

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
: :
: June 21, 2010
QUINNIPIAC UNIVERSITY :
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BENCH TRIAL

B E F O R E:

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

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1 (9:00 O'CLOCK, A. M.)

2 THE COURT: Good morning. Everybody prepared to
3 proceed?

4 MR. ORLEANS: Yes, Your Honor.

5 THE COURT: All right. Call your first witness.

6 MR. HERNANDEZ: Plaintiffs call Kayla Lawler.

7 THE COURT: Before we begin, my understanding is
8 that we have a stipulation that the testimony from the
9 preliminary injunction hearing shall be part of this
10 record as well and that I will simply ignore anything that
11 I deemed to be irrelevant for this proceeding. Is that
12 right?

13 MR. BRILL: That is correct except for the
14 deposition testimony of Dr. Lopiano.

15 MR. ORLEANS: Your Honor, at the pretrial
16 conference you indicated that you thought that the record
17 was the record and that it was senseless to try to parse
18 it so that's our understanding.

19 THE COURT: Okay. Remind me, I'm sorry, what
20 was the concern about Lopiano?

21 MR. BRILL: She gave a deposition in connection
22 with the preliminary injunction hearing, she didn't appear
23 and the parties agreed that she would simply testify in
24 this phase of the trial that her deposition that was given
25 prior to the PI hearing would not be considered part of

1 the trial record.

2 MR. ORLEANS: We did stipulate to that, Your
3 Honor.

4 THE COURT: Okay.

5 MR. ORLEANS: I was under the impression from
6 your remarks at the pretrial conference that you were more
7 or less overriding that and indicating that you wanted the
8 entire record to be the record, but either way --

9 THE COURT: Okay, well, hopefully it won't
10 matter.

11 MR. ORLEANS: Hopefully it won't matter.

12 THE COURT: I'm looking for a stipulation. It
13 looks like we have one.

14 MR. BRILL: Well, it's a significant difference
15 because --

16 THE COURT: I'll abide by the stipulation.

17 MR. BRILL: -- because I'm prepared to cross
18 examine her.

19 THE COURT: I'll abide by the stipulation.

20 MR. BRILL: Thank you, Your Honor.

21 MR. ORLEANS: That's fine, Your Honor. Thank
22 you.

23 THE COURT: Please raise your right hand.
24
25

1 K A Y L A L A W L E R, called as a witness on
2 behalf of the Plaintiff, having been duly sworn by the
3 Court, testified as follows:

4 THE COURT: Please be seated.

5 DIRECT EXAMINATION

6 BY MR. HERNANDEZ:

7 Q. Good morning, Ms. Lawler.

8 A. Good morning.

9 Q. Could you please spell your name for the record and
10 give us your address?

11 THE COURT: Actually don't give us your address.

12 MR. HERNANDEZ: That's fine.

13 THE COURT: Because this could wind up on the
14 internet.

15 MR. HERNANDEZ: Thank you.

16 A. K A Y L A, Lawler, L A W L E R.

17 Q. And what state do you live in Ms. Lawler?

18 A. Kentucky.

19 Q. And you traveled, did you travel here for testimony
20 in this case?

21 A. Yes.

22 Q. When did you travel here?

23 A. We left at 4:00 o'clock in the morning on Saturday
24 and we got here about 6:30 Saturday.

25 Q. Who's we?

1 A. My mother and I.

2 Q. Is your Mom here today?

3 A. Yes.

4 Q. And are some your teammates here today as well.

5 A. Yes.

6 Q. Will you be able to stay throughout the entire trial,
7 Ms. Lawler?

8 A. No.

9 Q. Okay. I'd like to talk to you a little bit about
10 last year, last season. How did you do academically?

11 A. I did very well. I think that this second semester I
12 had a 3.8. I think my cumulative for the two years is a
13 3.7, I believe.

14 Q. And did you receive any awards or, any awards last
15 year?

16 A. This past sophomore year I received the outstanding
17 sophomore award.

18 Q. And how did you get that award?

19 A. I had to get nominated by a faculty member. And then
20 I had to fill out an application to receive it. You had
21 to have above, I'm not sure the G P A was, and you had to
22 be actively involved in a couple of organizations on
23 campus.

24 Q. And do you play any particular leadership role within
25 the team?

1 A. I'm captain of the team for this coming season. And
2 I've always been a floor captain before.

3 Q. How were you chosen to be the captain.

4 A. Coach asked me if I wanted to take on the role.

5 Q. And what role does the captain play on the team?

6 A. We're responsible for making sure everyone's where
7 they are supposed to be on time. Keeping up the morale of
8 the team, keeping motivated. If there's any problems,
9 sitting down and talking them through, making sure
10 everyone has their equipment, clean locker room, lots of
11 stuff.

12 Q. Does that have an impact on team spirit and morale?

13 A. Yeah, I think it's really important.

14 Q. Are team spirit and morale important to the
15 competitive experience?

16 A. Yes.

17 Q. And over all, how has your experience been?

18 A. I love my team. We get really excited. We're loud,
19 we're enthusiastic and that's how we play. That's
20 important to us.

21 Q. All right. And as I recall, you train in Division I
22 volleyball through the entire year, is that correct?

23 A. Yes.

24 Q. All right. As a Division I volleyball player at
25 Quinnipiac university, are you required to play any other

1 sports as a condition to being a member of the volleyball
2 team?

3 A. No.

4 Q. Do you know how the volleyball team did academically
5 last year?

6 A. We had a very high G P A. My freshman year we won an
7 award, I think we were, had the top G P A for a volleyball
8 team in the conference and there's a strong
9 possibility we could get that again this year.

10 Q. Which schools did you compete against last year?

11 A. All schools in our conference, Robert Morris, CCSU,
12 Dartmouth, Yale. We also competed against some bigger
13 schools like St. Johns, that was one of our opening
14 tournaments, and then we also played Army, another big
15 competitive school.

16 Q. And what's the farthest that you had to travel in
17 order to compete?

18 A. This year the farthest was Pennsylvania.

19 Q. How did you get there?

20 A. By bus.

21 Q. You didn't have to fly?

22 A. No.

23 Q. Is competing with other schools in the northeast
24 conference important to your competitive experience in
25 college?

1 A. Yeah. It helps us figure out where we stand locally,
2 schools that are similar to us, and also it's our
3 conference, you know, that's how we measure our skill
4 primarily. You know, we want to be, you know, successful
5 in our conference.

6 Q. Have you developed any rivalries with schools in the
7 northeast conference?

8 A. Yeah. Personally, my personal opinion, I know my
9 teammates feel the same, Central Connecticut State
10 University and also Robert Morris, I'd say those are two
11 of the biggest ones in our conference.

12 Q. And does having a rivalry within the northeast
13 conference, is that important to your experience as a
14 competitive athlete in college?

15 A. Yeah, definitely.

16 Q. Why?

17 A. I think that it's a different experience when you
18 come to college. It's not like high school. In high
19 school the high schools are close, you might know some of
20 the kids. But in college it's a different experience.
21 You know, I didn't know much about the universities on the
22 East Coast. I've never been out here before. Developing
23 a rivalry against the people in our conference is a good
24 driving factor. It motivates us, gets us excited to play
25 and just that competitive spirit.

1 Q. What about locally, did you compete against any local
2 teams? And by local, I mean within Connecticut?

3 A. Yeah. Besides in our conference we also compete
4 against Yale this year.

5 Q. And traditionally have you competed against other
6 local schools like Fairfield U or Sacred Heart?

7 A. Yeah, Sacred Heart. We play a lot of schools in
8 Connecticut.

9 Q. Okay. And does the women's volleyball team have a
10 fan base at Quinnipiac University?

11 A. Yeah.

12 Q. And when you play at home, do some of your fans come
13 out to support you?

14 A. Yeah. We always have our parents, of course, Taylor
15 Payne's (ph) father, and we have classmates, roommates,
16 friends come out and support us.

17 Q. Is that local hometown fan base, if you will,
18 important to your competitive experience?

19 A. Very much.

20 Q. How so?

21 A. Just to have a fan base and to have support, know
22 that people are behind you, it's motivating, it makes you
23 want to win and it gets me pumped up, I guess.

24 Q. Okay. And what about when you travel to some of the
25 local schools like Fairfield U, Sacred Heart or Yale; do

1 you get support from your fan base?

2 A. Yeah.

3 Q. And what does that support involve?

4 A. They come out, you know, they wear shirts, they
5 cheer, yell for us, do chants, sometimes they have signs.
6 Lots of stuff.

7 Q. And is that fan base support at some of your local
8 competitions important to your experience as competitive
9 athletes?

10 A. Very.

11 Q. How so?

12 A. I think it's a completely different feeling, you
13 know, if you're there and you don't have people cheering
14 you on, I mean you still go out, you play hard, but just
15 knowing they are there makes you play that much harder.
16 It's a motivator.

17 Q. Okay. I think last year we talked about the
18 importance of your relationship with your coach. I'd like
19 to go into a slightly different area in that respect. And
20 again, do you have to have access to your coach the entire
21 year?

22 A. Yeah.

23 Q. All right. Now, if Coach Sparks were coaching
24 another team during your volleyball off-season, that is
25 when you're not competing, would that have an impact on

1 your access to her?

2 A. Definitely.

3 Q. And what sort of impact would that have?

4 A. Just knowing she didn't have the same time commitment
5 to us, she wouldn't be able to be there as much. Spring
6 season is when we really break down technique and we
7 remold and we work on things we couldn't work on during
8 season to get better for our next season. So just to know
9 she that has time to work with us and make us all better
10 and improve on our weaknesses is really important.

11 Q. And how many people are on your volleyball team or
12 were on in '09, '10?

13 A. I believe that we had eight or nine.

14 Q. Okay. And let's say that number were to next year
15 double; you had twice as many. Let's say you had as many
16 as 20 people on your volleyball squad. Would that have an
17 impact on you and your teammates' ability to have access
18 to your coach?

19 MR. BRILL: Objection, Your Honor.

20 Hypothetical.

21 THE COURT: I'll allow it. It's lay opinion.

22 BY THE WITNESS:

23 A. Yeah, definitely. The fact that Coach has the
24 ability to work with us individually and do stuff with us
25 definitely helps make us get more touches, more

1 repetitions and help us get better individually so that we
2 can be a better team overall.

3 Q. And when you go to use training facility for strength
4 and conditioning, do you go as a team?

5 A. Yeah.

6 Q. And if there were twice as many of you in the
7 training room, would that have any impact on your ability
8 to train effectively?

9 A. Yeah. If we have to wait on machines it would take
10 more time. That's one of the things that happens. If we
11 don't have morning weights but we if weight together later
12 than the other students in there, a lot of times it's hard
13 to do our workout.

14 MR. HERNANDEZ: I have no other questions, Your
15 Honor.

16 THE COURT: All right. Cross?

17 CROSS EXAMINATION

18 BY MR. BRILL:

19 Q. Good morning, Ms. Lawler.

20 A. Good morning.

21 Q. Were you here during the preliminary injunction
22 hearing?

23 A. Yes.

24 Q. Did you hear the testimony of Coach Sparks?

25 A. Yes.

1 Q. Do you recall that she testified that ideally she'd
2 like to have 15 to 16 players on the volleyball team?

3 A. Yes.

4 Q. Thank you.

5 MR. HERNANDEZ: No further questions, Your
6 Honor.

7 THE COURT: Okay, thank you. You're excused.

8 MR. ORLEANS: Your Honor, plaintiffs call Logan
9 Riker.

10 L O G A N R I K E R, called as a witness on
11 behalf of the Plaintiff, having been duly sworn by the
12 Court, testified as follows:.

13 THE COURT: Please be seated. State your name,
14 spell your last name for the record?

15 THE WITNESS: Okay. Logan Riker. Just last
16 name? R-I-K-E-R.

17 DIRECT EXAMINATION

18 BY MR. ORLEANS:

19 Q. Good morning, Ms. Riker. How are you?

20 A. Good, how are you?

21 Q. What state are you from?

22 A. Ohio.

23 Q. You're one of the plaintiffs in this case?

24 A. Yes, I am.

25 Q. Now, you didn't testify at the preliminary injunction

1 hearing, did you?

2 A. No, I did not.

3 Q. And why was that?

4 A. My mother came to testify for me because I was still
5 17 at the time.

6 Q. And since then you've come in as a plaintiff and your
7 mother has dropped off; you must have turned 18, is that
8 correct?

9 A. Yes.

10 Q. And you're a member of the volleyball team at
11 Quinnipiac?

12 A. Yes, I am.

13 Q. You played this past year?

14 A. Yes.

15 Q. So where do you stand in school at this point?

16 A. I am going to be a sophomore so I just completed my
17 freshman year.

18 Q. And in order to be a member of the volleyball team at
19 Quinnipiac, have you been required to play any other
20 sports?

21 A. No, I have not.

22 Q. Did the volleyball team have a spring season this
23 year?

24 A. We did have a spring season. We had fewer players,
25 so --

1 Q. I beg your pardon?

2 A. We had fewer players.

3 Q. Did you play volleyball in high school?

4 A. Yes, I did.

5 Q. How old were you when you started playing volleyball?

6 A. On official team I was eight years old but before
7 that I claimed I was the assistant coach starting when I
8 was about five years old on my sister's teams.

9 Q. When you were growing up through high school, was
10 volleyball important to you?

11 A. It was the main thing in my life.

12 Q. Would you just describe for the court briefly the
13 importance of volleyball in your life?

14 A. Volleyball has been everything. Since I was eight
15 years old I decided that I wanted to play in college at
16 an, obviously a collegiate level. It's what I spent
17 probably ten months out of the year doing, training in,
18 getting better. It was just something that I loved to do.

19 Q. Did you play for a high school varsity team?

20 A. Yes, I did.

21 Q. Were you recruited to play volleyball by colleges?

22 A. Yes, I was.

23 Q. Okay. Were you recruited by Quinnipiac?

24 A. Yes, I was.

25 Q. Were you recruited by other schools as well?

1 A. Yes.

2 Q. Why did you decide to -- well, withdrawn.

3 Could you just describe a little bit of what, what it
4 was like to be recruited; what was involved in being
5 recruited?

6 A. There was a bunch of different things. It's very
7 stressful. My Mom did a lot of it for me because it was
8 too much. There was a lot of letters being sent out. I
9 mean coaches ask for tapes. They come watch your games,
10 they come to tournaments. There's a lot of talking to
11 coaches just telling them what kind of player you are,
12 finding out what the school is. And obviously the most
13 important part of being, you know, a collegiate player is
14 student athletes have to make sure the school is a right
15 fit for you.

16 Q. And did Coach Sparks come and see you play?

17 A. Yes, she did.

18 Q. When you were in high school?

19 A. She never came to any high school games but she came
20 to my club tournaments.

21 Q. That would be when you were a senior in high school?

22 A. Yes.

23 Q. And did she talk with you when she came to see you
24 play?

25 A. Yes.

1 Q. And why did you -- well, withdrawn.

2 When did you decide that Quinnipiac was the school
3 for you?

4 A. I had visited -- Coach contacted me after one of my
5 last games as a high school player and that was in late
6 September or early November. I decided to come out for a
7 visit, which is showing interest mainly in that school.
8 It was on Election Day, so like November 4 I think.

9 Q. And after you visited Quinnipiac, did you reach a
10 decision that you thought Quinnipiac was the place for
11 you?

12 A. Yes, I did.

13 Q. When did you learn that Quinnipiac had decided to
14 eliminate its volleyball team?

15 A. In March after I had committed in November.

16 Q. That would be March of 2009?

17 A. Yes.

18 Q. Right? Not just this in past March but the March
19 before, right?

20 A. Yes.

21 Q. And when you learned that Quinnipiac had decided to
22 eliminate volleyball, did you investigate the possibility
23 of going elsewhere?

24 A. Slightly. It's very late in the recruiting period so
25 there weren't many top schools that I was interested in

1 that had a libero (ph) position open. Not many schools
2 had money which is obviously a huge factor in collegiate
3 volleyball. You work so hard all your life you want to be
4 rewarded somehow. And there weren't many options for that
5 in March and April.

6 Q. Are you receiving scholarship aid from Quinnipiac?

7 A. Yes.

8 Q. Why did you decide to attend Quinnipiac even though
9 you knew that there was a lawsuit that might or might not
10 result in the elimination of the volleyball program?

11 MR. BRILL: I object, Your Honor. Relevance of
12 her recently coming to Quinnipiac.

13 THE COURT: I'll allow it. Again, you know,
14 it's a bench trial.

15 MR. BRILL: All right.

16 THE COURT: So it can roll off my back if it's
17 not relevant. Go ahead.

18 BY THE WITNESS:

19 A. I came to Quinnipiac because in the first place if I
20 committed, like when I make a decision to do something I
21 dedicate myself to it. I couldn't back out on my team.

22 Q. And how do you feel about the prospects for the
23 volleyball team for the coming season?

24 A. This coming season I can't wait to play. I cannot
25 wait to get out in the gym. And we're going to be really

1 strong. We have some great recruits coming in. So --

2 MR. ORLEANS: Nothing further, Your Honor.

3 THE COURT: All right. Cross?

4 MR. BRILL: No questions, Your Honor.

5 THE COURT: All right, you're excused. Thank
6 you.

7 MR. BRILL: Your Honor, before we go to the next
8 witness, we have some deposition transcripts to hand up.
9 You want to do that now or --

10 THE COURT: Whenever is fine.

11 MR. ORLEANS: I was actually going to suggest it
12 might be a good time to take care of some housekeeping
13 matters before we call our next witness so why don't you
14 go ahead and I'll go after.

15 MR. BRILL: Sure. I have two deposition
16 transcripts of witnesses for the record. First is the
17 videotape deposition of Samuel Seemes who's the track and
18 field expert that was called by the defendant who was not
19 available this week, together with his written report.
20 And the parties stipulated that the written report would
21 be admissible.

22 And we have the videotape deposition of Karen
23 Martin who's the track and field coach who is not able to
24 be here. She gave birth just before the trial. And we do
25 have the videotape of this deposition as well.

1 THE COURT: Okay.

2 MR. BRILL: Let me note for the record we don't
3 yet have the videotape from Mr. Seemes but I'm not sure
4 that it's particularly necessary.

5 THE COURT: That's fine. And just so we're
6 clear, I'm going to treat these not as trial exhibits but,
7 rather, simply as part of the record. In other words, I
8 was going to treat it as if they gave oral testimony.

9 MR. BRILL: Yes, that's the way we would expect.

10 MR. ORLEANS: That is correct.

11 MR. BRILL: Your Honor, another thing, Your
12 Honor, in the pretrial order the parties designated and
13 cross designated portions of Coach Martin's deposition
14 transcript. We had not turned in our final cross
15 designation but we would like if the entire balance of the
16 deposition be read. There's just a few pages in the cross
17 examination that have not been designated yet.

18 MR. ORLEANS: Well, I'm sorry to make trouble
19 but the issue with Ms. Martin was we combined her
20 discovery deposition and her deposition for purposes of
21 trial into one deposition because at the time we took her
22 deposition, she was eight months pregnant and we knew she
23 wasn't going to be able to testify at trial, so it was my
24 understanding with respect to the cross examination
25 because I had never deposed her previously that I would be

1 able to designate portions of the cross examination for
2 purposes of trial and that the remainder of the cross
3 examination would not come in. So --

4 MR. BRILL: You're looking at me. That was not
5 my understanding, Your Honor, but I certainly would have
6 re-asked her the same questions if I'd known that was Mr.
7 Orlean's understanding and there's nothing to that effect
8 on the record. I don't think it's a big deal but there
9 are little gaps in a few pages here and there and I think
10 it should all be in read in context.

11 MR. ORLEANS: I agree it's not a big deal. I
12 think now that you know what happened, we're happy to have
13 you read the entire transcript.

14 THE COURT: Very good.

15 MR. ORLEANS: With respect to Mr. Seeme's
16 deposition, I think I received an email from
17 Ms. Berkebile -- am I pronouncing your name correctly?

18 MS. BERKEBILE: Yes.

19 MR. ORLEANS: Regarding the signature on that
20 deposition and any corrections?

21 MR. BRILL: Right.

22 MR. ORLEANS: We do not need for Mr. Seemes to
23 read and sign that deposition.

24 I did notice two transcription errors, not in
25 the testimony but in the questioning and perhaps at a

1 break I can find those and we can let Your Honor know what
2 those are later. It's just two words that do change the
3 meaning of the questions that I'd like to get corrected.

4 THE COURT: All right.

5 MR. ORLEANS: The other housekeeping matter I
6 thought we ought to address is the exhibits because, Your
7 Honor, you had indicated that you were hopeful that we
8 might stipulate into evidence many of the exhibits and I
9 think we can stipulate into evidence many, not all of the
10 exhibits and I thought it might be useful to just go
11 through that at this time, particularly because our next
12 witnesses, Dr. Lopiano -- and she's going to be relying on
13 some of the exhibits.

14 THE COURT: Okay.

15 MR. ORLEANS: Unfortunately I don't have, with
16 respect to the plaintiff's list, I don't have a copy that
17 I can hand up that has the exhibits noted -- the
18 objections noted on it but I could indicate for the record
19 my understanding of what the, which ones the defendants
20 object to and I think the rest all go in.

21 THE COURT: Okay, that's fine.

22 MR. ORLEANS: Does that work?

23 THE COURT: Yes, obviously.

24 MR. ORLEANS: I'm just going to step up to the
25 podium so I have something to put it down on.

1 With respect to the first 39 exhibits that are
2 listed on our list, those are all of the exhibits that we
3 had identified for the pretrial, the preliminary
4 injunction, and we thought that we shouldn't, since that's
5 becoming part of the record we thought we shouldn't change
6 any of that at all, so our exhibit list notes some of
7 those have already been admitted.

8 I should report that as to Exhibit Four, my
9 understanding is that the defendant objects on the grounds
10 of relevance to the portions of the exhibit that were not
11 already admitted. The defendant has objected to Exhibit
12 Five on the grounds of, on grounds of relevance. To
13 Exhibit 8 on grounds of relevance to the extent not
14 already admitted. To Exhibit 18 on grounds of relevance.
15 To Exhibit 22 and Exhibit 27 on grounds of relevance.

16 THE COURT: All right. Are the trial exhibit
17 numbers that were used at the preliminary injunction
18 hearing the same?

19 MR. ORLEANS: Yes, that was -- I didn't want to
20 disturb that. I thought it would be too confusing.

21 The defendant has objected to 30 on foundation
22 and relevance.

23 MR. BRILL: Could I just ask, Jon, could you
24 give me a few minutes? I'm having trouble --

25 MR. ORLEANS: Absolutely, I'm sorry.

1 (Pause)

2 MR. BRILL: Could we defer this, Your Honor?
3 Unfortunately I can't locate my copy of the objections
4 easily and I'm not sure we need to do this right now
5 before Dr. Lopiano's testimony. If there are specific
6 exhibits she wants to rely on we can address those but I'm
7 not prepared to go through the whole list.

8 MR. ORLEANS: That's fine. I don't need to
9 inconvenience Mr. Brill.

10 THE COURT: Okay.

11 MR. ORLEANS: We'll continue that later.

12 MS. GALLES: Your Honor, we would like to call
13 Dr. Donna Lopiano as the next witness please.

14 MR. BRILL: Your Honor, before Dr. Lopiano takes
15 the stand -- she can sit down but before she begins her
16 testimony -- we did not make a motion in limine as to her
17 testimony but I do have two issues that I think would be
18 useful to sort out now rather than through objections in
19 the course of her testimony.

20 THE COURT: All right. Before she sits let me
21 jury just swear her in. Would you raise your right hand
22 please?

23 D O N N A L O P I A N O, called as a witness on
24 behalf of the Plaintiff, having been duly sworn by the
25 Court, testified as follows:

1 THE COURT: All right, thank you. You can sit.

2 MR. BRILL: She's being called as an expert, as
3 I understand, on Title IX and I don't frankly understand
4 the point of testimony on what a law means anymore than
5 Mr. Orleans and I could testify about what Title VII
6 means. The court may find testimony of that useful as
7 background, I don't have any objection. I think what is
8 more concerned is in her report she purports to say at
9 various times what she thinks the Office of Civil Rights
10 would do or what positions the Office of Civil Rights
11 would take on certain issues. That to me, that's
12 absolutely beyond the bounds of what any expert -- she's
13 not even a lawyer but what an expert can say about what an
14 administrative agency could do with respect to the
15 situation where there's been no rulings, anymore than
16 Mr. Orleans or I could testify as to what we think the
17 EEOC or the Department of Labor might do in response to a
18 particular case where there's been no ruling. So I think
19 that ought to be the guidelines for that frankly ought to
20 be understood before she begins because these are issues
21 that she addresses in her report.

22 MS. GALLES: Yes, Your Honor. Several things I
23 guess I can respond to that. Number one, is shown in her
24 CV is that these are exactly the issues that Dr. Lopiano
25 has testified about in every major Title IX litigation

1 that has come up in the last 30 years, so this is nothing
2 more than what she has done before and has been accepted
3 by courts in the case against Brown University, Colorado
4 State, Louisiana State University, and many others that
5 are listed on her CV.

6 Secondly, what she really does is because of her
7 expertise in gender equity, sports administration, having
8 been the former athlete -- women's athlete director at the
9 University of Texas, how do you apply these principles
10 practically in an athletic program. And some of these
11 matters are simply calculating -- obviously the law says
12 here's how you do it but you have to calculate, you have
13 to use numbers. Who are participants, why are they
14 participants. And then how do you calculate if you have
15 how many men, how many women, just doing the math to show,
16 all right, that produces a gap of X. Somebody has to do
17 that and Dr. Lopiano has indeed done that, so it's more in
18 terms of application rather than she may state that
19 obviously OCR says this, this is how I would apply it
20 here.

21 THE COURT: All right. In general, I'm going to
22 allow this testimony.

23 MR. BRILL: Could I just clarify, Your Honor.
24 I'm sorry, I don't object to the testimony that Ms. Galles
25 described. That's fine, but what I object to is with

1 respect to competitive cheer there have not been rulings
2 and Ms. Galles in her statement says the OCR will take
3 such and such a position or would have such and such a
4 view. To me that is not permissible expert testimony. If
5 she wants to apply her understanding of how you count
6 numbers in participation, I don't have no objection to
7 that, with respect to that.

8 THE COURT: Again, it's a bench trial. If
9 somebody comes up here and says the 2nd Circuit's going to
10 go this way or that way, you know, no one knows. I think
11 we should keep the testimony moving and I'm really not
12 worried about sorting out these issues in the end.

13 I would ask though for a copy of plaintiff's
14 exhibits, assuming you have them.

15 THE CLERK: Do we have copies for --

16 MR. ORLEANS: Yes. You have to be careful what
17 you ask for sometimes, Your Honor.

18 THE COURT: Okay.

19 MS. GALLES: All right, ready to go?

20 MR. ORLEANS: I don't know if you're going to
21 need these, Dr. Lopiano. Here you are.

22 DIRECT EXAMINATION

23 BY MS. GALLES:

24 Q. All right. Dr. Lopiano, I would first like to direct
25 your attention to what has been marked as Plaintiff's

1 Exhibit 99, which you have your own copy in front of you.

2 Could you please take a look at that and let me know --

3 A. Are you talking about my expert report?

4 Q. Yes. Dr. Lopiano, I'd just like you to identify what
5 that is.

6 A. This is a report dated May 15th, 2010, and it was my
7 original expert report that was, that was done without the
8 submission of the 2009, 2010 squad lists, which I just
9 received in this past week. And that required me in order
10 to do a count of 2009, '10 based on the squad list, to
11 issue a supplemental report which I have done.

12 Q. Okay. And I am --

13 A. But this is my original report.

14 Q. Original report, Exhibit 99?

15 A. Right.

16 Q. Okay.

17 A. I trust you on Exhibit 99. I'll mark it.

18 MS. GALLES: May I approach the witness, Your
19 Honor?

20 THE COURT: Yes. It's not necessary to ask.

21 MS. GALLES: Okay, since we're -- all right.

22 BY MS. GALLES:

23 Q. And could you please give this to the judge?

24 (Hands Court.)

25 MR. ORLEANS: Just -- to identify that those are

1 the three supplemental exhibits, there's a supplemental
2 exhibit list, 149, 150 and 151. And the report is 149,
3 this report. The supplemental report is 149. The -- do I
4 have my numbers right?

5 THE CLERK: There's Exhibit A and --

6 MS. GALLES: And Exhibit B.

7 MR. ORLEANS: And they are attached. I don't
8 think they are in the exhibit book. I'm not sure.

9 THE CLERK: I have 149.

10 MS. GALLES: Oh, they are fast.

11 MR. ORLEANS: My staff did a faster job than I
12 even knew.

13 BY MS. GALLES:

14 Q. Okay. So, Dr. Lopiano, what I have handed you and is
15 marked as Exhibit 149, and attached as Exhibits A and B
16 which have been marked as Exhibits 150 and 151, could you
17 please identify those for us?

18 A. Yes, Exhibit 149 is my supplemental report dated June
19 20. Let me make sure on that date. Dated June 20, 2010.
20 And it has attached to it two charts, Chart A which is
21 150, and which is my athlete by athlete analysis of how I
22 counted each athlete on the squad list.

23 And then Chart B is a summary by sport of the three
24 different ways I counted a comparison to conference and
25 NCAA squad list. And then in addition to showing -- I'll

1 explain all this in my supplemental testimony -- I did
2 four different calculations based on the court's pleasure
3 and whether it's going to consider triple counting, double
4 counting, unduplicated counting or single sport counting
5 of the runners. So I'll explain all of that but I tried
6 to create in the supplemental report a very clear picture
7 of the choices that the court has in making a
8 determination on counts.

9 Q. All right. Dr. Lopiano, I'd like you to go to what
10 has been, what is marked as Exhibit A to your expert
11 report, but is Exhibit 100 of plaintiff's trial exhibits.

12 A. Okay.

13 Q. And that is your CV. And since providing the CV that
14 is attached or that is marked as Exhibit 100, have you
15 since updated that or confirmed it for accuracy?

16 A. Yes, I have updated it as of 6/13, 2010.

17 Q. Okay.

18 A. You have a copy of that, I believe.

19 Q. Yes. Dr. Lopiano, I'd like to present that to you.

20 (Hands witness.) And is what I have just handed you the
21 most recent version of that, of your CV?

22 A. Yes, it has very minor changes.

23 Q. Okay.

24 THE COURT: Mark that as 152.

25 MS. GALLES: Okay.

1 (Whereupon Plaintiff's Exhibit 152 was marked
2 full.)

3 THE COURT: Okay, I'm going to suggest this.
4 When exhibits are used with a witness, if there's going to
5 be an objection, just give me a heads up.

6 MR. BRILL: I was waiting, Your Honor. She
7 hadn't offered it.

8 THE COURT: No, I know, I'm thinking we can
9 almost --

10 MR. BRILL: All right, I'll state my position on
11 these exhibits. There are no objection to 152, the CV.
12 We did not stipulate that the reports of Dr. Lopiano could
13 come into evidence. Actually we didn't get the
14 supplemental report much I got it at six a. m. this
15 morning but I read it through. They are hearsay obviously
16 and we agree that she would give her testimony orally.

17 I probably, depending on the testimony, would
18 not object to Exhibits A and B to the supplemental report
19 coming in, nor the limited purpose of summarizing her
20 analysis, but not for the truth of the statements that are
21 on there, many of which are hearsay, inaccurate, et
22 cetera, et cetera. But if the plaintiffs want to put in
23 that chart simply to show that this is what I was
24 thinking, and this is how I made my calculations, then I
25 think it might be useful to have that in the record rather

1 than have them all orally, but certainly not for the
2 truth. She misquotes from emails, et cetera.

3 THE COURT: I understand, I understand.

4 MS. GALLES: Okay.

5 THE COURT: Do you need the reports in?

6 MS. GALLES: Well, obviously we will want the
7 reports in it was our understanding because this, the
8 trial was significantly shortened, that the court
9 preferred that we enter the reports and that we only
10 highlight some of the most important stuff in her oral
11 testimony. Otherwise, you know, we'd be here all day
12 having her go through the detail that's already in the
13 report. And as an expert, obviously she is entitled to
14 rely on hearsay if it's the type of information that an
15 expert would generally rely upon.

16 But I don't think, most of the materials that
17 she relies upon are either provided by Quinnipiac or are
18 the type of things that anyone in her position or a
19 athletic director's position would rely upon, such as NCAA
20 manuals, NCAA participation.

21 THE COURT: I think the concern are the reports
22 themselves are hearsay but I'm going to overrule that
23 objection in light of the procedure we're using in this
24 hearing, in light of the time limits that have, we've
25 imposed. And that will work both ways, so --

1 MS. GALLES: Okay, Your Honor. So the report
2 and the supplemental report have been --

3 THE COURT: Yes, 99, 149, 150, 151, 152 are
4 full.

5 (Whereupon Plaintiff's Exhibit 99, 149, 150,
6 151, 152 were marked full.)

7 MS. GALLES: Now, in addition to her report
8 includes many exhibits that are also separately marked on
9 the exhibit list. Would you like me to go through those
10 or would you like me to wait until I go through them with
11 Dr. Lopiano?

12 THE COURT: Why don't you list them right now.

13 MS. GALLES: All right. Exhibit 100 is her
14 original CV and then Exhibit 152 is her updated CV.

15 THE COURT: Right.

16 MS. GALLES: Exhibit 101 was the disclosure
17 about the compensation for an expert.

18 THE COURT: Okay.

19 MS. GALLES: Exhibit 102 are charts that
20 Dr. Lopiano prepared in conjunction with the preliminary
21 injunction hearing that merely compare Quinnipiac's squad
22 sizes to the average squad sizes.

23 MR. BRILL: Do you want my objections as we go
24 along, Your Honor?

25 THE COURT: Let me get the list out and you can

1 object. Basically we have 101 through what?

2 MS. GALLES: Yes, sir, 101 through 114.

3 THE COURT: All right, 101 through 114. 100 is
4 full. That's just the old CV. And I'm going to allow
5 that in, so 101 through 114, any objection to those?

6 MR. BRILL: Yes, Your Honor.

7 THE COURT: Okay.

8 MR. BRILL: 102 is completely irrelevant now.
9 This is having to do with proposed squad sizes from the
10 time of the preliminary injunction hearing and NCAA
11 averages at that time. It just has nothing to do with the
12 case at this moment and would be confusing just to have
13 another set of numbers that we're not really dealing with
14 now.

15 THE COURT: It might confuse the jury, it won't
16 confuse me.

17 MR. BRILL: 103 I have no objection to. 104 I
18 have no objection to. 105 I have no objection to. 106 I
19 have no objection to. 107, no objection. 108 I believe
20 is already in evidence, Your Honor.

21 THE COURT: Okay, well no harm in having it
22 twice.

23 MR. BRILL: Well then -- it is, these are
24 hearsay letters from the Office of Civil Rights written
25 to -- especially the second letter, responding to a

1 letter -- we don't know what the facts were. It was
2 stated to the OCR when he was responding to the letter so
3 it's half of the story.

4 THE COURT: All right, so 108 is already in in
5 another number?

6 MR. BRILL: I believe so.

7 THE COURT: But you're objecting to 108?

8 MR. BRILL: Yes, you asked me if you wanted it
9 in again.

10 THE COURT: So you're objecting to something
11 that's already in evidence?

12 MR. BRILL: I'm essentially asking the court to
13 reconsider the ruling on that objection.

14 THE COURT: Well, okay. I'm going to allow it
15 in. Go ahead.

16 MR. BRILL: 109, we have no objection. 110, no
17 objection. 111, I don't know. 111, the court has ruled
18 is irrelevant for the most part. These are the EADA
19 numbers going back to 1995.

20 THE COURT: Right. Again there's no point in
21 redacting this document. I can read it, I can understand
22 what it says.

23 MR. BRILL: I'm just stating for the record my
24 position about it so it's clear to the reader of the
25 record that there's been a ruling that this document is

1 largely irrelevant.

2 THE COURT: All right.

3 MR. BRILL: Exhibit M, which is reported as
4 Exhibit 112 --

5 MS. GALLES: We withdraw it.

6 MR. BRILL: That's withdrawn? Okay. 113, no
7 objection. Is that the last one or are we going --

8 THE COURT: 114.

9 MS. GALLES: 114.

10 MR. BRILL: No objection.

11 THE COURT: Okay, so 101 through 111, 113 and
12 114 are full.

13 (Whereupon Plaintiff's Exhibit 101, 111, 113,
14 114 were marked full.)

15 BY MS. GALLES:

16 Q. Okay. Dr. Lopiano, I'd like to just -- your CV is
17 now in evidence but just to provide some context to the
18 court for the, for your expertise, I would like you to
19 please describe briefly your employment history as it
20 relates to gender equity and intercollegiate sport
21 administration?

22 A. Yes, in terms of employment, for 18 years I served as
23 director of women's athletics at the University of Texas
24 in Austin in Division I program, consistently among the
25 top ten in the United States.

1 For 15 years I served as the Executive Director, CEO
2 of the Women's Sports Foundation, an expert research
3 efficacy programming organization in terms of gender
4 equity and increased opportunities for girls and women to
5 participate in sports and physical activity.

6 For the last two -- time flies here -- two years, two
7 and-a-half years, I started my own consulting business
8 called Sport Management Resources. I'm president and I
9 have three other independent contractors, all of which are
10 either researchers or experts in gender equity and other
11 areas of interest in terms of athletic programs from fund
12 raising to good compliance and eligibility systems, to any
13 athletic administrative topic that a student needs help
14 with that our directors could be of assistance, expert
15 athletic directors could be of assistance in.

16 That's the nature of the company with every one of
17 the principals having, again, college professors and
18 support management in addition to serving as
19 administrators and researchers themselves.

20 Q. And does any of that consulting involve gender equity
21 issues?

22 A. Absolutely. The schools will hire us to perform a
23 comprehensive Title IX assessment for them and to make
24 recommendations as to how they might come into compliance.

25 Q. Are there any other issues on your CV that you would

1 like to highlight or is that a sufficient summary?

2 A. It's up to you.

3 Q. Well, I would like you to describe your background
4 with the AIAW. Could you please explain what that is, and
5 what your role was?

6 A. In terms of non-employment leadership experience, I
7 was president of the association for athletics for women
8 which was predecessor government's organization for
9 women's championships, conducted women's championships
10 just like the NCAA did before the NCAA included women. It
11 existed for approximately ten years.

12 When AIW went out of existence, when NCAA took over
13 women's championships, I served in various leadership
14 roles within the NCAA, either on committees or chairing
15 various committees, that are detailed in the CV but it
16 ranged from rewriting entire NCAA manuals so people could
17 understand it to other issues in intercollegiate
18 elections.

19 Q. I'd like to focus on your mention of the OCR. While
20 you were athletic director at Texas and while you were
21 president of the AIAW, did you provide any input or
22 consulting services to the Office for Civil Rights
23 relating to gender equity issues?

24 A. Yes, not when -- I was president of AIAW in 1981, I
25 believe it is, but in the early 1970s when I was a member

1 of the executive board, director of national championships
2 for AIW, I was intimately involved in all of the beginning
3 OCR work on Title IX's application to intercollegiate
4 athletics, their protections and the '75 policy
5 interpretation.

6 On a number occasions, I testified before Congress on
7 the need for and the contents of these regs. I also, I
8 worked on the first Title IX investigators manual which
9 was developed as a training tool for all of the regional
10 Title IX coordinator offices. And was brought in along
11 with another colleague of mine in support manager resource
12 Dr. Christine Grant that we both engaged in training all
13 the regional offices as to how to apply Title IX to
14 intercollegiate programs and how to use it. At the time
15 it was a draft, this investigators manual.

16 Also worked with OCR. They contacted the Women's
17 Sports Foundation in my capacity there, helped them
18 develop their definition of sport criteria, which they
19 have used in not only letters responding to questions from
20 the individual institutes but it was also used in the 2008
21 recent Dear Colleague letter that really summarized how
22 one was, OCR was going to look at what activities would be
23 considered sports.

24 Also worked in, if I haven't said this already, I
25 also worked on the '96 clarification with Norma Cantoo

1 (ph) and staff there in terms of the three prong test, all
2 of that work.

3 And as the head of the Women's Sports Foundation and
4 as a former, you know, athletic director, every year I
5 would meet, we would meet with OCR. It was part of our
6 work to be experts to people who called into the
7 foundation seeking resources and advice. And typically we
8 would get calls from parents saying this is the situation
9 at the school, you know, is this allowed under the law.
10 Who can I go to? We would point them to OCR, we would
11 point them to educational resources, point them to legal
12 documents.

13 So it was very important for us to stay absolutely up
14 to date as to where OCR was on all of these questions and
15 we would formally meet with them once a year and the
16 women's sport agency still does that.

17 Q. I just want to clarify, I'm not sure if you mentioned
18 it or not, but in several different places in this case
19 and indeed in your report, it refers to the 1979 policy
20 interpretation. I believe there was a 1975 memo but there
21 also was a 1979 policy interpretation.

22 A. It was recodified when --

23 Q. So I just want to be clear, is the 1979 policy
24 interpretation also one that you provided expertise to OCR
25 on?

1 A. Yes, basically '79 was recodified when Department of
2 Health Education and Welfare was changed to DOE, so it
3 changed.

4 MR. BRILL: I'm sorry, Your Honor, could you ask
5 the witness to speak more directly into the microphone.
6 Maybe it needs to be adjusted, I'm having trouble hearing.

7 A. I apologize. Is that better?

8 THE COURT: Don't get too close because you'll
9 get on -- okay.

10 THE WITNESS: Raise your hand and I'll try to
11 enunciate more clearly.

12 BY MS. GALLES:

13 Q. Now, Dr. Lopiano, I'd like to have full disclosure
14 here for the court, I'd like you to look at what's been
15 marked as Exhibit B of your report which is exhibit --

16 THE COURT: It's 101.

17 MS. GALLES: 101.

18 BY MS. GALLES:

19 Q. And just are you being compensated for the work that
20 you have done in this case?

21 A. Yes, I am.

22 Q. Okay. And could you please let us know what your
23 rates are for this work?

24 A. Exhibit 101 specifies that if I -- I get \$175 an hour
25 for consulting with attorneys, two hundred dollars an hour

1 for preparation of written reports and research related to
2 such reports, \$250 an hour for a deposition or court
3 testimony. No charge for hours traveling. On site visit
4 for Title IX analysis, it's \$1,500 a day. These are
5 nonprofit rates, these are reduced rates. If the
6 plaintiffs had deeper pockets, they would be much higher.

7 THE COURT: Let me just briefly interrupt and
8 just let all counsel know that when a document's in
9 evidence, you can either just say, Judge, look at 101 and
10 you'll see what she's paid, or you can actually read from
11 it or you can --

12 MS. GALLES: Okay.

13 THE COURT: Save time doing that.

14 MS. GALLES: So go ahead and zip through unless
15 we want to emphasize it. Yes, sir, we will do that.

16 BY MS. GALLES:

17 Q. All right. Then, Dr. Lopiano, I'd like to jump ahead
18 to the substance of your original report. There is a part
19 A that says athletic participation opportunities dash
20 general. And it describes how you approach prongs one,
21 two and three in general, not with respect to Quinnipiac
22 but in general. Okay?

23 MR. BRILL: Could you just point us to what page
24 you're -- the pages aren't numbered.

25 MS. GALLES: Yes.

1 MR. BRILL: Could we agree to number of pages?

2 MS. GALLES: It starts right here.

3 BY THE WITNESS:

4 A. So this roman five capital A, that's where you are?

5 In the report, Roman numeral five capital A?

6 Q. Yes, roman numeral five, capital A.

7 A. Okay.

8 Q. Could you go through, there's some parts A -- let's

9 focus on subpart A about athletic participation

10 opportunities in general. Is what's in your report an

11 accurate summary of your approach to application of the

12 three part test?

13 A. Yes, it is.

14 Q. Okay. Now, I only want to highlight a few points in

15 there. I'd like you to go to the page that has the 1979

16 policy interpretation language in it.

17 A. Could you tell me where you are?

18 THE COURT: Three more pages.

19 BY MS. GALLES:

20 Q. Right here. (Indicating)

21 A. Okay.

22 Q. There you go. Now, on this particular page, you

23 reference the 1979 policy interpretation and again in your

24 supplemental report, in the front page of your

25 supplemental report, you reference the 1979 policy

1 interpretation and the 1996 clarification. I just want to
2 ask you, did you use or apply the definitions in those OCR
3 documents when conducting your analysis?

4 A. Yes, I did.

5 Q. Okay. Now, on the top of that page, you state that
6 when schools count male and female athletes differently in
7 this way they breach the purpose and intent of Title IX
8 and by definition they discriminate on the basis of sex.
9 Could you please explain what you meant by that statement?

10 A. When an athletic program establishes a policy that
11 says I want to have certain size teams and I want these
12 teams to be different sizes for male and female because in
13 athletics, we have separate programs, we treat them
14 differently, you are discriminating on the basis of sex.
15 And if the result of that policy results in a different
16 experience for men and women, it is discrimination on the
17 basis of sex, especially if women get the short end of the
18 deal.

19 So, for instance, when Quinnipiac says to the mens
20 program you can have no more than this number of athletes
21 and that number of athletes is equal to an average squad
22 size or lower than average squad size which is an ideal
23 size squad for instruction and participation, it's
24 matching up to everyone else that they are playing
25 against, they have a set up, a structure, a sport program

1 that is like who they are playing. When they say to the
2 women's program that you have a, a minimum floor that you
3 have to have a number, if the reach the number for your
4 squad that is larger than a national average, I want you
5 to generate more in participants for purposes of counting,
6 for instance, and they inflate by that policy,
7 artificially inflate the size of the team, they create a
8 team size that hurts both participants who would be on a
9 normal size and these extra inflated participants because
10 not everyone is going to be able to get the same
11 instructional attention on the part of the coaches that
12 the kids who would have been on a normal size game or your
13 best athletes would have gotten much more attention, and
14 the kids who now share all this who are, you know, who are
15 for all intents and purposes kind of extras are taking
16 away from that instructional responsibility. And also, it
17 dilutes the amount of money you put into the program that
18 now your, usually your per capita expenses are going to be
19 less and, therefore, your benefits and treatment of those
20 larger teams are going to be less than the small teams.

21 So it's a real red flag whenever you see policies
22 that are different for men and women. Ideally it is
23 perfectly acceptable and most institutions do this. They
24 say I want you to cap men and women, I want you to cap
25 teams at average squad sizes that are consistent with the

1 teams you play against. That's fair because that's who
2 I'm competing with and these average squad sizes then are
3 ways that I can financially control expenditures and it's
4 a reasonable financial control that affects men's and
5 women's teams equally. It's nondiscriminatory.

6 Q. So you're saying if you apply the same rules, are you
7 saying that you if you apply the same rules to men and
8 women it's okay, but if for men it's one and women
9 another, that's when it's discriminatory?

10 A. Yes, and they have the negative effect on one, it's
11 discriminatory.

12 Q. Now, I'd like you to go to the next page of your
13 report where the second paragraph says by padding women's
14 teams. Do you see that?

15 A. I do.

16 Q. Okay. And is that -- is there anything else you
17 wanted to add to that or is that what you were just
18 describing?

19 A. That is what I was just describing.

20 Q. Okay. Now, in the, the next paragraph, it talked
21 about they, meaning coaches, do not want to carry men
22 athletes who will never compete or who do not have the
23 athletic ability to contribute to the team overall. True
24 varsity teams are elite by their very nature and thus such
25 cuts must be made. Could you please explain what you

1 meant by that statement?

2 A. Yes. High schools, colleges, universities kind of
3 differ in terms of how big they want their squad and how
4 elite they want their squads, but there's no question,
5 individual ones, this is the most elite level, and you
6 always are looking to maximize the student/instructor
7 ratio. So, having a reasonable size team so you can
8 optimize coaching and the development of each of these
9 athletes is absolutely critical in Division I.

10 So that these squad sizes padded is, is very
11 antithetical to an elite athlete's success because, as I
12 just explained, it diminishes success for students and
13 makes you less competitive vis a vis your opponents.

14 Q. Just to confirm their Division I is the most elite
15 level of college athletics?

16 A. Yes, it is.

17 Q. And would you expect to have the most talented or
18 most accomplished athletes at the Division I level?

19 A. Absolutely. And in Division I, usually you look at
20 all recruited student athletes, you're looking at, you
21 know, vast majority of them are on athletic scholarship
22 and you are looking at the athletes who are going to
23 school to get the most out of that school's teaching staff
24 and the experience itself.

25 Q. Okay. Now, further down in the report, sort of the

1 last paragraph on that page, when it talks about how the
2 schools find their athletes?

3 A. The paragraph --

4 Q. Same page of the last paragraph, when investigating
5 the squad numbers?

6 A. Okay.

7 Q. Could you please explain the importance, if any, of
8 recruiting athletes at the Division I level?

9 A. Yes. Schools are obligated in treating their men's
10 and women's programs equally. These athletes who
11 participate in it should be coming from the same place.
12 If your men's programs said I am going to recruit the best
13 athletes from all over the country or the best athletes
14 from all over the region and are recruiting from an
15 incoming class of high school graduates, that is very
16 different than recruiting on your campus kids who are
17 unsolicited because of their athletic talent for coming to
18 your school who may or may not have exceptional talent.
19 So Title IX would expect the school to treat its women's
20 and men's program in the same way to make the commitment
21 to spend money on recruiting and to go out and recruit the
22 very best athletes and to provide the same quality of
23 experiences for both men and women. So recruiting's very
24 important.

25 Q. Which leads in to my next question. Would you expect

1 a Division I school to recruit most of its athletes as
2 opposed to just wait, see who shows up for the first day
3 of practice?

4 A. Absolutely. Usually 90 percent of who's going to be
5 on your team the coach knows about probably three or four
6 months before the, prior to the subsequent season.

7 Coaches are a year to a year and-a-half ahead of who they
8 are going to identify as potential recruits and are
9 recruiting them in their sophomore, junior and senior
10 years in high school. This is not just a, you know, last
11 minute, you know, call. It's a, recruiting is an art form
12 in Division I. The most successful coaches in Division I
13 have to be as good recruiters as they are instructors.

14 Q. So, let's go back to when you were the athletic
15 director at the University of Texas. If you're adding a
16 new sport, a new Division I sport, what process would you
17 use? Would you simply just start it up tomorrow or what
18 would be the steps that you would take to add a new sport?

19 A. The process is you would start at least a year in
20 advance, you hire the best coach you possibly could, you'd
21 establish a scholarship budget that would commit to a
22 certain number of scholarships over a four year period,
23 wouldn't give them all away in the first year because you
24 would have to stagger your squad. But you might give up
25 to half away in your first year you if you were able to

1 use some transfers, college transfers as well as incoming
2 freshmen, so would you recruit from the junior college as
3 well as a high school class, but it would take in a
4 Division I school at least a year in advance a commitment
5 to budget, commitment to scholarships, a real commitment
6 to, you know, hiring assistant coaches, doing all your
7 publicity materials. As I said, recruiting is extremely
8 important in Division I.

9 Q. Now I'd like you to move to the next part of your
10 report where it says prong two. Do you see that?

11 A. Yes, I do.

12 Q. Okay. And does the prong two text of your report
13 accurately summarize your views relating to prong two of
14 the three part test?

15 A. Yes, it does.

16 Q. Okay. The next part of your report deals with prong
17 three. Does that part of your report adequately describe
18 your views and opinions regarding prong three of the three
19 part test?

20 A. Yes, it does.

21 Q. Now, the next part of your report under section A
22 talks about levels of competition. Could you please
23 explain what you mean by levels of competition?

24 A. Yes. There are many levels of competition in terms
25 of interscholastic activity between schools. Clubs, which

1 are nonvarsity teams, can compete against each other.
2 Intermural teams can, champions of basketball murals at
3 one school can compete against basketball champions from
4 another school.

5 And a team, individual one in particular, is expected
6 to play all of its contests, majority of its contests
7 against someone of an equal competitive level. So if I
8 were running a Division I basketball program I would be
9 expected to play all other Division I schools and, as a
10 matter of fact, I would be penalized if I did not.

11 The selection procedure for national championships,
12 for example, the power ratings are all based on your, who
13 your opponents are. So there's a real specific
14 expectation, especially in Division I, but according to
15 Title IX, applicable to all schools, college, high school,
16 whatever, that you must provide men and women with the
17 same competitive levels.

18 So you would expect to see in Division I, I'm
19 competing against other varsity teams playing the same
20 number of contests against athletes of my high elitist
21 level.

22 Q. So if the men's programs at your Division I school
23 play primarily other Division I men's programs, would you
24 expect that the women's teams at that school should also
25 primarily compete against Division I institutions?

1 A. Absolutely. When you look at schedules you should
2 not expect to see in Division I level any competition that
3 wasn't in a bona fide Division I school.

4 Q. Now, on the next page still within that levels of
5 competition?

6 A. And not just Division I competition against the
7 school, a varsity team at that school. Not a club team at
8 that Division I school or exhibition team against this
9 Division I school.

10 Q. Okay. Now, I next want to focus you, you first in
11 that section talk about the level of exhibit and then you
12 talk about how many competitions. Why does it matter how
13 many competitions when you're comparing men and women?

14 A. The more you play against high level competition the
15 better you get and so you should still, you should -- men
16 and women should have the same opportunity to become as
17 good as they can be and you do that by designing your
18 competitive schedule and having it to be comparable for
19 men and women.

20 Q. Now, does the NCAA have any rules placing a limit on
21 the number of games or other competitions that you can
22 engage in?

23 A. Yes. It does, in all sports. And I believe we have
24 exhibits in the NCAA manual and 17.1, 17.2, that
25 specifically talk about every single sport and the number

1 of, maximum competitions that are allowed within an entire
2 period of time or in two separate competitive seasons.

3 And that is because coaches know that's what makes teams
4 good. They are going to take it to the absolute limit.

5 You would expect to see in Division I everyone playing at
6 or close to whatever those maximum limits are.

7 Q. So if the men's teams are playing 90 to 100 percent
8 of the maximum allowed by the NCAA, would you expect that
9 they, the women's teams at that same institution should
10 also be playing at 90 to 100 percent?

11 A. Absolutely.

12 Q. Now, I'm going to, for the moment I'm going to skip
13 over your discussion of cheerleading and move to part B of
14 the report, athletic opportunities at Quinnipiac
15 University.

16 MR. BRILL: I'm sorry, what page are you --

17 BY MS. GALLES:

18 Q. On are you on that page, Dr. Lopiano?

19 A. Yes.

20 Q. First, on that page I understand that you wanted to
21 make a correction on the first paragraph of that page
22 about this where it says the NCAA has long notified its
23 members?

24 A. At the top of that page.

25 Q. Yes.

1 A. In the paragraph that starts the NCAA -- that third
2 sentence in the front page, that should instead be on page
3 two.

4 Q. I just want to --

5 MR. BRILL: I'm sorry, could you -- explain that
6 to me? I don't see that.

7 MS. GALLES: Sure.

8 THE WITNESS: It's a minor editorial.

9 BY MS. GALLES:

10 Q. Now, going below to the part B, the athletic
11 participation opportunities at Quinnipiac University?

12 A. Uh huh. (Affirmative.)

13 Q. Okay. In assessing the application of the three
14 prong test to Quinnipiac, did you believe that it was
15 necessary to assess their historical compliance?

16 A. I did.

17 Q. And why is that?

18 A. There was real concern because there was no squad
19 list numbers, no numbers to go on. When I examined the
20 EADA reports, there were, when you looked at them back to
21 1996, when they were first required --

22 Q. Let me step back --

23 A. Sorry.

24 Q. I want to talk about the abstract.

25 MR. BRILL: Can I, Your Honor, there was rulings

1 made on the motion in limine that this evidence is not
2 relevant, and I understand Your Honor can sort through
3 what's relevant and what's not but there was a record that
4 may go up to a higher court and I am concerned --

5 THE COURT: I think they can sort it out too.

6 MR. BRILL: Excuse me?

7 THE COURT: I have confidence they can sort it
8 out too.

9 MR. BRILL: I'm not sure. I'm sorry, I haven't
10 tried a case before Your Honor and I don't know if you
11 just want me to sit here and not saying anything about
12 relevance?

13 THE COURT: You should object whenever you want
14 but let's wait for a question because right now we don't
15 have a question.

16 MR. BRILL: Thank you.

17 BY MS. GALLES:

18 Q. Dr. Lopiano, speaking in the abstract, if you are
19 assessing whether a school is or is not compliant with the
20 three prong test of Title IX, okay, would you look only at
21 this year's data or would you think it would be important
22 to look at several years' worth of participation data?

23 A. When you're assessing the three prong, you must look
24 back to 1975. It is critical for a prong two because if
25 you show a diminution, you drop a sport, show a diminution

1 of opportunities for women, or if you don't add an
2 opportunity for the under represented two or three years,
3 then you're not able to comply with two.

4 Also if you're going to use prong one, you have to
5 use prong one all the time. You just can't say I was, I
6 met prong one in 1975 and that was it. I'm prong one.

7 So I wanted to go back to see whether they had
8 traditionally reached prong one, whether they were ever in
9 compliance with prong one and whether I could have
10 confidence that, especially in the cases when it was first
11 presented, there they were creating a theoretical prong
12 one structure, I felt it really important to go back to
13 see if they were capable of even doing it theoretically.
14 And which is why I went back historically.

15 Q. And when you advised schools about compliance with
16 gender equity issues and you do your own analysis for when
17 the schools hire you, do you go back and assess the
18 historical compliance of prong one?

19 A. Absolutely. You must because there are three
20 independent tests and the school may be able to meet any
21 one of these three tests and you're obligated as a
22 consultant to tell them which one is better for them,
23 which one are they closer to, which is easier for them.
24 Which, you know, is not, not possible for them.

25 Q. Now, if, if a school has never relied on prong one in

1 the past, would it be even more important to look at the
2 historical, how they measure up historically regarding
3 prong one?

4 MR. BRILL: Object to the leading nature of
5 these questions. We're getting into an important matter
6 and Ms. Galles should not be feeding the answers to the
7 witness.

8 THE COURT: All right, rephrase the question.

9 BY MS. GALLES:

10 Q. If a school has never complied with prong one in the
11 past, would your response be any different?

12 A. I would always look back for any school, even if they
13 had not complied with prong one I would be very focused on
14 this with prong one. However, to really look at the size
15 of the gap and whether what they were thinking of doing
16 was even possible. If the gap is 100 or 200 students and
17 they are expecting to make that up in one year, for
18 instance, to have four sports in one year, five sports in
19 one year, it would influence how I speak to the school
20 about prong one. So you always go back and look and that
21 gap over time is very important for prong one and two.

22 Q. And if --

23 A. And three. If they were to cut a sport which
24 demonstrates interest.

25 Q. And if the school never complied with prong one

1 before and was saying that going forward they want to
2 comply with prong one, would their historical compliance
3 or noncompliance have any affect on their credibility in
4 your mind?

5 A. Only in the way I just said, that if the gap was
6 excessively large, if I look back and said and saw that
7 they were close, for instance, I would be more inclined
8 to --

9 Q. More inclined to what?

10 A. More inclined to trust they could achieve that and in
11 a relatively short period of time. If there were huge
12 gaps or, in this case, where there were --

13 Q. I don't want to talk about particular gaps right now.
14 We're just talking in the abstract, why it is or is not
15 important.

16 A. Right.

17 Q. Okay? And based upon that reasoning and your
18 assessment of other schools, did you believe it was
19 similarly necessary to do that for Quinnipiac in this
20 case?

21 A. Yes, and I did that in Exhibit one --

22 Q. L?

23 A. 111.

24 Q. I don't want to have you talk about that yet. I just
25 want to say, okay -- and did you indeed in Exhibit L

1 calculate that historical compliance or noncompliance with
2 prong one?

3 A. Yes, I did.

4 MR. BRILL: What exhibit are you referring to?

5 MS. GALLES: I'm sorry --

6 THE COURT: 111.

7 BY MS. GALLES:

8 Q. And is that analysis reflected in Exhibit L to your
9 report?

10 A. It is, based on EADA numbers.

11 Q. Now --

12 MS. GALLES: Your Honor, so given the foundation
13 that we have just laid regarding the importance of the
14 historical significance of the numbers, we would ask the
15 court to reconsider its ruling and allow Dr. Lopiano to
16 testify about the chart that she prepared and why it was
17 important.

18 THE COURT: Well, 111's in evidence so you can
19 certainly testify about it. Frankly I'll decide later
20 whether I'm going to reconsider.

21 MS. GALLES: Okay. So you're going to allow her
22 to testify about it?

23 THE COURT: Sure.

24 MS. GALLES: Okay.

25

1 BY MS. GALLES:

2 Q. So, Dr. Lopiano, would like you to look at Exhibit
3 11?

4 THE COURT: 111.

5 MS. GALLES: Yes, thank you, sir.

6 BY MS. GALLES:

7 Q. Exhibit 111 which is Exhibit L to your report, okay?
8 And it states Quinnipiac University historical EADA
9 figures, 1995 to 2009?

10 A. Right.

11 Q. Okay, could you please explain what this chart is?

12 A. Yes. If I were to look at the row numbers in row six
13 and seven, for every year --

14 Q. You know what, Dr. Lopiano -- if you would give me a
15 moment, Your Honor, I think we have it all on one big
16 sheet of paper and it might be easier for her to read.
17 May I grab that?

18 MR. BRILL: Your Honor, would this be a good
19 time for a short recess? Do you have a specific time when
20 you like to break?

21 THE COURT: I generally break closer to 11. We
22 started a little early today so maybe we can go a little
23 sooner but -- do you need a break?

24 MR. BRILL: I would appreciate a short break,
25 Your Honor.

1 THE COURT: All right, we can take a break. Why
2 don't we take 15 minutes. We'll stand in recess until
3 10:35.

4 MR. HERNANDEZ: Thank you.

5 (Whereupon a recess was taken from 10:20
6 o'clock, p. m. to 10:40 o'clock, a. m.)

7 THE COURT: Ms. Galles, before you start let me
8 quickly put on the record, I wanted to explain a little
9 further my ruling on the report. Obviously it's hearsay,
10 normally I don't allow an expert report into evidence but
11 the witnesses here, and the report is in lieu of her
12 testimony. You're free Mr. Brill to cross her on any
13 aspect of the report, so unlike your typical hearsay
14 judgment which you don't have the opportunity to cross the
15 proponent of the statement, here you do and it just seems
16 to me we'll never get this case concluded if we don't take
17 some shortcuts, including admitting the report and
18 allowing you to cross from it. So I just wanted to
19 explain that further.

20 MR. BRILL: I appreciate that, Your Honor.

21 THE COURT: Sure.

22 BY MS. GALLES:

23 Q. Dr. Lopiano, I'd like to go back to the part of your
24 report, section B, athletic participation opportunities at
25 Quinnipiac University, and where it says prong one, the

1 first, the first part of that section, it talks about your
2 analysis of the participation data for Quinnipiac for
3 1995, '96 through 2008, 2009. Is the chart at Exhibit 11
4 a compilation of that data?

5 THE COURT: 111.

6 MS. GALLES: Yes, thank you, Your Honor.

7 BY MS. GALLES:

8 Q. 111 a compilation of that data?

9 A. Yes, it is.

10 THE COURT: Let me just interrupt briefly, the
11 mic on the tables are very sensitive and when documents or
12 other things touch them they make that noise, so just, if
13 you could can be careful of those. Thanks a lot.

14 MS. GALLES: Okay.

15 BY MS. GALLES:

16 Q. So, Dr. Lopiano, if you could please just explain,
17 did you create Exhibit 11?

18 A. Yes, I did.

19 Q. Okay. Could you please explain what it shows?

20 A. Yes. Not only is this for '95 to '96 but this method
21 of computation is the one you'd use for '09, '10, using
22 the squad list and supplemental report. So in
23 understanding how the numbers mathematically are derived
24 is a really important concept. We can disagree on the
25 counts later on but you have to know how gaps are created

1 so I can explain it. Let me take, for instance --

2 Q. Could I just back up for one moment?

3 A. Sure.

4 Q. For those charts did you analyze squad lists or did
5 you just use the Equity in Athletics Disclosure Act
6 reports that were used?

7 A. I just used Equity in Athletics Disclosure Act
8 reports. No squad lists were available.

9 Q. So please continue.

10 A. Yes, so if we focus on column C, which is 1995, '96
11 as an example, Title IX prong one requires that your
12 percentage of males and females in the athletic program be
13 proportional to the percentage of males and females in
14 your general student body, full-time, undergraduate
15 enrollment. So if you look at rows six and seven you're
16 looking at QU's undergraduate enrollment for men and
17 women, and when you look at nine and ten, you're looking
18 at what they that represents as a portion, the percentage.
19 All right?

20 So, and then if you count up, let's just assume these
21 counts are okay right now, you see that at line 24, you
22 have 138 men in the program --

23 Q. Just I just want to be clear that like, for example,
24 men's teams, and 13 through 23, are those the numbers of
25 athletes for those men's teams?

1 A. Right, for each team. So you add up on the total
2 number of participants on each team, and the total for all
3 of the men's teams is at line 24, which is 138.

4 You do the same thing for women's teams. So add up
5 everything in line 27 to line 38, and you get the total
6 women, 107.

7 Now, you want to solve for the gap, you know, how
8 many women do you need to get up to 66.5 percent. This is
9 solving the gap. You know three variables. You know how
10 many men you have, which would be fixed. You know what
11 that should represent. The proportion 33.5 percent. You
12 don't know how many women you have but you know they
13 should represent proportion 66.5 percent. So --

14 Q. Okay.

15 A. -- you mathematically you have in this case, 138, the
16 men's participants is the 33.5, as, equals, X is to
17 66.5 percent. And if you then do the math, you get X
18 equals 138 times .665 divided by .335. And you get a
19 number that is represented at line 40 as 274. You solve
20 for X. So X is the number of women have that should be in
21 the program if women were 66.5 percent of the student
22 population.

23 And then you simply take the number of women who were
24 actually in the program which is 107, and you subtract it
25 from that 274 and you have 167 as the gap.

1 So it's a pretty simple mathematical computation.
2 This, the mathematical computation should not be in
3 question. It's how one counts. Obviously that is always
4 the question, but that's the basic thing to, you know,
5 that's the tool that you have to have for prong one
6 analysis.

7 Q. So for each each year, did you calculate the number
8 of women or number of women's athletic opportunities that
9 there would have to be or should have been in order to
10 provide the same proportionality as the undergraduate
11 enrollment?

12 A. Yes, and those numbers will appear on row 41.

13 Q. Okay. Well, row 40 is the number of athletes you
14 should have in row 41?

15 A. Is the gap.

16 Q. Is the gap?

17 A. Yes.

18 Q. And after making those calculations for Quinnipiac,
19 what did you find?

20 A. I found that obviously they were very significant.
21 These were huge numbers that would require the addition of
22 a great many teams.

23 Q. So in terms of -- let's focus on the 2000s. So if we
24 look at 2001 through 2002 all the way up through the end
25 of the chart?

1 A. Right.

2 Q. Okay? Could you summarize, for example, for 2001,
3 2002, what is the gap number?

4 A. The gap number is 153. Goes from 153, 155, 178, 139,
5 174, 111, 63, 102. And whenever I see changes in numbers
6 like that, for instance, it goes 174 down to 63, it always
7 raises a red flag for me, why is this happening when there
8 are no sports added or dropped. And so, this was great
9 indicator for me that something had changed in the
10 mechanisms of counting for the numbers of sports and I had
11 looked just much more carefully at this. Why were these
12 fluctuations happening when they weren't normal
13 fluctuations in team size. It's not unusual for team size
14 to fluctuate from year to year, two to four, or
15 participants up, down. You might have a lot of injuries,
16 you have a better recruiting class coming in next year
17 than you do this year. Little fluctuations are really
18 explainable but there aren't big program changes. Very
19 unusual to see number changes like this. So that's what
20 else I would get from this chart.

21 Q. Okay. So given that the size of the gap numbers,
22 would you expect, and this goes up through 2008, 2009
23 where the last gap number was 102, given gap numbers of
24 that size would you expect that a school could come into
25 compliance with prong one within one year?

1 A. No, but not looking from these numbers, just from --
2 if you take 102 within the context of what it takes to
3 start a program and having at least a year to, you know,
4 start developing a team and everything else, I thought it
5 would be very difficult to do that.

6 Q. Okay. Now, you identified the change in number; was
7 there anything about that -- when you said you thought
8 that that was strange, is there anything more about that
9 that you wanted to identify?

10 A. Well, if you look at both men and women stopped
11 counting individual teams in cross country, indoor outdoor
12 track, which is perfectly allowable with the EADA reports,
13 they chose to combine cross country and track participants
14 and that is, it is there that we see these big number
15 differences, these changes in numbers that just make me
16 want to look closer as to why you would go from 64 to 26
17 to 22 to 73 on line 35 at the last four years. You know,
18 those are really substantial changes. And the same with
19 the men. It would make me want to look closer to say,
20 well, what's going on here. So that's all that I would
21 get from this kind of analysis.

22 Q. Okay.

23 A. But again I am much more comfortable dealing with
24 squad list than I am with EADA reports. EADA are
25 notoriously weak.

1 Q. But based on using the EADA reports through 2008,
2 2009, did Quinnipiac meet the proportionality prong under
3 any of those years?

4 A. In none of those years and it was really far off.

5 Q. Okay. Now --

6 MR. BRILL: I apologize, Your Honor, the
7 witness' voice is dropping off at the end, I'm having a
8 lot of trouble hearing the end of her sentences here.

9 THE COURT: I think she said it really far off.

10 MR. BRILL: Thank you.

11 BY MS. GALLES:

12 Q. Now, Dr. Lopiano, I'd like you to jump ahead in your
13 report to where there's a small A, we're talking about big
14 subset B, small letter A.

15 A. B one? One A? Or --

16 Q. We're jumping to go right here. (Indicating)

17 A. Okay.

18 Q. Now, that part of your analysis where it starts A,
19 using QU zone, 2008, 2009 on part A --

20 A. Correct.

21 Q. -- B and C?

22 A. Right.

23 Q. Now, the original report was based upon what you had
24 for roster numbers?

25 A. The original report was based on EADA numbers and

1 rosters and therefore my supplemental report replaces
2 these sections.

3 Q. Okay, so I just want to be clear, so since you
4 prepared this report --

5 A. Right.

6 Q. -- have you reviewed the squad lists and seasons of
7 competition provided by Quinnipiac?

8 A. Yes, I have and that is what I based my 2009, 2010
9 analysis on.

10 Q. Okay, so the A, B and --

11 A. C.

12 Q. -- small A, small B and small C sections had been
13 replaced by your supplemental report?

14 A. Yes.

15 Q. Okay. And does your supplemental report, does that
16 address just 2009, 2010?

17 A. Yes, it does.

18 Q. Okay. I'd like you to pull up your supplemental
19 report that's been marked as Exhibit 149?

20 A. Right.

21 Q. And you've already identified it for us and just
22 to -- does this exhibit accurately reflect your analysis
23 and your opinions regarding the 2009, 2010 participation
24 numbers for Quinnipiac University?

25 A. Yes, it does.

1 Q. Okay. Now, I just want to give you a chance to
2 explain to the court, you said for the prior years you
3 looked at EADA. For 2009, 2010, how did you go about
4 counting athletic participants for men and women?

5 A. Well, first I depend on two documents. One was the
6 squad lists dated May 26, 2010 which was provided by QU,
7 and the other was the seasons of competition used.
8 Another document that said whether each athlete had used
9 the season in competition. And then I, in taking those
10 documents, I created a methodology for determining a
11 count. Do you want me to --

12 Q. Yes, hold on one second please. I believe the
13 defendants, the defendants have marked the squad list as
14 Exhibit E M, and the seasons of competition used list as
15 Exhibit E T. I'm going to show these to you and let me
16 know whether these are indeed the documents that you
17 reviewed. (Hands witness.)

18 A. Yes, these are the documents that I reviewed.

19 Q. Okay. So on the --

20 A. These are the documents that I have used in creating
21 my chart table 150.

22 Q. So if we look at for example, let's just take
23 baseball, for example?

24 A. Right.

25 Q. Okay?

1 THE COURT: Let me just interrupt you and see if
2 I can get our copies of the defendant's exhibits.

3 (Pause)

4 THE COURT: Go ahead.

5 MS. GALLES: Okay.

6 BY MS. GALLES:

7 Q. So, Dr. Lopiano I'd like you to focus on the squad
8 list first. So let's take baseball, for example. There
9 are a list of 33 men's names on the baseball squad list.
10 Okay? When deciding who should count as a participant, do
11 you just count all 33 names or how do you decide who you
12 count and who you don't count?

13 A. This is, this is the heart of my analysis in terms of
14 understanding how I count it so I would feel more
15 comfortable if I could be allowed to take you through the
16 methodology.

17 Q. Sure.

18 A. And to connect all the dots here.

19 Q. Okay.

20 A. Because there are many choices that the court is
21 going to have to make in terms of what count it accepts.

22 Q. Okay.

23 A. Okay. So if you look at the methodology section on
24 page one of my report.

25 Q. Your supplemental report?

1 A. Supplemental report. And then if you look at Exhibit
2 150, right? Which is the count chart that I created, I am
3 going to connect the two dots here.

4 Q. Okay.

5 A. As to which counts relate to what.

6 Q. Okay.

7 A. So first I took the absolutely clearly expressed in
8 OCR documents instructions to who to count. So I started
9 with the '79 policy interpretation that you see on page
10 one. And I looked at those, A B C and D, and I said we
11 absolutely have to use this as guidance and then in the
12 1996 clarification, in terms of when OCR considers a sport
13 season to commence and to conclude, and how it determines
14 who's listed on a squad list or an eligibility list, that
15 we had to take that and based on these definitions, I
16 created this nine reason count, methodology that I
17 assigned to each athlete the reason why I counted them.
18 And I made sure to connect it to the OCR guidance or I'm
19 pointing out when there is leeway in that guidance that
20 requires some interpretation because it's not absolutely
21 clear.

22 For instance, when the -- I've never received a QU
23 count, all I received from QU was here are the number of
24 kids on my squad list in the beginning of the year, here
25 are my number of the kids on the squad list at the end of

1 the year, but there is no what are the count for this
2 sport. There are two different numbers. There is no what
3 did you count, so I had to create this system.

4 Q. So did you go through each athlete by athlete to
5 determine whether he or she should count as participant?

6 A. Yes.

7 Q. And just to make, I believe you said nine reasons, I
8 only see eight here.

9 A. Did I say nine? I'm sorry, eight.

10 Q. So is it eight or is it nine?

11 A. It's eight.

12 Q. Okay.

13 A. And if you look at Exhibit 150, if you look at the
14 columns, reason one is going to correspond to reason one.
15 See the column that said reason one repeated?

16 Q. So could you please -- so in your report, reason one
17 athletes who participate in any competition?

18 A. Exactly. So I'm just making the connection with this
19 chart. So reason one says that I counted any athlete who
20 actually participated in a competition during the year,
21 whether in a NCAA traditional or nontraditional seasonal
22 sport who would be charged with a season of eligibility.

23 And I took that off of the eligibility list provided by

24 QU.

25 Q. Is that off of the seasons of competition?

1 A. That is right.

2 Q. Used? Which would be E T?

3 A. Right. Reason two corresponds directly with you have
4 to count athletes who cannot participate because of injury
5 but who received athletic aid and that corresponds to on
6 the first page, D, who because of injury cannot meet A B
7 or C above but continued to receive financial aid based on
8 athletic ability. And that is reason two on my 150 chart,
9 right?

10 Number three is a red shirt. A red shirt is an
11 athlete and it says very specific NCAA definition. An
12 institution determines whether there's red shirt and I
13 accepted all the red shirt determinations by QU.

14 Q. Could you please, explain for folks who are not well
15 versed in college athletics --

16 A. I'll explain what it is.

17 Q. -- well versed in college athletes what a red shirt
18 is?

19 A. A red shirt is one who does not use a season of
20 eligibility because they don't compete in the sport but
21 not only -- they practice, but you don't have to count
22 them and they haven't received some substantial benefits
23 of participation which kind of preserves your year of
24 eligibility. They cannot travel with the team, they can't
25 wear their team uniforms in open competitions. They are

1 legitimate practice player that the NCAA recognizes as a
2 way of preserving your eligibility but they count as a
3 participant because they are there all the time.

4 Q. So you're practicing every day, receiving --

5 A. Everything except travel, wearing the uniform.

6 Q. And competing?

7 A. Exactly. And competing in the, whether in
8 intercollegiate competition, or wearing the uniform of the
9 school. So that's number three on that chart.

10 Q. Okay.

11 A. Number four, I counted every athlete who was on the
12 squad list and practicing on the first day of competition
13 of the traditional season even if they didn't compete,
14 which is corresponding to the first page, definition of --

15 C. I'm sorry, the '96 clarification as a general rule all
16 athletes who are listed on a team squad list are on the
17 team as of the first competitive event are counted as
18 participants by OCR. So those were --

19 Q. So on the first go around, you counted all those
20 folks under number four?

21 A. Right.

22 Q. So even if they quit later in the season for purposes
23 of reason four, you counted them?

24 A. That is correct.

25 Q. Okay.

1 A. Okay. Now, what's important here is in my final
2 analysis I'm giving the court three options of counting.
3 The first option is these four reasons. I feel like they
4 are the most conservative, strongest tied, non
5 interpretive ways of counting that clearly match up to
6 specific language that is offered by OCR. There are four
7 additional reasons that I'm going to explain that I
8 believe are supported but not on point by the language.
9 And I'll explain why.

10 Q. Okay.

11 A. They are different circumstances and the court can
12 decide whether or not it wants to use this middle ground
13 of counting. And then I'm going to show you a third one.

14 Q. Okay.

15 A. So under reason number five, many sports have more
16 than one competitive season. So basketball, for instance,
17 goes from the first, a first practice date all the way
18 through, you know, the end of after the championship, cuts
19 across two semesters. Soccer has a traditional season and
20 non traditional season. Lacrosse has a traditional, a
21 nontraditional season and they are separated in two ways.
22 Sometimes they are separated by dates, the NCAA actually
23 says you can start the first one on this date, go to this
24 date, now you've got to break and you can start on this
25 day and go to this date. Or it may say you can only play

1 20 in the first period and five in the second or seven in
2 the first, five in the second. So it makes distinctions
3 and creates a double competitive season.

4 So the question I had to ask was, because you're
5 going have a multiple sport participants, all right, you
6 have somebody compete in soccer in the fall and choose to
7 compete in Lacrosse in the spring, so what what happens
8 when somebody enters in a nontraditional season, starts
9 playing in a nontraditional season, right? Has not
10 practiced before and is -- or may or may not have
11 practiced before but is on the squad list for that second
12 nontraditional season, I said that if they were on the
13 squad list for that second nontraditional season they
14 should count under reason five and I've specifically noted
15 that athlete so you knew why I counted that.

16 Q. So let me give you an example. Let's take soccer,
17 okay? Soccer, when is the traditional season for soccer?

18 A. The traditional season for soccer is in the fall.

19 Q. And --

20 A. I mean the traditional season is in the spring.

21 Q. Okay, so at the college level there's a non
22 traditional season in the spring, okay? So if someone
23 joined the soccer team after, you know, the first date of
24 competition in the fall, that person --

25 A. She wasn't counted under reason four.

1 Q. Because this person was not on the --

2 A. Listed on the first date of competition.

3 Q. On the first date of competition. Would that person
4 then be picked up under reason five because they would
5 exist on the squad list by the time of the first date of
6 competition?

7 A. Yes.

8 Q. Of the nontraditional season?

9 A. Yes, that's exactly what reason five does. That is
10 the case. Because, and the reason why you have to get
11 into reason five to eight is because when you look at the
12 language of, especially who counts on the squad list, it
13 says as general rule, right? So you have to use a rule of
14 reason at some point in time and that is what I'm doing in
15 five, six, seven and eight.

16 Q. Well, and also with the -- let's look at the
17 definition of the 1979 policy interpretation and the 1996
18 clarification. Does it anywhere talk about -- when it
19 talked about season does it say traditional season or non
20 traditional season?

21 A. No, the language just talks about better seasons and
22 seasons. It doesn't get into this kind of detail which is
23 why you have to look at it as a general rule and that you
24 have to apply it, and what I was expected to do was to
25 apply it evenly for males and females and that it would be

1 logically applied. So that the experience, you know, in
2 my mind was if you stood with a team for an entire
3 semester and you received the benefits of competition and
4 all of that, it's like if you go to a class for five week
5 they are not giving you a refund, you got something from
6 that school that was substantial. So that those reasons
7 five, reasons six, both of these, this was my standard
8 that they participated in practice for a substantial part
9 of the year.

10 Q. We haven't got to number six yet --

11 A. Right.

12 Q. -- so I want to confirm, four is on the squad list as
13 the first date of competition of the traditional season?

14 A. Yes.

15 Q. And number five, they are on the squad list as of the
16 first day of competition of the non traditional season?

17 A. And they weren't on, in the --

18 Q. For number four purposes?

19 A. Right, right.

20 Q. Okay, could you please explain what your reason
21 number six is?

22 A. Yes, reason number six is that if an athlete
23 practiced and received varsity benefits during traditional
24 season, nontraditional season, or a year long season when
25 they cut across two semesters, did not compete, didn't

1 meet reason number one, was not designated as red shirt
2 which is two, was not on the squad list which on the first
3 day of competition, four or five, I made a reasonable
4 judgment whether that person should be counted based on
5 whether he or she received a full semester of instruction
6 and coaching and all the accouterments of being a varsity
7 athlete.

8 Q. So, for example, let's, you use the example that
9 basketball being one long season as opposed to broken into
10 two segments, okay. Basketball season say starts in
11 October, you have the first game in November, the person
12 someone joins the team after Thanksgiving.

13 A. Right.

14 Q. So that person is not on the squad list of the first
15 November game?

16 A. Correct.

17 Q. But joined, you know, at Thanksgiving or after finals
18 in December. Okay? Is that an example of a person that
19 would fall under number six?

20 A. Yes, somebody who participated, occupied a
21 participants lock for the majority of the season, even
22 though they were not on the squad list that first day.

23 Q. And also I just want to point out for, sort of maybe
24 distinguish high school from college, in high school you
25 may think of soccer season as the fall, you play in the

1 fall and then you're done. What happens at the college
2 level? You're a college athlete, do you just play in that
3 one season and you're done? Or please explain how it
4 works at the college level?

5 A. High school is much more restrictive in terms of
6 allowing student athletes to play for an entire year in
7 any sport so you're not likely to see a double season in
8 high school at all. This is a peculiarly collegiate
9 university, high level lead score phenomena because the
10 NCAA was trying to control the, or to balance the time one
11 spends in sport not making it excessive so it would hurt
12 academics, so there became these, you know, segmented
13 seasons or these manipulations of what originally probably
14 was this thought of a season, being on one squad list one
15 season. So that's why I had to get into five.

16 Q. So in order to make that clearer, I would like us to
17 pull out the -- when making these determinations, would
18 you or any athletic administrator rely on the NCAA's
19 Division I manual, in terms of when the seasons are?

20 A. Yeah, I think I mentioned before that I use 17.1, and
21 17.2, in the Division I manual which shows either by
22 competition splits or by dates when seasons could start.

23 Q. I would just like to make that clear so we can show
24 exactly what you're looking at.

25 A. I have one.

1 Q. Okay.

2 MR. BRILL: I'm sorry, is there an exhibit
3 number?

4 MR. BRILL: E P, Edward Peter.

5 BY MS. GALLES:

6 Q. So this --

7 THE COURT: Let me just make sure that there's
8 agreement that E M, E T and E P are full exhibits?

9 Mr. Brill? E M, E T, E P, you have no objection?

10 MR. BRILL: Yes, no problem, Your Honor.

11 MR. ORLEANS: The plaintiff has not, does not
12 intend to object.

13 THE COURT: All right, those are full.

14 (Whereupon Exhibits Exhibit EM, ET, EP were
15 marked full.)

16 BY MS. GALLES:

17 Q. All right. Dr. Lopiano, I'd like you to focus on the
18 NCAA Division I manual and turn to what are figure 17.1
19 and 17.2. Okay?

20 A. All right.

21 Q. Okay. Could you please explain what these are in the
22 context of what you were talking about in terms of
23 seasons?

24 A. Yes, if you look at 17.1, it is, it is clear whenever
25 you see two -- let's say, look at lacrosse, women's, there

1 are two segments. Championship segment would be your
2 traditional season. Your other segment would be your
3 nontraditional season. You're allowed 17 dates of
4 competition in your championship segment and only five in
5 your other segment, but it clearly says this is a two
6 season sport.

7 If you look at basketball, which is a one season
8 sport, right? You can play 27 or 29 contests, really
9 depends, there are rules about the nature of those
10 contests but it's a season that covers both a fall and a
11 spring semesters. There would only be one squad list
12 assessment on there. But I should say something about
13 squad lists.

14 A squad list is, a squad list is a living document.
15 It is not a, most people think that a squad list is a list
16 of everybody who was there on the date of the first
17 competition. It is not. It's an electronic record of
18 when everybody started. So it could include a kid who was
19 not -- in fact, the squad list that we examine, they
20 include plenty of youngsters who were not on the squad
21 list on the first date of the competition but they are
22 there because they are participants. And what I'm trying
23 to do is to say are you a countable participant when
24 you're on that squad list.

25 MR. BRILL: Your Honor, I have not been

1 objecting and I don't intend to interpose many objections
2 but we don't really have questions and answers here.

3 Ms. Galles goes from one topic to another and I think the
4 it would be better for the record -- I'm sorry,

5 Dr. Lopiano segwayed into a discussion of squad lists that
6 had nothing to do with the question and I would prefer if
7 we could have question and answer for the sake of the
8 record. Thank you.

9 THE COURT: Ms. Galles?

10 BY MS. GALLES:

11 Q. All right. Let's step back to figure 17.1 and 17.2.

12 So, did you rely on the segment descriptions there in
13 assessing whether there was a traditional and a
14 nontraditional season of the sport?

15 A. Yes, I did. In every case in which competitions had
16 to be split into two, I said there was a traditional and a
17 non traditional season with regard to figure 17.1. In
18 every case in 17.2, when there was a, two competition
19 seasons that were defined by dates, then I used that as a
20 split season also.

21 Q. Okay. All right, so -- I'm sorry but we've kind of
22 melded this a little bit together. Have you, have you
23 finished your description of your reason number six?

24 A. No.

25 Q. Or not? Okay, I'll let you explain reason number

1 six.

2 A. No, I finished my description of reason number six as
3 this, this person who participated, you know, occupied
4 this participation time under the '79 policy A and B,
5 practice sessions, received all the institutional support,
6 insurance, coaching, equipment, everything else for a
7 majority of the season. And that was number six.

8 Q. Okay, and it states on here whether you received at
9 least a full semester or more of the usual benefits, so is
10 that the standard that you used?

11 A. That is. I thought that was a reasonable standard.
12 They definitely occupied a participation slot.

13 Q. So under six you did not count people who maybe were
14 there for just two or three weeks?

15 A. That is correct.

16 Q. Okay. Let's move onto number seven. Could you
17 please explain what number seven means?

18 A. Right. In number seven, there were specific athletes
19 that raised a red flag in my mind as to whether or not
20 they should be counted. And I wanted to specifically show
21 that reason and to explain whether I thought that they
22 were, they should be counted or not. They may have been
23 counted in reasons one through six but I said this might
24 not be legitimate, or they might not have been counted and
25 I thought they should for a given reason but that, case by

1 case those should be looked at individually.

2 Q. So when you -- on the ones designated red flagged --

3 A. It's a comment in general, if they were designated
4 red flag it's a comment in general I had a concern. If I
5 recommended a change in count because of that concern, it
6 appears in caps, bold, you know, exactly who it is that I
7 think should have been counted and wasn't or should not
8 have been counted and was.

9 Q. All right. Is there anything else on --

10 A. And if you look at Exhibit One, for instance, let me
11 see if I can show you one where -- Exhibit 111 -- 150
12 rather. If you go one, two --

13 Q. If you tell us the team?

14 A. Yes, the third page in is men's cross country.

15 Q. Okay.

16 A. And I had red flagged three athletes, right? But I
17 have done nothing about recommending whether -- I think
18 they should be counted exactly as they were and not
19 discounted, all right, but it's a real concern and I
20 wanted to point this out. So in each case the court would
21 have to look at this and say, you know, this really makes
22 sense.

23 Q. Okay. Now, reason number eight, could you please
24 explain what reason number eight is?

25 A. Right, reason number eight is the NCAA permits

1 somebody who has used up their eligibility to continue on
2 a fifth year so they use four years of eligibility, they
3 are now in their fifth year at school, they are completing
4 their degree. They are allowed to get financial aid, to
5 be on financial aid or not be on financial aid but they
6 are allowed to compete with the team.

7 Q. Can they --

8 A. Not compete with the team -- practice with the team,
9 to receive the benefits of training rooms, insurance,
10 everything, and typically in Division I these are kids who
11 could be going pro. They could be competing on outside
12 teams. They are pretty high level athletes. So they
13 choose to keep participating with the team and occupying a
14 participation slot. So for any athlete who was this
15 category, that they received fifth year aid, they weren't
16 eligible and they continued participating, I said reason
17 eight.

18 Now, there are only two athletes like that and I
19 don't know whether they, either of them participated or
20 not, so I counted them as participants equally. That
21 there was one male, one female, and so I said you are
22 obviously receiving all these benefits throughout the
23 whole year.

24 Q. So you applied the rule in the same way to both men
25 and women?

1 A. Men and women, it's just one and one so it's a minor
2 piece.

3 Q. Okay. Now, right after your reasons, there's the
4 paragraph that states, of course. Could you please read
5 that and explain that?

6 A. I think I've said this before, that first you have
7 rules that even say as a general rule, they are general
8 conceptual rules, this is how you should do it, there are
9 always fact situations that are going to be questionable
10 in somebody's mind or I wonder if it complies, whether it
11 doesn't, that's one piece.

12 The other piece is that it has become in vogue in
13 trying to achieve prong one compliance that there would be
14 efforts to look for loopholes in these rules so you won't
15 have to catch somebody. For instance, if you knew that
16 everybody who's on the, who has to play on -- who's on the
17 squad list on the first day of competition counts, I can
18 tell somebody don't come out for the team until after the
19 first date of competition and they wouldn't have to count.
20 So you could lower, let's say, a male team size that day
21 if you consistently did it. That's why it's so important
22 to be able to not have any definitive single, you know,
23 you're only there on the first date of competition. They
24 participate the day after and throughout the rest of the
25 year they can play they can do whatever. So it's really

1 important, I think, to look at the application of the rule
2 based on the totality of the circumstances. That's my
3 point in that section paragraph, to make sure there's no
4 loophole seeking in this.

5 Q. Okay. So let's look how you applied this. Is there
6 any particular sport you would like to start with or do
7 you just want to go with page one?

8 A. I would like to, I would like to connect the dots for
9 the court between, so I've established the eight rules and
10 I've shown you how to copy each athlete. Now I want to
11 show you how Exhibit 151 fits.

12 Q. I'd like to use an example of a squad how you count
13 it and then connect the dots. Like to go through baseball
14 and talk about why you did or you didn't?

15 A. Okay.

16 Q. All right? Let's look for example at the baseball
17 squad list and your Exhibit 150?

18 A. Okay.

19 Q. Okay? Now, there are 33 names on the baseball squad
20 list?

21 A. Correct.

22 Q. Okay? Of those 33 names, now let's back up now --
23 I'm seeing why you wanted to do that, to make that
24 connection to A B and C. Okay. Let's back up. Did you
25 count these, you indicated that?

1 A. Now I see it, an error in the -- it doesn't continue
2 but --

3 MR. BRILL: I'm sorry, Your Honor, maybe we can
4 move the mic but I cannot hear.

5 A. Okay.

6 THE COURT: She was talking under her breath and
7 she says she sees an error in the chart.

8 MR. BRILL: I didn't hear that, I apologize.

9 MS. GALLES: Okay.

10 BY MS. GALLES:

11 Q. So so we're looking at, let's just look at the
12 baseball chart, for example.

13 A. Right.

14 Q. Okay? So we list the, you list there the 33 names of
15 the baseball athletes?

16 A. That is correct.

17 Q. Okay. And reasons one, two, three and four, what are
18 those?

19 A. All right, and I would like to note an error in this
20 chart.

21 Q. Okay.

22 A. You will see on the very last line that there under
23 reason number two, there is a number two. That should be
24 zero.

25 Q. Nobody's marked in there, it's just a summary?

1 A. Correct, the rest of it is correct but -- sorry. So
2 29 of those 33 athletes actually -- 29 --

3 MR. BRILL: I'm sorry, Your Honor, which column
4 has the two you're correcting?

5 THE WITNESS: In reason number two.

6 MR. BRILL: Got it, thank you.

7 BY THE WITNESS:

8 A. Sorry. It's embarrassing to have that occur on your
9 first chart.

10 So, if you look at the bottom row where it says total
11 33 on the squad list, on the column reason one which
12 indicates they competed, 29 of those athletes on the squad
13 list were counted because they competed in one or more
14 games. None were reason two or three or four. There were
15 two athletes that I counted by virtue of reasons five and
16 six. And so in the case of Anis Campal (ph), I probably
17 mispronounced that -- this athlete practiced and received
18 varsity benefits the entire first semester. The first
19 date of competition in baseball was scheduled to be in
20 that semester. There are three contests that were
21 supposed to be played in the first semester and he's on
22 the squad list but the events never occurred. All right?
23 They never occurred. They should have occurred, they were
24 rained out. And so I said to myself, both in terms of it
25 was the nontraditional season, he would, the first part of

1 baseball is nontraditional. He was on the squad list for
2 the nontraditional season, so five would apply. And six
3 would also apply because he continued to receive benefits
4 for the whole remainder of the year.

5 Q. Okay.

6 A. Until the end of the semester.

7 Q. Could you please explain what other notes are?

8 A. Other notes, Q is quit, C is cut, I might have used C
9 or a cut, OR is other reason.

10 Q. And are those Quinnipiac designations?

11 A. These are all Quinnipiac designations from the squad
12 list.

13 Q. Okay. So we don't necessarily know why they were cut
14 or why they quit or what the other reason is?

15 A. Right.

16 Q. Okay.

17 A. I would like to connect the dots.

18 Q. Okay, go ahead.

19 A. To be here because otherwise this is going to be an
20 exercise you're not going to understand.

21 Q. Okay.

22 A. If you go to 151, all right, and you see my summary
23 counts in 151, so on 151, right, and you see columns at
24 the top which say Lopiano count A, Lopiano count B,
25 Lopiano count C, and Lopiano count A is this first four

1 reasons definitely okay. Lopiano count B is anybody who
2 on the first four reasons, four, five, six, seven, eight.
3 And so this becomes where I have exercised my expert
4 opinion that they should count. But you can, the court
5 needs to look at that and decide whether they believe me
6 or not or whether I was reasonable as an expert in making
7 a specific application of a general rule.

8 And then Lopiano C is when I made an adjustment to
9 either A or B, I'm recommending an adjustment because
10 something specific happened where I think this person
11 should not have been counted or they should have been
12 counted for a very unusual circumstance, a red flag. So
13 that's how chart 151 -- 150 --

14 Q. 151?

15 A. 151 relates to --

16 Q. 150?

17 A. 150 relates to 151, and when I talk about my
18 conclusions I'll try to be very clear in terms of how
19 these all relate to participation gaps and decisions on
20 how to count but that is the -- the execution of the
21 methodology in full to come up with the summary chart and
22 my conclusions at the end of 152.

23 Q. Okay, so for the baseball chart that you prepared?

24 A. Right.

25 Q. Okay? How athletes fell into reasons one through

1 four?

2 A. You see were counted, that column A equals 29, so A
3 is the first column, the Lopiano count A, in 151. So 29
4 athletes fell in reasons one through four, only two
5 athletes fell in reasons five to six, and there were no
6 changes recommended in terms of red flags.

7 Q. So, if we go to Lopiano count B of 151, it shows the
8 original 29?

9 A. Plus --

10 Q. Plus the two that fell into five through eight?

11 A. That's right.

12 Q. For a total of 31?

13 A. Thirty-one.

14 Q. And so you did not make any --

15 A. So does everybody follow that?

16 Q. Well --

17 A. No, I want to make sure. I want to make sure. I'll
18 say more about it if it's not clear. But if you look
19 at --

20 Q. We can tell you're a professor.

21 THE COURT: Show of hands?

22 A. But if you look at 151 and you, it becomes clear, and
23 if you look at Lopiano count B under B, you see 29 plus
24 two equal 31.

25 THE COURT: I've got it. You're doing this for

1 me.

2 BY MS. GALLES:

3 Q. All right. Well then let's, should we jump to one
4 where you actually made an adjustment so we can explain
5 the --

6 A. Okay.

7 Q. -- the red flag issue? Okay?

8 A. Okay.

9 Q. Let's -- well, so you went through and did this
10 analysis for every single Quinnipiac --

11 A. Student.

12 Q. -- team?

13 A. Every team, every team and every athlete who was on
14 the squad list.

15 Q. Okay. Now, let's jump ahead to women's field hockey.

16 A. Okay.

17 Q. Okay. Women's field hockey. There are 27 women on
18 the squad list. Could you please explain how you counted
19 the people on the Quinnipiac, how you counted field hockey
20 players?

21 A. Yes. And so if you look at reason one, there were 20
22 of the 27 who actually competed. None under reason two,
23 none under reason three. There were five who were counted
24 by virtue of reason four. They were on the squad list at
25 the beginning of the traditional season. There was one

1 who participated or practiced a full semester. She was on
2 the squad list of a, of the nontraditional season. She
3 came on into the spring, she's still playing. That is a
4 dual sport athlete, was still playing ice hockey and
5 started in the nontraditional spring season of, you know,
6 of the year, so they was a five. So there's one in five.

7 Q. So how many fell, how many did you count under
8 reasons one through four?

9 A. Twenty-five.

10 Q. Okay. How many --

11 A. So if you look under where I counted. Right, it says
12 A, reasons one to four were A. 25 were counted.

13 Q. And how many were counted under reasons five through
14 eight?

15 A. And reasons five through eight is one.

16 Q. So B equals one?

17 A. B equals one.

18 Q. Okay. Now --

19 A. And -- go ahead.

20 Q. I'm going to say now under the red flag notes, it
21 looks like you've made notes under four or five different
22 names?

23 A. Yes.

24 Q. But you made only one adjustment, it says C equals
25 minus one?

1 A. Yes.

2 Q. So could you please explain your red flag notes?

3 A. Yes.

4 Q. For the field hockey team?

5 A. Yes, I have to be, I was trying to be very
6 conservative with my red flags, that I have to have some,
7 either an email evidence or some confirmation of something
8 happening or that really said, come on, what are you doing
9 here? And otherwise I let it go. I wanted this to be a,
10 a very conservative adjustment, not something very
11 liberal, so in the case of one athlete --

12 Q. Can we go through -- because you didn't count all of
13 the red flags?

14 A. That's exactly right.

15 Q. Could we go through an example of when you counted
16 a red flag and when you didn't?

17 A. Sure. So when look at Katharine Calucci (ph), that
18 was the one I mentioned, right? So here is, I counted her
19 and I thought this was really funny. She was not, she was
20 cut from the ice hockey team. She came over to the field
21 hockey team even though she was not off of the ice hockey
22 team yet, and she was added onto three.

23 Q. And when was she --

24 A. This was a nontraditional season. You have to look
25 at the ice hockey to see -- but I just, this is kind of

1 unusual to see an ice hockey, field hockey, you know,
2 combo added that late in the year, cut from one squad.

3 It's like -- this kind of never happens in Division I.

4 Q. Okay. Now, let's also look for an example; there is
5 a woman named Meghan Lillibrige (ph), okay? That's marked
6 red flag there. Why was that marked as a red flag?

7 A. She was not on A, she didn't play. She, you know,
8 seemed to receive varsity benefits, she was cut on two, 26
9 on a, in the nontraditional season. And so she -- how I
10 do say this -- she, I didn't think -- I'm trying to think
11 how to say this.

12 Q. Well, let me see. If you're in the Division I --

13 A. She, she counted, she counted because she was on the
14 squad list and I didn't want to change that count. Even
15 though she was cut. And --

16 Q. So would you --

17 A. I considered it.

18 Q. So, for example, with the first two, the Ms. Calucci
19 and the Ms. Lillibrige, you flagged them but you counted
20 them anyway?

21 A. Yes. It's highly unusual to cut someone after your
22 traditional season unless there's something wrong but I
23 didn't know if there was anything wrong.

24 Q. So it could have been totally legitimate?

25 A. Yes.

1 Q. So you counted her because she fell under one of the
2 rules?

3 A. Right.

4 Q. Okay. Now --

5 A. I didn't want to change it.

6 Q. Now, let's look at the one person where you did the
7 red flag and adjusted the cut -- or, excuse me, adjusted
8 the count accordingly?

9 A. Right, here's a good example of, here's an athlete
10 who does not get on the squad list in her traditional
11 season. She's not there on the first day of competition
12 but right after it she gets cut. So she hasn't received,
13 she's cut on 10/15, right? So how -- what benefits did
14 she -- how long did she occupy this participation slot?

15 Q. So this --

16 A. So even though she was, you know, counted because she
17 was on the squad list, it's a great example of she was
18 counted because she was on the squad list but she
19 disappeared immediately, she was cut. She could have been
20 cut the day before the squad list. And it's so close
21 in --

22 MR. BRILL: Excuse me, I object. This is
23 speculative testimony about what could have happened to an
24 athlete. This witness doesn't know why this athlete was
25 cut. She can explain the chart and what she's basing it

1 on, but for her to talk about circumstances with
2 individual athletes that's not in evidence I just think
3 goes beyond her competency. She doesn't know anything
4 about the circumstances under which this athlete was cut
5 and she has not made any inquiries up until today.

6 THE COURT: Okay, let's continue.

7 BY MS. GALLES:

8 Q. Yes, Ms. Lopiano, you're not trying to make any value
9 judgments about why she was or why she wasn't cut, are
10 you?

11 A. No, I'm giving you the reason.

12 Q. So you're just looking at the date she was cut?

13 A. Exactly right. And the real question is is she
14 occupying a participation slot, receiving all the benefits
15 under A, B in the clarification, she's there for only two
16 weeks. Even if she was cut for any reason, no matter how
17 bad the reason, why isn't that fishy?

18 Q. So if she was -- and she was there less than a full
19 semester and less than a full season?

20 A. Yes, looks for a month, maybe. And that's why I
21 really have been careful to segment my Exhibit 151 C so
22 that the court can, if they don't like me making that kind
23 of a judgment then don't count that number, you know, that
24 column.

25 Q. Okay. So let's move, for example, let's jump to

1 women's lacrosse.

2 A. Okay.

3 Q. Okay? Now the women's lacrosse chart, okay, there
4 are 30 names on the squad list. Could you please explain
5 how you handled each of these 30 athletes?

6 A. This is women lacrosse.

7 Q. Women's lacrosse, yes.

8 A. So there were 30 athletes on a squad list, reason
9 one, 25 competed so they count. No one was counted in
10 terms of being injured, and on eight one was counted
11 because they were red shirt designated by QU. And two
12 were counted because they were on the squad list at the
13 beginning of the season and continued to practice.

14 Q. So --

15 A. Well, they were on the squad list at the beginning of
16 the season, that's right.

17 Q. So how many athletes fell under reasons one through
18 four?

19 A. Twenty-six -- I'm sorry, 28.

20 Q. Twenty-eight?

21 A. My glasses.

22 Q. Now you have two athletes in reasons five through
23 eight. Could you please explain how you handled those two
24 athletes?

25 A. Both of those athletes were on the squad list in the

1 nontraditional season. The nontraditional season is the
2 fall for lacrosse and they participated and they were on
3 this, on the squad list in that nontraditional season and
4 they participated the whole fall.

5 Q. Okay. Now those particular athletes --

6 A. Quit.

7 Q. They quit before the start of the traditional season?

8 A. That's right.

9 Q. So --

10 A. Which is the reason for -- for the red flag. That's
11 pretty unusual.

12 Q. So what -- but you did count them?

13 A. Yes.

14 Q. But you did not make, so -- are they counted under B?

15 A. I didn't want to change them. I felt that I didn't
16 want to change them because it really occupied a semester
17 of participation even before they quit.

18 Q. So --

19 A. Even though it's understandable, you don't keep
20 somebody for that period of time and then -- it's funny.
21 That's all.

22 Q. But because those athletes were there the entire fall
23 and up into the spring, you went ahead and counted them?

24 A. Yes, and what I think is important about this red
25 flag thing is I'm really, I really do think that it, it's

1 going to be demonstrated by Exhibit 151, that for the
2 women's teams there was an attempt to pad, to -- there was
3 a definite policy in place that established a minimum for
4 your team that was higher in many cases, in many sports
5 than an average game size. So my red flags, I was looking
6 for who are these athletes that really weren't serious
7 about playing, who were put on a team to meet the minimum
8 and then whose experience wasn't worthwhile or were cut
9 later. That was the red flag I was looking at because of
10 the indicator of Quinnipiac team size being off the
11 average team size and this policy that was in place.

12 Q. Okay. I just want to make sure that in, that in
13 terms of the red flags, were you making any kind of value
14 judgment regarding individual athletes?

15 A. I don't understand your question.

16 MR. BRILL: Object to the form of the question.

17 BY MS. GALLES:

18 Q. Yes, it was poorly worded. I want to focus on the
19 red flag, the fact that you maybe red flagged a particular
20 athlete, I just want to make sure that you weren't trying
21 to disparage any particular athlete by marking it as a red
22 flag?

23 A. No, I was just trying to demonstrate to the court the
24 relationship between this circumstance of this dual policy
25 application and how it creates pressures on the coaches

1 having, you know, to keep kids when they shouldn't or
2 wanting to add kids when they can't.

3 Q. And also for the red flags, you're not, you couldn't
4 make a determination whether that, the odd circumstances
5 were for an appropriate reason or an inappropriate reason,
6 could you?

7 A. I did not know why they were cut or why they quit,
8 absolutely right.

9 Q. So, in deciding what to -- did you see, did you just
10 rely on the totality of the circumstances as you could see
11 from the documents provided by Quinnipiac?

12 A. Yes. As I said, if I ever recommended an adjustment,
13 I really felt that it was a compelling circumstance.

14 Q. Okay. I guess --

15 MS. GALLES: Since this is a bench trial, may I
16 ask, we could go through each one of the lists but, as you
17 said, you got it. Do you want us to go through each one
18 or just we kind of use an example of each one and we can
19 jump to the --

20 THE COURT: I understand the charts. I
21 understand the analysis. If there's particular teams that
22 you want to focus on, you should do that.

23 BY MS. GALLES:

24 Q. Dr. Lopiano, were there any particular teams that you
25 wanted to focus on or did you want to move to Exhibit 151?

1 A. I can move to 151 upon which I base my conclusions.
2 I can move to my conclusions which might be most helpful.

3 Q. Okay. Well, let's -- please explain for the court
4 what Exhibit 151 is?

5 A. Well, Exhibit 151 is, it is a review, a summary table
6 that is based --

7 THE COURT: Let me just say I think you already
8 kind of explained it. You have the squad list numbers,
9 the numbers that the university used, your count A, your
10 count B, your count C, and then I assume NEC and NCAA and
11 average squad sizes for conferencing for Division I
12 schools.

13 THE WITNESS: Correct, and the reason I put the
14 last two columns in was so there could be a comparison to
15 QU's numbers which was beginning and start dates, so you
16 could make a decision as to whether or not there was an
17 artificial depression in team size or a padding of team
18 size.

19 THE COURT: Okay.

20 THE WITNESS: Just have it all in one chart so
21 you can look at it.

22 BY MS. GALLES:

23 Q. So, for Lopiano count A, those are all the athletes
24 that were counted only under reasons one through four, how
25 many men did you count?

1 A. 170.

2 Q. Okay. So --

3 A. That's right, yes, 170.

4 Q. So for Lopiano count B, people that fell under
5 reasons one through eight, how many males did you count?

6 A. 176.

7 Q. Okay. Now, Lopiano count C where you adjusted for
8 red flags, how many males did you count?

9 A. The number remained the same so I didn't make any
10 adjustments in the male athletes.

11 Q. Okay. So now, let's jump to the chart regarding
12 women.

13 A. Okay.

14 Q. Or the page relating to women. So the first page
15 summarizes the men, let's go to the second page. Okay.
16 You've broken them out to the female athletes except for
17 the runners?

18 A. Correct.

19 Q. Okay? So under Lopiano reasons one through four, how
20 many women did you count?

21 A. Before the runners, 170.

22 Q. And under Lopiano count B which is reasons one
23 through eight?

24 A. 172.

25 Q. Okay. And Lopiano count C where there was the red

1 flag adjustments, how many did you count?

2 A. 164.

3 Q. Okay. All right. Now, for -- now, let's jump to the
4 third page of that exhibit.

5 A. Right.

6 Q. Okay? Where it says cross country, track, indoor
7 track, outdoor?

8 A. Yes.

9 Q. So where do those numbers come from?

10 A. The cross country comes right off the cross country
11 squad list. I simply duplicated the track, track indoor
12 and track outdoor, the exact same list.

13 Q. So you actually looked at the squad list?

14 A. That is correct.

15 Q. And had the same?

16 A. Same numbers.

17 Q. Or the same?

18 A. Same people.

19 Q. Okay.

20 A. Same participants. And, as you know, in my analysis
21 I consider that that would be one season, indoor, outdoor
22 track, that's one team.

23 Q. So for it says cross country, under A B and C, it
24 says 18; what does that mean?

25 A. That means that reasons one through four, there were

1 18 cross country runners that were counted for those
2 reasons and there was no change. There were no five dates
3 and there were no red flag adjustments.

4 Q. Okay. So, but you didn't do any analysis of who
5 competed in what track or, excuse me, what cross country
6 meets or anything like that, did you?

7 A. No.

8 Q. You just looked at who was on the squad list?

9 A. Yes.

10 Q. On the first day of competition?

11 A. No. For whatever reason.

12 Q. That you listed?

13 A. Right.

14 Q. Okay. So let's go to the indoor, what's the number
15 that's recorded for the indoor?

16 A. For reasons one through four it's 30. Reasons one
17 through eight it's 30. And for, I didn't make any changes
18 for adjustments or red flags.

19 Q. So let's jump to the total runners.

20 A. All right.

21 Q. I'd like to start with the, just explain for the
22 unduplicated count, if we looked at the actual number of
23 athletes, how many female runners are at Quinnipiac? How
24 many are there?

25 A. This is my teaching person --

1 Q. Okay.

2 A. -- speaking now, right? I have combined the
3 definition of unduplicated, trial count whatever in my
4 conclusion in a more clear fashion that replicates exactly
5 what you see here as triple runners counted, double count,
6 unduplicated. I really feel, I tried to make my
7 conclusions absolutely reflective of this chart. But to
8 train on my conclusion in the clearest way possible so
9 that the court can make judgments. So if counsel would
10 permit, I would rather attack it that way. If I'm allowed
11 to.

12 Q. Okay, would you like to explain what you mean by
13 triple count, double count?

14 A. Yes.

15 Q. Please explain.

16 A. This is the heart of it right here. I'm going
17 through the supplemental report, the second to the last
18 page on page four, which says conclusion. And if you
19 follow this one, this is -- we're making this clear. If
20 the court decides to triple count QU's female runners,
21 which means counting cross country, indoor and outdoor, as
22 separate teams and separate seasons and does not choose to
23 count cheerleading, I do not consider cheerleading a sport
24 for the reasons that are already covered, right? Then
25 I've calculated using the mathematical formula I told you

1 about before, exactly what the gaps are under each of my
2 counts with and without volleyball. So if you look at
3 this first one, right? So here is the triple count
4 scenario. There's a gap of 28 without volleyball, so this
5 is --

6 Q. No, with volleyball it says?

7 A. I'm sorry, with volleyball.

8 Q. What do you mean by when you say with volleyball?

9 A. That means counting volleyball.

10 Q. So they don't eliminate volleyball?

11 A. So with volleyball counted the gap is still 28, so if
12 they eliminated it it would make it worse it would make it
13 41 without volleyball.

14 Q. Okay.

15 A. Right? So that's what happens under the triple count
16 scenario.

17 Q. And again, we talked about it earlier but just to
18 drive into this chart, when you say gap of 41, what do you
19 mean?

20 A. I took everyone through the mathematical
21 determination of gap. So what I mean by gap is that's the
22 difference between the number that Title IX would require
23 for prong one compliance and what they actually have.
24 Right? Under these two circumstances. And so you can
25 see, I didn't, you know, count cheerleading, right there

1 are 30 cheerleaders. You can see if you counted the 30
2 cheerleaders, right, that in the, with volleyball, right,
3 with volleyball there, you would be right there in terms
4 of prong one. You'd be right there. You'd have to keep
5 volleyball, right? And that's assuming cheerleading is
6 viable, which you know where I am, all right?

7 So if you then wanted to count cheerleading without
8 volleyball, right, you'd have to -- that number would be
9 41 minus 30, right? So you'd still be 11 short and you
10 would still have to add another team for women because
11 you'd add a golf team and do it, so that's how it worked
12 throughout each of these counts.

13 Q. So when I focus on that first chart that you're
14 presenting in your conclusion, that's under count A?

15 A. Triple count.

16 Q. Excuse me, that's under, counting under A so it's
17 just the four reasons that are --

18 A. Yes.

19 Q. -- the letter of the definition? That's triple
20 counting each, triple counting the running -- excuse me,
21 the runners?

22 A. Right.

23 Q. Okay. But that is not including cheerleading?

24 A. Exactly. And Count One does not take any into
25 consideration for red flags or squad size padding.

1 A. Well --

2 A. Unless a change was made in C, it wouldn't.

3 Q. Right, so under A it doesn't?

4 A. No.

5 Q. You just accepted the squad sizes?

6 A. Reasons one through four are all that is included
7 under Lopiano count A.

8 Q. So they would, the athletes would have been counted
9 even if they were on an unusually large squad size?

10 A. Yes.

11 Q. So let's move onto Lopiano count B under triple
12 counting.

13 A. Okay.

14 Q. Explain what that means?

15 A. So, I used one through eight as reasons, I did not
16 count cheerleading, I did count volleyball and the gap was
17 35.

18 Q. Okay, and you triple counted the runners?

19 A. This is all triple counting the runners, right. And
20 then I did the same thing, without counting volleyball,
21 what the gap would be, so it's 48 if you got rid of
22 volleyball.

23 Q. Okay. And so then let's look at Lopiano count C
24 under the triple counting scenario.

25 A. Same explanation, that in this, in this case, without

1 counting cheerleading, counting volleyball, the gap would
2 be 44. Without cheerleading, without counting volleyball
3 the gap would be 56.

4 Q. Now, let's move onto your next chart in your
5 conclusion.

6 A. Right.

7 Q. Okay?

8 THE COURT: Let me just short circuit, I think I
9 understand that chart. I mean feel free to spend as much
10 time as you want but --

11 MS. GALLES: Okay.

12 THE WITNESS: The whole chart?

13 THE COURT: I understand it.

14 THE WITNESS: The whole chart including the next
15 three things?

16 THE COURT: The difference is how you're
17 counting the runners.

18 THE WITNESS: Exactly.

19 THE COURT: Okay.

20 THE WITNESS: He's got it.

21 MS. GALLES: Okay.

22 BY MS. GALLES:

23 Q. Is there anything else you wanted to say about how
24 you're counting the runners?

25 THE COURT: I'd like to hear a little

1 explanation for why the runners should be counted in a
2 particular way.

3 MS. GALLES: Okay.

4 THE COURT: I don't know if this is the point at
5 which you intend to do that but at some point, why should
6 I pick any one of these scenarios rather than another?

7 MS. GALLES: Actually we had another expert who
8 was going to address that but Dr. Lopiano --

9 THE COURT: No, that's fine. We can do it then.
10 I understand the numbers. If she's not the expert to talk
11 about that, that's fine.

12 MS. GALLES: Well --

13 THE WITNESS: I did opine in my original report,
14 and I feel strongly about this, that under no circumstance
15 should you ever count indoor and outdoor as two separate
16 sports in two separate seasons. It is counter intuitive.
17 These are the same exact rosters participating indoors
18 shorter distances. Like long and short course swimming,
19 you don't split swimming up into long courses is a
20 different sport than short course. And they are right
21 next to each other, indoor and outdoor. Under no
22 circumstances would I ever consider those two to be
23 separate sports except one, and this is historical
24 statistical, before people started manipulating these
25 track numbers, when men's sports ran legitimate cross

1 country indoor and outdoor and women's sports ran
2 legitimate cross country indoor and outdoor, they
3 statistically offset each other, right? They counted
4 everybody in cross country. Everybody knew everybody in
5 indoor, everybody in outdoor, and statistically they were
6 a wash. They just cancel each other out.

7 Now, when you start saying, oh, we don't have
8 have an indoor and outdoor for men, right, then if you
9 weren't to triple count, you see where you go with that.
10 The same kids are getting counted 30, 30. You have not
11 increased the number of kids participating at all. You
12 haven't increased that many. They are the same kids
13 participating in indoor and outdoor, and in this situation
14 with Quinnipiac, there was such evidence in the
15 preliminary injunction --

16 MR. BRILL: I object, Your Honor, to the witness
17 summarizing evidence at the preliminary injunction.

18 THE WITNESS: I'm sorry. There were, if you
19 look at even Exhibit L, we saw that this whole program was
20 built on distance runners who, according to NCAA rules
21 could, a cross country team could participate in cross
22 country and indoor and outdoor and never count, never
23 count as indoor and outdoor, that they were allowed to
24 pick up distance events in those two seasons. And
25 wouldn't count.

1 And so the reason why I feel strongly about this
2 is whenever I see a different counting of men and women,
3 there is the danger of nefarious counts, that they are
4 doing it purposely to do prong one, and that's why I'm so
5 cautious before I -- that's why I don't even look at
6 triple counts anymore.

7 BY MS. GALLES:

8 Q. Well, let's look at, let's go to the NCAA manual and
9 you previously referred to figure 17.1, and 17.2. Okay?

10 Now, in there there's a, you indicated the separate
11 softball seasons, there's a championship segment and
12 there's an other segment?

13 A. Right.

14 Q. So when is the championship segment of softball?

15 A. It's in the fall.

16 Q. The championship season of softball?

17 A. Of softball, is in, in the spring, I'm sorry. I
18 don't know why I say fall.

19 Q. You used to be a softball coach?

20 A. I'm an American softball player. I apologize. And
21 in the spring season, the championship season, you would
22 can play 56 and in your nontraditional, you can play --

23 Q. So let's just look at softball. There's a
24 traditional and a nontraditional fall and a spring season?

25 A. Correct.

1 Q. Now, if someone plays pitcher on the softball team in
2 the fall, and plays right field in the spring, are those,
3 is that person counted as two different athletes?

4 A. No.

5 Q. Okay.

6 A. Only one.

7 Q. And now, let's look at lacrosse for an example.

8 There's a fall season and spring season, okay. If there's
9 an attacker in the fall season and a goalie in the spring
10 season, is that athlete counted as two different sports?

11 A. Nope, count as one. And that's a great example where
12 you see some of the lacrosse games that are actually
13 field, in field houses like indoor track, where you just
14 because it's indoor and outdoor, you don't make them
15 separate seasons.

16 Q. So that's in the next thing. Now, let's look at, you
17 know, as a -- were you a former softball player?

18 A. Yes.

19 Q. Were you a former softball coach?

20 A. Yes.

21 Q. So are you familiar with the different surfaces that
22 softball plays on?

23 A. Yes.

24 Q. Does softball sometimes play on dirt?

25 A. Yes.

1 Q. Does softball sometimes play on grass?

2 A. Yes.

3 Q. Does softball sometimes play on gravel?

4 A. Gravel, artificial turf. There's lots of different
5 surfaces.

6 Q. We used to call it kitty litter. It's not dirt but
7 it's that little gravelly stuff. Does softball play on
8 something like that?

9 A. Yes.

10 Q. Does some softball teams play on astro turf or some
11 other type of artificial surface?

12 A. Yes.

13 Q. Now, do you count softball as a different sport based
14 on the surface that it's played on?

15 A. No.

16 Q. Now, let's look at the sport of tennis. Okay. Now
17 did you use to be a tennis coach?

18 A. No.

19 Q. You didn't. Okay, sorry. Now, let's look at, is
20 there a spring and a fall, do college tennis teams play in
21 both the fall and the spring?

22 A. They do.

23 Q. Now, on tennis do they sometimes play on concrete
24 courts?

25 A. Yes.

1 Q. Do they sometimes play --

2 A. Very seldom on Division I however.

3 Q. Do they sometimes play on asphalt courts?

4 A. Yes, it's usually a composite of some court or clay
5 or grass.

6 Q. So is there -- are there different surfaces that the
7 same tennis player might play on during the course of the
8 season?

9 A. Yes, and there's another example where tennis can go
10 indoor for a competition, doesn't count as a separate
11 sport. Tennis is typically in the northeast. If you have
12 a field house facility, you'll just play indoors when
13 you're scheduled and you're rained out.

14 Q. So when it's snowing or raining --

15 A. And it's not a separate season, right.

16 Q. So for a tennis player, do you count that tennis
17 player as an athlete in separate sports based on the type
18 of tennis surface that that person plays on?

19 A. No.

20 Q. Do you count that tennis player as participating in
21 separate sports depending upon whether that tennis player
22 plays indoors or outdoors?

23 A. No.

24 Q. Now, let's use football for an example. Are there
25 different types of surfaces that football, college

1 football teams play on?

2 A. Yes, and if you're going in the same direction you
3 can play indoors or outdoors; they don't count as separate
4 seasons.

5 Q. Okay. So, and -- okay.

6 A. The only other thing I'd like point out, if you look
7 at 17 --

8 MR. BRILL: Your Honor, there's no question
9 pending. The witness is not here to give a lecture, she's
10 here to answer questions.

11 BY MS. GALLES:

12 Q. Is there anything else you would like to add to that
13 response, Dr. Lopiano?

14 A. Just in showing, when you look at NCAA figure one,
15 NCAA figure 17.1 and you look at track and field, they
16 combine indoor and outdoor in figure 17.1. And to 18
17 contests over those two indoor and outdoor periods. So --

18 Q. So could a track team, if you had a track team that
19 ran nine events indoors and nine events outdoors, that
20 would fall under the 18 maximum?

21 A. Yes.

22 Q. Okay. And if that school eliminated what it called
23 its indoor program, could those athletes continue to run
24 in 18 meets?

25 A. Yes.

1 Q. Okay, so --

2 A. And could even run in indoor.

3 Q. Okay. So they could still continue to run in nine
4 indoor and nine outdoor?

5 A. That's a good question. In order to count as indoor,
6 they have to do a minimum, you know, indoor so the example
7 is a poor one.

8 Q. But what I'm trying to get at is they could still run
9 18 meets and just call it outdoor?

10 A. Yes.

11 Q. Okay. In that instance, if you had a school that had
12 a men's track program, had 18 meets combined indoor
13 outdoor, then the school said we're going to eliminate our
14 men's indoor track program, okay, could those same men
15 still continue to compete in 18 meets but just in call it
16 outdoor track?

17 A. Yes.

18 Q. Okay. Now, also within a track meet, is there like
19 100 meter dash in, for example, outdoor track meets?

20 A. Because I was never a track coach, may I leave that
21 to a different expert?

22 Q. Okay.

23 A. If you're going to get into detailed events in track.

24 Q. What I'm trying to get into to is when we were
25 talking about the double counting, triple counting and

1 single counting --

2 A. Right.

3 Q. If a track athlete competed in the 100 meter dash and
4 the shot put in the same outdoor meet, is that athlete
5 counted as one track athlete or two track athletes because
6 he or she competed in two totally different kinds of
7 events?

8 A. One track athlete. The number of events and types of
9 events do not matter.

10 Q. So now if we start looking at, if in February a track
11 athlete runs 400-meters indoors, and then in March that
12 track athlete runs 400-meters outdoors, is that athlete,
13 how is that -- is that athlete counted as participating in
14 two separate sports under any of the triple, double,
15 single counting scenarios that you provided?

16 A. Obviously I contend they should be counted as one,
17 and that my scenario, my second scenario in terms of the
18 double count would allow indoor and outdoor as one.
19 Triple count would count them as two, that athlete in --
20 that does that.

21 Q. So under your triple counting scenarios --

22 A. Right.

23 Q. Okay. An athlete who ran 400-meters in every single
24 event -- or excuse me. Every single meet would be counted
25 as two different athletes if they ran indoors and

1 outdoors?

2 A. That is correct.

3 Q. Okay. But an athlete who ran 400-meters and threw
4 the shot put but only did so outdoors would be considered
5 as one athlete?

6 A. That is correct.

7 Q. Okay.

8 MS. GALLES: Could we take a short break, Your
9 Honor, or -- just kind of need to use the restroom.

10 THE COURT: Sure. All right.

11 MS. GALLES: Or were you planning to do a lunch
12 break soon or --

13 THE COURT: I was thinking of maybe 12:30 or one
14 but I'm not sure where you are with the witness, how much
15 longer do you think you have with the witness?

16 MS. GALLES: We do have a bit longer to go. I
17 just --

18 THE COURT: All right, let's take a five minute
19 recess.

20 MS. GALLES: Thank you.

21 THE COURT: Stand in recess until 12:15.

22 (Whereupon a recess was taken from 12:10
23 o'clock, p. m. to 12:15 o'clock, p. m.)

24 BY MS. GALLES:

25 Q. Dr. Lopiano, before moving on I just want to make

1 sure that, is there any -- anything else in your
2 supplemental report that you have left to explain or have
3 we finished that?

4 A. Unless you have any other questions. I think I said
5 enough probably, or if the court has any questions.

6 Q. Okay, well, I'd like to just go back to your original
7 report.

8 A. Okay.

9 Q. Which is Exhibit 99, and you have in front of you.
10 Now, this whole analysis of the supplemental report was
11 dealing with prong one, is that right?

12 A. That is correct.

13 Q. Okay. Now, in your original report, you provide a
14 brief analysis of prongs two and three. Could you please
15 go to that section of your report. It's like section B?

16 A. Yes.

17 Q. And then prongs two and prongs three?

18 A. Yes.

19 Q. Okay. Do you have that in your report?

20 A. I do.

21 Q. Okay, so does the brief section under prong two
22 accurately reflect your opinion regarding prong two in
23 this matter?

24 A. Yes, it does.

25 Q. Okay, and does the section under prong three

1 accurately reflect your opinion in this case?

2 A. It does with one correction, I've noticed an error in
3 three F.

4 Q. Okay.

5 A. That reference should go to Exhibit G which is 106.

6 Q. Okay.

7 A. And not E.

8 Q. Okay. So, if you were an athletic director in
9 Connecticut, and you were going to add a new sport, what
10 do you look at to decide which new sport you should add?

11 A. Well, under this, under prong three, I have showed
12 with exhibits and with explanations where I would look for
13 what sports to add. So I would look in my conference, the
14 Northeastern Conference, and I would say what sports are
15 changed because I have to make competitive equal post
16 season competition opportunities available for my women
17 and look there first, for sure, because you form a
18 conference because it's the same kind of schools. You
19 want your kids to compete against the same academically
20 stressed or unstressed kind of athletes. You also pick
21 your schools because they are in reasonable geographic
22 proximity. It is the natural first place to look when you
23 add sports.

24 So you can, especially if your conference already has
25 those sports, you have a schedule, instant schedule. You

1 don't have to worry about getting a nonconference games.
2 The hardest thing in Division I is on put a, to add a new
3 sport, to not have it be in your conference and to find
4 enough games to complete a new schedule because
5 everybody's all scheduled with their own conference. And
6 there aren't any opportunities for non conference schools,
7 so that would be my absolutely first choice.

8 Then it makes sense to look at other schools in my,
9 in my state. What are they doing? Because those are my
10 nonconference opponents. So first you look at your
11 conference, then you look at your nonconference schools in
12 your state because those are the ones who are at complete
13 my schedule. You never play just a conference schedule,
14 you have to keep both. So that would be natural.

15 And I've detailed here where I looked at all of those
16 websites or EADA reports of schools in Connecticut and
17 I've created tables.

18 Q. And is that the chart on Exhibit O of your --

19 A. Yes.

20 Q. Okay.

21 A. Which is 113.

22 Q. 113.

23 A. Okay. And then of course QU's an NCAA one school. I
24 would look at NCAA championships that are offered because
25 I have an obligation, would have a obligation to run a

1 sport that has a national championship competition because
2 national championship access is provided to women and so
3 you would look for a sport where you could give that to
4 your new female athletes also.

5 And then you'd look at, because you're recruiting
6 from high schools and you're recruiting from open amateur,
7 open amateur teams in your area, you look at Connecticut
8 high schools and see what their sport participating was.
9 And the national federation of state high school athletic
10 associations does an annual survey of what sports are
11 sponsored by high schools in, like, if you look at Exhibit
12 G, which is 106 -- like you could, if you look at the
13 second set of averages by just keep turning pages.

14 About four pages in, you can look up Connecticut and
15 then right across and you can see how many kids are
16 participating in every single sport in Connecticut at the
17 high school level. That's your recruiting pool, so you
18 would look at that.

19 And then looking at other state high school
20 associations not in Connecticut. So we're so close to New
21 York, so close to Massachusetts and so you would continue
22 to use that kind of resource for that.

23 And I always, we're also diversity consultants. You
24 know, lots of schools are very eager to increase diversity
25 so, you know, I always recommend that you look for diverse

1 schools to increase that kind of profile.

2 Q. All right. Now, have we sufficiently discussed the
3 prongs one, two and three of your analysis?

4 A. Unless you have further questions.

5 Q. No. Okay, just weren't to make sure there isn't
6 anything else you wanted to say. Let's jump toin your
7 original report, okay? Let me find the page here. You
8 address cheerleading.

9 This would be the first place where you address
10 cheerleading is in section eight, part five, cheerleading,
11 when does an activity count as a sport. Would you please
12 find that particular part of your report?

13 A. I have it.

14 Q. You found it? I'd like to start with when, when you
15 were CEO of the Women's Sports Foundation, could you, well
16 could you explain or describe the purpose or function of
17 the Women's Sports Foundation?

18 A. The Women's Sports Foundation is the expert in
19 women's sports in the United States. It's recognized by
20 most to be the place to go for research, for informational
21 resources, information on general, on gender equity,
22 policy issues, advocacy. Definitely the Women's Sports
23 Foundation are an advocate for gender equity and increased
24 opportunities for women's sports remedying historical
25 discrimination.

1 So we are -- that's what the Women's Sports
2 Foundation does. We have done studies of OCR, we've --

3 Q. So as CEO of the women's Sports Foundation did you or
4 the foundation develop any positions or policy papers
5 relating to cheerleading and sport?

6 A. Yes.

7 Q. Okay. I'd like to direct you to, it's Exhibit H of
8 your report and it's also Exhibit 107?

9 A. Exactly.

10 Q. This is a document with the Women's Sports Foundation
11 logo and it says cheerleading. Okay, could you please
12 take a look at that and tell us what it is?

13 A. Yes, this is a position paper developed by Women's
14 Sports Foundation and we do this, we did this regularly on
15 all, on any issue that was high public concern and if
16 you'd gone to the Women's Sports Foundation website and
17 type in search "position papers" you'd find any number of
18 these, but this was developed under my direction. I as
19 the executive director and CEO was in charge of the
20 advocacy director, and developed all position papers in
21 the area of gender equity, so I was the principal author
22 on this one.

23 Q. Okay. And could you please explain -- did you just
24 say that you were the principal author of this one?

25 A. Yes.

1 Q. Okay. Could you -- and was this indeed adopted as
2 the position of the Women's Sports Foundation?

3 A. Yes, it was. And let me just say in terms of -- say
4 something about my authoring, my background in terms of my
5 page includes a sociology of sports and the study of sport
6 and so the definition of sport, the thing I teach if I
7 were to be a teacher in colleges and universities would be
8 this, what makes something a sport and what isn't a sport.
9 When would chess be a sport and when would it not. When
10 would softball be a sport and when could it not. So this
11 is in my bailiwick of expertise.

12 Q. Okay. Could you please then summarize for us what,
13 what the position of the Women's Sports Foundation is
14 that -- or the position that you wrote and that was
15 adopted by the Women's Sports Foundation?

16 MR. BRILL: Objection, Your Honor. The document
17 in evidence speaks for itself. Don't need to summarize
18 it.

19 THE COURT: Well, if they want to summarize, I
20 have no problem because it's in evidence if they want to
21 summarize it.

22 BY THE WITNESS:

23 A. What I think is fair to say in keeping with the
24 court's time, that we met with OCR on this, we had
25 extensive discussions on what makes a sport a sport --

1 MR. BRILL: Your Honor, I'm sorry to interrupt.
2 The witness is not answering questions so it's difficult
3 for me to object. If she'd been asked did you meet with
4 OCR and what did OCR say to you, I would be objecting to
5 hearsay. She was asked the question to summarize this
6 document, not to talk about conferences she had with aOCR
7 years ago.

8 MS. GALLES: All right. Well, I will let you
9 rule --

10 THE COURT: No, are you withdrawing the
11 question?

12 MS. GALLES: Yes.

13 THE COURT: Okay.

14 BY MS. GALLES:

15 Q. Dr. Lopiano, before preparing this particular
16 position paper, did you do any research or take any steps
17 in order to investigate the cheerleading situation and
18 whether it should or should not be a sport?

19 A. The answer is yes. I can't remember --

20 Q. And what --

21 A. -- the time, whatever, but the Women's Sports
22 Foundation involvement with cheerleading is a neutral one.
23 The Woman's Sports Foundation position is the more sports
24 for women, the better. And so we want more sports for
25 women to evolve and I have no objection to competitive

1 cheerleading or the Woman's Sports Foundation doesn't have
2 any objection to legitimate, objective cheerleading sports
3 and we indeed encourage the American cheerleading
4 association, which is a sideline cheering association
5 because of this opportunity for new sports. For the last
6 15 years, we kind of met with them and said, look, you're
7 in a perfect position to develop competitive cheerleading
8 as a sport that we can count and involve girls in --

9 MR. BRILL: Your Honor, I'm sorry to interrupt.
10 That is a narrative. This is a very sensitive area of the
11 case. I would appreciate questions and answers by the
12 witness, not deviating into conversations she had 15 years
13 ago with some other organization that is not even a
14 government organization. If we could take it question and
15 answer, I'll be able to object and the court can rule. I
16 don't want to have to interrupt the witness and I didn't
17 object when she was giving a lecture essentially on prior
18 testimony but I would really ask that she be asked
19 questions that I have an opportunity to object and she
20 answer the question.

21 THE COURT: All right. Well, I think she is
22 answering the question. Did you do any research or take
23 any steps in order to investigate the cheerleading
24 situation and whether it should or should not be a sport.

25 It is a fairly long answer but I don't see a

1 problem with it. Why don't we get another question.

2 BY MS. GALLES:

3 Q. Dr. Lopiano, you were talking about the steps you
4 took with the American Cheerleading Association. Is
5 that --

6 A. And so we said we need an NGB. You're in a perfect
7 position to be the NGB. There has to be a set of rules,
8 you have to come up with a different name, otherwise
9 people are going to think it's sideline cheerleading. So
10 we worked with that group and I believe that group has
11 incorporated and wants to get into this --

12 Q. I just wanted to talk about what you particularly
13 have knowledge about. Any other -- so do you personally
14 have a beef regarding cheerleading?

15 A. No, competitive or sideline. Competitive or
16 sideline.

17 Q. Okay, so let's get back to the position paper that
18 you wrote for the Women's Sports Foundation; could you
19 please summarize that position paper for us?

20 A. I believe it's would be self explanatory.

21 Q. Okay.

22 A. But it defines sport, with a number of points.

23 Q. All right. Now, do sideline cheerleaders sometimes
24 compete?

25 A. Absolutely.

1 Q. And the fact that a sideline cheerleader competes,
2 does that turn into a sport in your opinion?

3 MR. BRILL: Your Honor, first of all, there's no
4 foundation for this witness testifying about sport and
5 competitive cheer. They have a expert on competitive
6 cheer and we don't know the spent of extent of this
7 witness' knowledge about it. If she's --

8 THE COURT: She hasn't been asked about
9 competitive cheer. She's being asked about sideline
10 cheer.

11 MR. BRILL: Well, she was asked about a sideline
12 cheerleader competing and we have no evidence that she has
13 foundation on this issue. I don't know how far she's
14 going to testify about sideline cheer and competitive
15 cheer but I don't believe she has any sufficient
16 foundation, and they have a witness coming tomorrow as an
17 expert on the sport of -- what we've -- the sport of
18 competitive cheer and sideline cheer.

19 THE COURT: Well, okay. You want to lay a brief
20 foundation?

21 MS. GALLES: Sure.

22 BY MS. GALLES:

23 Q. Dr. Lopiano, during -- you've described for some of
24 us, over the last say ten or 15 years, have you been
25 involved in working with cheerleading groups in order to

1 help develop or evolve cheerleading into a competitive
2 sport?

3 A. Yes, I have.

4 Q. Okay. Based upon those years of those discussions,
5 have you developed an understanding of what sideline cheer
6 is?

7 A. Yes.

8 Q. Okay. And what is your definition of sideline cheer?

9 A. When the primary purpose of the activity involves the
10 encouragement of student spirit, their appearances at the
11 competitive event of someone else or as a school
12 auditorium event, it is a student -- student spirit focus.
13 It is not competing against another cheerleading team in
14 order to determine who's the best cheerleader.

15 Q. And do sideline cheerleaders, do they sometimes
16 compete?

17 A. Yes, they could or they could not.

18 Q. Okay.

19 A. It's very common for cheerleaders in sideline
20 cheerleading groups have a one or two events a year where
21 they compete with each other, or festivals where they
22 compete against each other and put on exhibitions of their
23 routines and are judged better than someone else.

24 Q. Okay, and the fact that, as you say, the sideline
25 team goes and attends a few competitions a year, in your

1 opinion would that be enough to convert what those
2 sideline cheerleaders do into a sport?

3 A. No.

4 Q. Okay. Now, you prepared the Women's Sports
5 Foundation paper; I'd also like you to look at what's
6 Exhibit I to your report which is Exhibit 108 of the, of
7 plaintiff's exhibits. That's an OCR letter?

8 A. Correct.

9 Q. Okay. And at any time in your, like you said, over
10 the years of your working on the cheer issue, were you
11 ever consulted by or did OCR ever request input from you
12 to provide guidance on cheerleading and sport?

13 A. Yes, we were consulted in the development of this
14 response and they, we met with them, shared with them our
15 definitions of sport, and helped create this list of
16 factors.

17 Q. Okay, I'd like to jump to page two of that, of the
18 letter where it says types of inquiries and OCR may also
19 consider?

20 A. Correct.

21 Q. All right. So did you work with OCR in the creation
22 of those criteria?

23 A. Yes.

24 Q. Okay. And are those criteria generally accepted in
25 the sports world as establishing the factors for when an

1 activity can be considered a sport?

2 MR. BRILL: Objection, Your Honor. Generally
3 accepted in the sports world is vague and not material.
4 The question here is whether something is a sport for
5 purposes of Title IX, and we have specific criteria that
6 we can give the court.

7 THE COURT: All right, but I'll allow the
8 question.

9 BY THE WITNESS:

10 A. This is OCR and as opposed to a generally accepted,
11 the point was well made that this is what OCR says. It is
12 going to look at, these are all the factors they look at
13 in making a determination of whether or not this is a
14 sport vis-a-vis a sideline cheerleading activity.

15 Q. Now, I'd also like you to look at Exhibit J which is
16 Exhibit 109. This is OCR. Could you please describe for
17 us what this particular letter is?

18 A. This is, this letter was issued in September of 2008.
19 Instead of applying generally to cheerleading it applies
20 to the definition of sport in general. And it follows and
21 tracks the extent letter which was the previous exhibit
22 and is even a little more comprehensive than that. It
23 clearly, I think it's just a more clear enunciation of
24 what OCR is going to look at.

25 Q. Okay. So let's jump to Exhibit 110, which I believe

1 is Exhibit K of your report. Exhibit K are the users
2 guide for the Equity in Athletes Exposure Act; do you see
3 that?

4 A. Yes.

5 Q. I'd like to direct your attention to page 19 where it
6 says information you need to complete this screen?

7 A. Yes.

8 Q. Okay. Could you please read the second bullet point?

9 A. "To be considered a sport under the EADA an
10 activity's primary purpose must be to engage in
11 intercollegiate competition. If you indicate in the
12 caveat box that your other sports are dancing and/or
13 cheerleading, please also specify in the caveat box that
14 your institution has a letter from the Office of Civil
15 Rights confirming that the OCR has determined that dancing
16 and/or cheerleading are varsity sports in your
17 institution."

18 Q. Does the OCR provide technical assistance to schools?

19 A. Yes, it does.

20 Q. Could you please explain what that means?

21 A. That any institution can go through to a regional
22 office and ask them to assess a specific fact situation at
23 your institution and indicate whether it complies or
24 doesn't comply with policy, laws, what have you.

25 Q. So could a school go to OCR and ask for technical

1 assistance about whether their cheerleading program meets
2 the OCR criteria for a sport?

3 A. Absolutely. And I have confirmed that no school ever
4 has.

5 MR. BRILL: Your Honor --

6 A. I'll tell you --

7 MR. BRILL: I move the last portion to be
8 stricken. That was not responsive and I did not have an
9 opportunity to object to the hearsay which she just put on
10 to the record.

11 THE COURT: That's fine, that's stricken.

12 BY MS. GALLES:

13 Q. As you sit here today, are you aware of any school
14 that has ever gone to OCR to -- and received an OCR
15 determination that their cheerleading program is a sport?

16 A. No.

17 Q. Okay. As you sit here today, are you aware of any
18 college that has, or it says here that your institution
19 has a letter from the Office of Civil Rights confirming
20 that OCR has determined that dancing and/or cheerleading
21 are varsity sports at your institution; are you aware of
22 any colleges that have received such a letter from the
23 OCR?

24 A. No.

25 Q. Do you know whether the NCAA sanctions cheer as a

1 sport?

2 A. It does not.

3 MR. BRILL: Objection, Your Honor. How could
4 she know that? There's no foundation for this witness to
5 testify what the NCAA thinks about this.

6 THE COURT: That was the question. I'll allow
7 it.

8 BY MS. GALLES:

9 Q. Whether they sanction a championship in cheer?

10 A. They do not.

11 Q. Do you know whether the NCAA has -- do you know what
12 an emerging sport is at the NCAA?

13 A. I do.

14 Q. And what is an emerging sport?

15 A. An emerging sport are those NCAA non championship, or
16 sports related that is not sponsored championships which
17 it has identified as being prospective NCAA sports. NCAA
18 has a minimum number of institutions that are required
19 before championship could be established. And in an
20 effort to remedy historical discrimination, has lowered
21 this number for a classification of sport called emerging
22 sports in an effort to help those sports get what they
23 need to be comparable to men. So it has a classification
24 of such sports that is administered by the committee on
25 women's athletics.

1 Q. Okay. Do you know whether the NCAA classifies any
2 form of cheerleading as an emerging sport?

3 A. It does not.

4 Q. Okay.

5 MS. GALLES: Your Honor, could I just take a
6 moment to make sure I've covered everything and to confer
7 briefly with counsel?

8 THE COURT: Sure.

9 (Pause)

10 BY MS. GALLES:

11 Q. Now, on the emerging -- you mentioned that it
12 requires a minimum number of schools in order to be
13 designated a championship sport or an emerging sport; do
14 you know why there is a minimum number of school
15 requirement for that?

16 A. I would opine just logically that before the NCAA's
17 going to spend significant resources to sponsor a national
18 championship, it pays expenses of everyone to go to
19 national championships, that it has to be assured that a
20 minimum number of institutions are participating in this
21 sport.

22 Q. Now, in your report you state that your opinion
23 that -- let's see. All right, I'd like to go to the last
24 paragraph in part five, A five where you talk about
25 cheerleading.

1 MR. BRILL: Could you show me what --

2 MS. GALLES: Sure.

3 (Pause)

4 BY THE WITNESS:

5 A. The NCAA has long notified? That one?

6 Q. Yes. Okay. You go onto say that given this
7 longstanding direction from OCR and the NCAA, I do not
8 believe that any school can count cheerleaders as athletes
9 for purposes of Title IX whether the school classifies
10 these cheerleaderies as sideline cheerleaders or
11 competitive cheerleaders. Is this an accurate statement
12 of your opinion?

13 MR. BRILL: Your Honor, I have an objection.
14 Not to whether it's accurate or not but whether it's
15 admissible. I mean the witness has identified the only
16 OCR positions that exist on this and this goes to the
17 issue I raised earlier. She's identified the OCR
18 standards, she's testified that she's not aware of any OCR
19 letter that approves this, but she's not competent to give
20 an opinion as to, you know, what the OCR would do here.
21 It's just -- beyond her, beyond her expertise and beyond
22 her ability for her to testify to say what OCR may or may
23 not do about this in the future.

24 MS. GALLES: I'm not asking her what OCR would
25 do. I'm asking about whether she as an expert in sport

1 and a expert in woman's sports, sociology of sports,
2 whether she would recognize cheerleading as a sport at
3 this time.

4 THE COURT: I'm going to allow it.

5 BY THE WITNESS:

6 A. The answer is no. It doesn't fulfill the majority of
7 criteria established by the OCR. And as paragraph, this
8 paragraph you're referring to, it's clear the NCAA does
9 not support it. In the 2008 letter which was issued by
10 OCR, it specified specifically that support of the
11 governing association was one of the criteria, and we also
12 know that without OCR approval, that you can't count it.
13 So that is the basis for my opinion that it should not be
14 counted. It simply hasn't evolved enough right now to be
15 considered a sport.

16 Q. But are you open to that at some point in the future
17 it might evolve into something that could be considered a
18 sport?

19 A. Absolutely.

20 Q. But as it exists today, what is your opinion?

21 A. It is not a sport. It's not even close.

22 MS. GALLES: I believe that's it for direct
23 exam, Your Honor.

24 THE COURT: Okay, why don't with break for
25 lunch. Normally I would take an hour for lunch. Is

1 everybody willing to try and squeeze that a little bit?

2 MS. GALLES: I'm sorry, I didn't hear.

3 THE COURT: How long do you need for lunch?

4 MR. BRILL: Forty-five minutes, Your Honor?

5 MR. ORLEANS: That's fine with us, Your Honor.

6 THE COURT: Let's shoot to come back at 1:30 or
7 just after. Have a nice lunch.

8 (Whereupon the luncheon recess was taken at 12:50
9 o'clock, p. m.)

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