Biediger et al v. Quinnipiac Univ Doc. 97 Att. 1

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
	:	
	:	October 22, 2009
QUINNIPIAC UNIVERSITY	:	

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STATUS CONFERENCE

B E F O R E:

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

A P P E A R A N C E S:

FOR THE PLAINTIFFS:

PULLMAN & COMLEY
850 Main Street
P.O. Box 7006
Bridgeport, Connecticut 06601-7006
BY: JONATHAN B. ORLEANS, ESQ.
ALEX V. HERNANDEZ, ESQ.

KRISTEN GALLES, ESQ. (Via Telephone)
10 Rosecrest Avenue
Alexandria, Virginia 22301

FOR THE DEFENDANT:

WIGGIN AND DANA, LLP
400 Atlantic Street
P. O. Box 110325
Stamford, Connecticut 06911-0325
BY: MARY A. GAMBARDELLA, ESQ.

PROSKAUER ROSE
1585 Broadway
New York, N. Y. 10016
BY: EDWARD A. BRILL, ESQ.
SUSAN D. FRIEDFEL, ESQ.

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Susan E. Catucci, RMR
Official Court Reporter
915 Lafayette Boulevard
Bridgeport, Connecticut 06604
Tel: (917)703-0761

(Whereupon the following session was held in chambers.)

(2:00 O'CLOCK, P. M.)

THE COURT: Good afternoon. I'm going to go around the room and ask everybody to identify themselves for the record.

MR. ORLEANS: Jonathan Orleans for the plaintiffs.

MR. HERNANDEZ: Alex Hernandez for the plaintiffs.

MS. GALLES: Kristen Galles for the plaintiffs.

MR. BRILL: Edward Brill, Proskauer Rose, for the defendant. And with me is my associate, Susan Friedfel.

MS. GAMBARDELLA: And Mary Gambardella, Wiggin & Dana, also for the defense.

THE COURT: All right. I understand we're here principally to try and get a schedule in place and I have, from Mr. Brill's recent letter dated October 20th, a modification of the defendant's point of view on scheduling.

I've got the following -- just confirm these are the dates that you're fighting about, perhaps.

We have motions to join parties: Plaintiffs proposed December 1; Defendants propose November 13.

Plaintiff's submission of class certification; Plaintiffs propose January 15th; Defendants propose November 13th of this year.

Jump in if I get anything wrong.

Motions to join additional parties: Plaintiffs propose January 1, with no competing proposal from the Defendants.

MR. BRILL: That's for the defendants to add parties. For the plaintiffs to add additional parties, they are proposing December 1st. We don't intend to propose any additional parties so it's not applicable.

THE COURT: All right. Completion of discovery, October 1st versus February 5th of 2010.

Completion of fact depositions, June 1 versus December 22nd. That's December 22nd of this year.

Plaintiff's designation of experts, March 1st versus December 22nd of this year.

Completion of depositions of Plaintiff's experts, April 15th versus January 15th.

Plaintiff's designation of rebuttal experts: September 1st is the proposal from the Plaintiff.

Completion of depositions of Plaintiffs' rebuttal experts: October 1st.

Plaintiffs' designation of experts: June 1 is Plaintiff's proposal; January 22nd is the Defense

proposal.

Completion of depositions, Defendant's propose September 1st versus February 5th.

Damages analysis: March 1st versus November 13th of this year.

And dispositive motions: November 1st versus February 1st.

Have I got it right?

MR. BRILL: We didn't make a specific proposal on dispositive motions based on the discovery schedule. I think it would have to be sometime after -- our new cutoff is February 5th of 2010 so it would have to be sometime after that.

THE COURT: So --

MR. BRILL: I would say 30 days before that.

THE COURT: So March 30th, or -- excuse me, March 5th.

MR. BRILL: And the only other thing I would note is that with respect to rebuttal experts, we didn't propose a specific date. We said the leave of court would have to be required.

THE COURT: Sure, okay.

MR. BRILL: Otherwise you're all right there.

THE COURT: Let's maybe discuss a little bit why each side's proposal makes sense. Mr. Orleans?

MR. ORLEANS: You want to hear from us?

THE COURT: Sure.

MR. ORLEANS: Your Honor, essentially all of the deadlines flow from the question of when are we going to have a merits trial, working back from that. The defendant, I think, wants to have a merits trial as soon as possible because the defendant would like to eliminate the volleyball team before the next academic year.

Our view, Your Honor, is that even, even on the most constricted view of what's at issue in the case, which it is the defendant's view that the only thing that's at issue in this case is the statistical component with prong one of 2009 in the current year, you can't really evaluate that until the current year has been completed and, among other things, the defendant will not have filed its NCAA reports until next October. They have never provided this kind of information any earlier than October of the following academic year.

So, in our view it's just completely unrealistic to think we could have a merits hearing before the defendant, which the court has found to have manipulated its participation figures in the past, can demonstrate or before we know how the defendant has operated its program for this entire year. And, therefore, we think this notion of having a merits trial sometime in the early part

of 2010 is just not practical or warranted under the circumstances.

We also think that there are, you know, we have some disagreements on the scope of discovery obviously. We are intending to amend our complaint and we may very well be adding retaliation claims. We may be adding claims relating to financial support for men's and women's sports. Those are going to create some additional discovery issues and, again, it's not, not going to be practical to complete the necessary discovery and schedule a trial during the current academic year.

And, therefore, we have proposed a schedule that gets us a trial reasonably early in the next academic year so that if the plaintiffs -- if the defendant should win at that stage, there would be adequate time then to make whatever adjustments are necessary in the athletic program and for the student athlete plaintiffs to find other places to play if that's what they want to do.

THE COURT: What's really at issue between the parties is one more year of volleyball?

MR. ORLEANS: Before merits are heard.

MR. BRILL: It's true, our goal is to have a trial, if possible, by early Spring so that we can have a decision on the University's ability to eliminate the volleyball team. We don't think that there's all that

much discovery that would be needed with respect to that issue. And there's no reason that the facts would not be available by, certainly by March. The EADA numbers, we already have the first day of competition for 14 out of 16 sports and the other two will be available within the next two weeks.

With respect to the sports that start in the Spring, so that the championship season starts in the Spring, the last day -- or the first day of championship competition is early March and there's no need to wait until the end of the school year.

As we said in the Rule 26(f) report, there's been significant changes made by the University with respect to the issues that concerned the court at the preliminary injunction hearing. There's now an entirely new set of controls over the roster numbers whereby the Senior Vice President of Academic Affairs, who's essentially the provost of the University, is directly responsible for roster numbers, and no roster can be changed, nothing can be added or deleted to the roster without his approval. Every roster is set by an interactive process with the coach who signs off on the adequacy of the roster in order to provide meaningful participation experience.

The specific sports where the court found

there'd been a problem in the past, such as men's lacrosse and women's softball, competitive cheer, those numbers have all been substantially changed and we are prepared to demonstrate, to have discovery on those issues and to have a trial on our compliance with the substantial proportionality test which can easily be accomplished by the Spring. There's not really much discovery that would be necessary for that. And it would be better, we believe, to have that determination made in, you know, in March or early April at the latest so that there is a track record of the entire year of Fall sports and the beginning of the competition season for Spring sports.

But there's no reason to assume that any problems that occurred in the past would continue based on the changes that have been made, which the plaintiffs can have discovery about and the court can have testimony about and a demonstration that the, you know, the roster numbers are now true and correct and that we're in, completely in compliance with Title IX for this academic year, and that, even eliminating the women's volleyball team, the school would be in compliance going forward.

So that is the issue between us and it's not a small thing to say so they'll continue the volleyball team for another year. We've continued it for one additional year beyond what the school had intended but -- I didn't

mention there's been another men's team that's been eliminated, so three men's teams have been eliminated now and, you know, the men athletes have borne the brunt of that. The coaches of those teams, money's been saved with respect to those teams, and there is no reason that we have to wait yet another year to determine whether the volleyball team can be eliminated when all the evidence on that would be available by early Spring.

With respect to -- it's difficult to address the issue of new claims that the plaintiffs may add because we haven't seen them, but I would say those claims would be significantly different than anything that's now in this case and that if they do amend the complaint, for example, to raise issues of I think equal facilities or equal support or with respect to other sports, those could really be separated out for purposes of discovery at trial.

And we're entitled to a ruling, you know, one way or the other on the issue of the continuation of the volleyball team. We'd rather, frankly, have a trial on the merits rather than having to make a motion to lift the injunction, which obviously we could do if it turns out that the case is going to continue on that length of time, but there's really no reason to have to do that, have that issue resolved in that procedural posture.

MS. GALLES: Your Honor, this is Kristen Galles. Can I speak in rebuttal or --

THE COURT: Sure.

MS. GALLES: Okay. I actually would like to point out that I would strongly disagree with Mr. Brill's characterization about the counting of the numbers. Actually for all of the Fall sports, their competitive season has not started yet so there would -- there are no EADA numbers, for example, for basketball, ice hockey, and I believe they are claiming cheer as a Winter sport, even though there is no set season.

And as for the Spring sports -- and although we disagree, we believe OCR disagrees in terms of counting indoor track as a separate sport, obviously that has not even begun yet so they could not count those sports yet.

As for the Spring sports, outdoor track, lacrosse, softball and baseball, again, those are all sports where the EADA numbers obviously cannot be provided and so, therefore, their first competition date, the only numbers that Quinnipiac could provide under the schedule they've proposed and could provide would be for the Fall sports.

And then, secondly, we aren't just talking about EADA numbers. As the court found, EADA is just sort of a presumption of, hey, here's what the school says are the

numbers. What really counts for Title IX purposes are who actually has an opportunity, and as was shown at the preliminary injunction hearing, you need to look behind those to find out, hey, how many men had genuine opportunities and actually participated in the entire season but were not counted for EADA purposes. And, in the alternative, how many women were being counted but never actually participated in a contest because they were cut or because they were improperly playing under the EADA in the Fall as opposed to the Spring.

And then, of course, there's the whole, we believe, the whole idea of the triple counting of track, which legally is improper, and we will need the full year's worth of information in order to demonstrate our allegation that, hey, Quinnipiac really only has a cross country team, it does not have a track team, and part of showing that is going through and seeing who's participating at what time in what event, what are the schedules. Are they really running this as a separate track team or is this really just a cross country team that runs in a few track meets.

All those things, of course, are very fact-intensive and would require the full year's view of what is going on because, of course, you know, our contention is Quinnipiac has not complied with Title IX in

37 years. The court found that it did not comply, so the volleyball team was reinstated.

So Quinnipiac's position is, okay, we promised to comply for the 2009-2010 school year and so we need to really complete the 2009-2010 school year and to essentially audit what's happened during that 2009-2010 school year in order to see whether they, indeed, fulfilled that promise to come into compliance for this year. Thank you.

MR. BRILL: May I respond to that, Your Honor?

THE COURT: All right. As I understand the plaintiff's position, the discovery that's necessary before a trial on the current claims would be the participation numbers?

MR. ORLEANS: I don't think it's limited to that, Your Honor. There would be current participation numbers, there would be inquiry into the operation of the cheer program because, as Your Honor observed in the preliminary injunction proceedings, competitive cheer might, if it were properly administered and run, be appropriately counted as a varsity athletic opportunity, but it also might not, and so we're going to need to inquire as to how it's being operated and run.

Mr. Brill has mentioned changes to the operation of the athletic program at Quinnipiac which are intended

to insure compliance and we need to inquire into those because, frankly, without going into all the details, we are not entirely convinced that the changes that he's outlined will actually function to assure compliance with Title IX.

For example, the interactive process that he mentioned, under which coaches were ostensibly consulted about their roster sizes, might have been read by the coaches as coercive or retaliatory, and I think we're going to need to depose every coach to inquire about how that went and whether the letter that they were required to sign reflected their real opinions. So I think there's really quite a bit to be done.

In addition, for preliminary injunction purposes, I understood that Quinnipiac relied entirely on prong one of Title IX. I believe that that was stipulated or announced at some point in open court.

MS. GALLES: Uh huh. (Affirmative.)

MR. ORLEANS: But I don't know that that's going to be true on a merits hearing. In other words, as Your Honor knows, Title IX -- prong one, the statistical compliance is a safe harbor for a university whose compliance with Title IX is challenged, but if the university does not comply with prong one, the university -- it's still open to the university to show

that it is in compliance with Title IX by demonstrating compliance with prongs two or three. And unless the university is prepared to stipulate that its only defense is a prong one defense, then we have to conduct some discovery in order to prepare for a possible contested trial on prongs two and three. So --

THE COURT: All right, let's sort that out.

MR. BRILL: We do stipulate that that's our defense, is prong one, and we agree to the areas that Mr. Orleans has identified for discovery, but that's not a year's worth of discovery. Other than deposing every coach, which I'm not sure is justified, he is entitled to discovery in our view into the operation of the cheer program and into the, the roster calculations.

I'm not, you know, I'm not taking a position now about deposing every coach but certainly some discovery into how the new system operated and how the coaches have responded to the interactive process would be appropriate. But we think two months, which we proposed, is more than adequate for that and it doesn't take a year.

Can I go back to responding to what she said for a minute?

THE COURT: Sure.

MR. BRILL: There were three points she made in her remarks, that the EADA numbers are not available until

the competitive season starts; that's just factually inaccurate, Your Honor. I didn't make copies of this but I have the schedule of the first day of competition for every sport which is what the EADA numbers are based on, and 14 of the 16 sports have had their first day of competition. The spring sports do have competition in the fall, that's not the championship season but they do have a competition. The only two remaining are men's and women's basketball which are coming up within the next ten days and, frankly, there's no real issue about the basketball rosters in any event but the EADA numbers are now -- will be set within the next two weeks.

I agree also that the EADA numbers are not to be the be all and end all of the matter, and that's why I said that we agree that the hearing could take place in the early Spring, after the spring season championship competitions have begun. But I don't think anything in the judge's prior -- in your prior opinion, or common sense, would say you need to wait for the entire season to be completed before you can make a determination.

The concerns that the court had with respect to roster manipulation or any people practicing that, all of these occurred shortly after the competition had begun and it's not necessary to wait until the school year is over to see whether these numbers are legitimate.

We're, you know, we are the ones who are at risk, frankly, in saying that we're content to have a trial on the merits in March or April. If we can't convince the court at that time that the numbers are legitimate and reliable, then it's our risk, it's not the plaintiff's risk. And we believe that the combination of the changes that we made and having, you know, some significant period of time, a championship competition for every sport would be more than enough for the court to make a ruling that whatever problems that there were in the past are no longer an issue.

As I said, the University is in compliance and there's no reason to believe that eliminating women's volleyball would take us out of compliance and we'd like to have that ruling in the Spring, out of fairness to the volleyball players as well as out of fairness to the University, because if it's delayed until late Spring or Summer, and then the court rules that Quinnipiac can go ahead and eliminate the volleyball team, you know, they are going to be complaining that it's too late for the volleyball players to make plans for next year.

I mean, frankly, we would like to have the hearing right now or a month from now, but we recognize that the court may need and the plaintiffs may need some additional record of compliance and some additional facts,

but we think that ought to be done at the earliest reasonable opportunity and that would be fairer to both parties.

THE COURT: Well, I tend to agree that we ought to do the merits trial at the earliest fair date.

MS. GALLES: Your Honor, could I chime in and sort of rebut what he had stated or do you want me to shut up?

(Laughter)

MS. GALLES: I'm not there so I can't read the dynamics, I apologize.

THE COURT: I don't think I've ever told a lawyer to shut up so I'm not going to start now.

MS. GALLES: You may have wanted to.

THE COURT: Well, fair enough.

MS. GALLES: I just think it might be helpful to explain in terms of the discovery and why we need it and why it's not going to be available until after the full school year is over.

THE COURT: Sure. Let me give you my initial thoughts and then perhaps you can even make your comments reflect your reaction to that.

I'm always reluctant to have a decision that I make on procedural grounds, the scheduling of a trial, the timing of discovery, affect the substance of the

discovery. And if we extend this trial too late, it's a form of relief for the plaintiffs which occurs without any evaluation of whether that relief is justified on the merits, and so my preference would be to do an earlier trial consistent with everyone's ability to get ready for it, and I think the suggestion of severing out claims is a good one.

I understand the need to undertake discovery even potentially for the bulk, if not the entire academic year, but I'd like to be in a position to try the case very quickly thereafter and perhaps in May or June. So let me get your reaction to that.

MS. GALLES: Yes, sir. First off, the reason why we definitely would need -- number one, we definitely disagree with Mr. Brill in terms of his assertions of the measuring date for the numbers for the EADA. It's our position Spring sports, we don't report them until the competitive season, but beyond that, because essentially our belief is -- and if you look at the past treatment of the cross country program at Quinnipiac is that Quinnipiac has only a cross country program, has always only had a cross country program, and only recently in order to manipulate its numbers in order to falsely reflect a prong one that they have done this idea of claiming they have an indoor track team, an outdoor track team. You know, we

believe that's absolutely not the case, and we need to be able to prove that. We were not allowed to go into discovery in the preliminary injunction stage to really investigate that and to present the expert to demonstrate what really is going on and has gone on and how track works and, you know, that's a very fact-intensive inquiry that will require certainly for Quinnipiac to finish what it claims to be its full track season in order for our experts to look at, hey, who's running track, what events are they running, what is the schedule, is this being run as a cross country program, is this being run as a track program?

And so obviously that kind of factual information is not going to be available until after the track season and I don't believe the track season ends until late May, early June. That's when the NCAA championships are.

THE COURT: I was going to guess that Quinnipiac's outdoor track season ends closer to late April, early May. Does anybody have this information?

MS. GALLES: We have the championship dates.

THE COURT: Well, the NCAA -- let's be frank, Quinnipiac probably isn't going to send anybody to the NCAA championships.

MS. GALLES: I have no idea. I have no idea.

So we would obviously need -- in addition, we definitely would need all of that factual information.

Secondly, in terms of the cheer issue, no court and OCR has never ever accepted cheer as a competitive sport. Quinnipiac is trying to get this done or recognized as a sport for the first time ever, and I believe OCR continues to disagree that it is a competitive sport, and so if we're going to be setting that kind of precedent that is contrary to 37 years of Title IX precedent, at least from the executive agency in charge of it, of saying that this is a sport, we really do need the factual inquiries and we intend to have, you know, expert witnesses come in and explain why this is not a sport, why it's not being run as a sport, even if it were open to being a sport. And that is going to require obviously a full look at the cheer program, and since cheer doesn't have a competitive season, you know, we would have to look at all the way through when Quinnipiac claims that its, you know, cheer season is over.

And also in terms of -- here's why separating out the claims is not really possible. Title IX, unlike other discrimination claims, when you're talking about athletics, you're talking about a sex segregated environment, and so either you violate Title IX or you don't. It's not like just the volleyball team, you know,

claim or complaint, you know, dealt with, hey, Quinnipiac does not offer enough opportunities to female students, and that would be far more than just volleyball. Obviously the preliminary injunction was to only get volleyball reinstated but, you know, how you work Title IX is you have the three part test, number one being the substantial proportionality, and if you are off on the substantial proportionality and, you know, if they are conceding they don't meet two or three, then, hey, you need to be adding additional women's sports, and we are contending that one of the issues is we believe that there should be a women's track team. We don't believe that they offer one, but they believe that there should be and, indeed, that the prior coach for many years had requested that he have a women's track team, that he have sprinters and jumpers and throwers and all that, and was repeatedly denied the chance for that.

And so -- and as we also indicated, there are many, many sports in the conference that Quinnipiac does not have, and so when you -- so Title IX has a programatic view of whether you comply with Title IX. We couldn't have separate lawsuits of, all right, the young women, the people who want a separate legitimate women's track team and the bowling team and the gymnastics team and the swim team and the volleyball team, we don't have four or five

separate lawsuits trying to each get a team because, frankly, Quinnipiac's numbers aren't that bad. You know, we may be fighting over, hey, they should have two or three of these sports, not all five of these sports. So they all have to be, and this is to decide which of the sports they should be having, all need to be adjudicated in one litigation and, of course, you know, we can't have inconsistent verdicts of having volleyball players only over here and track people only over here, and again, unlike Title VII where you might violate it as to one employee but not violate it as to another employee in the Title IX context because of the sex segregated nature, you either violate it or you don't, and so you really have to adjudicate all of the participation problems at least in one lawsuit.

And, and because of that, again, the preliminary injunction was only volleyball because that's the only one where we were trying to prevent it from being dropped as opposed to requiring Quinnipiac to increase its opportunities, or in the realm of track, to make a legitimate opportunity with a legitimate track team, not what we would consider a faux track team, and that's the reason why you can't really separate out any claims related to the participation issues.

THE COURT: Okay, I think we have the date --

MR. ORLEANS: Yes, Your Honor. According to the Quinnipiac 2009-10 Athletics and Recreation Staff Handbook, the Women's Outdoor Track Championship will be May 1 and 2; Men's Lacrosse is May 2 through 4; Softball is May 14 and 15, and; Baseball is May 20 through 22.

MR. BRILL: Could I see that?

MR. ORLEANS: Absolutely.

(Hands Counsel)

MR. ORLEANS: If I could make just a couple of brief points -- I don't want to wear out our welcome here. It seems to me that even a trial in April or May, even if we were to have a trial in April or May --

THE COURT: I was thinking May or June.

MR. ORLEANS: Well, we're then going to run into the same problem we ran into last year as far as what happens to the volleyball girls, what happens to these athletes. You know, Coach Sparks is recruiting now and you're going to have students who were accepted, you're going to have problems with people. What happens to their scholarships? Where do they go? Can they find other opportunities? I'm sure you recall the testimony on those points.

So that even if we have a trial that soon, it seems to me that, as a practical matter, Quinnipiac will be compelled to maintain the volleyball program for one

more year, and as long as it's going to have to do that, there's no reason to rush into that trial. We could just as well have the trial in the Fall as in the Spring because the whole reason Quinnipiac wants the trial in the Spring is to be able to eliminate the volleyball program that much sooner.

And, secondly, I would say with all respect to the defendants' position, they are operating under a preliminary injunction and it should be as limited in time as possible. I would say it's really their own fault. They decided to announce this change in March of 2009, giving very little time for students or their parents to make alternative plans. They could have, when they announced that they were eliminating the volleyball program, they could have said we're eliminating the volleyball program a year from now, and given the students and their parents and the coach and so forth time to make alternative plans. They didn't. When we filed the lawsuit, they could have stipulated to something like that.

In other words, it was fully within Quinnipiac's control to handle this in a way that would have gotten them a merits trial in ample time to eliminate the team for next year, but they chose not to. They timed their announcement, they chose their defense in such a way that

now here we are trying to schedule a merits trial and it's virtually impossible to schedule that merits trial in time to allow them to eliminate the program for 2010-2011, and it's nobody's fault but the defendant's.

And so it seems to me that, you know, it's appropriate to give us adequate time to prepare the case and have the trial, and if the plaintiff should lose the trial, then the student athletes should have a reasonable opportunity to find other places to go.

MS. GALLES: And, Your Honor --

MR. BRILL: I'm sorry --

MS. GALLES: -- one more thing I would like to throw in about why we need to make sure we have adequate time to prepare the trial, is that in reality this case is not just about Quinnipiac. This is a -- these practices are going on nationwide in terms of schools are, you know, like tax cheats. We believe that there are many, many schools that are going -- in order to appear like they are in compliance with prong one, when in fact they are not, they are being taught these same techniques. And because of that, schools and lawyers all over the country are very intensely looking at this particular case and, indeed, it will likely be sort of a test case on these issues and what schools can do, can't do, should do, whether these manipulations are allowed or not. And because of that,

you know, we really need to make sure that this case is done right because everybody is going to be looking to it as to what is allowed or not allowed going forward for many years to come.

MR. BRILL: I'm sorry to have to respond but there's a lot to respond to. First of all, obviously I don't think comparison to tax cheats or saying that people all around the country are looking at this case has anything to do with the schedule that we realistically need to set here.

There's a whole body of case law under Title IX, and what we're talking about here is a very specific factual inquiry relating to what Quinnipiac has done. And it's simply not true to say that if we have a trial, as the court suggested, if we had a trial in May -- it would be a very short trial, presumably it's not going to take very long for the court to make a ruling. If the ruling is in defendant's favor, we will eliminate the volleyball team and the plaintiffs, we've told the plaintiffs that. We've been telling them that all along.

That's our plan, either to have a trial on the merits or to file a motion to eliminate the preliminary injunction. So there's no surprises here and people can make their plans accordingly. Both sides are at some risk but that's what happens when you have litigation. And we

don't think, again, we don't think it's fair to force the University in effect to continue for another year, simply, but if the earliest opportunity to have these claims tried on the merits is in May, we'd be prepared to have the trial earlier but the plaintiffs say no, they need more discovery. So, you know, if they want more discovery and more time, the cost of that is not having an early decision for them.

As I said, if they want to have a hearing in two months over continuation of the preliminary injunction, we'd be prepared to put our evidence in at that point, but we think it makes more sense to do as much discovery as reasonably possible and to have a trial on the merits. I don't think you need to go to the NCAA championships to make a ruling. I think by April or early May the seasons will have been substantially complete. It would make little sense to say the University is going to wait until the last two weeks of the season or the last few weeks under the season and it will be manipulating a roster. There was no evidence that that type of thing was happening and it wouldn't make any sense.

I think what the court identified in the past was that there was one or two, or two or three instances where teams had put in a number for the EADA report and then immediately after that, changed the roster numbers.

There's no showing that during the course of a season, once the championship competition had begun, that there was some wholesale effort to change the rosters.

And, again, the last -- the first day for every Spring sport of competition is no later than, March 5th I think is the last date that any Spring sport starts competition. So by March and April, you've got two full months at a minimum of championship competition. If you waited until early May for a trial or mid May, that's two and-a-half months. That's almost the entire semester and there's no reason that discovery can't be completed by that date.

As far as the issues about the track team, I don't really understand what the claim is but if there's some claim that the indoor/outdoor women's track teams are not bona fide and haven't been, first of all, there's history of the track teams in the past and, as I understand, there's been some discovery as to that already, and there's been expert testimony about that.

So you have the past experience with the indoor/outdoor track teams and you certainly have the complete indoor track season that's been completed by the beginning of the spring semester. And, as I said, you'd have two months of the outdoor track season which is substantially the entire season by the end of April.

The other argument that was made was that somehow you can't segregate out the claims. I really don't understand that, the only claim here that we're talking about having a trial on is the substantial compliance and proportionality claim. That's the same whether you're talking about the volleyball team or any other team.

If the University is in compliance with Title IX, the case law is very clear it's completely within the university's discretion whether -- how it's going to comply, whether to eliminate men's teams, add women's teams, or add a different women's team. The court has no role in that and the plaintiffs have no role in that. If we're not in compliance, then obviously the court can issue whatever remedy is appropriate under those circumstances. But if we are, that's only one issue to be tried.

And, by the way, the plaintiffs here, at least so far, are only volleyball players, so the issue of there's some unmet need to start a women's rugby team or some other kind of women's team for people that aren't being plaintiffs, that's not really part of this case at the moment. Right? I mean the only issue that's properly before this court on these complaints with these plaintiffs is whether the volleyball team can be

eliminated.

MS. GALLES: Your Honor, I would completely disagree on two points. First of all, in order to decide whether the volleyball team should stay reinstated, as a point of legal analysis, it requires a program-wide analysis, which means that even if this were only about volleyball, it would require us to do the very fact-intensive analysis of what's going on in particular with the track and the cheer programs. We might agree that in terms of the numbers manipulation in the other sport, what goes on early in the season may be what is most important, although, again, we would indicate what they showed for lacrosse, like the men's lacrosse, they were not reporting the men and it took us to see the entire year of schedule and NCAA data to find out that, oh, indeed, these men had played many times throughout the season and had not been counted. How would we know that until after that lacrosse season was over?

And the same in terms of -- more important, in terms of the track team, yes, we are alleging that the indoor and outdoor track teams are not legitimate teams. We have always alleged that and that means can they be counted for prong one purposes? Our position is no, they cannot be counted for prong one purposes because they are not legitimate teams and that means we do have to have an

intense analysis and intense review of what's going on in the track program in order to decide whether the university meets prong one for purposes of the volleyball team.

So that's why this -- when he keeps saying, you know, about volleyball, no, you have to look at how the numbers are counted in every single sport and the reality of what's going on underneath those numbers. That's why I keep using the auditing analogy. Those numbers have to be audited and examined in order to decide what to do in terms of the volleyball program.

But then, in addition to that, we would disagree that this case is only about volleyball. This case is about equal opportunity and making sure that Quinnipiac indeed complies with all three prongs. They've admitted they are not relying on prongs two and three. We believe we have shown that they did not and have never complied with prong one in the 37 years of Title IX, and so, therefore, hey, they need to be. And they can't cut any more men's teams in order to remain at the Division I level. They are sort of stuck with what they have.

And so, in order to comply with prong one, they are going to need, we believe, to add more women's teams. And part of our, why we wanted time for the motion to amend, although there is clearly case law that our

particular plaintiff can represent a class of all female students who want to add a sport or participate in a sport not offered by the school, in order to remove all doubt, you know, we are expecting to have plaintiffs come in who indeed are particular to those sports and, again, they all have to end up being in the same lawsuit to decide, all right, Quinnipiac, did you comply with prong one? You know, if you do, fine. If you don't, then you're going to have to add all these sports.

And I would say that Quinnipiac keeps talking about the burden of volleyball. Well, you know, Quinnipiac for 37 years has gone without complying with Title IX, has gone without providing its female athletes with an equal opportunity to participate, and so what they claim is a burden is really compliance with what has long been federal law. And, again, it presumes that they keep counting a cheer team that has not even competed in a single event yet. So you're looking at the balancing of the inequities and the public interest. Obviously keeping the volleyball team is of utmost importance.

THE COURT: Let me inquire whether Quinnipiac would be prepared to provide within 48 hours every intercollegiate contest, a certified roster of the participants in the sporting event for the rest of this case through the trial date?

MR. BRILL: Unfortunately I can't answer that yes or no. I mean my inclination would be to say yes but I don't know how quickly that's available.

THE COURT: Well, okay. Doesn't to have be 48 hours; I mean 72 hours, whatever.

MR. BRILL: Whatever reasonable period is possible, we would certainly be willing to do that.

THE COURT: I mean we should not have to have intense discovery to figure out who participated in sports events. Presumably when you take the field in a baseball game, you provide the referee with a list of your players and indicate who's going to be playing.

MR. BRILL: I think there is a participation report done.

MS. GAMBARDELLA: There is.

MR. ORLEANS: Of course we want to see not only who is listed on the roster but who actually plays.

THE COURT: Right.

MS. GALLES: Who competed.

MS. GAMBARDELLA: I believe it is reported that way.

THE COURT: I think that should be provided voluntarily, and if not voluntarily, by order of the court, after every contest for this academic year. And that being said, I think we should try the case on the

merits beginning May 3rd.

MR. BRILL: May --

THE COURT: Three. I'm assuming this case can be tried in about a week, and I would strongly urge both sides to forego dispositive motions so that the parties can instead -- with a bench trial, there's no point in having a dispositive motion right before the bench trial because if you're going to win summary judgment, you're going to win the bench trial.

MR. ORLEANS: Are you agreeable to that?

MR. BRILL: Yes.

MR. ORLEANS: Okay. So are we.

THE COURT: And that way you can focus on getting your discovery done and preparing your witnesses and having an efficient trial.

We should at the appropriate time talk about mechanisms to make that trial efficient, and I am very open to trial by submission of deposition transcripts that are highlighted.

MS. GAMBARDELLA: By fire.

THE COURT: You know, putting on affidavits for direct, having crosses, however we want to do it in a way that makes this thing efficient but, at the same time, fair. But I really think that both sides have raised strong points about the timing, suggested timing of the

trial. The fundamental thing for me, it seems, is I think that there is a reasonable compromise if we get it done the first week of May, it's not ideal for the volleyball players who want to switch schools, but it, I think, gives the plaintiffs the opportunity to take the discovery they need to get prepared, and to have essentially a full academic, almost a full academic or athletic season for every sport and for both sides to make their arguments based upon that record.

MS. GALLES: Your Honor, could I just raise one issue around that date?

THE COURT: Sure.

MS. GALLES: Whether that's finals week. We expect to have many of these students testifying and do we know when finals are? I understand that you want to do it early but, depending upon when finals are, it may require to do it one week later or --

THE COURT: My belief is the finals may be somewhat later but we ought to confirm that.

MS. GALLES: Okay. So that it would not conflict with the final exams.

MS. GAMBARDELLA: What were the dates of our hearing?

MR. ORLEANS: 11th and 12th.

MS. GAMBARDELLA: Because finals week, I

believe, was around there or the week after, last year.

MR. BRILL: We'll confirm that relatively quickly.

THE COURT: Because it's a bench trial, if it turns out we have some students that need to testify, I can work you in earlier too, so those students can testify in April.

MS. GAMBARDELLA: Your Honor, may I inquire, so if the complaint is -- Ed, if you don't mind -- if the complaint is amended and there are more claims brought, is there a bifurcated discovery period or would discovery on any other claims brought in be simultaneous? I'm not sure --

MR. BRILL: We'd have to see what the new claims were, probably.

THE COURT: That's what I was going to say. Let's see how it goes.

MR. BRILL: There's one -- I'm sorry, were you --

THE COURT: No.

MR. BRILL: We had, as I understand it, the defendant had not answered the original complaint because there was some understanding the complaint was about to be amended, we had an informal understanding about that, so I think we ought to have something formal now. If there is

going to be an amended complaint, we'd just like to wait to answer the amended complaint, if that makes sense.

MR. ORLEANS: Yes, we don't have any problem with the defendant not answering until an amended complaint is filed, and we'll endeavor to get the amended complaint filed as soon as we can.

I should just tell Your Honor I've got a trial in front of Judge Thompson coming up in November and I'm pretty swamped for the next few weeks, but we do have other lawyers working on the case as well. We'll do our best to get an amended complaint filed reasonably promptly and, as we indicated in the Rule 26 report, we will substitute Logan Riker, who's now 18, for her mother. And I understand there's no objection to that.

MR. BRILL: No.

THE COURT: Ms. Gambardella, going back to the question about simultaneous discovery, I think discovery should, unless there's a good reason not to, should proceed with respect to any issues that are --

MS. GAMBARDELLA: I assume that's what you meant but just wanted to make sure.

THE COURT: If a coach is going to be deposed, it would be unfortunate, I think, to limit it to --

MS. GAMBARDELLA: Agreed.

THE COURT: -- issues that are going to be

tried.

MR. ORLEANS: And we agree as well. No point in deposing a coach twice.

MS. GAMBARDELLA: Absolutely not.

MR. ORLEANS: Explore all the issues.

MS. GAMBARDELLA: Thank you.

THE COURT: In terms of other deadlines, rather than trying to work through these now, because I have a sentencing scheduled, frankly, I'm going to ask counsel to go back --

MR. ORLEANS: I think we should be able to work something out.

THE COURT: I'm hopeful in light of the trial work you can work back, and if you have trouble, give me a call and we'll sort it out.

MR. BRILL: Working back from the trial date.

THE COURT: But my hope is everybody can agree what makes sense with all these other deadlines based upon the trial date.

In terms of a pretrial memo, I don't need that more than, say, a week before trial starts. And if you think there's going to be a need to do so, I could even get it later than that. If I could get it three or four days before trial, that should be enough. So if you believe that there's critical last minute discovery that

has to get included in a trial memo, then let me know and we'll try and accommodate that.

MR. ORLEANS: Certainly, Your Honor.

THE COURT: All right. What else can we usefully take up today?

MR. BRILL: I think that's about it for today.

MR. ORLEANS: Pretty much it for today.

MR. BRILL: We need some time to try and work things out based on this trial date.

THE COURT: I'll look for hopefully a joint motion, if not a joint schedule.

MR. ORLEANS: We'll set a schedule.

MR. BRILL: We're certainly free to begin discovery at this point?

THE COURT: I don't think anybody should hold back on discovery.

MR. ORLEANS: Okay.

THE COURT: The case is proceeding and it ought to proceed, and the only thing I would say is if you hit a bump in the road, call me sooner than rather than later so we can try and work it out. I would not want a dispute about whose deposition is going forward first or what is going to happen, anything to slow this case down and interfere with the trial date.

MR. ORLEANS: There are no indications thus far

we'll be subject to that sort of dispute.

THE COURT: I've had those before though, trust me.

MR. ORLEANS: So have I.

THE COURT: All right, thank you all.

(Whereupon the above matter was adjourned at 3:00 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

Susan E. Catucci, RMR
Official Court Reporter
915 Lafayette Boulevard
Bridgeport, Connecticut 06604
Tel: (917) 703-0761