

1 A F T E R N O O N S E S S I O N .

2 (1:30 o'clock p. m.)

3 THE COURT: Cross?

4 MR. BRILL: Thank you, Your Honor. Good
5 afternoon.

6 CROSS EXAMINATION

7 BY MR. BRILL:

8 Q. Dr. Lopiano, your position in this case both at the
9 preliminary injunction hearing and today, is that
10 competitive cheer or cheerleading, as you refer to it, is
11 not a sport, is that correct?

12 A. Correct.

13 Q. And your position at the preliminary injunction
14 hearing and today is that cross country, indoor track and
15 field and outdoor track and field should not be counted as
16 separate sports, is that correct?

17 A. Correct.

18 Q. Did you read the judge's decision on the preliminary
19 injunction motion?

20 A. I did not.

21 Q. Are you aware that the judge found as a preliminary
22 matter that he rejected your position on both those issues
23 finding it likely that Quinnipiac would prevail on both
24 the competitive cheer and the track and field issues?

25 A. I did not read the judgment so I do not know that.

1 Q. No attorney advised you of that?

2 A. I, I was just asked to do what I just did and, no, I
3 didn't.

4 Q. So for the year that you've been serving as expert in
5 this case you never bothered to read the preliminary
6 injunction decision?

7 A. I said I did not read the decision.

8 Q. Okay. Well, in Exhibit --

9 THE WITNESS: No offense, Judge.

10 THE COURT: None taken.

11 BY MR. BRILL:

12 Q. In Exhibit M to your original report, you analyzed
13 Quinnipiac's participation numbers for 2009, 2010 in no
14 less than 11 different ways as I counted, does that sound
15 right to you?

16 A. Exhibit L?

17 Q. The original report?

18 A. L.

19 MS. GALLES: Object, and it's been withdrawn.

20 MR. BRILL: I'm asking about her original
21 analysis.

22 THE COURT: Okay.

23 MR. BRILL: She analyzed it eleven different
24 ways originally.

25

1 BY MR. BRILL:

2 Q. You analyzed it seven different ways in the revised
3 Exhibit M that you give me on Friday, correct?

4 A. Okay, go slow. The first question is what?

5 Q. I withdraw that question.

6 Dr. Lopiano, in all of the assessments that you've
7 done of Quinnipiac's roster numbers, in all of your
8 reports and supplemental reports and amended reports, did
9 you ever analyze those numbers the one way the judge said
10 was likely correct, that is, to include competitive cheer
11 and triple count, as you put it, the track and field and
12 cross country athletes?

13 A. I asked to follow, my understanding, my expert
14 understanding, was of NCAA rules and I don't --

15 MR. BRILL: No. Your Honor, would you instruct
16 the witness to please answer my questions on cross yes or
17 no?

18 THE COURT: Well, if you want her to answer yes
19 or no, you need to ask her in your question, yes or no.

20 BY MR. BRILL:

21 Q. Dr. Lopiano, yes or no, in your evaluations did you
22 ever assess, in the reports that you issued did you ever
23 provide an assessment of Quinnipiac's participation
24 numbers for 2009, 2010, including the competitive cheer
25 athletes and counting cross country, indoor track and

1 field and outdoor track and field as separate sports? Yes
2 or no.

3 A. Yes. In my testimony in conjunction with the report.
4 Because in my conclusion for the supplemental report, I
5 did tell you what would happen if you put cheerleading
6 together with all three counted separately. So in an
7 effort to be responsive to your question the answer is
8 yes. Concerning --

9 Q. But not in any of your reports, is that correct,
10 Dr. Lopiano? Yes or no. There's no chart in any of your
11 reports that looks at the numbers that way, putting aside
12 your testimony this morning.

13 A. Yes, the conclusion of my supplemental report, that's
14 says exactly that.

15 Q. Did you actually calculate what the percentage of
16 participation numbers for men and women would be on your
17 assumptions if you included competitive cheer athletes as
18 well as triple counting track and cross country athletes?

19 A. Did I -- say this once more?

20 Q. Did you make a calculation, taking the numbers that
21 you gave us this morning in your supplemental report, and
22 comparing the percentage of women participating in sport
23 at Quinnipiac to the percentage of women enrolled as
24 undergraduates, did you compare those numbers, including
25 competitive cheer athletes, as well as track and field and

1 cross country athletes counted separately?

2 A. No, I only did participation gaps.

3 Q. Well, I only got your supplemental report this
4 morning at six o'clock so forgive me if my math is wrong
5 but I want to see if I'm correct.

6 If you can look at that, if I turn it right side up.
7 You may want to refer to your supplemental report but am I
8 correct that, putting aside your count C which is a
9 counting for red flags, that you, without competitive
10 cheer you have 170 men and 248 women in count A?

11 A. Can you tell me where this is in the report just so I
12 can -- because this is in the supplemental report, right?

13 Q. Yes, in your supplemental report which we got today.

14 A. Okay.

15 Q. I want to make sure I'm understanding it correctly.

16 A. Surely.

17 Q. If you look at Exhibit 151?

18 A. Okay.

19 Q. Okay?

20 A. Okay.

21 Q. Column A, count A, you say 170 men?

22 A. Right.

23 Q. And count B you have with, including all runners,
24 triple count, as you put it, you have 248 women, right?

25 A. What page are you on?

1 Q. Well, I'm looking at your chart, that's Exhibit --

2 A. Which page?

3 Q. -- 151 and at the bottom of the first page it says
4 170 in men in count A and 176 in count B?

5 A. Got it.

6 Q. The next page, for total women, triple counting
7 runners, you have 248 for count A and 251 for count B?

8 A. I don't see that in the second page.

9 THE COURT: It's the third page.

10 BY MR. BRILL:

11 Q. Third page?

12 A. Okay, I have it. Third page.

13 Q. Now, you agree there were 30 athletes in the
14 competitive cheer team, correct?

15 A. On the squad list, yes.

16 Q. On the squad list. So I did a little calculation of
17 when your numbers come out to if we add in competitive
18 cheer. And tell me if I'm wrong. If we add in the
19 competitive cheer athletes in count A, the percentage of
20 women is 62.1 percent versus 61 percent, 61.9 percent
21 enrollment which is 0.2 percent over representation of
22 women. Do you need a calculator? I happen to have one
23 here.

24 A. No, no, I understand your point at all and --

25 Q. No, the question is my math right?

1 A. Is your math right?

2 Q. Yes. Do you agree with those calculations?

3 A. I agree that you are absolutely close on, on prong
4 one, if you kept volleyball, which that does. And you
5 counted cheer. And so we're on the same page.

6 Q. Okay, great. Now, Quinnipiac did have a volleyball
7 team during 2009, 2010, didn't it?

8 A. It did.

9 Q. So there's no justification for counting
10 proportionality or measuring proportionality without a
11 volleyball team for 2009, 2010, is there?

12 A. And I chose to do that.

13 Q. You chose to --

14 A. I gave all the options that I considered the court
15 might want to consider.

16 Q. How could Quinnipiac leave the volleyball team out of
17 its report to the government of the sports that it
18 sponsored for 2009, 2010? We had a volleyball team.

19 A. It was my understanding you didn't want to have a
20 volleyball team, which is, you know, why I included that
21 possibility. I thought that was the whole reason for the
22 lawsuit. Maybe I'm wrong. I apologize if I'm wrong but I
23 thought it was the dropping of the volleyball team which
24 led to this whole thing.

25 Q. But you understand that Quinnipiac did have a

1 volleyball team in 2009, 2010, right?

2 A. Absolutely.

3 Q. And you agree that if you include the volleyball team
4 and you include the competitive cheer athletes that under
5 your count A or count B, prong one is satisfied?

6 A. I have said that.

7 Q. Thank you.

8 A. If you triple count.

9 Q. Thank you.

10 A. Yes, sir.

11 Q. Now, would you agree that as a general rule, the EADA
12 information can be used to calculate whether an
13 institution meets the substantial proportionality
14 requirement prong one and, if not, how large the
15 participation gap is?

16 A. No.

17 Q. But isn't that what you say in your report?

18 A. I said that's all, that's all the information I had,
19 when I used the EADA. As soon as I was supplied with the
20 eligibility list and the squad list, that was what I used
21 and what I prefer to use.

22 Q. Do you have your report in front of you?

23 A. Which one?

24 Q. Your original report?

25 A. Yes, which was, which was amended with my

1 supplemental report when I got the squad list.

2 Q. I apologize for turning my back, Your Honor. I'm
3 looking for a document. Please turn to the fourth
4 unnumbered page of your report. You have that?

5 A. Yes. Well, let me make sure. Where are you on
6 this --

7 Q. The language I highlight, isn't that on your report
8 --

9 THE COURT: Okay, okay. We have to have some
10 rules here because the court reporter's trying to take
11 down what everybody is saying and she can only do that for
12 one person at a time. So, you need to not answer while
13 the question's being asked and you need to not talk while
14 the answer's being given. Thank you.

15 BY THE WITNESS:

16 A. Okay.

17 Q. Did you find the page of your report --

18 A. I found it and I see now, you have it on the screen
19 and I am reading your highlighting portion.

20 Q. And that's what you said in your report, correct?

21 A. That is correct.

22 Q. Thank you?

23 A. But I pointed out in my report --

24 Q. No, no, there's no question. There is no question
25 pending.

1 THE COURT: You'll get a chance to explain when
2 your lawyer comes back up.

3 THE WITNESS: No problem.

4 BY MR. BRILL:

5 Q. Your lawyer will have a chance to ask you additional
6 questions on redirect, Dr. Lopiano.

7 A. I understand.

8 Q. So your only function now is to answer my questions
9 to the best of your ability.

10 A. I apologize.

11 Q. Thank you. And the dated numbers are based on the
12 squad list as of the first date of competition, correct?

13 A. Correct.

14 Q. And the OCR --

15 A. They are supposed to be.

16 Q. The OCR guidance similarly states, does it not, that
17 as a general rule, all the athletes who are listed on a
18 team squad or eligibility list and/or on the team as of
19 first competitive event are counted as participants by
20 OCR?

21 A. For EADA, yes.

22 Q. Well, for OCR purposes, correct?

23 A. Okay, say the question again.

24 Q. Let me show you, this is an excerpt from the OCR
25 guidance, which I believe has been marked as Exhibit

1 Seven, and is it correct that the OCR says as a general
2 rule all athletes who are listed on the team squad or
3 eligibility list and are on team as of the first date,
4 first competitive event, are counted as participants by
5 the OCR?

6 A. Yes. May I make a clarification? Were you asking me
7 about the EADA report or did you skip the EADA report?

8 Q. I asked you about the EADA report first and now I'm
9 asking you about the OCR instructions.

10 A. Okay, I did not understand the separation. So now
11 we're off the EADA report and we're talking about what OCR
12 says?

13 Q. Correct.

14 A. Okay, that's fine.

15 Q. And this is what OCR says, correct?

16 A. That is partially what it says, yes.

17 Q. Thank you. Did you calculate the number of athletes
18 on Quinnipiac's teams as of the first date of competition
19 for each sport?

20 A. I did.

21 Q. And where does that appear on your report?

22 A. Reads number four.

23 Q. No, I didn't ask you to about reason for. I said is
24 there a chart that you have this shows your calculation of
25 the number of athletes on each team as of the first date

1 of competition for that sport?

2 A. I was never provided with a squad list that indicated
3 that.

4 Q. So your answer is you didn't, you didn't calculate
5 that?

6 A. I did not, I wasn't provided with that information --
7 no, no I take it back, I take it back. Can I see the --
8 can I see the one -- could I see the one page Quinnipiac
9 document with start and end teams and it's my
10 understanding that that indicates the total number of
11 athletes on the squad list, and that does not represent
12 the number of athletes on the squad list on the first day
13 of competition. It was the number of athletes on the
14 squad list who may or may not have been on there on the
15 first day of competition. That was my understanding and
16 the reason I could not give you that number. So if I am
17 incorrect I will stand corrected.

18 Q. But so you're saying that you didn't have enough
19 information to calculate the number of athletes on the
20 squad list on the first date of competition?

21 A. I was not provided with, I do not believe that the
22 squad list represented that.

23 Q. But isn't that your very reason for, don't you say in
24 general I count all the athletes who are on the squad list
25 and practicing on the first date of competition of the

1 traditional season?

2 A. So, all right, so reason for and is reason one
3 through four became administrative so the clearest count,
4 no matter what, was if you used -- okay, look. When you
5 look at the supplemental report, and you're looking at all
6 of the things that are considered, it says as a general
7 rule all athletes are listed on team squad list or
8 eligibility list. It's "or." So I could have chosen
9 eligibility first or I could have chosen squad list first.
10 Since the squad list is not everybody on the first date of
11 competition but eligibility is for sure you use your
12 eligibility, I chose to use eligibility first and then to
13 see if anybody should be added as a result of first date
14 of competition when I could determine that they did not
15 use for eligibility and I was forced into that position to
16 calculate it because I was never provided with just first
17 date of competition.

18 Q. What information did you lack that you say you would
19 need to calculate the squad list as of the first date of
20 competition? Just describe as succinctly as you can what
21 you say you didn't have.

22 A. That every -- the 33 members on the squad list were
23 not, were not all on there on the first day of
24 competition; some were added after the first day of
25 competition. They didn't appear on the squad list.

1 Q. No, what information, if you now were to sit down
2 with the information that you had and attempt to calculate
3 the numbers of athletes on Quinnipiac's teams as of the
4 first date of competition, what information would you need
5 that you don't already have?

6 A. I'd have to look at it. You want me to take time to
7 look at it --

8 Q. In the year you served as expert did you ever ask,
9 did you ever say to your lawyers or to Quinnipiac, to ask
10 Quinnipiac for additional information so that you could
11 calculate the first day of competition squad list numbers?

12 A. Yes, I absolutely did. And I got the squad list in
13 May and said they were not clear. And they went back to,
14 it was my understanding that they went back to the
15 compliance officer earlier this week and asked all the
16 questions I asked of them. And then came back to, they
17 came back to me and it was when all the questions on
18 status were cleared up that I made this assessment.

19 Q. So your explanation -- but do you agree that the
20 information that both OCR and EADA at least presumptively
21 say is most significant is the first day of competition
22 squad list numbers?

23 A. No, because it says or it could be the eligibility
24 list. So as a general rule it could be the eligibility
25 list which is seasons. You use a season of competition or

1 first day of competition so I think I could go either way,
2 as long as I eventually combine them, starting with which
3 one. You would rather me started with the first day of
4 competition and I did not. You were right, I did not
5 start with the first day of competition. I explained
6 why.

7 Q. Now did you look at the numbers that Quinnipiac
8 supplied for the first day of competition?

9 A. Let me check the squad list. I just want to make
10 sure.

11 Q. I'm talking about the charts that we gave to your
12 attorneys that summarized the first day of competition
13 squad list in every sport?

14 A. Could you show me this chart?

15 Q. Sure, I'll show it to you a little later in my cross
16 examination.

17 A. Okay.

18 Q. Rosters of teams can change for a variety of reasons
19 after the first competitive event, isn't that true?

20 A. Yes.

21 Q. In fact, as you said, it's a living document
22 throughout the course of the season. Athletes could be
23 injured, correct?

24 A. Correct.

25 Q. They could be become ineligible for academic or other

1 reasons, right?

2 A. Correct

3 Q. Or they simply may decide to leave the team for
4 personal reasons?

5 A. Correct.

6 Q. And other athletes may legitimately be added to a
7 team during a season, correct, for such reasons as
8 clearing NCAA eligibility; would that be a reason to add
9 an athlete?

10 A. Absolutely.

11 Q. Transferring from another school, correct?

12 A. Absolutely.

13 Q. Or replacing an athlete who's injured in a key
14 position on a team, correct?

15 A. Absolutely.

16 Q. Like a goalie on a hockey team; if you lose a goalie
17 you need to get another goalie on the team, correct?

18 Would you agree with that?

19 A. Yes.

20 Q. This normal fluctuation in roster size would not
21 affect the determination of whether a school meets
22 substantial proportionality under prong one, would it?

23 A. If it were normal fluctuation, it would not.

24 Q. Thank you.

25 A. We'd have to look at it over time.

1 Q. And the EADA contains no requirement that if the
2 number of participants on a team changes during a season
3 that the institution has to either modify its report to
4 reflect the change or otherwise file any notice with the
5 government, does it?

6 A. What report?

7 Q. The EADA report.

8 A. Okay, so -- ask that question again.

9 Q. The dated report is filed on October 15 of each year,
10 correct?

11 A. Correct.

12 Q. And that report contains the squad numbers as of the
13 first date of competition for each sport, right?

14 A. Correct, right.

15 Q. And if those numbers change during the course of the
16 season, there's no requirement that the school modify or
17 amend its EADA report?

18 A. That is correct, but EADA report is not Title IX
19 compliance assessment.

20 Q. Thank you. I'm going to try and specify when I need
21 a yes or no answer.

22 Now, you saw nothing in your review of information
23 regarding Quinnipiac rosters indicating the number of
24 participants on any team change for illegitimate reasons,
25 did you?

1 A. Say it again.

2 Q. Did you see anything in, or review information
3 regarding Quinnipiac rosters indicating that the number of
4 participants on any team was changed during the season for
5 illegitimate reasons?

6 THE COURT: Talking about this past season?

7 MR. BRILL: During 2009, 2010.

8 A. I saw no definitive number from Quinnipiac about what
9 they counted for each team. I don't know what this number
10 was. All I saw was -- this is why I'm asking for this
11 chart. All I saw was the, here's the squad list on the
12 start --

13 THE WITNESS: I feel like I'm at a disadvantage,
14 Your Honor, not having the document I referred to in front
15 of me, that I'm trying to recall.

16 BY MR. BRILL:

17 Q. What document is it, Dr. Lopiano? You refer to your
18 own chart in Exhibit 151 --

19 A. No, I need to refer to the Quinnipiac chart I'm
20 talking about.

21 Q. Well, I'm withdrawing that question. I'm asking you
22 to refer to Exhibit 151.

23 A. Okay.

24 Q. You have your own chart that says Quinnipiac numbers,
25 correct? Start and end numbers for each team.

1 A. Okay, if I might --

2 (Pause)

3 All right, so --

4 Q. So you have --

5 A. This is the chart I'm looking for. I would like to
6 see the chart from which I derived these numbers.

7 Q. What is that chart?

8 A. Okay, now -- I can see it in my mind. And -- let me
9 look, see if it's in here.

10 MR. BRILL: What exhibit is it?

11 BY MR. BRILL:

12 Q. Exhibit B M in your exhibit book, Dr. Lopiano.

13 A. B, I do not --

14 Q. Exhibit B as in boy, M as in mother.

15 THE COURT: I don't think the witness has
16 defendant's exhibits.

17 THE WITNESS: I do not.

18 MR. BRILL: Is there a convenient place to put
19 those?

20 MS. GALLES: Your Honor, just like to make the
21 objection for the record now that we did object to this
22 based, to this exhibit because we didn't know the basis
23 for it or where the numbers came from. So if he's going
24 to examine her about it we would object to the
25 admissibility of it on foundation and -- primarily on

1 foundation.

2 THE COURT: So you're objecting now?

3 MS. GALLES: I'm objecting to -- yes, I'm
4 objecting to his asking the witness about it because
5 there's no foundation for the document as to where those
6 numbers came from.

7 THE WITNESS: I do not have B M.

8 THE COURT: Well, I'm not going to admit it at
9 this time. I don't believe it was being offered at this
10 time.

11 MR. BRILL: Only that the witness asked to see
12 it.

13 THE WITNESS: I do not have E M in these
14 exhibits.

15 MR. BRILL: Excuse me?

16 THE COURT: No, B as in boy.

17 MR. BRILL: B as in boy.

18 THE COURT: It's in volume one.

19 THE WITNESS: Okay I have it.

20 BY MR. BRILL:

21 Q. Does that help you answer my question now?

22 A. Would you repeat your question again please?

23 Q. I think my question was whether in your review of the
24 information regarding Quinnipiac's rosters you found any
25 indication that the number of participants on any team

1 changed for illegitimate reasons during the course of the
2 year?

3 A. Okay, say that again. I didn't think that was a
4 question. I'm sorry. Say it again.

5 Q. Maybe that wasn't the pending question. I might have
6 gone back one question too far.

7 THE COURT: Well, you were questioning about her
8 chart showing Quinnipiac's own numbers.

9 MR. BRILL: Right, right, right.

10 BY MR. BRILL:

11 Q. And my question was where you derive those numbers
12 from.

13 A. When I looked at this chart, B M, right, and looked
14 at 31, I could not tell in looking at the squad list where
15 the 31 came from. All I saw was 34. And there is no
16 first date of competition on that chart. So I chose then
17 to start with the eligibility list for that reason,
18 because I felt it was the more, it had more definitely
19 countable numbers and would be a more defensible
20 foundation for my count.

21 Q. Well, let me --

22 A. That's the only explanation I can give you.

23 Q. Thank you. I'm going to move on, Dr. Lopiano.

24 Did you find any men's sport in your review of all
25 the information that you had where you found athletes who

1 were cut immediately before the first day of competition
2 and that added back to the squad shortly thereafter?

3 A. I'll have to look. All right, so I'm looking for
4 male athletes who were --

5 Q. Cut before the first day of competition and then
6 added back to the squad shortly thereafter.

7 A. Or who were not put on until after the first date of
8 competition; they don't have to be cut, right?

9 Q. No, my question was men's sport where athletes were
10 cut before the first day of competition and then added to
11 the squad shortly thereafter.

12 A. I will look.

13 (Pause)

14 All right, so you're saying cut prior to, added
15 after. I would never -- even without looking at this --
16 cut prior to, added after, doesn't make sense. I wouldn't
17 think that there's one of those in here, because if they
18 were cut prior to, you just wouldn't put them on until
19 after.

20 Q. Did you find any indication of male athletes who were
21 just added to teams right after the first date of
22 competition in a sport?

23 A. Okay, that I would look for.

24 Q. If you found such information, Dr. Lopiano, would it
25 not be reflected in your supplemental report that I gave

1 you this morning?

2 A. What I can't tell is in looking at this chart what
3 the date of first competition was so I was just going to
4 look at the chart you just mentioned --

5 Q. Thank you.

6 A. -- for that. And that doesn't tell me the date
7 either. I think the answer is I would have to go back and
8 look at the first date of competition in Exhibit B and
9 compare it to my add notes in Exhibit A. The 150, I would
10 have to look at my notes on the actual date of first
11 competition in B then go back and compare it to my other
12 notes in 150 in order to answer your question.

13 Q. How much --

14 A. And --

15 Q. I'm sorry, how much time did you spend preparing the
16 supplemental report that we received this morning?

17 A. (whistle) I'd have to look at my hourly notes but
18 I've been working on it since Wednesday. So I would guess
19 ten, 15 hours?

20 Q. And would it not have been significant to you to
21 include in your supplemental report if you found a
22 situation where a team had unaccountly added athletes
23 right after the first day of competition, men athletes to
24 a team and then kept them on the team for the entire
25 season?

1 A. I would think I would have picked it on a red flag
2 but since I had a reason that -- let me give you an
3 example. Since I inserted a reason five which was that I
4 would count you if you were there on the first date of
5 competition for your second, for the nontraditional
6 season, then I did pick up athletes that I added in, and
7 for instance, the -- if you look at, if you look at the, I
8 think it's cross country. Let me see.

9 Okay, if you look at the three on cross country --

10 Q. I'm sorry, men or women?

11 A. The men's cross country. We're talking about men,
12 right? So here are three cross country runners who ran,
13 were added after the first date of competition in
14 traditional season, right? Who were picked up under
15 reason five because I added them because they were on the
16 squad list first day of competition for the nontraditional
17 season. So, so -- since I picked them up I noted them in
18 the red flag. But because they were counted, I did not
19 think it required a change in them. I thought they were
20 properly counted by reason five.

21 Q. Now, Dr. Lopiano, my question was whether you found
22 something I would say suspicious about a situation where
23 Quinnipiac seemed to be leaving men off the first day of
24 competition roster and then adding them in right after
25 that. Now, the example you've given us has to do with the

1 men's cross country team, the first day of competition for
2 which was the beginning of September, right?

3 A. For the traditional season.

4 Q. For the whole, for the first day of competition for
5 the year. The date for the EADA report was the beginning
6 of September, correct?

7 A. For the traditional season, correct.

8 Q. Yes, and that season ended at the end of the fall
9 semester, correct?

10 A. No, they continued to practice into the
11 nontraditional --

12 Q. The competitive season, the championship season ended
13 on November, the end of November for cross country, right?

14 A. That is correct, and the nontraditional season was in
15 spring.

16 Q. I didn't ask you about the nontraditional season,
17 okay? These three runners were added to the team in
18 February, correct?

19 A. Correct.

20 Q. So this is not an example of people that were added
21 to the team right after the first day of competition, is
22 it?

23 A. It is, if you count -- it is, it absolutely is, and
24 that's why it's red flag. Because you can, if you count
25 them, you've got 16. You don't you have 13, right? So --

1 Q. Dr. Lopiano, I'm sorry, maybe we're miscommunicating.

2 These runners were added --

3 A. You were --

4 Q. Excuse me, these runners were added to the team six
5 months after the first day of competition for that team,
6 correct? Yes or no.

7 A. Yes.

8 Q. Okay. So they were not added to the team right after
9 the first day of competition, were they?

10 A. In the, in the nontraditional season they were not
11 added right after the first day of competition, they were
12 on the squad list for the first, the squad list at the
13 beginning of the nontraditional season. And let me
14 explain why this could have been nefarious, as you would
15 suggesting. There is an email from the coach saying that
16 because my squad is limited to this number, right? And
17 because my seniors finished their nontraditional season,
18 I'll get rid of those guys and now I'm going to add these
19 guys to take their participation places. And the question
20 is whether or not they should be counted. And I would, I
21 am suspecting that QU would say no, and I would say yes,
22 reason five. That that is exactly what happened. Let me
23 see if I can check that.

24 Q. Dr. Lopiano, nobody is debating with you at the
25 moment whether they qualified under some definition of

1 participant. My question was whether you found evidence
2 that Quinnipiac was manipulating the squad size numbers as
3 of the first date of competition which was in September.
4 So I gather your answer is no, there was no -- the entire
5 cross country championship season finished without these
6 three runners on the team, correct?

7 A. Without the three runners that started in the
8 nontraditional season.

9 Q. Correct? And you know that Coach Martin gave a
10 deposition in this case, is that correct?

11 A. Yes.

12 Q. And you did read her deposition, did you not?

13 A. Yes.

14 Q. And did you see her explain why these three athletes
15 were added in the spring?

16 A. Yes, and I read an email to that effect.

17 Q. Okay. So there's no red flag about the fact that
18 these three men were added to the team in the spring to
19 start practicing for the fall in your view, is there?

20 A. I didn't see, I didn't make an adjustment because of
21 it.

22 Q. Is there any --

23 A. I'm not trying --

24 Q. I'm sorry, I don't want to waste -- we have precious
25 time. Is there any other team that you can point to where

1 you believe the evidence showed that Quinnipiac added men
2 to a team right after the first date of competition with
3 the intent of misstating the number of players on the
4 roster?

5 A. In that specific example of first, of first day of
6 the traditional sport season squad list, let me just
7 check.

8 Q. Well, just to be clear, the first day of competition
9 can be either a nontraditional season or a traditional
10 season, right?

11 A. Yes.

12 Q. Depending on whether it's a fall sport or a spring
13 sport?

14 A. Yes, and --

15 Q. But the EADA report is based on the first day of
16 competition, whether it's traditional season or
17 nontraditional seasonal, correct?

18 A. Yes, and I did not consider the EADA report for 2009,
19 '10, I did not.

20 Q. It hasn't been filed yet, has it?

21 A. But I'm not -- I'm counting -- I don't know why
22 you're bringing up EADA for 2009, '10. I did not -- my
23 whole testimony is here. I did not consider EADA for '09,
24 '10. I considered the best possible information that was
25 available which is squad list and eligibility lists. So I

1 don't know why you're bringing up EADA.

2 Q. Because you have the number, don't you, Dr. Lopiano,
3 that Quinnipiac maintained in its official records,
4 whether it's on the summary chart or lots of other
5 documents that we supplied that showed the university's
6 count of athletes on the very first day of competition.

7 A. In the traditional season.

8 Q. Traditional or nontraditional, the first date of
9 competition.

10 A. I don't know that, because when I look at the B M,
11 right? It does not say the date. It does not say when it
12 was determined, and the squad list doesn't either. So I'm
13 sorry, I just couldn't milk that out of the data. I can
14 trust that first column in E M, I can trust it and say,
15 are they right? But no date was given to me. I couldn't
16 check it which is why I went to eligibility first.

17 Q. Well, whatever you went to first --

18 A. That's the best I could do.

19 Q. I'm sorry, the court has to make a determination here
20 as to whether Quinnipiac was engaged in manipulation of
21 the roster numbers, okay? Let's be very blunt about it.
22 And you're serving as an expert witness to give us your
23 analysis of the rosters. You've been serving as expert
24 for a year, correct?

25 A. Go ahead.

1 Q. Excuse me. What can you point to to tell this court
2 that you found any indication with respect to the men's
3 rosters now, that any single team, the roster number that
4 Quinnipiac indicates in its documents, was manipulated or
5 less than you believe it should have been as of the
6 beginning of the season?

7 A. A specific policy which limited the men to a cap,
8 which was different from a standard applied to women and
9 the women had a minimum threshold that they had to have.
10 So that in and of itself was a discretionary policy that
11 depressed the size of the men's teams and inflated the
12 size of the women's teams and that's what I pointed to as
13 manipulative.

14 Q. Is that the best answer you can give to my question?

15 A. Yeah, I think.

16 Q. Now, women's teams, what evidence can you point to to
17 show the court that any women's and any women's team,
18 there were athletes who were included in the roster as of
19 the first day of competition by Quinnipiac but were cut
20 from or quit the team immediately thereafter?

21 A. Say it again.

22 Q. What evidence can you point to based on your analysis
23 of the roster information as to any women's team where
24 athletes were included on the roster by Quinnipiac as of
25 the first day of competition and then either cut or quit

1 the team immediately thereafter?

2 A. I believe I went over one example.

3 (Pause)

4 Women's field hockey, Mucci, who was cut after the
5 first date of competition and I recommended an adjustment
6 in that.

7 Q. What was the name of that --

8 A. M-U-C-C-I, Mucci?

9 Q. Did you know that Mucci was a foreign athlete from
10 Italy and the university was trying to get her
11 eligibility. She was able to practice with the team for
12 the first one and-a-half months but then ultimately was
13 ruled ineligible by the NCAA? Did you see that
14 information in the emails that you reviewed?

15 A. No, I only saw that she was cut on 10/15.

16 Q. So you don't know that she was cut because she was
17 declared ineligible by the NCAA?

18 A. Usually it was in EE status; it was not cut.

19 Q. If you assume what I was telling you was correct,
20 would that remove the red flag you have on Mucci?

21 A. Yes, it would.

22 Q. Okay. Anybody else where you feel there was some
23 improper indication that women were cut from or quit teams
24 right after the first day of competition?

25 A. Okay, ask -- the coach's -- okay. So in the case of

1 women's ice hockey, all right?

2 Q. Right.

3 A. There was an email from this coach wanting to cut
4 these kids and everyone of them as I say just not to
5 count. And he wasn't allowed to cut them until after they
6 had completed the -- he wasn't allowed to do it.

7 Q. That's that's what you think that email said?

8 A. Yes.

9 Q. Did you see the email or did somebody describe it to
10 you?

11 A. No, I have this email.

12 Q. Okay. Did you know that your attorneys asked to
13 speak to the women's ice hockey coach last week?

14 A. Yes.

15 Q. Do you know after they spoke to him, they decided
16 they would not call him as a witness in the case?

17 A. I do not know that.

18 Q. Did the attorneys tell you what the ice hockey coach
19 told them?

20 A. They said that he did not reiterate what he said in
21 his email, and that's why it's red flagged and that's why
22 I've tried to separate this column so that the court can
23 absolutely decide not to use it if it doesn't want to.

24 But I'm pointing out what I was concerned with.

25 Q. All right, but just to go back to my question --

1 A. Sure.

2 Q. Dr. Lopiano, let's start with Stacy Kmill on the
3 women's ice hockey team. The first day of competition for
4 the --

5 A. Wait, wait. What's her name?

6 Q. Stacy Kmill?

7 A. Are you on ice hockey? I'm at field hockey, I'm
8 sorry. Now I'm on ice hockey. Stacy Kmill.

9 Q. Do you see Stacy Kmill?

10 A. No, I don't see her. How do you spell it?

11 Q. K-M-I-L-L?

12 A. I don't see her.

13 THE COURT: She's just past halfway down the
14 women's ice hockey. It starts with a K, not a C.

15 A. Sorry, sorry. Okay, got it.

16 Q. Now the women's ice hockey team, the first day of
17 competition is at the end of September, right?

18 A. Correct.

19 Q. And Stacy Kmill was deleted from the team on April
20 fifth, right?

21 A. Correct.

22 Q. You know she had a full scholarship?

23 A. No.

24 Q. You saw, you had the list of scholarships, didn't
25 you?

1 A. Well, are you asking me do I recall it? I --

2 Q. Well, when you analyzed those numbers would it make
3 any difference to your analysis, Dr. Lopiano, if I told
4 you that Stacy Kmill had a full scholarship; she was on
5 the team the entire championship season and competed in 34
6 games?

7 MS. GALLES: I would just say objection,
8 foundation.

9 MR. BRILL: I'm asking if that would make a
10 difference to her answer.

11 THE COURT: I'll allow it.

12 BY THE WITNESS:

13 A. That's a fair question so say it once more.

14 BY MR. BRILL:

15 Q. Would it make a difference to you --

16 A. I'm not trying to make it hard for you. You speak
17 quickly and I'm trying to make sure I understand your --

18 Q. I'll try and slow down. That's fair.

19 A. That's okay.

20 Q. Would it make a difference to you if you were aware
21 Ms. Kmill was on full scholarship?

22 A. Yes.

23 Q. She was on the team the entire time, the championship
24 ice hockey season?

25 A. Yes, it would.

1 Q. And she competed in 34 games?

2 A. Yes.

3 Q. There's nothing suspicious about her --

4 A. I agree.

5 Q. Would it make a difference to you, let's look at
6 Brenda Poultry (ph) another one of your red flags, on ice
7 hockey?

8 A. Okay.

9 Q. Would it make a difference to you if you knew that
10 she was also on full scholarship? That she competed in 37
11 games? And she was on the team the entire championship
12 season?

13 A. Yes, it would.

14 Q. Nothing wrong with that, right?

15 A. That is correct.

16 Q. And would it make a difference to you if I told you
17 that both, that Jessica Puieg, P-U-I-E-G, who was deleted
18 from the team on April fifth actually competed and was on
19 the team the entire championship season?

20 A. Yes, in general I would -- yes, the answer is yes.

21 Q. And Christina -- I'm sorry. And Katharine Colucci
22 (ph) competed, was on the team and competed the entire
23 championship season?

24 A. Yes, I would make those adjustments.

25 Q. And, in fact, none of those people who were deleted

1 from the ice hockey team were deleted or cut at any time
2 close to the first day of competition, isn't that true?
3 The first day of competition being in September and they
4 were cut from the team in April?

5 A. That is true. Fenoia (ph) is not one of those people
6 who you mentioned in terms of who had participated, right?

7 Q. I left her out, and would it make a difference to you
8 if you knew that Christine Fenoia actually spent at least
9 the first part of the season practicing with the team even
10 though she did not compete?

11 A. It says here she spent the whole time.

12 Q. Excuse me?

13 A. It says here she spent the whole time and the reason
14 why I red flagged it was because the coach wanted to cut
15 her and they were forced to keep them on the team, and I
16 don't know what else to tell you. That the red flag notes
17 are my, you know, opinions in the third column which is
18 the most, which are the opinions you should most question.
19 And I fully admit two and what I try to do in column three
20 was because I was looking at Exhibit L and, you know,
21 concerned about this use of the policies, the use of --
22 you know, the numbers were getting really, whatever. I
23 just tried to raise these issues as red flags. So I'm
24 perfectly, you know, happy for the court to just weigh
25 that for exactly what it is. Your information and my

1 understandings. That's fine.

2 Q. When you started to find these red flags did you ask
3 the attorneys for the plaintiffs to see if you could
4 actually talk to the coaches in the last two weeks?

5 A. I just got all this stuff on Wednesday. And here was
6 the court date.

7 Q. You got what stuff on Wednesday?

8 A. I got the answers to all my questions, was able to do
9 my analysis on Wednesday because the meeting with the
10 compliance person to clear up all my questions wasn't
11 until Monday.

12 Q. So the answer is --

13 A. I was out of town, I could not even get to this until
14 Wednesday. And in preparing for court, I didn't -- I
15 thought there was nothing else we could do at that point.

16 Q. Would it help you at this point to talk to some of
17 the coaches to clarify some of the red flags that you
18 have? You know that Quinnipiac has offered from day one
19 to make any of the coaches available to the plaintiffs for
20 interviews or depositions; you're aware of that, right?

21 A. If the court would like me to do that, I'd be happy
22 to do that but how did I know what question to ask them?
23 I mean --

24 Q. I can't tell you that but --

25 A. I didn't have anything to go on until Wednesday and I

1 could have, should have but I didn't have anything to go
2 on until Wednesday and I was looking at giving you a very
3 light supplemental, so I mean I'm sorry if I didn't pull
4 out all the plugs or try to.

5 Q. You would agree this is a very important case?

6 A. Absolutely.

7 Q. Both to the plaintiffs and to the defendant, correct?

8 A. Absolutely.

9 Q. Any additional information you need to make sure that
10 your report is correct, you'd like to have that
11 information, wouldn't you?

12 A. If the court allows time for it, sure, but that
13 wasn't a possibility. I did the best I could and I am,
14 I'm going repeat this again. That because of my level of
15 confidence of C, I have completely separated that out,
16 completely been transparent with it and perfectly willing
17 to hear your criticism of it or correction of it. I make
18 no qualms about that.

19 Q. Okay. Dr. Lopiano, just to make sure we've covered
20 it, is there any other team that you can point to where
21 you believe there was evidence that you discovered of
22 women who were included on the opening day roster in
23 effect to pad the roster or inflate the roster and then
24 shortly thereafter either deleted from the team or cut
25 from the team?

1 A. See, you're putting two pieces of the puzzle together
2 and they are independent variables and I'll answer them
3 separately. That it is a composite look at the data, so
4 you have to look at your, the QU numbers in the, in E M,
5 then you have to look at the average squad sizes to see
6 whether the policy itself created this inflation. It
7 wasn't necessarily the way I counted that creates
8 inflation, or whether you just count somebody after or
9 count somebody before. The inflation is created alone
10 with this differential policy about cap and floor. So
11 that alone is a problem if you see that you don't match up
12 to your numbers, your average squad size numbers for
13 conference or for national.

14 Q. Is that the best answer you can give to my question
15 at this time?

16 A. Yes, the best I can do.

17 Q. Now, Dr. Lopiano, there was nothing in the OCR
18 definition of a participant for determining prong one
19 compliance, there's nothing in that definition that
20 requires that an athlete actually needs to engage in
21 competition to be counted as a participant, correct?

22 A. Correct.

23 Q. In fact, OCR guidance specifically says that
24 participants include both walk ons and athletes who
25 practice but may not compete, correct?

1 A. Correct.

2 Q. And OCR complains that even athletes who do not
3 compete receive numerous benefits and services of being on
4 the team?

5 A. And I so stated, correct.

6 Q. Including intangible benefits of being a member of a
7 team and participating in a whole variety of ways.

8 Correct?

9 A. Absolutely.

10 Q. And isn't that one of your principal focuses for many
11 years as an advocate for increasing women's athletic
12 opportunities that it's important to get the life lessons
13 of being on a team?

14 A. Absolutely, and those are the principal bases for my
15 reasons that I laid out for you and I considered at that
16 point.

17 Q. And now, there's nothing in the OCR in definition of
18 participant that requires an athlete to compete at a
19 particular level of performance, is there?

20 A. The Title IX requirement for giving the athlete the
21 same opportunities as men to participate at a particular
22 level is there. It is not in this count section. It's --
23 levels of competition is separate from the participation,
24 how you count. You have two requirements under prong one.

25 Q. Okay. But in order to be counted as a participant --

1 A. Right.

2 Q. Let's say in order to count a member of a track team
3 as a participant, do you have to run a certain time in the
4 400-meter dash or can you count the slowest runner as well
5 as the fastest runner?

6 A. No, it doesn't depend on performance, no. You have
7 performance in competition all the time.

8 Q. And similarly there's no such requirement in the
9 definition for participant for EADA purposes, correct?

10 There's no --

11 A. Okay, wait, wait. You're confusing me with your
12 question. So say --

13 Q. There's no requirement for -- the purposes of EADA
14 counting and reporting, there's no requirement that a team
15 member satisfy a certain level of performance?

16 A. No.

17 Q. And, in fact, it's quite common for teams to include
18 athletes who will never compete, correct?

19 A. Oh absolutely.

20 Q. For example, many men's football teams have well over
21 100 athletes, even though the NCAA limits division I
22 schools to 85 football scholarships, correct?

23 A. Yes.

24 Q. In fact, you yourself have referred to the 120th man
25 on a football team as the tackle dummy, right?

1 A. I was just going to say that. You beat me to it.

2 Q. And that 120th man is probably never going to see the
3 playing field, is he?

4 A. That is right.

5 Q. But he receives coaching insurance, practice time and
6 all the other accouterments of being on the team, right?

7 A. Yes.

8 Q. And you would consider being a tackle dummy on the
9 football team as a legitimate varsity experience, wouldn't
10 you?

11 A. If he participated in the whole season, if he did all
12 those things, that is a legitimate experience.

13 Q. And in your report, and I believe in your testimony,
14 you've talked about reasonable squad sizes, correct?

15 A. Correct.

16 Q. And you suggested, actually in your report you state
17 that schools that fully fund a sport with large travel
18 budgets and large coaching squads may reasonably carry one
19 or two more athletes than schools that have limited
20 budgets and high coach to athlete ratios, do you remember
21 that statement from your report?

22 A. I don't but I would not disagree with that statement.

23 Q. But isn't it true that squad sizes of a given sport
24 often vary by more than one or two athletes at given
25 schools?

1 A. Squad sizes do vary from school to school.

2 Q. And in fact --

3 A. And if you're saying do they, do they vary by more
4 than one to two, statistically I would say they probably
5 would, but all you'd look at is averages in terms of
6 trying to make some kind of a comparison.

7 Q. Well, let's take a look at the NCAA average. The
8 NCAA squad sizes that you attach as an exhibit to your
9 report, I believe this is Plaintiff's Exhibit 103?

10 A. What year is this?

11 Q. This is what you attached to your report. I believe
12 it's 2008, 2009, if you look at the top. And so just to
13 run down --

14 A. So this is, so this is --

15 Q. Can you see that from where you are?

16 THE COURT: It's Exhibit D to your original
17 report.

18 THE WITNESS: Thank you.

19 A. Okay, got it.

20 Q. Well, I just want to review with you that the squad
21 sizes for these women's teams range enormously; don't
22 they? For example, women's field hockey from 17 to 28.
23 Women's golf, from five to eleven. Women's lacrosse, from
24 15 to 30. Women's soccer from 21 to 30. Women's
25 softball, from 14 to 29. And so on. It's going town to

1 outdoor track which ranges from 17 to a high of 55.

2 A. Right. And your question is?

3 Q. So my question is you cannot tell just from the size
4 of a team whether it's providing genuine athletic
5 opportunities to all athletes on the team, can you?

6 A. No, as I said, you have to a look at the total
7 situation and when you have a policy and cap and floor and
8 then you have averages which are out of sync and that's
9 the only point I'm making, I think that's a valid thing to
10 look at.

11 Q. From now on, I'd like --

12 A. You can tell by my 151, by looking at those averages
13 and the two numbers, the court can make its assessment
14 whether or not there's inflation or too small.

15 Q. From this point on, Dr. Lopiano, I'd like you to
16 answer yes or no to the extent that you can.

17 A. On every question?

18 Q. Yes.

19 A. Okay.

20 Q. The NCAA average squad sizes are just averages,
21 correct?

22 A. Yes.

23 Q. You don't know the range of squad sizes that schools
24 have reported for any given sport to the NCAA, have you?

25 A. No.

1 Q. Some deviation from the average one way or the other
2 would be expected, correct?

3 A. Yes.

4 Q. And not every school has the same squad size in every
5 sport, do they?

6 A. Try it without the negative.

7 Q. Schools have different size squads of the same sport,
8 correct?

9 A. Yes.

10 Q. Would you agree that as long as a school is providing
11 women on its teams with genuine participation
12 opportunities within the meaning of the OCR guidelines,
13 there is nothing wrong with a school providing greater
14 participation opportunities in a sport than the NCAA
15 average?

16 A. There's two considerations -- I would not agree with
17 that.

18 Q. You would not -- I've asked for those questions to be
19 answered yes or no.

20 THE COURT: That's fine.

21 A. Okay.

22 Q. Now, schools report squad sizes to the NCAA based on
23 the first date of competition, correct?

24 A. I do not know that.

25 Q. I'm showing you an excerpt from Exhibit GI which is

1 the current NCAA work sheet, in particular page 23.

2 A. G I?

3 Q. I guess, G I.

4 A. And this is, I have a Big Forest Open -- this is
5 not -- I have the times of the meet.

6 BY MR. BRILL:

7 Q. I'm sorry, it's G K. I apologize. You need any
8 assistance finding the exhibit?

9 A. What am I looking for within this document?

10 Q. It's on page 23.

11 A. Twenty-three?

12 Q. Yes.

13 A. Got it.

14 Q. Okay.

15 A. It says --

16 Q. Are you familiar with this?

17 A. Does it say table one, participation?

18 Q. Yes. Are you familiar with this NCAA work sheet?

19 A. I've seen them before.

20 Q. Well, just so the record is clear, the NCAA has its
21 own reporting requirement separate from EADA, correct?

22 A. Yeah, the NCAA requires you to complete these, all
23 NCAA work sheets from which the EADA is derived so you
24 don't have to do two separate ones.

25

1 Q. Well, actually you do have to do two separate ones
2 now, isn't that --

3 A. But this is your work sheet.

4 Q. And the NCAA report is filed January 15th of each
5 year, is that correct?

6 A. I --

7 Q. You don't know?

8 A. No.

9 Q. But you agree that the NCAA form defines
10 participation as a student athlete as of the date of the
11 varsity team's first scheduled contest, is either listed
12 as team member or practices with the varsity team and
13 receives coaching or receives athletically related aid,
14 but those factors are measured as of the first date of
15 competition, correct?

16 A. Yes.

17 Q. So would you agree with me that the average squad
18 sizes published by the NCAA are based on first day of
19 competition squad sizes?

20 A. Yes, that's exactly what it says here.

21 Q. So you didn't compare, your comparison of total
22 participation versus the average first day squad size is a
23 meaningless comparison, isn't it? It's apples to oranges?

24 A. I am trying to -- what I tried to do is say these are
25 actual real participants, right? And to compare that to

1 an average squad size.

2 Q. But some of those participants, as you said, joined
3 the teams during the season after the first day of
4 competition, right?

5 A. That is correct.

6 Q. And that would be the case on many other, many NCAA
7 teams, correct, across the United States?

8 A. So you are saying that there is a statistical error
9 inherent in using NEC or NCA squad list and comparing it
10 to a participant count.

11 Q. I'm saying that you're comparing two things that are
12 not comparable.

13 A. I think you are agreeing with what I just said,
14 right?

15 Q. I don't know if there's a question pending but do you
16 recognize --

17 A. I don't either. I'm just supposed to be saying yes
18 or no.

19 Q. Do you recognize a discrepancy between your count --

20 A. Yes, I understand your point completely. I
21 understand your point completely, yes.

22 Q. Thank you. And in your report, you say that a
23 recruited athlete with Division I skills does not want to
24 waste valuable NCAA limited practice time --

25 A. Where are you now?

1 Q. On page eight of your report, I'm sorry.

2 A. Now my original report or my old one?

3 Q. Your original report.

4 A. All right.

5 (Pause)

6 Q. Pages aren't numbered, unfortunately.

7 A. I apologize for that.

8 Q. But --

9 A. This is the page that starts with the schools
10 carries?

11 Q. It's the last sentence of the first paragraph right
12 above where the heading says prong two on page eight --

13 A. Last sentence of the first paragraph?

14 Q. Right, you see, did you not, that recruited athlete
15 with division --

16 A. Wait, I'm not with you.

17 Q. May I approach the witness and point it out to her,
18 Your Honor?

19 A. Thank you.

20 THE COURT: You don't need to ask.

21 Q. (Indicating)

22 A recruited athlete with Division I skills. Do you
23 see that sentence?

24 A. Yes.

25 Q. Okay. Do you want to read that into the record?

1 A. A recruited athlete with Division I skills does not
2 want to waste valuable NCAA -- a recruited student athlete
3 with Division I skills does not want to waste valuable
4 NCAA dash limited practice time training with students
5 with substantially less skill who will never compete.

6 Q. Is that assertion based on any research by you?

7 A. This is --

8 Q. Yes or no. Did you do any research before you made
9 that assertion?

10 A. Okay, you're confusing me, yes or no. Okay, so it
11 was not derived from research, only experience.

12 Q. Does it apply to the star quarterback on a football
13 team who was forced to share his practice time with the
14 tackle dummy?

15 A. It depends on the context.

16 Q. Isn't it true, Dr. Lopiano, that most Division I
17 teams and all sports have a range of athletes from stars
18 to the starters to the substitutes down to the bench
19 warmers; isn't that a common pattern?

20 A. It is but I hope you're looking at this, counselor,
21 this statement as the general introduction and not a
22 characterization of the specific fact situation, right?
23 You're not --

24 Q. Many teams -- are you finished with your answer?

25 A. Yes.

1 Q. Many teams have walk ons who will compete
2 infrequently, if ever, right? As well as scholarship
3 players, correct?

4 A. Yes.

5 Q. And OCR, as you testified earlier, recognizes the
6 significant benefits to those nonrecruited walk on
7 athletes who do not compete but otherwise fully
8 participate on a team, correct?

9 A. That is correct.

10 Q. And incidentally, you talked about how people are
11 recruited; do you know of any Quinnipiac University
12 athlete of any sport who is recruited from the dining hall
13 or the physical education classes?

14 A. I do not specifically by name, no.

15 Q. Now, your position as you stated is that indoor track
16 and field and outdoor track and field are always the same
17 sport, is that correct?

18 A. Correct.

19 Q. In fact, you testified at your deposition in this
20 case that indoor and outdoor track is always considered
21 the same sport, no ifs, no ands and no buts; do you
22 remember that testimony?

23 A. Correct.

24 Q. But you are aware that the NCAA treats indoor track
25 and field and outdoor track and field as separate sports,

1 aren't you?

2 A. Yes, for different purpose.

3 Q. Conducts separate championships in each sport?

4 A. Yes.

5 Q. Counts its sport separately for meeting minimum
6 number of sports sponsorships necessary to qualify as
7 Division I? It counts its sports separately for purposes
8 of meeting minimum number of sports sponsorships necessary
9 to qualify as a Division I, two or three school, isn't
10 that correct?

11 A. Yes, for those purposes.

12 Q. And, in fact, Dr. Lopiano, isn't it true that the
13 NCAA bylaws which you refer to --

14 A. I'm sorry, the NCAA --

15 Q. The NCAA bylaws, provide that cross country and
16 indoor track and field and outdoor track and field shall
17 be considered as separate sports?

18 A. NCAA, not Title IX.

19 Q. Is that what the NCAA bylaws provide, Section
20 14.2.3.3?

21 A. The NCAA; not talking Title IX.

22 Q. But that is what the NCAA bylaws provide, correct?

23 A. Yes.

24 Q. And you were aware of that, correct?

25 A. Yes absolutely, because it's for a different purpose.

1 The counting, what the NCAA is trying to do is to --

2 Q. No no, I'm not asking you what the NCAA is trying to
3 do, Dr. Lopiano. I'm asking you very different specific
4 questions, okay?

5 A. Sorry.

6 Q. Now, the EADA also provides for separate reporting of
7 cross country indoor track and field and outdoor track and
8 field, correct?

9 A. Correct.

10 Q. Did you consider the fact that --

11 A. Uhm -- it allows -- I would like to look at the
12 EADA -- they have changed the EADA report to move from
13 separate reporting to combine the reporting and I would be
14 more comfortable looking at the EADA report currently to
15 remind myself, you know, how that's put.

16 Q. We'll come back to that. So, Dr. Lopiano, you don't
17 consider it even an if, an and or a but that the NCAA
18 considers track and field, indoor and outdoor, to be
19 separate sports?

20 A. Absolutely not. They are for separate purposes.

21 Q. Not even an if, and or but?

22 A. That's right.

23 Q. Now, in your report, I'm not sure if this was in your
24 testimony but it's in your report; you said this, that if
25 Quinnipiac does not enter athletes into most events, it's

1 not operating a track and field team, let alone a varsity
2 team; do you recall saying that?

3 A. This is in my report? Can you point it out to me?

4 Q. Is this your position as you sit here today, that if
5 Quinnipiac does not enter athletes into most events --

6 A. Could you tell me whether I said that in my report?

7 Q. Well unfortunately --

8 A. No.

9 Q. -- I deleted the references to your report from my
10 outline because I didn't think it was going to be in
11 evidence. I can find it later. But just listen to my
12 question and see if you agree with it as you sit here
13 today or not.

14 If Quinnipiac does not enter athletes into most
15 events at a track and field meet, is it operating a track
16 and field team, let alone a varsity team?

17 A. I could not agree with the statement you're saying
18 without it being in context. That, it's unfair of you to
19 pull that out of an analysis of QU's legitimacy and
20 whether it's really running a track program. That's one
21 little piece of the puzzle.

22 Q. I'm asking you that piece of the puzzle.

23 A. Because if you had all -- runners, distance runners,
24 and nobody was in a field event and nobody as in
25 traditional -- they were, nobody's is was in any of the

1 traditional other events, it could bring into question
2 whether or not you were really conducting your cross
3 country nontraditional season in your, through your indoor
4 and outdoor which the NCAA allows, and that was the
5 context in which I was trying to make those statements.

6 Q. Well, let me just ask you a yes or no question so
7 it's clear. Is it your position that if Quinnipiac does
8 not enter athletes into most events at a track and field
9 meet that it's not operating a legitimate track and field
10 team, yes or no?

11 A. I repeat that I cannot --

12 Q. Can you answer that yes or no?

13 A. I cannot answer yes or no because it is out of
14 context.

15 Q. Well okay, that's fine you can stop there,
16 Dr. Lopiano. Yes or no or I cannot answer yes or no is
17 fine.

18 A. I cannot answer yes or no.

19 Q. Didn't you, you gave testimony in the case of
20 Mansurian (ph) against University of California Davis. Do
21 you recall that case?

22 A. I recall having been an expert.

23 Q. And you recall giving deposition testimony in that
24 case?

25 A. It was sometime ago. You'll -- do I recall exactly

1 what I said? If you show me I will try to recall.

2 Q. Do you remember saying in Mansurian -- incidentally,
3 Mansurian involved a claim by three women varsity
4 wrestlers that they had been improperly denied the
5 opportunity to continue as varsity wrestlers, correct?

6 A. Correct.

7 Q. And didn't you testify in that case that a school
8 could have a viable competitive varsity track team or
9 wrestling team with one athlete?

10 A. Because of wrestling being able to compete one on one
11 according to weight class, yes.

12 Q. And you said a track team could have as little as one
13 athlete, correct?

14 A. To enter a meet.

15 Q. Could have a varsity track team with with one
16 athlete, correct, wasn't that your testimony?

17 A. Yes.

18 Q. But it's not possible for a single track and field
19 athlete to compete in the majority of events at a meet, is
20 it? Not even Bruce Jenner could do that?

21 A. How does that, how does that relate? I'm -- I'm
22 trying to get the context of your question.

23 Q. Is it possible for a single track and field athlete
24 to compete in the majority of the events at a track and
25 field meet? Yes or no.

1 A. I'm not getting the connection.

2 Q. Well, maybe the judge gets it.

3 A. I'm one person, would I ever put that one person into
4 all track and field events; is this your question? As a
5 coach probably not.

6 Q. It's not physically possible?

7 A. But it's not a team. You're taking it out of
8 context. I'm talking about to be considered varsity team,
9 not whether one athlete can enter how many different
10 events.

11 Q. Well, as you surely know, do you not, the NCAA
12 requires a minimum of 14 athletes on an indoor or outdoor
13 track and field team, correct?

14 A. Right.

15 Q. The NCAA does not require that a school participate
16 in both track and field events, correct?

17 A. Say that again? Sorry.

18 Q. Yes or no, the NCAA does not require that a school
19 participate in both track and field events?

20 A. Correct.

21 Q. The NCAA does not require that a school participate
22 in any minimum number of events or any number combination
23 of events to sponsor an indoor or outdoor track and field
24 team, correct?

25 A. It does. No, it does.

1 Q. What's that?

2 A. The NCAA does.

3 Q. I didn't hear the answer, I'm sorry?

4 A. The NCAA does.

5 THE COURT: The answer is no.

6 Q. Can a school sponsor a team, let's say a track team,
7 with fewer than 14 athletes for the purposes of Title IX
8 even if it didn't comply with the minimum participation
9 requirements of the NCAA?

10 A. Okay, say that again.

11 Q. Okay. Let's say I'm a small school, I only have ten
12 women that are coming out for track and field, so I want
13 to operate at a track and field team with ten women and
14 count them for OCR purposes even though it's not a, it's
15 not a NCAA compliant track team.

16 A. So they don't play in the minimum number of contests
17 with the NCAA?

18 Q. Right.

19 A. Whatever, it's just can I participate in this sport.

20 Q. And count --

21 A. And entering into all these events, yes.

22 Q. You can count it for OCR purposes, correct?

23 A. I think you have to look at the experience itself to
24 make sure it's legitimate. Like you're doing
25 hypotheticals right now and out of context and it's making

1 me nervous. Because if you only participated in one or
2 two events and it wasn't comparable and this whole
3 counting or legitimacy under Title IX, without looking at
4 the totality of the fact situation and saying I looked at
5 this, I looked at this, that's a little general --

6 Q. I'm sorry, I'll try to get specific if that's easier
7 for you, Dr. Lopiano. In your supplemental report that
8 you testified about this morning, you looked at one
9 possible way of counting Quinnipiac's track athletes as
10 only counting the 18 women who participated on the cross
11 country team, right?

12 A. That was one of the -- last one.

13 Q. The that was one of your options?

14 A. The last one, yes, I believe, yes. So you're talking
15 about on the conclusion page, you're talking about if they
16 only count cross country, the very last one with my
17 signature.

18 Q. Right, but you know from reading the deposition of
19 the track coach there were 12 other women who were not on
20 the cross country team who were on the indoor and outdoor
21 track and field team who participated, practiced and
22 actually ran events throughout the entire indoor track and
23 field season and the outdoor track and field season,
24 correct?

25 A. Are you --

1 Q. I'm asking if there were 12 women who were in the, on
2 the cross country team but actually participated, ran
3 races consistently in the indoor track and field season,
4 the outdoor track and field season?

5 A. Yes.

6 Q. Well, can you explain any possible basis to exclude
7 those 12 women from your count? Why is that even an
8 option for the court, Dr. Lopiano?

9 A. Because it's my understanding that I was not the
10 expert on track, and that there, that these four options
11 would be considered by the court and I was asked to give
12 my numbers for each of these options so that's why I put
13 it there.

14 Q. Who gave you the options you were to address?

15 A. Legal counsel asked me for my opinion.

16 Q. So the same counsel who asked you to consider an
17 option not counting 12 athletes who actually competed
18 throughout two seasons, that's the same counsel that told
19 you to leave out or didn't mention to you that you should
20 look at competitive cheer?

21 A. Whoa, whoa. That's a very convoluted statement. So
22 say it again, just say it slowly.

23 Q. Is it the same counsel --

24 A. Same counsel.

25 Q. -- who advised you not to look at the impact of

1 including competitive cheer on your calculations --

2 A. No, no, counsel did not advise me to do that. I say
3 competitive cheer is not a sport. Counsel did not advise
4 me that.

5 Q. That was your own decision?

6 A. That is right.

7 Q. But --

8 A. I didn't, I'm not passing judgment on these four, all
9 right? I'm saying these are all the possibilities I think
10 that are going to be raised were raised within the
11 preliminary injunction that I wanted to make sure you had
12 complete choices here. It was just a, you know, a way for
13 me to try to be comprehensive and not to dictate, you
14 know, by narrowing options.

15 Q. But what --

16 A. That's all.

17 Q. You expect your options to be reasonable ones,
18 wouldn't you?

19 A. Absolutely.

20 Q. Well, what possible explanation could there be not to
21 count, even if it's just once, not to count 12 women who
22 had varsity participation experience on both the indoor
23 track team and outdoor track team but weren't cross
24 country runners?

25 A. The explanation is simply that it's possible and I

1 don't know if a subsequent expert, right, is going to
2 characterize those athletes the way you just characterized
3 them.

4 Q. But you read in Coach Martin's testimony, right?

5 A. But you're trying to milk a stone here.

6 THE COURT: Let me interject here there's no
7 point in the two of you arguing with each other.
8 Counsel's point is there's 12 women who aren't included in
9 the report. I got that.

10 MR. BRILL: I'll move on, Your Honor.

11 THE COURT: Okay.

12 BY MR. BRILL:

13 Q. Do you know Dr. Athena Yiamouyiannis?

14 A. I do.

15 Q. And you coauthored some books with her or articles,
16 haven't you?

17 A. I do not know.

18 Q. Would you consider --

19 A. She's a colleague I served on, you know, numerous
20 committees with her and organizations. I don't remember
21 whether I coauthored anything with her.

22 Q. Would you consider her to be an expert on Title Nine
23 gender equity issues?

24 A. Yes, I think she's quite capable.

25 Q. Are you familiar with the book chapter authored by

1 her on gender equity sports sponsorship and participation?

2 A. Not offhand.

3 Q. Well, let me show you --

4 A. When was it published?

5 Q. In 2009.

6 MR. BRILL: I'm going to come back to that, Your
7 Honor. I'm trying to locate the chapter now.

8 BY MR. BRILL:

9 Q. Let me go onto another topic. That's roster
10 management. Would you agree, Dr. Lopiano, that roster
11 management can be a useful tool for institutions -- I'm
12 going to ask these questions yes or no, that's my first
13 few questions, if you could try. Would you agree that
14 roster management can be a useful tool for institutions to
15 satisfy prong one of the three part test?

16 A. Yes.

17 Q. Would you agree that roster management can properly
18 include both limits on the size of men's teams and
19 increasing the size of women's teams?

20 A. As long as the standard is equally applied and that
21 would be a desirable result. As long as the policy
22 standard were applied equally in terms of caps and
23 obviously women aren't to under represent, or over
24 represent, the intent of the cap policy would not be to
25 artificially depress either side but allow it to go to its

1 equal number.

2 Q. That was a long way of saying yes or no. I asked
3 that these questions be answered yes or no.

4 I have one more yes or no question for you. Would
5 you also agree or would you agree that roster management
6 is permissible as long as it does not hurt men's teams to
7 the point that they are not viable or so long as it does
8 not increase women's teams to the point that they do not
9 really have a viable varsity athletic experience, for
10 example, if the added women do not receive coaching, do
11 not compete, do not receive uniforms, et cetera?

12 A. Not according to the example, the extreme example.
13 Your beginning premise as a generality was pretty decent
14 but your example of completely and extreme position being
15 completely without coaching, that's not how it happens.
16 It happens that the, every athlete has a lower coach
17 instructional time when there are more athletes. It's not
18 a complete absence of teaching or the complete absence of
19 something.

20 MR. BRILL: Your Honor, I'm getting frustrated.
21 I would appreciate it if would you ask the witness when I
22 do ask for a yes or no answer if she confine herself to
23 yes or no. It's taking up my time on cross examination.

24 THE COURT: You should, if you can answer yes or
25 no or I can't answer yes or no.

1 BY MR. BRILL:

2 Q. Dr. Yiamouyiannis (sic), the three sentences that you
3 did just read were taken verbatim from your expert report
4 in the Mansurian case, is that not true?

5 A. I don't know that.

6 Q. Let me show you excerpt from your report and see if
7 you recognize it. This was the cover that is the case in
8 which you submitted an expert report?

9 A. Yes, it is.

10 Q. And your discussion of roster management is on the
11 next page?

12 A. Could I see that little section?

13 Q. Yes, sure.

14 A. Could do I have to read from here? Okay.

15 Q. I think we have an extra copy.

16 A. I think I'm doing okay.

17 Q. I was given this by the plaintiff so I assume they
18 have a copy. It's Dr. Lopiano's expert report in the
19 Mansurian case. I don't want to offer the whole report, I
20 just want to call the witness' attention to the page that
21 I was referring to on roster management.

22 (Hands witness.)

23 A. Thank you.

24 Q. I just want you to read that and without going into
25 detail because we have the document, whether that report

1 that you gave in Mansurian accurately reflects your
2 position on roster management.

3 A. If you take the entire section in its totality it
4 does but I am hesitant to agree with, without reading the
5 whole thing, to agree with one statement out of context
6 and I think that's only fair.

7 Q. That is fair.

8 MR. BRILL: And, Your Honor, I'll offer that
9 section of the report as the next defendant's Exhibit.

10 MS. GALLES: No objection.

11 THE COURT: All right, that's fine.

12 THE CLERK: That's G L.

13 MR. BRILL: That's G L, thank you.

14 THE COURT: You'll prepare an excerpt that
15 includes just the portion that you're offering?

16 MR. BRILL: Excuse me?

17 THE COURT: Can you prepare a copy that has only
18 the portion that you are offering?

19 MR. BRILL: Yes, that's what I handed to the
20 clerk and we'll make a copy.

21 MS. GALLES: Your Honor, we would object to
22 taking a snippet out of the report, Dr. Lopiano said if
23 you take the whole thing in context. We do not object to
24 the entire report coming in but if he's only going to take
25 out a small part --

1 THE COURT: I think he offered a section.

2 MR. BRILL: The entire section on roster
3 management, Your Honor.

4 THE COURT: If you -- do you object to the
5 section on roster management being --

6 THE WITNESS: I haven't seen it.

7 MS. GALLES: No objection if the entire report
8 comes in. In terms of the section on roster management,
9 we'd like to reserve.

10 THE COURT: Take a look. He's offered it so
11 take a look, see if you object.

12 MS. GALLES: I actually don't have a copy.

13 MR. ORLEANS: Could we look at a copy?

14 MR. BRILL: And Dr. Yiamouyiannis --

15 MS. GALLES: Dr. Lopiano.

16 BY MR. BRILL:

17 Q. Dr. Lopiano, thank you. I've now located the article
18 by Dr. Yiamouyiannis which is contained as Defendant's
19 Exhibit G C, if you would take a look at that.

20 MS. GALLES: Your Honor, if the entire portion
21 regarding roster management is what is being offered we
22 have no objection. We just don't want a small snippet.

23 THE COURT: So G L is full.

24 (Whereupon Defendant's Exhibit G L was marked
25 full.)

1 THE COURT: And you'll prepare, can you prepare
2 a non-highlighted copy of that?

3 MR. BRILL: Yes, Your Honor, sure.

4 THE COURT: That would be great.

5 BY THE WITNESS:

6 A. I have the exhibit.

7 Q. Have you located G C?

8 A. G C, I have it.

9 Q. Are you familiar with this article, the book chapter?

10 A. I can't say that I have. I haven't read the whole
11 thing but I can't say that I have.

12 Q. Let me show you an excerpt from it and ask if you
13 agree with your fellow expert, Dr. Yiamouyiannis. In
14 discussing the issue of sports participants, there she
15 says she talks about the duplicated count, unduplicated
16 count?

17 A. Could you just give me the page? Where is this?
18 Right here? It's easy for me to read here, so -- is
19 this --

20 Q. It's on, the page number's at the top, it's page
21 48 --

22 A. Okay, hold it. Okay, this has to do with the Equity
23 in Athletic Disclosure Act?

24 Q. Correct.

25 A. Okay, and your question?

1 Q. Why don't you take a moment to read that whole
2 paragraph on sports participants?

3 A. I'd like to read this whole section if I could.

4 Q. The whole section on sports participant you can read.

5 A. I'd like to read the whole section what it's talking
6 about.

7 (Pause)

8 All right, okay, and your question is?

9 Q. I want to know if you agree with her statement in the
10 paragraph on sports participants, actually the two
11 statements that I've highlighted, first duplicated count
12 is used for determining sport participation opportunities
13 at prong one of the three prong test. Do you agree or
14 disagree?

15 A. The EADA --

16 Q. Yes or no, Dr. Yiamouyiannis -- Dr. Lopiano, I
17 apologize.

18 A. You know you're really good because I can't even say
19 Athena's last name so I really -- it's good practicing.

20 Q. I simply want to know, yes or no, do you agree with
21 her statement that the duplicated count is used in
22 determining sport participation opportunities under prong
23 one of the three prong test?

24 A. Yes, for every sport.

25 Q. And did you also agree with her statement that this

1 means that an athlete competing in indoor track, outdoor
2 track and cross country would count three times for
3 determining a sport participation opportunities but only
4 once for purposes of assessing financial aid?

5 A. No, unless -- and I believe I said this before in my
6 testimony that you had the same teams for men and women
7 and it was a statistical wash.

8 Q. So your position is that how you count cross country,
9 indoor outdoor track and for cross country, indoor outdoor
10 track depends on whether the schools have both men's
11 teams in those sports and women's teams in those sports in
12 general, Dr. Yiamouyiannis --

13 A. Dr. Lopiano.

14 Q. Dr. Lopiano. I'm very sorry. Does your position
15 depend on whether a school has both men's and women's
16 teams in those sports?

17 A. Historically, my position does. When the, when there
18 are different assessments used for men's and women's multi
19 sport, multiple or --

20 Q. Would it raise -- I'm sorry, did you finish your
21 answer?

22 A. Yes, I did, thank you.

23 Q. Would it raise a red flag for you, Dr. Lopiano, if
24 you reviewing an EADA report for a school that eliminated
25 three men's sports and women's, and a women's sport in the

1 following year -- let me start this over again.

2 Would it raise a red flag for you if you were
3 reviewing an EADA report for a school that eliminated
4 men's cross country, men's outdoor track and men's indoor
5 track and eliminated a women's sport as well and the
6 following year reported zero male athletes who were track
7 and cross country and 133 women on the cross country and
8 track teams combined?

9 A. Yes.

10 Q. That would raise a big red flag for you, wouldn't it?

11 A. Yes.

12 Q. You would want to look into this and see what the
13 story was, wouldn't you?

14 A. Right. I would not be counting three sports in that
15 situation.

16 Q. Now, are you familiar with something called an NCAA
17 gender equity guide?

18 A. Yes.

19 Q. As a matter of fact I think you offered it as an
20 exhibit in connection with your testimony?

21 A. You're correct.

22 Q. At the preliminary injunction hearing, correct?

23 A. Correct.

24 Q. And that was published in 2008?

25 A. I don't recall.

1 Q. I believe that's Exhibit 25?

2 A. Do you want me to check that publication?

3 Q. If you want to look at it, yes. It's Plaintiff's 25.

4 A. It's plaintiff's --

5 Q. Plaintiff's 25?

6 A. I thought it was in -- okay.

7 Q. And are you familiar with the discussion of roster
8 management in the NCAA gender equity?

9 A. No, I can read it again if you point me where it is.

10 Q. On pages 180 and 181.

11 A. How much of this do you want me to look at?

12 Q. I just wanted to ask you if you were familiar with
13 the NCAA's position that the practice of adding spots to
14 current women's teams increases women's opportunities
15 without adding a brand new women's sport team which
16 carries a challenge of securing money for salaries for a
17 new staff, operating budget, and sometimes new facilities?

18 A. And your question is?

19 Q. Were you familiar with the fact that that is the part
20 of the NCAA's statement on roster management contained in
21 their gender equity?

22 A. I would object to taking, pulling that out and not
23 reading that from the very top and understanding what
24 roster -- how they are presenting roster management, when
25 previously over represented sex with all, with no limits

1 as to their participation typically men, and then you're
2 trying to raise opportunities for women you have limited
3 financial resources. Then by using the same cap for men
4 and women will be the same cap for men and women which
5 roster manages both in an equal basis, yes, those overly
6 represented athletes may have the, may be disadvantaged in
7 not having the opportunity to compete that they previously
8 had. I agree with that statement and that context.

9 Q. So you would agree with the final summary here that
10 in summary, if maximums for men and minimums for women are
11 truly fair, this practice can assist administrators in
12 predicting more accurately future expenditures in each
13 sport?

14 A. No.

15 Q. No, you don't agree with that?

16 A. No, I think it has to be a cap for both, not have
17 maximums and minimums, there should be caps without
18 floors.

19 Q. That is what I just showed you, you recognize is the
20 position of the NCAA in the gender equity guide?

21 A. That's their gender equity guide.

22 Q. Okay, I want to move onto the subject of competitive
23 cheer. You, at least in your report and I believe in your
24 testimony this morning, you said that -- I'm going to
25 refer to the sport as competitive cheer, do you understand

1 I'm not talking about sideline cheerleading?

2 A. I do.

3 Q. That in order for competitive cheer to be counted as
4 a sport, Quinnipiac would have to schedule, have to have a
5 full schedule of competition against other varsity
6 programs, is that your testimony?

7 A. It is one of the criteria we looked at.

8 Q. And you state that a competition against the club
9 team would not qualify the team as varsity, correct?

10 A. You'd have to look at all of those criteria in
11 totality. You couldn't say that any one of them was, you
12 know, this completely discriminates you, you have to look
13 at all of them.

14 Q. But you do say in your report the competition against
15 a team does not count in qualifying a team as varsity,
16 correct?

17 A. I explained this in my testimony. That you can have
18 anything you want on your schedule, that you don't see
19 that in Division I, and you -- it would be a -- if the men
20 don't have it and the women are forced to play lower level
21 competition, that that is the point of contention, in
22 terms of equal opportunity for women to have a varsity
23 experience. The men don't have, you know, club teams on
24 their schedules. You would look at that as a reason to be
25 concerned.

1 Q. Dr. Lopiano, let's talk about emerging sports for
2 men. Isn't it true, yes or no, that schools who sponsor
3 teams competing in emerging sport often compete in club
4 teams, yes or no?

5 A. Yes, it's the nature of emerging sports in fact at
6 NCAA, which cheerleading is not.

7 Q. Excuse me?

8 A. Which cheerleading is not.

9 MR. BRILL: Please, Your Honor, please ask the
10 witness not to volunteer statements. I asked her a
11 question and I didn't ask her whether cheerleading --

12 THE WITNESS: That was my --

13 THE COURT: All right, okay.

14 MR. BRILL: I'm sorry, it's becoming
15 antagonistic.

16 THE COURT: She understands. Next question.

17 BY MR. BRILL:

18 Q. You recognize, don't you, that the NCAA rules with
19 respect to emerging sport expressly require there be 20 or
20 more varsity teams or competitive club teams that exist on
21 college campuses in order for a sport to qualify as
22 emerging sport?

23 A. If you say that's what's in the rule book, I believe
24 you. The details of it right now this second without
25 looking at the rule, I can't attest to.

1 Q. You don't know if in fact all 20 of these teams could
2 be club teams, correct?

3 A. Without -- you're asking me without even looking at
4 the NCAA rules to say something is correct and I'm very
5 uncomfortable with that.

6 Q. All right. In fact, isn't it true that a number of
7 sports currently recognized as emerging sports by the NCAA
8 do not have even ten schools that sponsor the sport at a
9 varsity level?

10 A. I do not know that.

11 Q. Well, look at Exhibit F to your report, which is
12 Exhibit 105 in the exhibit book.

13 A. Under page, NCAA participation, which page --

14 Q. Page 65?

15 A. Thank you.

16 Q. And that page shows the current list of recognized
17 emerging sport, does it not?

18 A. Okay, so you're on page --

19 Q. Sixty-five.

20 A. Sixty-five. Okay, emerging sports. Got it.

21 Q. And if you look down to the bottom and if you look to
22 the right hand column which is headed overall, in other
23 words, combined divisions one, two and three?

24 A. Right.

25 Q. The total number of schools sponsoring each one of

1 those sports appears there, is that correct?

2 A. That is correct.

3 Q. So there's one in archery, two in badminton, five in
4 rugby and eight in swimming, right?

5 A. Right.

6 Q. So doesn't it follow that schools competing in these
7 emerging sports necessarily are competing against teams
8 other than other varsity teams?

9 A. That would be a good deduction.

10 Q. And isn't it also true that a sport does not need to
11 be recognized as a NCAA championship or emerging sport for
12 a school to count that sport as a varsity sport for Title
13 IX purposes?

14 A. Okay, repeat that question.

15 Q. A sport does not need to be recognized by the NCAA as
16 either a championship sport or an emerging sport in order
17 for a school to count that sport for Title IX purposes?

18 A. Yes, it does.

19 Q. Well --

20 A. Okay, so -- okay. You started this by saying let me
21 talk about cheerleading; are we talking about cheerleading
22 or not?

23 Q. I'm asking the questions, Dr. Lopiano.

24 A. No, you prefaced, you prefaced all of this with let
25 me talk about cheerleading.

1 THE COURT: Ma'am, let him ask the next
2 question. Okay.

3 A. Okay. Go ahead.

4 Q. Let make it simple. There are schools that sponsor
5 men's varsity squash, for example, right here at Yale they
6 have a squash team for men, don't they?

7 A. Right.

8 Q. And squash is not, men's squash is not a championship
9 sport. In fact, emerging sport are only for women, right?

10 A. Right.

11 Q. So squash is not an NCAA sport?

12 A. Right.

13 Q. Can you count squash for Title IX purposes?

14 THE COURT: Well, squash is a male
15 nonchampionship sport. Is that an emerging sport or not?

16 MR. BRILL: No, it's not an NCAA recognized --
17 this page only talks about emerging sports for women.

18 BY MR. BRILL:

19 Q. There are no emerging sports for men, is that
20 correct, Dr. Lopiano?

21 THE COURT: There are not emerging sports for
22 men?

23 MR. BRILL: No.

24 THE COURT: Not even nonchampionship sports.

25 MR. BRILL: You have to go to the next page.

1 THE COURT: That's what I'm looking at, page
2 six. What are non championship sports for men.

3 MR. BRILL: There are none. There are only
4 championship sports for men.

5 THE COURT: Archery, badmitton, bowling,
6 equestrian, rowing, rugby and squash are listed --

7 MR. BRILL: Oh, I see what you're saying. Those
8 are sports -- you want me to explain? Those are sports
9 that schools can self report to the NCAA, that they
10 participate in the sport even if it's not a championship
11 sport. So the NCAA will report participation statistics.
12 We can clarify this with Dr. Yiamouyiannis who worked at
13 the NCAA when she testifies but those are sports that are
14 not recognized by the NCAA. In other words, those sports
15 don't count for purposes of determining minimum sports
16 sponsorship for any other purpose except the NCAA collects
17 statistics on them. And we can confirm that with
18 Dr. Yiamouyiannis.

19 THE COURT: Okay.

20 BY MR. BRILL:

21 Q. In any event, let me go on.

22 Women's wrestling is not a NCAA championship or
23 recognized emerging sport, is it?

24 A. It is not listed.

25 Q. And in the Mansurian case, however, you took the

1 position that women wrestlers at U C Davis were varsity
2 athletes, correct?

3 A. Yes.

4 Q. And you testified, did you not, that it didn't matter
5 whether they competed against wrestlers on other college
6 teams?

7 A. That is correct.

8 Q. You testified in that case competition against other
9 women who were open amateur athletes was sufficient?

10 A. That is correct.

11 Q. And in fact, you said neither Title IX nor NCAA rules
12 require them to compete against other college teams,
13 right?

14 A. That is correct. This is all NCAA. You're not
15 saying that Title IX requires.

16 Q. Didn't you testify specifically --

17 A. Yes, and I'm just clarifying that you said, you're
18 saying that's what I said in terms of NCAA.

19 Q. And in Mansurian, didn't you testify -- Mansurian was
20 about Title IX, was it not?

21 A. It was.

22 Q. And didn't you testify that nothing in either Title
23 IX or the NCAA rules require those wrestlers at U C Davis
24 to compete against other college teams?

25 A. Right, and the reason why I'm clarifying this is I

1 feel as though you're taking this little small piece of
2 testimony in Mansurian which does not relate to the larger
3 list of what it takes to be a sport and you're insinuating
4 because I said wrestling was a sport which has a national
5 governing body which has all the pieces of the puzzle,
6 that you're going to then say, oh well, wrestling is a
7 sport, cheerleading is a sport and, you know, it's apples
8 and oranges and you're trying to lead me to that point and
9 I don't think it's accurate for the court.

10 Q. Well, I'm asking you to relax and not worry about
11 where I'm leading you, Dr. Lopiano, and just answer my
12 question. All I'm asking you in this case you testified
13 in your report -- let's go back and see it, that in order
14 to count as a varsity sport, that a team would have to
15 compete against other college competition?

16 A. Yes.

17 Q. But you testified --

18 A. Among those and among others.

19 Q. But that was one of the factors you pointed to?

20 A. Right, exactly.

21 Q. And I'm only asking so that factor you said in
22 Mansurian, that factor did not matter in Mansurian, did
23 it?

24 A. Yes --

25 Q. Yes or no?

1 A. Yes, it was one of the factors.

2 Q. You said it didn't matter in Mansurian that they
3 didn't compete against other colleges, right?

4 Do you want me to show you the testimony? Would that
5 help you?

6 A. The way you're phrasing the question is confusing me.
7 Say it once more. Say it once more. I said that in
8 Mansurian. All I'm concerned about is context, apples and
9 oranges, but that's okay. I will say yes -- it's yes. If
10 it's in context along with the other stuff, the other
11 criteria of a sport.

12 Q. Isn't it true that, well -- withdrawn. Withdraw
13 that.

14 Are you aware that Quinnipiac has recruited athletes
15 for the competitive cheer team for 2010, 2011?

16 A. 2010, 2011.

17 Q. For next year?

18 A. No.

19 Q. And you talked about how schools would need a one
20 year ramp up period to start a new sport, but are you
21 aware that in this case members of the Quinnipiac sideline
22 cheerleading squad were engaging in competitive events for
23 several years before 2009, 2010?

24 A. Was I aware they were?

25 Q. Yes.

1 A. Engaging in competitive events?

2 Q. Yes.

3 A. Yes.

4 Q. And nothing in Title IX, OCR rules or the NCAA
5 regulations require a national search for coach of a new
6 sport or any sport for that matter --

7 A. Absolutely not.

8 Q. Correct?

9 A. Yes.

10 Q. And have you ever seen a Quinnipiac university
11 competitive cheer team compete?

12 A. No.

13 Q. Have you ever seen any member of the NCSTA -- do you
14 know what the NCSTA is?

15 A. I think something told me that.

16 Q. The National Competitive Stunts and Tumbling
17 Association?

18 A. Your question is what?

19 Q. Have you ever seen any school that's a member of the
20 NCSTA compete in competitive cheer?

21 A. No.

22 Q. So when you testified this morning that in your
23 opinion competitive cheer is not a sport, you were
24 saying that without ever having witnessed anybody engage
25 in competitive cheer, is that correct?

1 A. Watching a sport isn't required. I don't get your
2 point, in other words. I didn't watch it.

3 BY MR. BRILL:

4 Q. I'm not making a point, Dr. Lopiano. This is not a
5 debate. I just want to get facts on the record.

6 A. I have not seen those schools participating in
7 competitive cheer.

8 Q. Now, the April 11th, 2000 letter that you referred
9 to --

10 A. April 11 --

11 Q. 2000 letter from OCR, Exhibit 108.

12 A. Okay.

13 Q. Do you have that?

14 A. Okay.

15 Q. That letter states that OCR's practice is to assess
16 each activity on a case by case basis, correct?

17 A. Correct.

18 Q. Taking into account the types of inquiries described
19 in the letter to determine whether the activity is a
20 sport, correct?

21 A. Are you reading from it? Are you quoting from it?

22 Q. Yes.

23 A. Then I would assume it's correct. I didn't follow
24 exactly where you were. I was wondering whether you were
25 asking me or whether it was them.

1 Q. Now, the 2008 Dear Colleague letter which is Exhibit
2 109, that's the one that you said clarified in some
3 respects --

4 A. 109, okay.

5 Q. That didn't change the OCR's position that it does
6 not have a specific definition of the term sport and
7 instead makes a determination in each case based on case
8 by case evaluation, correct?

9 A. That is correct.

10 Q. And nothing in that letter suggests that competitive
11 cheer is not subject to the same case by case
12 determination, is there?

13 A. That is correct.

14 Q. And OCR, in fact, if you look at the first page of
15 the letter I think you'll see, if you agree with me, the
16 second page, I'm sorry, that OCR considers the factors
17 listed to make a, quote, overall determination, close
18 quote, of whether the activity can be considered part of
19 an institution's intercollegiate athletic program for
20 purposes of Title Nine compliance, correct?

21 A. Correct.

22 Q. And OCR also emphasized in that letter, does it not,
23 that its policy is to encourage compliance with Title IX
24 in a flexible manner that expands rather than limits --

25 A. Are you reading from this? So I'm, I'm attesting to

1 whether or not you're reading correctly?

2 Q. Do you see that in the letter? I can point the --

3 THE COURT: If it's in evidence you can just
4 read it. You don't have to have her acknowledge it says
5 that.

6 MR. BRILL: Rightly. I'll read this into the
7 record.

8 THE COURT: Fine.

9 MR. BRILL: It is OCR's policy to encourage
10 compliance with Title IX, and this is on the last page the
11 second to the last paragraph, to encourage compliance with
12 Title IX athletics regulations in a flexible manner that
13 expands rather than limits student athletic opportunities.
14 By disseminating this list of the factors OCR intends to
15 provide institutions with information to include new
16 sports in their athletic programs, such as those athletic
17 activities not yet recognized by governing athletics
18 organizations and those featured at the Olympics games if
19 they so choose. Expanding interscholastic and
20 intercollegiate athletic opportunities to new new sports
21 can benefit students by creating and stimulating student
22 interest in athletics, taking advantage of athletic
23 opportunities specific to a particular competitive region
24 and providing the opportunity for access to a wide array
25 of competitive athletic activities.

1 BY MR. BRILL:

2 Q. And going back to the NCAA gender equity guide, if
3 you would, Dr. Lopiano, Exhibit 25?

4 A. I'm sorry, say it again?

5 Q. Paragraphs Exhibit 25.

6 A. Okay.

7 Q. Would you turn to page 20 which is what is a
8 athletics team for purposes of Title IX.

9 MS. GALLES: I'm sorry, what page did you say
10 please?

11 MR. BRILL: Page 20. Plaintiff's Exhibit 25,
12 page 20. It's paragraph three A, what is an athletics
13 team for purposes of Title IX.

14 BY MR. BRILL:

15 Q. Do you see that?

16 A. I do.

17 Q. And, Your Honor, I'd just like to point, could I just
18 call the court's attention to the following?

19 THE COURT: Absolutely.

20 MR. BRILL: Language that appears on page 21?
21 Although men's rowing clearly appears to meet the test,
22 the status of other team activity such as competitive
23 cheerleading, rodeo and judo are not as clear the OCR has
24 taken the position that cheerleading squads, for example,
25 or support services and not varsity programs. This view

1 has begun to change as competitive opportunities for
2 cheerleading have increased nationally and as schools
3 offer coaching, practice facilities, equipment and
4 scholarship opportunities to squad members who compete
5 against squads at other colleges and universities. It
6 should be noted that the OCR and its regional officers
7 have not uniformly accepted competitive cheerleading as a
8 sport under Title Nine but, rather, continue to evaluate
9 each program on a case by case basis.

10 BY MR. BRILL:

11 Q. Now, Dr. Lopiano, do you know if the NCAA has issued
12 any further statement with respect to competitive cheer
13 since the 2008?

14 A. I do not know.

15 Q. In your report, you refer to a statement in the NCAA
16 form --

17 A. Which report?

18 Q. I'm sorry, your original report, you refer to a
19 statement in the NCAA and EADA reporting form that was
20 used in 2002, Plaintiff's Exhibit Seven?

21 A. Where are you in this report?

22 Q. I'm sorry?

23 A. Where are you?

24 Q. I'm not, I can't give you the exact page now but do
25 you recall that you referred to the 2002 reporting form

1 Exhibit Seven? Would you look at Exhibit Seven.

2 A. Plaintiff's Exhibit Seven?

3 Q. Seven, yes. I think this was the form that you said
4 there was something on page two, you changed your report
5 to say the statement appeared on page two.

6 A. So it's my let's see --

7 THE COURT: Exhibit G.

8 A. No, that's an exhibit. I didn't mark an exhibit
9 there. This is also, the NCAA is pointing out without
10 looking at the exhibit --

11 Q. Let me just short circuit this, Dr. Lopiano. Try and
12 save sometime. You refer, first of all, 2002 there was no
13 college sponsoring competition only, competitive cheer
14 team, correct?

15 A. I do not know.

16 Q. You don't know of any school that was sponsoring a
17 competition?

18 A. I don't know that.

19 Q. And do you know whether that same form that was used
20 in 2002 is being used today by the NCAA form that was
21 introduced as Plaintiff's Exhibit Seven?

22 A. Where is Plaintiff's Exhibit Seven?

23 MR. ORLEANS: Plaintiff Exhibit Seven is the
24 1996 clarification.

25 MR. BRILL: Oh, it is?

1 MR. ORLEANS: Yes.

2 MR. BRILL: Then I have the wrong exhibit number
3 and I apologize. I'll come back to that.

4 BY MR. BRILL:

5 Q. Now, the Women's Sport Foundation position on
6 cheerleading that you said you helped draft, what year was
7 that adopted?

8 A. I cannot recall.

9 Q. It was prior to 2003, was it not?

10 A. I don't know.

11 Q. Do you know whether at the time you adopted that
12 position, that the Woman's Sport Foundation adopted the
13 position, whether there was any compete only competitive
14 cheer team at any college?

15 A. I do not know.

16 Q. And that report does say under certain circumstances
17 cheerleading could be considered a sport, correct, in the
18 view of the Women's Sports Foundation, correct?

19 A. Yes.

20 Q. And that those circumstances are set forth in the
21 statement, correct?

22 A. Correct.

23 Q. Now, I want to ask you about the language that you
24 referred to in your testimony this morning that appears in
25 the, on page 19 of the instructions to the EADA form. I

1 believe that's Defendant's, I believe that's Exhibit 110
2 but my exhibit numbers may be slightly discombobulated,
3 the NCAA instructions.

4 A. Yes.

5 Q. And the paragraph you read earlier says and let me
6 just read it again -- to be considered a sport under --

7 A. So what page is this?

8 Q. This is on page 19 of that exhibit. To be considered
9 a sport under the EADA, an activity's primary purpose must
10 be to engage in intercollegiate competition.

11 Stopping there for a minute, do you know whether or
12 not the Quinnipiac University competitive cheer team has
13 has a primary purpose of engaging in intercollegiate
14 competition?

15 A. I would guess it does.

16 Q. It does. And the second sentence says if you
17 indicate in the caveat box that your other sports are
18 dancing and/or cheerleading, please also specify in the
19 box that your institution has a letter from the Office of
20 Civil Rights confirming that the OCR has determined that
21 dancing and/or cheerleading are varsity sports at your
22 institution, right? That's what you were pointing to this
23 morning?

24 A. Right.

25 Q. Now, that instruction first appeared in the EADA

1 instructions for reports to be filled out for 2009, 2010,
2 correct?

3 A. I don't know.

4 Q. That was not in the, you don't know that that was not
5 in the instructions prior to this year?

6 A. No -- I cannot recall.

7 Q. Okay. Do you know whether OCR has provided any
8 written explanation of that instruction?

9 A. The only reference I can -- well -- I do not know, I
10 do not know.

11 Q. And assuming, and we'll link this up, Your Honor,
12 that the instruction first appeared for reports to be
13 filed for the '09, '10 year, those reports aren't due
14 until October of 2010, correct?

15 A. You're asking me to assume --

16 Q. You know what? I don't need to ask you to assume
17 anything --

18 A. I'm just trying to get your question. You're trying
19 to get me to say yes to that, assuming that --

20 Q. I'm going withdraw my question.

21 A. This is my first time, this is the first time this
22 appeared, right? If that is true, you would like me to
23 say yes or no whether I agree that it would apply to the
24 next year for the first time, and if you want me to assume
25 that, I will be willing to say yes, if both of those

1 things, if that's true.

2 Q. And so you asserted this morning and you state on
3 your report that a school, in your opinion a school cannot
4 count cheer as part of --

5 A. Where are you? Are you on my report now, back to my
6 original report?

7 Q. Well, you testified to it this morning, Dr. Lopiano.

8 THE COURT: Let me interrupt. Mr. Brill, how
9 long how much longer do you have?

10 MR. BRILL: I have about two more minutes, Your
11 Honor.

12 THE COURT: All right, let's go.

13 BY MR. BRILL:

14 Q. You heard this morning that a school cannot count
15 cheer as part of prong one unless and until it receives
16 approval from the OCR?

17 A. That is correct.

18 Q. That's your testimony, right? And didn't you testify
19 to precisely the opposite of that at your deposition in
20 this case in advance of the preliminary injunction
21 hearing?

22 A. I don't believe I did.

23 Q. I'd like to show the witness a copy of her pages 207
24 to 209 of her deposition, Your Honor.

25 THE COURT: Well, if you're impeaching her why

1 don't you --

2 MR. BRILL: What's that?

3 THE COURT: If you're peaching her, why don't
4 you simply read it out loud, question and answer.

5 MR. BRILL: Thank you. It's a rather long
6 passage, I apologize. I'm going to -- actually I'll put
7 it up on the Elmo so you can follow along.

8 Didn't you testify at this point at your
9 deposition, all right, I asked you for your -- for the
10 authority for what I perceived to be your contention that
11 this multi part test had to be administered in advance for
12 OCR to even begin to apply the five part test and you
13 referred me to the case by case basis language, did I
14 understand?

15 I'm going skip the colloquy of counsel and you
16 answered, I repeat what I said earlier, two to three times
17 that I have never -- you may have misunderstood but I
18 have never said that singularly it is a case by case
19 statement which the reason why an institution should have
20 OCR come in and look at it. I said it was that in
21 combination with the suspect nature of cheerleading and
22 the inability of cheerleading to comply with this test,
23 these test queries that would lead me to believe that
24 there was a high risk proposition for anyone to depend on
25 just establishing cheerleading and assuming that it would

1 be considered a sport. So I --

2 Question: But it's not.

3 Answer: No, you keep on going back to this case
4 by case when that's not what what I said.

5 Question: Okay, so to clear it up, there is no
6 legal requirement that this assessment be done in advance.
7 It is your recommendation it would be unwise not to do it
8 with OCR, but there is no legal requirement that an
9 advanced in assessment can done with OCR of its
10 competitive cheer team as part of the compliance test that
11 it done in advance.

12 Answer: It is absolutely true that every
13 institution puts its athletic program together and until
14 OCR or a court looks at it, these issues do not come up.
15 My point with cheerleading is that this is a very high
16 risk area for you to have cheerleading be the lynch pin
17 for your prong one or any prong compliance, and that's why
18 I recommended it, and --

19 Question: Fine.

20 Answer: I recommended that OCR come in first.

21 Question: Okay, but so there is no legal
22 requirement OCR come in first, is that true or false?
23 There's no legal requirement OCR do this in advance?

24 Answer: Yeah, there is no requirement that OCR
25 come in and attest to anything about your sport program.

1 Question: Thank you.

2 In fact every sport presumably would be
3 subjected to this multi part test.

4 Question: Every sport presumably can be put to
5 this test by OCR in audit, correct?

6 Answer: Absolutely, and my point -- sorry.
7 Absolutely, and my point was with in record to
8 cheerleading that this is an activity that is so highly
9 suspect and without the federation and governance and
10 national championship basis of all other sports that are
11 in athletic programs commonly, that you'd have to be a --
12 not astute athletic director to put your institution at
13 risk like this.

14 Question: So it's risky not to do it in advance
15 when it's not required?

16 Answer: That's a fair statement.

17 And you gave this testimony at the preliminary
18 injunction, did you not?

19 A. Well --

20 Q. Yes or no. I'd like to know, yes or no, is that your
21 testimony?

22 A. Yes, in the context of legality.

23 Q. Thank you.

24 A. That it does not appear in the Title IX regs that you
25 have to check cheerleading with, with your -- with OCR.

1 It appears in a clarification letter that I was
2 distinguishing between legal and what that requirement was
3 that you have to get OCR approval. And it's legal that I
4 was answering to. You kept on saying is it legally
5 required, is it legally required, and I'm making a
6 difference between Dear Colleague letter which says you
7 shall and what was in, you know, the regs. That is my
8 intent.

9 MR. BRILL: Your Honor, I'm sorry. I do have a
10 follow up question.

11 THE COURT: Go ahead, Mr. Brill.

12 BY MR. BRILL:

13 Q. Yes. Dr. Lopiano, what clarification letter were you
14 referring to that requires the school to get OCR
15 permission in advance before counting it as a sport for
16 Title IX purposes?

17 A. When it says -- you know, getting tired here. When
18 is it says in instructions to the EADA report that you
19 don't include cheerleading without first getting a letter
20 from OCR, the EADA instructions to me are not a, a part of
21 the EADA law. It's instructions. And this was, this
22 excerpt, Your Honor, was after a long interchange about
23 what was the nature of this requirement. Was it a legal
24 obligation, was it a high risk proposition, was it
25 somewhere in the middle, and I was saying it was here and

1 it was here. That it wasn't part of the original law, it
2 is definitely an OCR position. And also as an athletic
3 director I wouldn't dare like make that the lynch pin of
4 any prong one compliance piece without getting that letter
5 and that was my position. And it still is my position.

6 Q. And there's nothing that you can point to, is there,
7 Dr. Lopiano, that would require a school to give OCR
8 approval of a competitive cheer team before counting as a
9 varsity sport except for the instructions to the EADA form
10 that I showed you just a few minutes ago?

11 A. That is correct.

12 Q. And as you testified we don't know what the OCR meant
13 by that because it's not self explanatory?

14 A. (Pause)

15 Are you asking me something?

16 MR. BRILL: I withdraw that, Your Honor. I
17 don't want to be arguing with the witness. I think her
18 testimony is clear. I'd like, before I close my cross I'd
19 just like a minute during break to review my notes. Or
20 would you rather --

21 THE COURT: Why don't you do it now. I'd rather
22 break after you finish cross.

23 MR. BRILL: I'll close my cross now.

24 THE COURT: Okay. All right. Let's take a 15
25 minute break and stand in recess until 3:55.

1 (Whereupon a recess was taken from 3:55 o'clock,
2 p. m. to 4:10 o'clock, p. m.)

3 REDIRECT EXAMINATION

4 BY MS. GALLES:

5 Q. Dr. Lopiano, I'd like to, if you would start off
6 where Mr. Brill left off which is Exhibit K of your
7 report, the EADA users guide?

8 A. Okay.

9 Q. Now, Mr. Brill, if it is true as he indicated that
10 this section about --

11 A. Where are you?

12 Q. This is page 19, yes?

13 A. Okay.

14 Q. If it is true that that section is new, and that it
15 will only apply to to 2009, 2010, okay, if that is true,
16 then wouldn't Quinnipiac have to get such a letter to
17 count its cheer starting next year?

18 MR. BRILL: Objection, Your Honor. This witness
19 is not in a position to interpret the OCR language.
20 With -- she said she has, they've not issued a
21 clarification of this language. Anybody in this courtroom
22 can interpret if as well as this witness.

23 MS. GALLES: He examined her extensively about
24 her view of it.

25 MR. BRILL: There are two opposing thoughts in

1 that paragraph.

2 THE COURT: Well, all right, I think it's speaks
3 for itself.

4 MS. GALLES: Okay.

5 BY MS. GALLES:

6 Q. Dr. Lopiano, I want to refer you to page four of your
7 supplemental report, please.

8 A. Okay.

9 Q. Where we're talking about the numbers.

10 A. Yes.

11 Q. Okay. Mr. Brill kept saying that you weren't
12 counting cheer and you weren't counting cheer. Now, on
13 those numbers, if there were an order to account for
14 cheer, how would you do that? Like if there were 30
15 cheerleaders, then the numbers would be --

16 A. I explained in each of these cases that you would add
17 30 -- sorry, 30 would offset the -- if I'm looking at the
18 conclusion, the first column A, and cheer would count,
19 then the gap of 28 would be reduced with, to two as long
20 as you kept volleyball. And if you didn't keep
21 volleyball, then it's 41 minus 30, it would be 11 and
22 you'd have to add another team like golf or something that
23 would make up that discrepancy, and that applies to every
24 single column. You would make that adjustment in what the
25 gap would be.

1 Q. So with the number, with the calculation of the gap,
2 that tells you how many sports, additional sports
3 opportunities Quinnipiac would have to provide?

4 A. That is correct.

5 Q. And no matter what they claim those opportunities
6 are, cheer, track, rugby, whatever?

7 A. Correct.

8 Q. Now, I'd like to direct your attention to your
9 charts, the Exhibit A or I believe it's 150?

10 A. Okay.

11 Q. And I just want to make clear that reasons one
12 through five -- okay, well, let's look, for instance,
13 reason number two, they are injured and still on aid; can
14 that be tied directly to the 1979 or 1996 policy
15 clarification?

16 A. Yes.

17 Q. Okay? Reason number three, a red shirt as designated
18 by the school, can that be tied directly to the 1979 and
19 '96 clarification?

20 A. Yes.

21 Q. The reason number four, that's on the squad list on
22 the first day of competition just as Mr. Brill discussed,
23 correct?

24 A. Yes.

25 Q. Okay. And reason number one is they actually played

1 in a game, does it not?

2 A. Yes. That's also tied to the same thing as, it's in
3 general the squad eligibility list.

4 Q. And so you looked at the eligibility list to see if
5 they used up their NCAA eligibility for the year?

6 A. Yes.

7 Q. Okay, and reason number five is if they were on the
8 squad list the first day of competition in the
9 nontraditional seasonal?

10 A. Correct.

11 Q. Okay. So for reasons one through five, are those
12 tied directly to what Mr. Brill was discussing in terms of
13 the first day of competition or actually competing?

14 A. I believe they are.

15 Q. Okay. So, also in terms of the ice hockey, Mr. Brill
16 gave some examples of those ice hockey athletes, those six
17 athletes that he identified that you red flagged, you
18 actually, did you actually count them in your column A?

19 A. I'm trying to find --

20 MR. ORLEANS: The women's ice hockey.

21 A. Women.

22 Q. Women's ice hockey, yes?

23 A. Yes, all but Christine Fenoia.

24 Q. Okay, so the six that he was talking about, that he
25 was talking about earlier in terms of column A, you

1 counted these ice hockey women, right?

2 THE COURT: Four of the six.

3 MS. GALLES: Excuse me?

4 THE WITNESS: Yes, you're absolutely right.

5 THE COURT: Carry Wilson, two of them are
6 listed.

7 THE WITNESS: They were, they were counted in
8 different column.

9 MS. GALLES: Yes, so I'm looking at were they
10 counted for under --

11 THE WITNESS: One through four?

12 THE COURT: One through four. Got it, okay.

13 BY MS. GALLES:

14 Q. And were all six of them counted in columns A and B
15 of your summary chart?

16 A. Yes.

17 Q. Okay, so the only place --

18 A. Yes, one through four, yes.

19 Q. So the only place where you made an adjustment was in
20 column C, the red flag column?

21 A. That is correct.

22 Q. Okay.

23 THE COURT: Are we going to seat the Seeley
24 email?

25 MR. BRILL: I'm sorry, what did you ask, Your

1 Honor.

2 THE COURT: Are we going to see the S-E-E-L-E-Y
3 email?

4 MR. ORLEANS: Yes, Your Honor.

5 MR. BRILL: Well, over our objection, Your
6 Honor. The emails are hearsay. We offered to have Hope
7 Seeley available, they spoke to him --

8 THE COURT: Okay, if it's not being offered at
9 this moment, I'm just asking whether that's going to be
10 offered at some point or whether we should talk about it
11 through this witness.

12 MR. ORLEANS: It will be offered, Your Honor.

13 THE COURT: Okay.

14 MS. GALLES: So we can talk about that later.

15 BY MS. GALLES:

16 Q. I also wanted to speak about average squad sizes.
17 Mr. Brill put up NEC with broad ranges of the squad sizes
18 for various sports, okay? If you saw an unusually high
19 number of athletes at any school, not just Quinnipiac, an
20 unusually high number of women in a sport, would that
21 raise a red flag for you?

22 A. If -- in comparison to the averages.

23 Q. Yes.

24 A. It would make me look closer. And that's what the
25 red flag's intended to do.

1 Q. And I also want to refer you to Exhibit 25.

2 Mr. Brill took you through the NCAA's discussion of roster
3 management. Exhibit 25.

4 A. Okay. Okay, page number? Page number?

5 Q. Page 180.

6 A. Okay.

7 Q. Okay, on the Elmo here I've sort of put a, that
8 little bracket is mine. Okay?

9 A. Okay.

10 Q. You read different parts of that section. I would
11 like you to read the part that I've outlined. Start where
12 the negatives, see where it says the negatives?

13 A. The negatives of roster management include the fact
14 that overall, some opportunities are lost for men, it also
15 is possible that so many roster spots are eliminated that
16 team may be rendered noncompetitive. The way to solve
17 this problem would to be use the traditional team average
18 of roster response as a method to reasonably and fairly
19 cap men's teams.

20 Q. Okay. Is that statement regarding one of the
21 negative aspects of roster management one that you agree
22 with?

23 A. Yes.

24 Q. Okay. Would you please read the next paragraph?

25 A. The opposite problem could occur in women's teams.

1 If roster management for women's teams may be so high
2 there are too many people on a team for it to be a
3 meaningful experience for all. Using the divisional
4 average should be a way to reasonably and fairly construct
5 roster management numbers for women's teams as well.

6 Q. Is that, does that paragraph, would you agree with
7 that particular paragraph as it relates to roster
8 management?

9 A. Yes, my statement, as long as you use the same caps
10 and they are based on average sizes, that that makes
11 sense.

12 Q. Now, Mr. Brill was talking a lot about Mansurian and
13 women's wrestling. Is there, do you know of any dispute
14 in the athletic community as to whether wrestling is a
15 sport?

16 A. No.

17 Q. And does such a dispute exist regarding cheerleading?

18 A. Yes.

19 Q. Now, Mr. Brill also talked about what if you only
20 have a track team with eight or ten athletes on it. If
21 you were an athletic director and you had only eight or
22 ten athletes on your track team, what would you do?
23 Presuming you're a Division I institution like Quinnipiac?

24 A. The reason why I'm hesitating with the question is I
25 can't imagine Division I institution not having bona fide

1 track team that would be large enough to compete. That's
2 all I can say. What would I do? I would never have one
3 that small. That's --

4 Q. Would you go out and recruit athletes in order to
5 fill those additional spots?

6 A. Oh absolutely. My point is that Division I is you're
7 on a level, when you've say I'm going to participate in
8 these sports, you're pretty much saying I'm going to play
9 with these guys under those circumstances and these are
10 going to be my team sizes and things like that. So
11 whenever you posit just even hypothetically really
12 small teams in Division I or half hearted efforts at
13 particular sports, it doesn't compute to Division I
14 athletics.

15 Q. Well, I'd like to tie that back into or, into the
16 1979 policy interpretation which is on the front page of
17 your supplemental report.

18 A. Okay.

19 Q. Okay? And for A, it says that you would count
20 participants who are receiving the institutionally
21 sponsored support normally provided to athletes competing
22 at the institution involved, e.g., coaching, equipment,
23 middle and training room services on a regular basis
24 during a sports season, okay? Could you please explain
25 what that means?

1 A. Well, the Title IX isn't only about counting based on
2 where are you in the season or anything else. It's a
3 whole laundry list of requirements, comparative tests that
4 look at how you treat men in your institution, how you
5 treat women in your institution, and it's a list about 11
6 factors and it looks at everything. And that's, that's
7 this total program look. That has to be made, and you
8 look at supplies, it's access to the same quality coaches,
9 it's size of schedule, it's quality of schedule, it's
10 access to post season play, it's housing, it's
11 transportation, it's support staff. It's everything. And
12 when you look at these things, you really are taking the
13 total program look and that's why it's so important to be
14 fact specific with this.

15 Q. So if you were looking at varsity, Division I varsity
16 program, and all of the men's teams have level A of
17 varsity benefits, and then you look over at the women's
18 teams, and would it raise any red flags for you as to
19 whether it's a varsity team or not if only a woman's team
20 didn't have a facility to practice in?

21 A. That in and of itself as a single factor would not.
22 I don't think you can take any one thing and say
23 absolutely, if you fail this test you're out of here or
24 you're in. It is total program. And what is good about
25 the OCR regs asking for technical assistance, doing all

1 this is schools are being invited to come in and do this
2 test and to help you to be confident with certainty that I
3 am doing the right thing here and I'm not going to get
4 caught, and that is the struggle that I have with, you
5 know, with cheerleading, that knowing all of this, you
6 have to be a, it's almost an absence of fiduciary
7 responsibility on the part of the administrator not to do
8 it.

9 Q. Now, I want to focus on, however, looking back at
10 you're looking at the totality of the circumstances, under
11 what circumstances might there be red flags as to whether
12 a program is being run as a Division I varsity program?
13 What kinds of things would you look at?

14 A. I think you have to look at the, all of the tests
15 under participation which are levels of competition, and
16 whether you're, you know, supporting that program in terms
17 of the same level as the men, as well as numbers of
18 opportunities, whether -- and then you go into the laundry
19 list of recruiting, you know, support -- it's looking at
20 all of it. I don't know how else to -- I think I keep on
21 saying this, that this total program comparison is, it's
22 not just words. It's very important to do it that way.

23 And I think it speaks to Mr. Brill's point in terms
24 of flexibility, that this is very flexible. That's why I
25 don't know why people wouldn't ask for technical

1 assistance to determine it. That's what confuses me,
2 because if you trust in the flexibility, if you trust in
3 the law, then you go and you, you know --

4 Q. Sure.

5 A. You get the word out.

6 Q. I'd also like to, we were talking about wrestling
7 we're talking about cheer. If an athletic director, if I
8 came up to you and said my school, my school is going to
9 start Run Pass Tackle next, would that raise a red flag to
10 you as to whether that could be counted as a sport at the
11 Division I level?

12 A. Yes.

13 Q. And why is that?

14 A. Because I don't know if there's a N G B in that
15 sport. I don't know anything, I don't know whether or not
16 any of the list of criteria could probably be met with the
17 name of this new thing. I don't know if anybody plays it,
18 if there's --

19 Q. So would you supply the same criteria as were
20 discussed in the 2008 --

21 A. Yes.

22 Q. -- OCR Dear Colleague letter?

23 A. Absolutely. Run pass, whatever -- Frisbee.

24 Q. And then also if Quinnipiac wanted to provide
25 cheerleading or competitive cheerleading opportunities to

1 its female students, there's nothing that would stop them
2 from doing so and just not counting them for Title IX
3 purposes, is there?

4 A. True.

5 MS. GALLES: I think we're done, Your Honor.

6 THE COURT: All right. All right, whose your
7 next witness?

8 MR. HERNANDEZ: Mark Thompson.

9 MR. BRILL: I have some redirect, Your Honor.

10 THE COURT: Recross.

11 MR. BRILL: Just two to three questions.

12 THE COURT: Well, we ought to figure out if we
13 want to do this in this context or not.

14 MR. BRILL: Oh, that's fine. I don't have
15 anything that's that significant. That's going to --

16 THE COURT: I think a lot of judges cut it off
17 after redirect and I think in light of the limited time
18 that we have, it might be useful to do that.

19 MR. BRILL: Could we just have a good cause
20 exception?

21 THE COURT: Good cause exception.

22 MR. BRILL: Thank you.

23 THE COURT: If the redirect gets into a whole
24 new area and there was no objection.

25 MR. BRILL: I don't need to.

1 THE COURT: Okay, thank you.

2 (Whereupon the witness was excused.)

3 MR. BRILL: Before we move to Dr. Thompson,
4 could we raise two procedural issues? The plaintiffs are
5 planning to call Mr. Web tomorrow and we had raised an
6 issue on Friday about the privileged nature of the
7 communication.

8 THE COURT: I will get you a ruling quickly.

9 MR. BRILL: And we did make and I know they
10 haven't had a chance to respond but we also made a motion
11 in limine this morning as to his testimony. I wonder
12 there could be some at least some response to that before
13 he's called to testify.

14 MR. ORLEANS: Not only have we not had a chance
15 to response, we've barely had a chance to read it.

16 THE COURT: I haven't read it either.

17 MR. BRILL: It was a lot shorter than mine.

18 MR. ORLEANS: We'll be prepared to address it
19 tomorrow, Your Honor, but --

20 MR. BRILL: Okay, that's fine, thank you.

21 THE COURT: Okay. Okay, let me just express a
22 little concern about time. I had set down four days for
23 this trial thinking eight hours each day. Two for
24 plaintiff, two for defense. Obviously that's not going to
25 work out.

1 MR. ORLEANS: Your Honor, I think we had been
2 under the impression you had set down five days.

3 MR. BRILL: Yes, we had.

4 THE COURT: Well, that was my sense of your
5 impression since we spent a lot of time on the last
6 witness.

7 MR. ORLEANS: It's a little bit hard to know how
8 long anyone is going to take. If we're calling Thompson
9 next, are you going to do your, essentially your direct as
10 part of --

11 MR. BRILL: Yes.

12 MR. ORLEANS: -- as part of your cross? So he's
13 going to go for a while and certainly it's not impossible
14 that we would done by the end of the day on Thursday, Your
15 Honor, but --

16 THE COURT: Well, let me just urge everyone,
17 I've tried to hint to both sides that there are ways to
18 make this a lot faster. You may have a reason for reading
19 something into the record, you can point me to the
20 paragraph, I can read it a lot faster than it can be read
21 into the record and you can read it into the record rather
22 than asking the witness to adopt it. We've essentially
23 adopted a practice of if an exhibit is used without
24 objection it's a full exhibit. I think that helps, but
25 all I'm trying to say to you is I'm going to be out of the

1 country for a significant period of time and so we don't
2 have flexibility on the back end and we need to be aware
3 of where we are and get this case done and I think it can
4 get done but it's going to take everybody's cooperation.
5 So remember this is a bench trial, it's not a jury trial.
6 I'm relatively intelligent, I can follow things. You
7 know --

8 MR. BRILL: It would help if you granted our
9 motion in limine, Your Honor, that would --

10 THE COURT: I haven't read it.

11 MR. ORLEANS: I'm not sure we'd stipulate to
12 that, Judge.

13 THE COURT: I've got to at least read it. But
14 I'm not trying to squeeze anybody, I'm just trying to say
15 I think you can do the same case you intend to do faster
16 than it's been going today.

17 MR. ORLEANS: May I just ask, Judge, if we're
18 not done by the end of the day on Thursday, do you have
19 time for us on Friday or is that out of the question?

20 THE COURT: I have some time. I have a speaking
21 engagement in the middle of the day in Stamford
22 unfortunately. We'll get it done this week. I just
23 really --

24 MR. ORLEANS: I agree.

25 THE COURT: It means moving some other people

1 and not getting some things that I'd like to get to as
2 well, so your cooperation is appreciated. I'm going to
3 shorten this speech and leave it at -- who do we have?

4 MR. HERNANDEZ: Plaintiffs call Dr. Mark
5 Thompson.

6 M A R K T H O M P S O N, called as a witness on
7 behalf of the Plaintiff, having been duly sworn by the
8 Court, testified as follows:

9 THE COURT: Please be seated. State your name,
10 spell your last name for the record please.

11 THE WITNESS: My name as Mark Thompson.
12 T-H-O-M-P-S-O-N.

13 DIRECT EXAMINATION

14 BY MR. HERNANDEZ:

15 Q. Sir, you're an employee of Quinnipiac University?

16 A. Correct.

17 Q. You are a doctor, is that correct?

18 A. Correct.

19 Q. What do you hold a doctorate in?

20 A. Economics.

21 Q. Where did you get your doctorate in economics?

22 A. Georgia State University.

23 Q. You're a numbers guy.

24 A. That is correct.

25 Q. All right. I may be referring to your transcript of

1 your deposition during the course of your testimony so I
2 have your sworn testimony from before, that's just up
3 there for your convenience in case we need to refer to it.

4 Sir, what is your present title at Quinnipiac
5 University?

6 A. Senior vice president for academic and student
7 affairs.

8 Q. And what areas fall under your portfolio?

9 A. I'm responsible for all the deans of all our schools
10 report to me, in addition against the academic portion.
11 The student affairs portion is student affairs for
12 essential life health services and I'm also responsible
13 for athletics and recreation.

14 Q. Okay. So is that, do I count correctly that's four
15 different portfolios that fall underneath your purview?

16 A. If you count athletics and recreation as two
17 separate.

18 Q. Okay, we'll say three.

19 A. Okay, that's fine.

20 Q. Combining athletics and recreation?

21 A. (Nodding head affirmatively.)

22 Q. All right. That seems like an awful lot to cover.
23 Approximately how much of your time percentage wise is
24 covered by academics?

25 A. It varies depending upon what's happening in any

1 given time. For example, this past year, quite a bit of
2 academics was covered as a result of our regional
3 accreditation that occurs every ten years, so it varies
4 from time to time. Would you like a general --

5 Q. Yes, roughly about what percentage of your time in
6 this past year was devoted to the academic portion of your
7 portfolio?

8 A. Just in the past year?

9 Q. Yes.

10 A. I would say approximately 40 percent of my time.

11 Q. Okay. And what about student affairs; how much of
12 your time is consumed by that?

13 A. I would say probably about 20 percent, 20,
14 25 percent.

15 Q. All right. So that leaves approximately 40 percent
16 for athletics and recreation, is that correct?

17 A. Yes.

18 Q. Okay. Now, when did you take athletics and
19 recreation under your umbrella?

20 A. This became part of my responsibilities July 1st of
21 2009.

22 Q. All right, well, when did you first begin working on
23 athletics and recreation issues for Quinnipiac University?

24 A. There was some preparation prior to July 1st, 2009,
25 where I was part of some meetings with management over the

1 course of April, May, June.

2 Q. What were those meetings about?

3 A. In part some budget decisions that were made with
4 respect to elimination of teams and when the lawsuit was
5 filed, some preparation as I was getting ready to take
6 over the responsibilities July 1st.

7 Q. Okay. And did you have an opportunity to begin
8 working on proposed roster management numbers for the year
9 2009, 2010?

10 A. Yes.

11 Q. And do you recall when you first prepared such a
12 roster?

13 A. I think my work on roster numbers began sometime
14 probably beginning of May, middle of May, 2009.

15 Q. Okay. Showing you Plaintiff's 146, do you recognize
16 Plaintiff's 146?

17 A. Yes.

18 Q. And is that your handwriting in the lower right hand
19 corner, May 20, 2009?

20 A. Yes.

21 Q. Is that approximately when you drafted your first
22 proposed roster management numbers?

23 A. Yes.

24 Q. So when you came in and assumed athletics and
25 recreation, one of your first tasks was to begin working

1 on roster management target numbers for '09, '10, is that
2 correct?

3 A. Correct.

4 Q. All right, and for the sake of reference, Plaintiff's
5 146, can we agree, sir, that that is all of the proposed
6 roster management target charts that you generated during
7 the course of your -- here I'll hand it up, to you.
8 During the course of your tenure to date as being in
9 charge of athletics and recreation?

10 MR. BRILL: Your Honor, could you advise the
11 witness that he has the exhibits in the books next to him?

12 THE COURT: Sure, that's fine.

13 MR. BRILL: I'm not sure he has a document.

14 BY MR. HERNANDEZ:

15 Q. And, sir, just to keep things moving, is that your
16 hand writing in the lower right hand corner in each of
17 these documents?

18 A. Yes.

19 Q. Okay. So --

20 A. Sorry, just making sure. These appear to be all of
21 the ones that I worked on, yes.

22 Q. Okay. Now, sir, when did you become aware that a
23 lawsuit was filed against your employer Quinnipiac
24 University?

25 A. I don't remember the exact date but whatever date it

1 was that the lawsuit was filed or the day thereafter.

2 Q. And did there come a time when you learned that Judge
3 Underhill entered his decision and order granting the
4 plaintiff's motion for a preliminary injunction?

5 A. I'm sorry, what did you say? Would you say that one
6 more time?

7 Q. Did you learn that Judge Underhill ruled in the
8 plaintiff's favor as far as the preliminary injunction?

9 A. Yes, I did.

10 Q. And you're aware that a published decision was issued
11 as a result of that, is that correct?

12 A. Yes.

13 Q. All right. And as I understand it from your
14 deposition transcript, you've had an opportunity to read
15 that decision, correct?

16 A. That is correct.

17 Q. And did you understand that Judge Underhill found a
18 problem with the way Quinnipiac University was adding,
19 strike that. Was dropping male student athletes shortly
20 before the first date of competition and then adding them
21 on again after the first date of competition?

22 A. Yes, I read that as part of his ruling.

23 Q. All right, and according to your deposition
24 testimony, was that, was it your understanding that was
25 the sum and substance of the problem that Judge Underhill

1 had with Quinnipiac University's use of roster management?

2 A. Yes, I think that was the primary concern.

3 Q. All right. Now, as a result of that, you undertook
4 to monitor roster management, is that correct?

5 A. Yes, correct.

6 Q. And could you explain for Judge Underhill what steps
7 you took in order to manage what you understood to be the
8 most important part of Judge Underhill's decision?

9 A. There was a several step process on my part of it,
10 there was an educational process and part was an
11 implementation process.

12 The educational process was to familiarize myself
13 with Title Nine legislation, NCAA regulations and so
14 forth. And in order to accomplish that, I reviewed
15 government available information from Department of
16 Education, Office of Civil Rights, so I reviewed NCAA
17 documents such as the ones that referred to under gender
18 equity. I engaged the help of an expert in the field to
19 help me understand the appropriate way to implement roster
20 management for compliance with Title IX.

21 In the implementation piece, following that work in
22 order to familiarize myself with various laws and
23 regulations, I then followed up with a meeting with head
24 coaches to discuss my own concerns about roster management
25 insuring that we made it very clear that we were to be in

1 compliance with Title IX, NCAA regulations. And at that
2 time I talked a bit about my own analysis, at least a
3 preliminary analysis of the roster numbers and what I
4 thought they might be for the up coming year.

5 But I thought this part of the process was to have
6 the vetting with the individual coaches who know their
7 sport and their situation best with respect to
8 competition, travel schedule, budgets and so forth. So I
9 invited the coaches to come to me individually to discuss
10 their individual sport and any concerns and get their
11 input with respect to what the appropriate roster number
12 would be that did reflect a genuine experience for each of
13 the participants in each of those teams.

14 There's a secondary invitation that followed that so
15 some of the coaches did come and see me and I was
16 concerned that not all of them had come so I sent a
17 secondary invitation. Eventually I did speak with all of
18 the coaches on a one to one basis to get their input.

19 And in addition to that, I indicated to the coaches
20 that we would be having formal training for all of them in
21 Title IX compliance as well as NCAA regulations. And this
22 was a process that went forward over the course of a
23 couple months. And again, the most important part for me
24 was making sure from the coach's perspective, given their
25 knowledge about their particular sport and so forth that

1 they would represent a number that was reasonable with
2 respect to genuine participation.

3 Q. Okay. Sir, my question was the steps that you took
4 to educate yourself on Title Nine. Do you recall being
5 asked the following question and giving the following
6 answer -- page ten, beginning at line eight -- on
7 May 14th, 2010.

8 Question: And after becoming in charge of athletics
9 and recreation, did you take any steps to educate yourself
10 on the university's requirements under Title IX?

11 Yes.

12 And what steps did you take?

13 It was more along the lines of educating myself with
14 respect to Title IX in general, not limited to the
15 university's website, talking with attorneys, talking with
16 Tracy -- I can't remember Tracy's last name.

17 Tracy Flynn?

18 Tracy Flynn, thank you. Our compliance officer in
19 athletics, an expert in Title IX, who asked to come help
20 with my understanding of Title IX was all about.

21 And later you said that's okay, that pretty much
22 covers what I did.

23 A. Yes, at the time, as I remember, yes.

24 Q. Sir, I'd like to talk to you about this process that
25 you mentioned about finding out what a reasonable target

1 roster management number would be. Do you have a contract
2 with Quinnipiac University?

3 A. Employment contract?

4 Q. Yes.

5 A. Yes.

6 Q. When does that expire?

7 A. My current contract expires June 30th of 2011.

8 Q. Are you being compensated for your time being here
9 today?

10 A. Not outside the employment contract.

11 Q. And I think you mentioned that you sent an email to
12 the coaches asking them for their input on reasonable
13 roster management numbers, is that correct?

14 A. I sent both an email, I also asked -- first sent that
15 invitation and asking for their respect input, yes.

16 Q. Did that email come before or after you sent out
17 proposed target roster management numbers?

18 A. I think, my recollection was that it was a meeting
19 that occurred either late May or I think it was early June
20 actually and at that point I did go over some numbers that
21 I thought represented what was close to NCAA average squad
22 sizes and my email followed that meeting, inviting them to
23 come speak with me individually.

24 Q. Did the email you sent to the coaches include
25 proposed roster management numbers for '09, '10?

1 A. I don't believe, I don't believe so. I think that
2 the discussions took place at the face to face meetings.
3 I do not believe that I attached a spread sheet at that
4 point.

5 Q. Did you have a face to face meeting with each and
6 every coach?

7 A. Right.

8 Q. As a result of this email?

9 A. Either through the personal invitation I made for the
10 head coach meeting or via email which was a secondary
11 invitation to come speak to me.

12 Q. Did there come a time where you emailed proposed
13 target roster management numbers to the coaches?

14 A. I don't believe that I ever sent an email directly to
15 the coaches. My recollection could be wrong. My
16 recollection was that if I did email something, it was to
17 our athletic director Jack McDonald.

18 Q. Did you ask him to further those to the coaches?

19 A. I asked him to make sure that he communicated with
20 the coaches for the purpose of having their input, yes.

21 Q. And after forwarding the proposed target roster
22 management numbers for '09 dash '10, did you invite the
23 coaches to come and speak to you about those proposed
24 numbers?

25 A. Yes.

1 Q. Okay. And did they come and speak to you about those
2 proposed numbers?

3 A. Yes.

4 Q. Did any of them express problems with the proposed
5 numbers for '09, '10?

6 A. It wasn't anything I would consider to be a, anything
7 I would consider to be significant in terms of the numbers
8 on the teams. It was more concern about their own
9 understanding of the process and Title IX compliance
10 regulations.

11 Q. And sir, did the coaches at the time that you met
12 with them, did they have an employment contract with
13 Quinnipiac University?

14 A. Yes, they did. It was May of last year -- June of
15 last year so they would have had a contract at that time.

16 Q. All right, and when did their contract expire?

17 A. In general when we issue contracts it ends the fiscal
18 year that ended June 30.

19 Q. And did were the coaches contracts renewed as of
20 July 1, 2009?

21 A. No, they were not.

22 Q. All right. And, in fact, are all of the coaches at
23 Quinnipiac University at this time employees at will?

24 A. Yes, in addition to all the other administrators at
25 our university.

1 Q. After the coaches became employees at will, did you
2 solicit the target roster management numbers for '09, '10?

3 A. Yes.

4 Q. Sir, how many coaches are there for the combined
5 men's, women's cross country and women's indoor and
6 outdoor track?

7 A. I'd have to take a minute to count, but I can tell
8 you that there's -- I'm sorry, for cross country indoor
9 outdoor track? That's one coach who has responsibility
10 for men's cross country, women's cross country, women's
11 indoor and women's outdoor track.

12 Q. Is that Coach Martin?

13 A. Yes.

14 Q. All right. Do you know how many men are on the cross
15 country team?

16 A. I'd love to look back and see the cross numbers but
17 whatever the roster number was is what they started their
18 season with.

19 Q. And is it your understanding that Coach Martin has to
20 coach the men's and women's cross country team at the same
21 time, the same season?

22 A. Yes.

23 Q. All right, and after that she coaches the women's
24 indoor track?

25 A. As I said, she has responsibility for men's and

1 women's cross country, indoor track and outdoor track for
2 women.

3 Q. And so after indoor track, she coaches outdoor track,
4 is that correct?

5 A. I'm not clear in terms of -- given my
6 responsibilities, the breadth of my responsibilities, I
7 can't tell you precisely when indoor track ends and
8 outdoor track begins but, as I said, she has
9 responsibility for all four teams.

10 Q. Sir, is it your understanding that in this litigation
11 your employer's position is that each of those sports
12 men's cross country, women's cross country and women's
13 indoor and outdoor track, are four separate sports?

14 A. Yes, that is correct.

15 Q. Is she paid four times as much as the other head
16 coaches?

17 A. I don't know what her salary is relative to the other
18 coaches without looking at it. I know approximately what
19 her salary is personally but I don't know how it compares
20 off the top of my head with others.

21 Q. Does she have any assistant coaches?

22 A. Yes.

23 Q. All right, how many assistant coaches does she have?

24 A. Again, I'd have to look. I think she has at least
25 two.

1 Q. Okay. Sir, you had an opportunity to hear
2 Dr. Lopiano testify about the importance of fairness in
3 the proportional allocation of competitive opportunities,
4 do you agree?

5 A. Yes.

6 Q. All right. You're an economist, right?

7 A. Yes.

8 Q. Would you agree, sir, if we have a limited resource,
9 R, and you divide it by a certain number, you get a
10 percentage?

11 A. Yes.

12 Q. All right. And the bigger the number underneath
13 gets, the smaller the amount of resources are going to be
14 that gets spread around, correct?

15 A. Yes.

16 Q. All right. Sir, in connection with your educating
17 yourself about Title IX, did you have an opportunity to
18 review the NCAA's gender equity and intercollegiate
19 athletics handbook?

20 A. Yes, I have.

21 Q. On gender equity?

22 A. I did look at this.

23 Q. Did you forget that you had read it when you
24 testified?

25 A. I didn't remember all the things I did at the time.

1 Q. Okay. And sir, did you have an opportunity to look
2 at the NCAA gender equity handbook -- well, you tell me
3 when you first saw it.

4 A. I would say it was probably June of last year, June
5 of 2009.

6 Q. All right. And, sir, as I understand it, your
7 primary, your understanding of the primary concern of the
8 court was this roster manipulation, is that correct?

9 A. Yes.

10 Q. All right. And that's what you were looking at?

11 A. I was looking at the entire, when I take
12 responsibility for somebody, I take it very seriously so
13 my review was not limited just to the question that you
14 just asked me, it was my responsibility in its entirety.

15 Q. Now, did there come a time when Coach Martin
16 requested that she increase the number of women's
17 athletes?

18 A. Yes, that came with regard to the setting of roster
19 for the upcoming academic year.

20 Q. And was she granted her request to increase the
21 target roster management number for the women's track?

22 A. Yes, she was.

23 Q. All right. And, sir, draw your attention to, if we
24 can just back up a little bit to Plaintiff's Exhibit 85,
25 you have a copy up there and I'll throw it up here.

1 Do you recognize, sir, Plaintiff's 85 as an email
2 chain between yourself and Jack McDonald, the athletic
3 director?

4 A. Yes.

5 Q. And sir, was that email dated Tuesday, July 21st,
6 2009, from Jack McDonald to you?

7 A. Yes.

8 Q. All right. And did that have an attachment?

9 A. Yes, it did.

10 Q. Okay, and what was attached to that email?

11 A. You'll have to put it back so I can see. If you can
12 put two back on the first page? The reason I'm asking the
13 question is because it indicates there's a sample there
14 with respect to baseball and -- I'm sorry, could you move
15 it down so I could see the top?

16 Q. Sure.

17 A. Thank you. Okay, thank you. Yes, I think, I believe
18 the attachment is the ones you just showed, the excel
19 spread sheet.

20 Q. Is this your response to Jack McDonald's email, "I
21 think this looks good, I attached the roster numbers, we
22 are seeking in case you don't have the latest"?

23 A. Yes, that's what I said.

24 Q. And this is your attachment, correct?

25 A. I believe that is correct, that's right, yes.

1 Q. All right, and this email was sent by you to Jack
2 McDonald on July 21st, 2009, correct?

3 A. Correct.

4 Q. This is after the coaches had become at will
5 employees at Quinnipiac University, is that correct?

6 A. That is correct.

7 Q. All right. And what was the purpose of
8 transmitting -- well, withdrawn.

9 Did you send another proposed target roster
10 management, set of target roster management numbers to
11 Mr. McDonald on or about September 1st of 2009,
12 Plaintiff's Exhibit 86?

13 A. Yes. Could I see the attachment, please?

14 Q. Sure. First of all, do you recognize --

15 A. Yes, I recognize.

16 Q. The plaintiffs --

17 A. Yes, I recognize it, yes.

18 Q. And showing you the attachment --

19 MR. BRILL: What is the exhibit number, please?

20 MR. HERNANDEZ: Eighty-six, Plaintiff's 86.

21 A. Yes.

22 Q. All right. This is your email?

23 A. Yes.

24 Q. All right, sir, did you have an email exchange with
25 Coach Martin, referring to Plaintiff's Exhibit 84, on or

1 about November 16th of 2009. This is an email chain, do
2 you recognize it?

3 A. Maybe just a bit bigger. I can look if -- it's one
4 of the exhibits there. Thank you, that's perfect. Yes, I
5 recognize that.

6 Q. And that begins on November 16th from Carolyn Robin
7 (ph) to Tracy Flynn and just so that we're clear, is
8 Carolyn Robin the maiden name of Carolyn Martin?

9 A. Yes, it is.

10 Q. So that we're clear. And this email is Carolyn
11 Martin requesting an opportunity to add some add ons to
12 the women's track team?

13 A. Yes.

14 Q. All right, and Tracy responds, correct?

15 A. Yes.

16 Q. All right, and she sent that email to you, is that
17 correct?

18 A. That is correct.

19 Q. All right, and did you respond in email dated
20 November 19th, 2009?

21 A. Yes.

22 Q. And was your response, quote, "Dear Tracy, Does this
23 represent the process of building her roster up to the
24 required 30"?

25 A. Yes.

1 Q. Those are your words?

2 A. Yes.

3 Q. Required?

4 A. Yes, she had her roster target at 30 and she was
5 required to meet that. That's a management issue.

6 Q. That was mandatory, correct?

7 A. Yes, as with every team there's a target number and
8 my expectation is coaches being held accountable for those
9 numbers, and yes.

10 Q. And we were talking here about a women's team,
11 correct?

12 A. It's the same standard for both men and women.

13 Q. Okay, and did you convey to Coach Martin that she was
14 required to build up her roster to 30?

15 A. As I said, for every coach there's a target cross
16 number that they are expected and held accountable to
17 meet.

18 Q. I believe the word you used in your email was
19 required, is that correct?

20 A. And I'm answering it's required of every coach.

21 Q. Thank you. Sir, drawing your attention to
22 Plaintiff's Exhibit 81, this is the -- first page, it's a
23 four page document. Email chain, Plaintiff's Exhibit 81.
24 Beginning on the last page, does this represent an email
25 chain that you were copied on?

1 A. Yes.

2 Q. All right. And is that, does that represent an email
3 exchange between yourself and Carolyn Robin also known as
4 Carolyn Martin?

5 A. I don't know if there's others included along the way
6 but yes, that's, there's exchange between myself and
7 Carolyn, yes.

8 Q. And Carolyn Martin again is an at will employee at
9 Quinnipiac University coaching four teams?

10 A. Correct.

11 Q. Sir, did she send an email to you; is this her email
12 to you in which she says, this is highlighted, "I would
13 like to increase my number from 18 to about 24"?

14 A. Yes.

15 Q. That's what she said?

16 A. Correct.

17 Q. Did she also say for women's track I currently have
18 30 women on the team and made no cuts this year so my
19 track team has some lower quality women with next year's
20 increase in cross country I will probably need a slight
21 bump up in track, I think 35 would be sufficient.

22 A. Yes, that's what she says.

23 Q. All right, and you read this email?

24 A. Yes, I did.

25 Q. All right. And later she said "I'm willing to work

1 with these numbers to help the overall goal. Please let
2 me know what you think. Thank you so much for your
3 support. This year's gone very smoothly with all the
4 changes. Thanks again, Carolyn"?

5 A. Yes, that's what she wrote.

6 Q. And did you actually speak to her about this email?

7 A. Yes, I did.

8 Q. All right. Did you meet with her after you received
9 this email?

10 A. Yes.

11 Q. Where did you meet with her?

12 A. In my, either in my office or in the athletics
13 center, I don't remember which.

14 Q. What did you talk about?

15 A. I asked some questions. I was concerned about the
16 impact of increasing the team on her budget.

17 Q. And what was, did you have concerns about any other
18 aspects about her program other than the budget?

19 A. I did ask her questions regarding her statement about
20 lower quality women. She did qualify that later by saying
21 that, despite her statement in her email which she
22 indicated was -- I'll give you one example, there was one
23 participant in the team she felt contributed in a way in
24 terms of strategy that she offered that she wasn't
25 necessarily highly competitive in terms of her

1 performance, but that she was a significant component of
2 the team as a result of this strategy and what she brought
3 to what they might be doing differently.

4 I also questioned her on the number, the increased
5 number she sought and, again, that was mostly around my
6 concern that she have a sufficient budget to insure that
7 she could handle the additional number that she's
8 requesting.

9 Q. All right. And so if I'm correct, your concerns with
10 her were budget -- that was one, correct?

11 A. Correct.

12 Q. All right. Two was whether the add ons were
13 competitive, is that correct?

14 A. Yeah, well, again, it was more than around my concern
15 that she was able to offer legitimate experience for the
16 side roster she was requesting.

17 Q. All right. And based upon her representations to
18 you, you allowed her to have these people, is that
19 correct?

20 A. That is correct.

21 Q. All right, and so what we're looking at here is an
22 addition of six women to the cross country team, is that
23 correct?

24 A. I believe that's what -- I'd have to refer to the
25 final roster for --

1 Q. Well, I'm referring to her email.

2 A. Okay, that's what she proposed. I don't remember
3 that's precisely what I approved.

4 Q. Okay, and --

5 A. I believe it is but I'd have to look back at the
6 numbers.

7 Q. And she was proposing a 30 percent increase in the
8 number of women on cross country, is that correct?

9 A. Correct.

10 Q. All right. And did you offer to increase her salary
11 by 30 percent of one fourth of whatever her income was?

12 A. No, I did not.

13 Q. Did she also request an increase of five women to the
14 women's track team?

15 A. Yes, she did.

16 Q. Did she tell you where these women were coming from?

17 A. No, she didn't.

18 Q. Did you eventually learn some of them were walk ons,
19 she was attempting to add them with walk on athletes?

20 A. No, she did not share that information with me.

21 Q. And, again, the increase from 30 to 35, that would be
22 a 20 percent increase, is that correct?

23 A. Correct, approximately.

24 Q. Sir, drawing your attention to the email that you
25 eventually sent on or about May 7th in the same email

1 chain, were your concerns stated in that email, did you
2 say you had a couple of concerns, two concerns, first is
3 with the budget and second about the quality of the
4 athletes?

5 A. And also I put in the question about genuine
6 experience.

7 Q. And when you -- well, withdrawn.

8 All right. Did you eventually approve an increase in
9 her roster?

10 A. Yes, I'd have to again look at the roster plan to
11 know what the exact number was but yes, there was an
12 increase.

13 Q. Okay. You know, along with increasing her roster,
14 did you also increase the number of assistant coaches that
15 were available to help her?

16 A. No, I did not.

17 Q. All right, did you require her to work longer hours
18 to coach these additional female student athletes?

19 A. No.

20 Q. Did you take any steps to get more scholarship
21 funding to help bring quality Division I student athletes
22 to her track team?

23 A. No. We did increase her operating budget.

24 Q. By how much?

25 A. I believe her budget was around 50,000-dollars and we

1 increased it by another \$10,000. A coach does have
2 discretion how they utilize their budget so I'm not quite
3 sure what her plans are in terms of how she plans to use
4 that.

5 Q. You didn't ask her?

6 A. No, I think that's the responsibility of a coach
7 who's doing their job to have an understanding how best to
8 utilize their budget.

9 Q. Sir, you had an opportunity, I believe you said, to
10 read the gender equity and intercollegiate handbook,
11 correct?

12 A. Correct.

13 Q. Sir, would it surprise you to learn it's actually the
14 responsibility of the university to make sure that the
15 coaches are spending their money appropriately?

16 A. No, it wouldn't surprise me at all. I think the same
17 with regard to my academic program, the primary oversight
18 is with the dean of the school, for example, or the
19 chairman of a department, chairperson of the department.
20 And then the university would review whether or not they
21 are within their budget limits and have some sense as to
22 whether or not they are using their budgets appropriately.
23 And that's standard, comes through in review things with
24 respect to accreditation, when accreditation visits occur
25 and so forth.

1 Q. Okay. And, sir, drawing your attention to
2 Plaintiff's Exhibit 96, does this represent an email
3 chain, for the record referring to bate stamp numbered D
4 13322 and 13323. Do you recognize this email chain, sir?

5 A. Yes.

6 Q. All right. Does that begin on -- on May 3rd from you
7 to the head coaches?

8 A. Yes.

9 Q. And did Coach Dave Clark respond by email to your
10 request for input about the target numbers?

11 A. Yes, he did.

12 Q. All right. And in fact, he emailed you back the very
13 next day, correct?

14 A. Correct.

15 Q. All right, do you recall this email?

16 A. Yes, I do.

17 Q. And what team does Coach Dave Clark coach?

18 A. He's the women's soccer coach.

19 Q. I'm sorry?

20 A. Women's soccer.

21 Q. Women's soccer. Okay, and did you as of May 4th,
22 2010 let him know what the target roster management number
23 was that you and the university were looking for out of
24 him for women's soccer?

25 A. No, I think he was assuming that his number might be

1 the same as the prior year.

2 Q. Okay. And did he tell you if he had a choice he
3 would have a roster of 22 to 24 players?

4 A. Yes, that's what he wrote.

5 Q. "In the current climate I understand that I need to
6 have a definitive number that would be as high as 27"?

7 A. Yes, he wrote that.

8 Q. All right. And did he also go onto say "I will work
9 with what the school needs but keep in mind that 27 is not
10 a manageable number for a sport such as soccer"?

11 A. Yes, he wrote that as well.

12 Q. All right. And eventually he was given a break on
13 his target number, is that correct?

14 A. I was concerned about --

15 MR. BRILL: Objection, objection to the
16 characterization in the question. Given a break.

17 THE WITNESS: I would object to that
18 terminology. I don't give people a break. I take this
19 very seriously and I listened very closely to what he had
20 to say via his email, and I did reduce his roster number
21 because he did express a concern about -- my
22 interpretation of a manageable number and his concern
23 about a change in the opportunity.

24 BY MR. HERNANDEZ:

25 Q. Would say it be fair to say that Coach Clark, coach

1 of the women's soccer team, expressed that he believed
2 that the school had a need with respect to target roster
3 management numbers for women's soccer?

4 A. Yeah, and I hoped that my response to him took his
5 end of it very seriously and in reducing his roster taking
6 away any concerns he had about trying to meet the target
7 needs. I responded very seriously to his concern about
8 his needs.

9 Q. And by needs, earlier you had told the coaches that
10 they were required to meet their roster numbers, is that
11 correct?

12 A. Again, it came after the invitation of the coaches
13 and after the rosters were set following what I think was
14 an appropriate process in making a determination about
15 change and opportunities.

16 Q. Sir, let's talk for a moment, if we could, about
17 genuine competitive opportunities. What's your
18 understanding of what the NCAA looks for as far as a
19 genuine competitive opportunity?

20 A. Came out in earlier testimony actually today. Could
21 include participating in competitions, it could include a
22 role whereby someone is helping with practice. It can
23 include an experience of being on, part of a team in terms
24 it was comradery and so forth that comes, but essentially
25 it means that benefits flow as a result of the person's

1 being a member of a team.

2 Q. And sir, do you understand that as far as substantial
3 proportionality goes, when you compare the men's program
4 to the women's program, they have to be fair?

5 A. I'm not clear what you mean. I understand
6 substantial proportionality being the percentage of
7 opportunities for men's and women's athletics need to
8 match the full undergraduate population.

9 Q. That's a number, right? Correct?

10 A. Yes.

11 Q. 50/50, 60/40, whatever that may be?

12 A. Correct.

13 Q. And, sir, would you agree with if the population were
14 50 percent women and 50 percent men and the participation
15 rate were 50 percent female and 50 percent male, that
16 would be numerical proportionality?

17 A. If you're asking whether or not there are any more
18 analysis to understand about whether or not the 50/50
19 split represented genuine opportunity or whether it was
20 window dressing, I would say what you're saying is I'd
21 have to know -- your question is at best a way for me to
22 respond is I'd have to know more about the situation.

23 Q. Okay. Sir, are you aware that Quinnipiac University
24 prepared a self audit as far as gender equity when it
25 joined Division I?

1 A. I believe it was in 2006.

2 Q. All right. Did you read the university's gender
3 equity plan?

4 A. Yes, I did.

5 Q. All right, when did you read that?

6 A. Again it was approximately a year ago. I may have
7 read it before then when the report was released but I
8 don't recollect exactly when but I remember the last time
9 I read it was about a week ago.

10 Q. And included in the gender equity plan, were there
11 some proposed student surveys?

12 A. Yes, I think there were.

13 Q. Okay, to your knowledge -- to your knowledge were
14 your surveys ever sent out?

15 A. You're referring to the end of the year or end of the
16 season surveys?

17 Q. Well, there's actually two surveys, right? Is that
18 correct?

19 A. I don't know, I'd have to go back and look. The once
20 I'm familiar with are the end of the season or end of the
21 year surveys to get some inputs from the students with
22 respect to their experience and, yes, my understanding is
23 those have been done.

24 Q. And have you had an opportunity to see any of the
25 student surveys that came back?

1 A. No, I haven't seen them.

2 Q. All right, and do you know if those surveys have ever
3 been sent out?

4 A. Sent out to whom?

5 Q. To student athletes?

6 A. If you're requesting a response --

7 Q. Yes.

8 A. Yes.

9 Q. And I'm not talking about the end of the year survey.

10 A. Okay, you'll have to tell me which survey you're
11 referring to.

12 Q. All right, we'll get to that in a second.

13 A. All right.

14 Q. Sir, who is the Title IX coordinator at Quinnipiac
15 University?

16 A. Sarah Steele, S-T-E-E-L-E.

17 Q. And have you had a chance to speak to her about
18 Quinnipiac University's problem with roster management?

19 A. I don't feel we have a problem with roster management
20 so I haven't discussed it with her.

21 Q. All right. Who is Jo Martin?

22 A. Jo Martin is one of the representatives, she's a
23 faculty member from our legal studies department who
24 serves on the student advisory committee, student athlete
25 committee.

1 Q. All right. Sir, in connection with your role as
2 being in charge of athletics and recreation, did you take
3 any steps to monitor whether any nontrack athletes were
4 running or practicing with any of the cross country
5 runners?

6 A. No.

7 Q. Did you take any steps to find out if there were any
8 male student athletes who were practicing with whatever
9 male team, who were not being recorded on rosters?

10 A. No.

11 Q. Are you aware, sir, that Coach Martin requires all of
12 her cross country athletes to run track?

13 A. No. No.

14 Q. Sir, do you know if anyone at Quinnipiac University
15 in charge of Title IX compliance has made any efforts to
16 speak with Coach Sparks to investigate the allegations of
17 sex discrimination at Quinnipiac University?

18 A. I'm not aware of that, no.

19 Q. Have you taken any steps to speak with her about the
20 allegation the of sex discrimination at Quinnipiac
21 University?

22 A. I've spoken to Coach Sparks like the other coaches
23 with respect to their roster numbers, the same questions
24 with respect to any concerns they had about their subjects
25 or resources, schedules and so forth, but we did not

1 talk specifically about gender equity concerns. I see
2 that as a broader issue than just one team at a time.

3 Q. Sir, have you had an opportunity to compare the total
4 expenses for the men's athletic program against the
5 women's athletic program?

6 A. Yes, I have looked at it.

7 Q. When did you look at it?

8 A. Again this was probably about a year ago, probably
9 June or July of last year and then I did see it again,
10 October when we submitted the EADA report for '08, '09 or
11 '07, '08, whichever one we submitted last October.

12 Q. Sir, I'd like to talk with you about the timing of
13 when coaches are made aware of what their target numbers
14 are going to be. All right? When in 2010 did you or the
15 athletic director notify the coaches as to what their
16 target numbers were going to be for the coming year, 2010,
17 '11?

18 A. Finalized numbers were only provided to them recently
19 within the last couple weeks, and this was a problem that
20 came up as a result of the last meeting I had with head
21 coaches. So my hope is that the process going forward is
22 going to go, we're going to know well in advance now that
23 I have a better understanding about recruiting issues and
24 so forth. It did come, I consider it to be late this year
25 but I'm moving forward. My hope is we'll come at an

1 appropriate time for them to make it easier in terms of
2 recruiting and so forth.

3 Q. Okay. And when you say late, when were they
4 notified?

5 A. Again, as I said, they were notify within the last
6 two weeks. I don't remember exactly what date it was.

7 Q. So would it be fair to say first week of June?

8 A. Sometime around then, yes.

9 Q. Would this have been after June 1st?

10 A. I believe so.

11 Q. All right. And, sir, what is your understanding as
12 to when depositis are due from prospective candidates?

13 A. Deposits are due on July 1st -- I'm sorry, June 1st.

14 Q. June 1st, correct?

15 A. Yes, correct.

16 Q. All right. And the target roster management numbers
17 were made available to the coaches after June 1st, is that
18 correct?

19 A. I should say that most of them were in advance of
20 that in items of verbal communications from me but the
21 actual final roster plan in terms of being on a spread
22 sheet was distributed, did not come until after June 1st.

23 Q. Okay. And sir, are you aware that after, sometime
24 after the budget is set for the coming year the university
25 sometimes imposes mandatory costs on the teams, for

1 example, an increase in the cost of insurance?

2 A. No.

3 Q. What about increased expenses for things like
4 training?

5 A. No.

6 Q. All right. You're not aware that after the numbers
7 are set and the budget is set, that sometimes a team's
8 expenses will go up?

9 A. No, I'm not, but again, my question to coaches was
10 very specific with regard to their budgetary needs. They
11 did not offer this information to me.

12 Q. And you did not learn that either, correct?

13 A. I'm not aware of it, no.

14 Q. All right. Sir, showing you what we've marked as
15 Plaintiff's Exhibit 143, all right, this is an
16 inter-department envelope addressed to Robin Sparks marked
17 Confidential. Do you know whose handwriting that is?

18 A. No, I don't.

19 Q. All right. And is that dated June 9, 2010?

20 A. Yes.

21 Q. All right. And drawing your attention to the
22 attachment, the second page, do you recognize the latter?

23 A. Yes, this is the part of the process that I
24 implemented that requested the coach's certification of
25 their number with respect to, again, it's a reasonable

1 number on their team and can be supported by the budget
2 and represents genuine experience for the athletes on the
3 team.

4 Q. And this letter was actually addressed June 1st, is
5 that correct?

6 A. That is correct.

7 Q. But it wasn't put into enter office mail until
8 June 9 --

9 MR. BRILL: Objection, Your Honor. There's no
10 testimony it was his office mail. Actually there's no
11 evidence about this at all. We don't know whose
12 handwriting that is, who sent it to Robin Sparks and when.

13 THE COURT: Well, 143 is in evidence and it says
14 what it says.

15 MR. BRILL: Excuse me?

16 THE COURT: 143 is in evidence and it says what
17 it says. We don't need to ask the witness to agree.

18 MR. BRILL: You're saying you're accepting it
19 into evidence now?

20 THE COURT: We have a practice when an exhibit
21 is used absent an objection, it becomes a full exhibit.
22 143, there's no objection -- do you have a objection to
23 143?

24 MR. BRILL: No, I don't object.

25 THE COURT: Okay, so it's there. It says

1 whatever it says.

2 BY MR. HERNANDEZ:

3 Q. And, sir, did you make it clear to the coaches at
4 Quinnipiac University that after target roster management
5 numbers were set, their rosters really should not change
6 without your permission?

7 A. That is correct.

8 Q. Or without your review, is that correct?

9 A. That is correct, I indicated I had final approval on
10 any changes to the rosters.

11 Q. Okay. And, but the bottom line was that the caps on
12 the men's teams were fixed as far as you were concerned?

13 A. I don't believe that we had caps or ceilings on any
14 of our teams. I think that's evidenced through some of
15 the changes we made in roster numbers from last year to
16 this year, having one year's experience with last year's
17 roster numbers.

18 Q. But the roster numbers going forward for 2010, 2011,
19 those --

20 A. It's a number. I don't consider it to be either a
21 cap or a ceiling.

22 Q. Okay.

23 A. Or a floor, I'm sorry.

24 Q. You do not consider it, correct?

25 A. It's a number and it's just like any number. Again,

1 in an economic department if there's a number that needs
2 to be met with respect to a faculty student ratio to
3 maintain accreditation standards, it's not a floor or a
4 ceiling, it is a number that is required accountability
5 with respect to them managing that number.

6 Q. And sir, you eventually approved an increase in Coach
7 Martin's roster management number for her women's track
8 team, is that correct?

9 A. Yes, I approved a roster increase for Coach Martin.

10 Q. And when you approved that increase, did you consider
11 the relative level of accessibility of her as a coach to
12 the other student athletes?

13 A. I believe I addressed that when I asked her about
14 the, her resources and what she needed and she responded
15 she could have that size roster and provide an opportunity
16 to athletes.

17 Q. And, sir, you expanded the women's track team,
18 correct?

19 A. Correct.

20 Q. All right.

21 A. Indoor and outdoor.

22 Q. All right. Were they given additional locker space?

23 A. I don't know.

24 Q. You don't know?

25 A. No.

1 Q. Did you look into whether their locker space would be
2 sufficient for these added student athletes?

3 A. As I testified before, the question was posed to the
4 coach specifically about how this would impact resources
5 available to her athletes and she indicated there was no
6 problem. She had reasons for wanting this. This was a
7 large group for competitive reasons and they did, as I
8 said, increase the operating budget which was primarily my
9 concern.

10 Q. Did you look into the locker room question?

11 A. Personally, no. Again, I rely on coaches to respond
12 to my questions with respect to how they'll be impacted
13 about any of these changes.

14 Q. Did you take into consideration access to training
15 facilities in light of this increased number of women on
16 the women's track team?

17 A. Again, I think this was covered by my question with
18 respect to her ability to provide a genuine opportunity to
19 her athletes.

20 Q. Sir, I'd like to talk to you if I could about the
21 competitive cheer squad. Did the university solicit to
22 hire a head coach?

23 A. I don't understand the question.

24 Q. Did the university hire a head coach for the
25 competitive cheer?

1 A. Yes.

2 Q. And were you involved in that process at all?

3 A. No.

4 Q. All right. Sir, I'm going to show you Plaintiff's
5 Exhibit 82. Do you recognize Plaintiff's Exhibit 82?

6 A. No, I have not seen that before.

7 Q. You have not seen that before?

8 A. No.

9 Q. Sir, in connection with competitive cheer, is it the
10 university's intention to increase the roster of the
11 competitive cheer team for the coming year?

12 A. Yes, the coaches requested an increase from 30 to 36.

13 Q. All right, and again that's a 20 percent increase, is
14 that correct?

15 A. Not quite but pretty close.

16 Q. All right, and did you approve that increase?

17 A. Yes, I did.

18 Q. All right. When you approved the increase, did you
19 consider the experience of the head coach in coaching
20 competitive cheer?

21 A. No.

22 Q. You did not?

23 A. No.

24 Q. Did you consider her ability to recruit student
25 athletes when approving the increase in the competitive

1 cheer squad?

2 A. No.

3 Q. Did you consider Coach Powers' access to support
4 staff when you agreed to increase her roster for the
5 competitive cheer team?

6 A. Again, same question I posed to any coach who made a
7 request of changing their roster numbers and it was with
8 respect to the impact on the student athletes.

9 Q. And, sir, are you aware that Coach Powers, the head
10 coach for the competitive cheer team, has not passed the
11 NCAA recruiting test?

12 A. Not until it was brought to my attention during the
13 deposition.

14 Q. And your deposition was in May of this year, correct?

15 A. Correct.

16 Q. Just a few weeks ago?

17 A. Correct.

18 Q. All right, and notwithstanding the fact that she --
19 well, just so that we're clear, do you understand if she
20 ha has not passed the NCAA recruiting test, she's not
21 allowed to recruit off campus?

22 A. No, I did not know that.

23 Q. Okay. Sir, would you agree that if a coach is unable
24 to recruit off campus, that has an impact on how the team
25 is run?

1 A. Yes, it obviously has an impact that limits the scope
2 of the degree of where the coach can recruit, yes.

3 Q. And that would also have an impact on the competitive
4 experience of the members of the competitive cheer team,
5 correct?

6 A. I don't see a connection there.

7 Q. You do not?

8 A. No.

9 Q. Would you be surprised, sir, that the NCAA considers
10 recruiting to be a real hallmark, lynch pin of a qualified
11 head coach?

12 A. Yes, I do.

13 Q. You are surprised or --

14 A. No, I'm sorry, I understand that that's an important
15 part of what a coach would do, recruiting a team to be
16 competitive.

17 Q. All right, and when you approved increases to Coach
18 Martin's women's track team, were you aware of her
19 experience as a track coach?

20 A. No.

21 Q. Have you had a chance to look at her resume?

22 A. No.

23 Q. All right. Do you know what her experience is as far
24 as recruiting, referring to Coach Martin?

25 A. No.

1 Q. Do you know if she has taken any steps to recruit off
2 campus for the student athletes that she proposes to add
3 to her roster?

4 A. No.

5 Q. Sir, would you agree that if Coach Martin is coaching
6 the entire year, she has no off season, correct?

7 A. Again I'm not quite sure when seasons end and begin
8 but I would say she has a significant portion of the year
9 she has coaching responsibilities.

10 Q. And would it be fair to say that since she's coaching
11 year round, four teams in a year, she doesn't have the
12 luxury of down time, noncoaching time to recruit?

13 A. I don't know how Coach Martin divvies up her time
14 between different responsibilities.

15 Q. Would you agree if she's spending a substantial
16 amount of her time coaching three -- strike that, four
17 teams during the year, she's not going to have as much
18 time available to recruit?

19 A. Again I think it's speculative to make that
20 statement. I don't know how she divvies up her time. I
21 don't know how she utilizes her assistant coaches.

22 Q. So what I'm hearing from you when you approved an
23 increase to her roster management numbers for the women's
24 track team, you didn't ask her about her ability to
25 recruit with these added responsibilities?

1 A. Again, the question was with respect -- I did not go
2 through all 12 standards of the OCR letter, for example,
3 or, you know, go down a check list of various things. The
4 conversation was please tell me how this impacts your
5 ability to provide a genuine opportunity to your student
6 athletes.

7 Q. All right, and we would agree that the quality of the
8 competitive experience is determined by the 12, the 12
9 point check list propogated by OCR?

10 A. I'm sorry, say that one more time.

11 Q. We would agree that determining the quality of the
12 competitive experience is driven by that 12 point check
13 list?

14 A. I think it's important to pay attention to the 12
15 points, yes.

16 MR. HERNANDEZ: I have no further questions.

17 THE COURT: All right, why don't we break here
18 for the day. I understand we're going to be picking up
19 with both cross and your direct of this witness?

20 MR. BRILL: Yes, I'll finish up this witness
21 tomorrow morning, Your Honor. I would expect to have
22 probably an hour.

23 THE COURT: Okay.

24 MR. ORLEANS: And we'll proceed with Mr. Webb, I
25 expect.

1 THE COURT: All right. All right, thank you
2 sir. You may step down.

3 (Whereupon the witness was excused.)

4 THE COURT: We'll take up motion in limine, when
5 do you want to respond to that?

6 MR. ORLEANS: You want something written, Your
7 Honor?

8 THE COURT: It's up to you, I can hear your
9 argument in the morning.

10 MR. ORLEANS: Let us take a look at it, if we're
11 going to have something in writing we'll try to get it
12 emailed before we go home tonight, first thing in the
13 morning so you can see it tomorrow morning if we're going
14 to respond. If we're not going to respond in writing we'll
15 let you know when you take the bench and be prepared to
16 argue.

17 THE COURT: Okay, very good. Anything else we
18 should take up today?

19 All right, thank you all. We'll stand
20 adjourned.

21 (Whereupon the above matter was adjourned at 5:20
22 o'clock, p. m.)

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24

25

C E R T I F I C A T E

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

/S/ Susan E. Catucci

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