

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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STEPHANIE BIEDIGER, ET AL : No. 3:09cv-621 (SRU)
 : 915 Lafayette Boulevard
 vs. : Bridgeport, Connecticut
 :
 : June 25, 2010
 QUINNIPIAC UNIVERSITY :
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BENCH TRIAL

B E F O R E:

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

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1 (9:10 O'CLOCK, A. M.)

2 THE COURT: I get advantage of the fact that the
3 electricity was off a little while. Although it's
4 actually after 9:00 o'clock it says before nine, so I'll
5 take that. How is everyone this morning?

6 MR. BRILL: We're fine. I have a few
7 preliminaries I'd like to raise with the court before we
8 begin the arguments.

9 THE COURT: Sure. I want to make sure where we
10 are on the exhibits.

11 MR. BRILL: Well, there was -- I think we're in
12 agreement except for one exhibit which was defendant's
13 Exhibit G C, there were no, there was no objection to it
14 when it was, when I questioned Dr. Lopiano about it. This
15 is the book chapter that was authored by
16 Dr. Yiamouyiannis, and what happened was she never
17 testified but she did identify the book chapter at her
18 deposition. So there's really no dispute that it's
19 authentic and we believe it should be placed in the record
20 as, just as we did other portions of her report. That was
21 my first item. Perhaps Mr. Orleans --

22 MR. ORLEANS: I would like to be heard. We
23 haven't been getting daily transcripts so I honestly don't
24 remember if there was an objection asserted when that
25 exhibit was shown to Dr. Lopiano, but it is hearsay. At

1 the time if we didn't object it would have been because we
2 expected Dr. Yiamouyiannis to testify. Since she did not
3 testify, it seems to us that the article authored by her
4 which Dr. Lopiano I think testified that she hadn't read
5 and disagreed with, we don't think that the article should
6 be part of the trial record.

7 MR. BRILL: Well, we can cure the hearsay
8 objection by offering that portion of her deposition which
9 would be admissible under the federal rules.

10 THE COURT: Let me figure out whether there's a
11 real problem here. If it's not part of the trial record,
12 is there any dispute that I could look at an article like
13 this and glean from it whatever I wanted to glean from it?

14 MR. ORLEANS: I suppose not, Your Honor.

15 THE COURT: I mean, you know, I'm not sure it
16 matters whether it's in the trial record or out of the
17 trial order so I'm going go ahead and admit it. It was
18 used, I don't recall an objection, so --

19 MR. BRILL: The second issue, there's no
20 controversy, Your Honor. There were a number of exhibits
21 that were put into evidence that it turns out contain
22 personal information regarding student athletes and we've
23 agreed with Your Honor's permission to seal those
24 documents rather than to attempt to redact them.

25 THE COURT: Well, there's not really a need to

1 do that, I don't think. Trial exhibits are not docketed
2 in any way. They are --

3 MR. BRILL: Okay.

4 THE COURT: I mean they are here. I suppose
5 somebody could ask to see one in which case we would want
6 to redact it before it was shown to anyone in the public,
7 but it's not obvious to me that the trial exhibits need to
8 be redacted at this point in time. After a decision they
9 will be returned to the parties and would be available to
10 the Court of Appeals in the event that there's an appeal,
11 at which time it certainly is appropriate, I think, for
12 either side to redact any, you know, personal information.
13 I understand that to be an agreement of the party.

14 MR. ORLEANS: Yes, Your Honor.

15 THE COURT: Is that right? Yes.

16 MR. BRILL: Your Honor, I have one more issue.
17 This one is a bit more difficult and frankly it's a
18 situation I've never faced before and I'm not quite sure
19 what to do about it but I wanted to, I felt compelled to
20 bring it to the court's attention.

21 You may recall that Mr. Webb testified at the
22 very end of his direct testimony that in his opinion
23 cheerleading, including cheerleading competition, is not a
24 sport. That's on page 415 of the transcript. That
25 testimony was widely reported in the press and I

1 understand, of course, the fire storm of controversy, as a
2 result of which Mr. Webb has been issuing a series of
3 statements on his website and elsewhere which I regret to
4 say appear to directly contradict his court testimony, and
5 I felt it was necessary to bring this to the court's
6 attention.

7 I have his statements but, you know, I'm not --
8 the record the closed, I understand, but it seemed to me
9 the court needed to be aware of the fact in effect he's --
10 I'm not sure if I would say he's recanted his testimony
11 but he's put out public statements that I think I can
12 fairly say states the opposite of the testimony as it was
13 in court. I've handed out copies of these statements to
14 plaintiff's counsel.

15 MR. ORLEANS: Your Honor, I hadn't seen the
16 statements before this morning and I'm looking at them
17 myself. I have to say that I don't think that they
18 contradict his testimony. I think if you look at his
19 testimony in context and you read the entirety of his
20 public statements he's made, he's trying to walk a fine
21 line but I don't think he's contradicted himself in any
22 way.

23 What's more, the record is closed and I don't
24 think it's proper for the court to take notice of any
25 statements Mr. Webb made or may have made after he's off

1 the stand and no longer testifying in this case.

2 THE COURT: I would agree with that. I think
3 the record is the record. I mean, to be perfectly frank,
4 I'm not going to take whole hog what Mr. Webb or anybody
5 has to say. I'm going to evaluate it as I'm required to
6 do, and I don't think anybody's prejudiced by not opening
7 the record.

8 MR. BRILL: Thank you.

9 THE COURT: All right.

10 MR. ORLEANS: Good morning, Your Honor.

11 THE COURT: Good morning.

12 MR. ORLEANS: I'd like reserve ten minutes for
13 rebuttal, if rebuttal is necessary.

14 THE COURT: Sure.

15 MR. ORLEANS: Your Honor, it's the plaintiff's
16 contention in this case, in this action that Quinnipiac
17 University discriminates against women in the operation of
18 its athletic program by failing to provide them with
19 genuine varsity participation opportunities in proportion
20 to their share of the undergraduate population.

21 Now, let me take just a moment to say what this
22 case is not about, in our view. This case is not
23 volleyball players against cheerleaders. We're not making
24 a claim that competitive cheer or a team stunt and tumble
25 team can never be a legitimate sport, although we do claim

1 that it is not currently recognizable as a varsity sport.

2 It is not volleyball players against runners.
3 We believe that Quinnipiac ought to be required to beef up
4 its running program for women.

5 And it certainly is not an attempt to reduce
6 opportunities for men. We encourage Quinnipiac University
7 to increase the athletic participation opportunities for
8 all its student, both men and women, nor are we
9 criticizing the skills or the efforts of any athlete or
10 coach.

11 We are here because of Quinnipiac's failure to
12 take seriously its obligation of nondiscrimination against
13 its female student athletes. We believe that Quinnipiac
14 has demonstrated by its behavior since the preliminary
15 injunction was entered in this case that it is focused on
16 the appearance but not on the reality of gender equity and
17 Title IX compliance.

18 I'm going to try in my remarks to briefly
19 explain the five ways in which we believe that Quinnipiac
20 discriminates.

21 First, Quinnipiac discriminates by putting
22 ceilings on the sizes of men's rosters and floors under
23 the women's rosters.

24 Now, Dr. Thompson testified that he manages to
25 the numbers and, in general, they have tried to cloke this

1 floor and ceiling policy in the language of management
2 consulting. But, in fact, we believe that it was clear
3 from the evidence, both the documentary evidence and the
4 testimonial evidence, that for the men's teams the numbers
5 operate as ceilings and for the women's they operate as
6 floors.

7 Now, this chart -- this chart is derived from
8 Exhibit 142 which is the Quinnipiac's chart comparing the
9 sizes of its rosters for 2009, 2010, and for 2010, 2011
10 with the NCAA average squad sizes. And also from Exhibit
11 eight, which was admitted at the preliminary injunction
12 hearing and included a, it was a -- it was part of
13 Dr. Lopiano's report at that point and it included a
14 column showing the northeast conference average squad
15 sizes. So I took that column in order to show what I
16 would like to show now.

17 If you examine, if you compare the Quinnipiac
18 university squad sizes, both for the year just finished
19 and for the year to come, with the NCAA and NEC averages,
20 here's what we see.

21 Starting with the men, for basketball and for
22 hockey, for ice hockey, which are the favored sports at
23 Quinnipiac, the sport of emphasis, the sports with
24 prestige, the men get squad sizes that are larger than the
25 NCAA average, and in the case of basketball larger than

1 the NEC average.

2 For baseball, the squad size is smaller than
3 both NCAA and NEC. For soccer, the same. For tennis it's
4 equal to NCAA but smaller than NEC. For lacrosse it's
5 smaller than both significantly. For cross country, it's
6 smaller than both. And so clearly there's a consistent
7 pattern of setting the men's roster sizes below the
8 relevant benchmarks.

9 On the other hand, for the women, even the
10 favored sport of basketball, the roster is larger than
11 both NCAA and NEC. For field hockey, the same. For
12 soccer, you know, it's close. It's one smaller than
13 the -- in the year just finished it was larger, in the
14 year to come because the coach has been vocal, it's a
15 little smaller than the NCAA average, it's the same as the
16 NEC. In tennis it's larger than both. In lacrosse it's
17 larger than both. In cross country it's significantly, in
18 the year to come projected to be significantly larger than
19 both. In the year just finished in cross country, the
20 woman's squad was about the size of the NCAA but
21 significantly larger than the NEC. And for ice hockey,
22 it's larger.

23 Now, the tracks, because Quinnipiac does not
24 enter so many events and does not have field athletes, the
25 comparisons really aren't relevant. In softball, we're

1 close. This year we were the same as the NCAA or a little
2 larger than the NEC. For the coming year, again we have a
3 vocal coach in softball and the squad size is going to be
4 the same as the NEC.

5 In competitive cheer, there's no comparisons.
6 And in volleyball, for obvious reasons, it's a special
7 case but it's still projected in the coming year to be
8 just a little bit -- to be larger than the NEC average.

9 And we would submit, Your Honor, that it's quite
10 clear that these squad sizes in comparison to benchmarks
11 operate as ceilings for the men and floors for the women.

12 THE COURT: Is there anything wrong with that?

13 MR. ORLEANS: Yes. Dr. Lopiano, as Dr. Lopiano
14 testified, if you're not going to discriminate between men
15 and women, you should have the same policy for both men
16 and women. You can set, you could set a range, it seems
17 to me, for -- you could say that both men and women should
18 be within one or two of the average and give the coaches
19 some room to move within that. And none of this would be
20 a problem if you had an established record of compliance
21 with Title IX, if you had been expanding women's sports,
22 if you had been meeting the needs and abilities and
23 interests of your population. It's only when you get into
24 this situation where you're struggling desperately to
25 reach statistical proportionality that you start to misuse

1 roster management in this way.

2 THE COURT: Let me understand, is roster
3 management in and of itself a problem or is it a problem
4 only to the extent that it implies that the opportunities
5 for some of them, the women on an over sized roster, are
6 not genuine participation opportunities? In other words,
7 is it direct evidence of a problem or is it only an
8 indirect evidence of a problem?

9 MR. ORLEANS: Our contention is that the way
10 roster management is implemented at Quinnipiac is
11 discriminatory on its face. But to answer your question a
12 little more directly, it's certainly necessary for schools
13 to manage their rosters. We can't really contest that.
14 No school's in a position to simply say, you know, go out
15 and get as many athletes as you want and let the chips
16 fall where they may. They have to set some targets but
17 they have to set those targets and implement those targets
18 in a nondiscriminatory way that is accountable to the
19 needs of the sport, the needs of the coach, the needs of
20 the athletes, and the comparison to relevant benchmarks.

21 We do, we do contend that the quality of the
22 women's experience versus -- is less than the quality of
23 men's experience because the women's teams are inflated in
24 size and the men's teams are not. The men's experience is
25 compromised also because of the ceilings, but in

1 particular, as Your Honor observed at the preliminary
2 injunction stage, you know, we think it's imposition of
3 floors under the women's teams that operates the
4 disadvantage the women have in Title IX.

5 Is that in answer to your question?

6 THE COURT: Yes.

7 MR. BRILL: Jon, could I ask you to speak into
8 the mic? It's hard to hear you.

9 MR. ORLEANS: Yes.

10 MR. BRILL: Thank you.

11 MR. ORLEANS: So there was also evidence, Your
12 Honor, we would submit, that the coaches and the
13 administrators perceived the men's targets as ceilings and
14 the women's targets as floors. The coaches of the men's
15 teams were frustrated that their numbers were low, coaches
16 of the women's teams found it difficult to meet the
17 targets that were too high.

18 And as Dr. Lopiano testified and I just said
19 treating the men's teams and women's teams differently is
20 discriminatory on its face and we don't think the court
21 really has to go any farther than that in order to find in
22 favor of the plaintiffs.

23 Second, Your Honor, Quinnipiac discriminates in
24 the way take it counts runners in order to comply, in
25 order to appear -- again it's the appearance versus the

1 reality -- in order to appear to comply with Title IX
2 without actually doing so.

3 This is the multiple, the multiple count issue
4 and I want to say that the court doesn't need to find that
5 all running sports are one sport or that indoor and
6 outdoor are really the same sport, although that is a
7 contention that I'll address in a few minutes. The court
8 doesn't need to find, although we do contend it and I'll
9 address it in a few minutes, that there's anything less
10 than legitimate or genuine about the indoor and outdoor
11 track program for women. In order to see that the way
12 that Quinnipiac counts its male and female runners is
13 discriminatory, you don't really need to reach those
14 issues, I think.

15 What Quinnipiac is doing is exploiting counting
16 rules. And, you know, we know that the NCAA says you
17 count a kid as an athlete in each sport and that, that
18 cross country, indoor and outdoor track are different
19 sports for NCAA purposes. And we know that for EADA
20 purposes, the Office of Civil Rights says you count kids
21 multiple times if they are in different sports and
22 certainly in that sense if you've got a kid who plays say
23 soccer in the fall and softball in the spring.

24 But you have to interpret these rules and
25 regulations for Title IX purposes in light of the purpose

1 of Title IX, which is expanding genuine participation
2 opportunities for women and insuring that women get equal
3 participation opportunities as men. And it is simply, we
4 submit, obviously unfair, illegitimate, discriminatory to,
5 to multiple count female runners and single count male
6 runners. It's taking advantage of loopholes in the system
7 for purposes for which they were, for which those rules
8 were never intended.

9 Quinnipiac had -- let me put the chart back up
10 just so we have the numbers.

11 THE COURT: It will come. I think it's auto
12 focus.

13 MR. ORLEANS: There it is. In the current year,
14 2009, 2010, the year just finished, Quinnipiac had 13 male
15 cross country runners. Now, we should observe and I'm
16 sure Your Honor recalls the evidence, Quinnipiac before
17 this past year had indoor and outdoor track for men and
18 when Quinnipiac had indoor and outdoor track and cross
19 country for both men and women, it counted them the same,
20 and even if there were some differences in the sizes of
21 those rosters, you know, for statistical purposes there
22 was something of a wash, not a perfect statistical wash
23 but at least they were all being treated the same.

24 Now, in the current year, in the year just
25 finished, we have 13 men who counted as 13 men. We have

1 18 women who run cross country. They're required by their
2 coach to also run indoor and outdoor track which, not
3 coincidentally puts floors under the size of the indoor
4 and outdoor track squad. And so these 18 women count as
5 54. Then we have 12 more women who run track only. They
6 run both indoor and outdoor, so they count as 24. So we
7 end up with 30 women who count as 78.

8 For next year, we're going to, the proposal is
9 to increase the cross country squad, beyond any obvious
10 reasonable need, so that the 24 women running cross
11 country will count as 72 and the 11 additional women who
12 will run track only will count as 22 and we'll have 35
13 women who count as 94.

14 It's not -- it's not right. It's not fair.
15 It's not consistent with Title IX. It's an exploitation
16 of the rules. It's facially discriminatory because of the
17 way, the difference that it establishes between how men
18 are counted and women are counted, and it violates Title
19 IX.

20 Third, Quinnipiac discriminates by failing to
21 count its participants properly. Here we're relying on
22 the testimony of Dr. Lopiano and her, particularly her
23 supplemental report. There was a lot of testimony about
24 that, Your Honor is familiar with the exhibits, and her
25 conclusions, her conclusion page will be attached as an

1 exhibit to our trial brief which will be filed today. I
2 apologize for that, Your Honor. We had a bit of a glitch.
3 I think our proposed findings and conclusions are --
4 probably will be filed before we're done this morning,
5 emailed from the office. And when we get back to the
6 office, we have to finish fixing the trial brief and we
7 will promptly file it.

8 Dr. Lopiano in her supplemental report explained
9 in detail her approach to counting, and I think it's
10 appropriate here to point out, I think, a real difference
11 in the approach of the plaintiffs and the defendant. It
12 seemed to us that the defendant focused almost exclusively
13 on counting student athletes on the roster as of the first
14 day of competition, which is the standard for the EADA.
15 The EADA equaled -- the EADA takes a snapshot on the first
16 day of competition and asks that that information be
17 reported to the government. But Title IX is counting
18 participants across an entire season or an entire academic
19 year. And so Dr. Lopiano, who as the court knows is not
20 only recognized as an expert in Title IX but also was
21 herself an athletic director, looked at more than just the
22 first date of competition squad lists. She conducted an
23 exhaustive analysis of each team and each athlete. And,
24 as you'll recall, she laid out her reasons from the
25 perspective of an athletic director for counting or not

1 counting each athlete.

2 And there was a lot of attention paid during the
3 trial to the group of athletes that she described as red
4 flags. And frankly I think eight little bit of a red
5 herring. Those were athletes about whom Dr. Lopiano
6 concluded that she didn't have sufficient information to
7 be sure of her judgment whether this was someone who
8 should count or shouldn't count.

9 And she explained what her concerns were and
10 it's indicated on the carts. And the testimony that's
11 been presented, I think we would concede, resolved those
12 concerns about some of these athletes and showed that
13 Quinnipiac probably would be justified in counting them or
14 not counting them, whichever preferred to do with respect
15 to some of them and perhaps not with respect to others.

16 But even if the court were to decide that all of
17 the judgment calls that Dr. Lopiano made with respect to
18 the, quote/unquote, "red flagged athletes" were incorrect,
19 her column B would still be the best and most solid basis
20 for counting participants, and her column A would be an
21 even more conservative approach.

22 So I'm not going to spend the time here in the
23 oral argument putting those charts back up on the board.
24 The court has them and is familiar with them. But
25 Dr. Lopiano showed that even if Quinnipiac is permitted to

1 triple count its runners and even if it is permitted to
2 count competitive cheer, that absent volleyball in the
3 year just finished, there would have been -- and this is
4 column B I'm referring to -- there would be an equity gap
5 of 18 which was necessary, which clearly was sufficient to
6 support the volleyball team.

7 And under column A, even if Quinnipiac were
8 allowed to triple count its runners and even if it were
9 allowed to count competitive cheer without volleyball, the
10 equity gap would have been 11, again, enough to support
11 the volleyball team.

12 THE COURT: Is that the standard? The defendant
13 cites cases suggesting that it's not enough to show that
14 there are, there would be a gap large enough to support a
15 small team but, rather, there has to be a gap large enough
16 to support the average team for there to be a Title IX
17 violation.

18 MR. ORLEANS: Your Honor, our contention is that
19 the 1996 interpretation is pretty clear about this, that
20 where the gap is large enough to support a team, then the
21 university is obligated to offer that team. And in this
22 case, certainly we know what teams are at issue, so that
23 even if in some hypothetical set of circumstances the
24 university, a university could claim, well, you know, the
25 gap is very small and we shouldn't be required to invest

1 all those resources to establish a five person golf team
2 or something like that. That's not this case. This case,
3 we have a volleyball team, we have a coach, we have
4 scholarships, we have a schedule. So I don't think it's a
5 case, these circumstances are circumstances where the
6 defendant should be heard to say we're not obligated to
7 offer volleyball because it's a smaller team than the
8 average team.

9 I know that the defendant also makes some
10 contentions about what is substantial proportionality and
11 whether 2 percent is close enough or whether it has to be
12 farther apart, and our contention with respect to that
13 will be, look, if you are -- if you comply with Title IX
14 and you slide out of compliance because things do
15 fluctuate, you know, the gender proportion of the student
16 body may change, the team may have a bad recruiting year
17 or a good recruiting year, a school is entitled to be cut
18 some slack if it has shown in one way or another that it's
19 serious about nondiscrimination and needs some time to
20 adjust. But a school with an established record of
21 discrimination is not, we submit, entitled to be cut much
22 slack.

23 Now, on the counting issue for the coming year,
24 Quinnipiac wants to close its gap by adding six cheer team
25 members and six runners. We've already talked about how

1 the six runners would be counted as 16, and Quinnipiac
2 claims it will close its gap that way and will be entitled
3 to eliminate volleyball. For the reasons we've already
4 discussed that's completely improper, but we also contend,
5 as we have contended throughout the litigation, that it's
6 not enough to promise we'll be good in the future if
7 Quinnipiac is currently not in compliance. And plaintiffs
8 are entitled to an injunction to assure compliance in the
9 future, they are not entitled to cut an existing team and
10 make a promise they'll fix it some other way.

11 Now, fourth major contention. Let me address
12 competitive cheer. Just one moment, please.

13 (Pause)

14 Now, it's our contention that the new sport, new
15 activity, endeavor, whatever you want to call it, offered
16 by Quinnipiac, whether you call it cheerleading, whether
17 you call it competitive cheer, whether you call it
18 competitive stunt and tumble, it's a terrific opportunity
19 for a bunch of kids who want to do that, but it's not yet
20 a varsity sport for Title IX purposes.

21 The brief, the amicus brief of the United States
22 I think lays out very thoroughly the standards that the
23 government, that the OCR uses to address this question of
24 what's a sport for Title IX. And we suggest that it is
25 extraordinarily significant, Your Honor, that neither

1 Quinnipiac nor its new organization, the National
2 Competitive Stunt and Tumble Association, has gone to OCR
3 to request a determination letter. Here is the agency
4 that is primarily responsible for enforcing Title IX.
5 Here is an agency that has an established track record of
6 saying cheerleading does not qualify as a varsity sport.

7 And there's obviously, certainly since last
8 spring when we were here on the preliminary injunction,
9 there's controversy and question as to whether this new
10 activity counts as a varsity sport. But they haven't gone
11 there. They don't want to ask the government for an
12 opinion because they are afraid of the result. And, you
13 know, it would be appropriate we think, for this court not
14 necessarily to defer to the government, but certainly to
15 weigh heavily into the balance in Your Honor's
16 consideration the fact that Quinnipiac has not done the
17 very logical thing and gone to the OCR and asked for a
18 determination of whether this new endeavor is a sport.

19 Now, let me just say briefly why we think that
20 at this time competitive stunt and tumbling is not ready.
21 First of all, it's not recognized by the NCAA. There's a
22 well established process, you heard testimony about the
23 process for recognizing emerging sports at the NCAA.
24 Quinnipiac recognizes the emerging sport status is
25 desirable. The National Competitive Stunt and Tumbling

1 Association recognizes this an emerging sport status is
2 desirable but they haven't submitted a proposal yet. They
3 don't have the ten schools on board they need in order to
4 submit that proposal. They've engaged in conversation
5 with the NCAA, they are making a plan but they haven't
6 done it yet, they don't plan to do it until next spring
7 sometime and it's purely speculation to wonder when that
8 proposal might be acted on and when the NCAA eventually
9 will make a decision.

10 But since competitive cheer is not yet
11 recognized, the participants in the activity are deprived
12 of all of the benefits that come with competing in a NCAA
13 sport. Now, obviously Quinnipiac voluntarily follows some
14 of the NCAA rulings for those participants, but merely
15 following the rules does not encompass all of the benefits
16 that come from being part, as an athlete, from being part
17 of the NCAA and that's not true of any other athletes at
18 Quinnipiac.

19 THE COURT: Let me follow up a little bit. The
20 status as a NCAA sport or a NCAA emerging sport might
21 provide a presumption that a sport counts for Title IX
22 purposes. Is the converse necessarily true? Is the
23 absence of NCAA recognition conclusive or largely
24 conclusive of the Title IX inquiry or is the inquiry
25 independent of what the NCAA has or might do?

1 MR. ORLEANS: Judge, I don't think we have any
2 basis to say that the absence of emerging sport, of the
3 emerging sport designation is itself conclusive. I can't
4 point to a rule or regulation or a case that says an
5 activity will never be treated as a sport unless the NCAA
6 has recognized it. But it certainly should weigh very,
7 very heavily in the balance, especially at this early
8 stage when there are only half a dozen schools that are
9 engaged in the activity, when they haven't decided what to
10 name the activity yet, when they haven't had a
11 championship yet.

12 With all of the other indicia, the lack -- the
13 failure to even apply for emerging sport status yet should
14 weigh heavily in your determination.

15 THE COURT: Is there anywhere in the record an
16 indication of other sports or activities that are not
17 counted for Title IX purposes that one might consider a
18 sport? I recall seeing an exhibit that listed, for
19 example, NCAA championship sports and then some sports
20 that were not championship sports. Is there any
21 indication -- let's take, and this is completely out of
22 the blue, I have no idea what the status is, but let's
23 take bowling, okay? Now, bowling it seems to me is a
24 sport potentially, it's potentially an intercollegiate
25 sport. Are there colleges that offer --

1 MS. GALLES: That is a recognized NCAA sport,
2 Your Honor.

3 THE COURT: Okay.

4 MS. GALLES: It has been for a few years.

5 THE COURT: All right. There is an example of
6 Ultimate Frisbee, very popular on college campuses, teams
7 travel around the country -- some call it a sport. Is
8 there any indication one way or the other whether, first,
9 it's recognized by the NCAA and, second, whether it's
10 counted for Title IX purposes?

11 MR. ORLEANS: I'm not, certainly not aware of
12 any school counting Ultimate Frisbee as a NCAA sport, but
13 my awareness or nonawareness is not really conclusive of
14 anything. I'm smiling because I think that a painting of
15 NCAA recognition would be contrary to the culture of
16 Ultimate Frisbee.

17 (Laughter)

18 THE COURT: Fair enough.

19 MR. ORLEANS: There's an anti-authoritarian cast
20 to that activity.

21 But I can't cite you a place in the record that
22 identifies other non-NCAA recognized activities that are
23 counted for Title IX purposes, if that's the question.

24 THE COURT: That's what I was looking for, yes.
25 Okay.

1 MR. ORLEANS: In any event, just to get back
2 then to the -- and do you have further questions along
3 that line?

4 To get back then to the reasons that we think
5 that competitive cheer is not ready for prime time yet,
6 obviously it's not the case that any other sports at
7 Quinnipiac University are not NCAA or NEC. I've already
8 made the point it's not recognized by OCR and that
9 Quinnipiac hasn't asked for that recognition, for that
10 recognition yet or that determination.

11 You heard some testimony on recruiting, and even
12 accepting Coach Powers' testimony that she gets a lot of
13 inquiries from kids who want to participate in this new
14 endeavor, obviously the inability up until this coming
15 August to go off campus to recruit is going to affect the
16 quality of the team and that in turn is going to affect
17 the quality of the experience for the athletes.

18 The lack of Northeast Conference recognition or
19 competition is going to affect the quality of that
20 experience. The team can't form rivalries. They can't
21 build a fan base. They don't have people traveling with
22 them to nearby schools.

23 The quality of the competition is inconsistent.
24 There are a few varsity teams nationwide, teams that treat
25 themselves as varsity. The competition that the

1 Quinnipiac squad faces includes sideline cheerleaders whom
2 compete occasionally. It includes club teams. There's no
3 other varsity sport at Quinnipiac University that faces
4 such an uneven quality of competition.

5 The rules of the competitions are inconsistent,
6 from event to event. In this past year, Quinnipiac had
7 only two meets in the new NCSTA format. That format has
8 since been changed and there are plans to have more meets
9 in that format next year, but those are only plans. And
10 in the meantime, there will be some number of meets in the
11 coming year that are under different rules. Some of those
12 contests include the traditional sideline crowd response
13 aspect; some of them don't.

14 Some of them include, are based purely on the
15 two and-a-half minute team routine which is similar to
16 what a sideline squad does. Some of them include the
17 individual event heats that are part of the NCSTA format.
18 But there's no consistency to it.

19 And as I believe Your Honor observed during the
20 trial, I may be incorrect about that, but I remember there
21 was some testimony about the size of the squad for the
22 team event and the NCSTA I think has recently established
23 the maximum at 24, but there is no minimum. Now, compare
24 that to other -- can you imagine a soccer team showing up
25 with seven or a basketball team showing with no out field?

1 This is -- it's evolving. It may get there some day but
2 it's not there yet.

3 The governing body, the NCSTA which you heard
4 testimony about is still in the process of being
5 organized. It's not incorporated. It has no staff. It
6 has no bylaws. Its committees are still being organized
7 and it's not recognized by anyone except the institutions
8 that are involved in it.

9 And it has yet to hold its first championship
10 event that is scheduled for next year.

11 Now, we would submit, Your Honor, that based on
12 all of these factors -- and you can run, you can compare
13 the list of factors that I've just run through with the
14 2008 OCR letter which is quoted heavily in the United
15 States' brief, and we think it's clear that the quality of
16 the experience of the competitive cheer athlete at
17 Quinnipiac just is not the same as the experience of other
18 athletes.

19 It's certainly not the experience of, similar to
20 the experience of the male athletes. And it's not fair to
21 the competitive cheer athletes or to the other women at
22 Quinnipiac to count this activity yet as a varsity sport
23 for Title IX purposes and allow Quinnipiac thereby to
24 escape its obligations to provide other sports for women.

25 Now, of course, if the court were to say that

1 competitive cheer doesn't count yet, that's not saying to
2 Quinnipiac don't pursue this. Quinnipiac ought to pursue
3 it. It's simply saying that, for present, it doesn't
4 count toward your Title IX obligations.

5 Now, finally, Your Honor, the fifth -- how am I
6 doing on time? What time did we start?

7 THE COURT: We started at nine, the clock on the
8 wall.

9 MR. ORLEANS: So, with my ten minute rebuttal I
10 have ten minutes left. This is taking my longer than I
11 expect and I apologize if I'm rambling on.

12 The fifth major contention that we wanted to
13 advance is that Quinnipiac discriminates by failing to
14 operate a genuine varsity women's track and field program.
15 Now, this is, again, not a, not a criticism of the coach,
16 not a criticism of the athletes, and it is not a statement
17 that in every case cross country track and field are one
18 sport. But if you read Coach Martin's deposition, you
19 know that she conceded during her testimony that the track
20 and field program is essentially operated as an adjunct to
21 cross country. It's a way to keep the cross country
22 runners in training throughout the year. It's not
23 necessary since the cross country runners could compete in
24 at least a limited number of track and field events in the
25 winter and spring, even if they weren't designated as a

1 separate team.

2 But in a variety of ways Quinnipiac shows that
3 it's not serious about operating a competitive track and
4 field program for its women. It has a barely adequate
5 practice facility for indoor. It has no practice
6 facilities for outdoor. It can't ever host an event
7 either indoors or outdoors. It doesn't recruit for any
8 events other than the distance events. All of the
9 scholarships available to runners go to the cross country
10 athletes. So all of the, all of the participants who run
11 only track are walk-ons.

12 Because the coach is responsible for four teams,
13 unlike any other coach at Quinnipiac, the female runners
14 don't get the same access to coaching that other varsity
15 athletes get. They don't ever have a realistic chance as
16 a track team to win a meet. Now, I know it's an
17 individual sport but there are team scores and part of the
18 experience, I would think, of being a varsity athlete is
19 having a chance to win. The girls who run track at
20 Quinnipiac never have a chance to win as a team.

21 The track teams at Quinnipiac compete only in
22 the minimum number of meets permitted by the NCAA rules if
23 you want to have it count as a team for Division I
24 purposes. There's no other team at Quinnipiac in any
25 sport that competes in only the minimum number of events.

1 There's no other sport at Quinnipiac where,
2 where the student athletes are required as a condition of
3 participating in sport A to also participate in sport B
4 and/or sport C. It's only the female cross country
5 runners who are required as a condition of being on the
6 cross country team to also participate in indoor and
7 outdoor track.

8 Based on all these factors, Your Honor, it seems
9 to us that the female track athletes at Quinnipiac do not
10 enjoy a varsity experience that is of the same quality as
11 other varsity athletes at Quinnipiac, including all of the
12 men. And we submit, we are cognizant of the fact that the
13 class was certified in this case and we represent a class
14 of current and prospective female athletes. We submit
15 that Quinnipiac ought to be required to invest in its
16 women's track program and to expand those opportunities
17 for women if it wants to count women's indoor and outdoor
18 track separately from cross country.

19 So, let me just say a word about remedy.

20 THE COURT: Before you get there, let me ask you
21 a question.

22 MR. ORLEANS: Sure, yes, Your Honor.

23 THE COURT: What it takes for plaintiffs to win
24 this case. There seems to be some difference of opinion
25 about whether it's a statistical exercise or a qualitative

1 determination, whether it's based upon a percentage
2 calculation, deviation from undergraduate enrollment
3 percentage or, as you suggested, that if the gap is large
4 enough to support another team. Give me some sense of the
5 plaintiff's position with respect to what it takes to win
6 and how you get there.

7 MR. ORLEANS: It's both a statistical and a
8 qualitative exercise. In order to -- you can't do the
9 statistical exercise, which is the counting, the
10 calculation of percentage without deciding who you count
11 and which sports count. And in order to do that, you have
12 to engage in the qualitative consideration of what's the
13 experience of the athletes like. So, although we did
14 think that particularly the first argument that I made,
15 Your Honor, the argument about floors and ceilings and the
16 roster management policy, that that is basically
17 discriminatory and that if you find for us on that, we
18 think we win without having to go much further. But once
19 you get past that argument, I think that in order to do
20 the calculation you have to look at some of the
21 qualitative considerations. Is that --

22 THE COURT: All right.

23 MR. ORLEANS: Is that answering your question?

24 THE COURT: The way you sought to do that,
25 principally, not entirely but principally, is with what

1 I'll call more generalized arguments. You're not saying
2 that Jane Smith, who was the sixth fastest 800 runner on
3 the indoor track team and finished last in every event and
4 never got the coach's attention and whatever, whatever,
5 you're not saying that she shouldn't be counted; you're
6 really going on a more generalized approach and saying it
7 isn't, it can't be a real opportunity, a genuine
8 participation opportunity for at least some of the women
9 on the track teams.

10 MR. ORLEANS: One of our arguments, based on
11 Dr. Lopiano's searching --

12 THE COURT: Right.

13 MR. ORLEANS: -- gets to that level of
14 individual. But the arguments that I've made here today
15 are more generalized, yes.

16 THE COURT: I understand her red flags, there's
17 some evidence about individuals.

18 MR. ORLEANS: Right.

19 THE COURT: But principally you're arguing these
20 broader --

21 MR. ORLEANS: Yes, Your Honor.

22 THE COURT: -- items. All right, okay. So in
23 your view, as I understand it, if you win on ceilings,
24 floors, you think you win. And then if you, through any
25 of the other arguments, can demonstrate a gap large enough

1 to support the volleyball team, you believe you've won.

2 MR. ORLEANS: Yes, Your Honor.

3 THE COURT: All right. Remedy.

4 MR. ORLEANS: What I want to say about remedies
5 is simply the following. The defendant has suggested that
6 before the court enters any order, if the court is going
7 to find for the plaintiffs, that the defendant should be
8 allowed to submit a compliance plan and we don't think so.
9 We think that it's appropriate for the court immediately
10 to enter an order that puts Quinnipiac under supervision.

11 They've had a lot of time to comply. They've
12 had all of this year to get into compliance. Before the
13 preliminary injunction hearing in 1996 when they conducted
14 their NCAA certification self study, they identified
15 gender equity as a problem, and I believe that there was
16 testimony about that from Mr. McDonald at the preliminary
17 injunction hearing, although the study itself was never
18 admitted into evidence.

19 So they've had a long time to figure out how to
20 comply and they've failed to do that. We think that the
21 appropriate thing for the court to do by way of remedy is
22 to put Quinnipiac under the supervision of a magistrate
23 judge or special master, order them to maintain the
24 volleyball program for the foreseeable future and we can
25 work out the details from there.

1 THE COURT: Okay. Thank you.

2 MR. ORLEANS: Thank you very much, Your Honor.

3 MR. BRILL: May I have a short recess, Your
4 Honor, to use the restroom facilities?

5 THE COURT: Sure.

6 (Pause)

7 THE COURT: We've lost opposing counsel.

8 MR. BRILL: Oh well, if they don't want to
9 listen --

10 (Laughter.)

11 (Pause)

12 MR. BRILL: Thank you, Your Honor. Good
13 morning. If I could just begin argument with a few
14 personal words, Quinnipiac University appreciates the
15 dedication of the volleyball players, the plaintiffs in
16 this case, and understands their deep disappointment over
17 the decision last year to eliminate their team.

18 And it also regrets having to cut three men's
19 teams at the same time, affecting almost 30 male athletes.

20 But the other personal side to this story, Your
21 Honor, is the 30, soon to be 36, Quinnipiac athletes who
22 participate in competitive cheer. Coach Powers described
23 the feelings of those athletes, of those students being
24 treated as varsity athletes this year for the first time.
25 The tangible benefits that they received, the

1 scholarships, the training, of access to the weight room,
2 of uniforms, of academic support. And also the intangible
3 benefits that they felt. The respect that they had as
4 they walked across the campus as members of the varsity
5 team, the feeling of being members of that team, and the
6 feeling of having crowds cheering for them instead of
7 leading crowds and cheering for others. There could not
8 have been a more eloquent description of what Title IX is
9 all about than what that experience means for the
10 athletes.

11 I will address plaintiff's claims about roster
12 management issues, the proper counting, cross country and
13 track track and field in a few moments. But really, Your
14 Honor, there is only one issue in this case and it really
15 is this sport of competitive cheer that's on trial here,
16 notwithstanding what Mr. Orleans said. In fact, there
17 probably would be no trial at all or at least no serious
18 issue in my view if Quinnipiac and others had called this
19 sport something else.

20 The court's suggestion in its preliminary
21 injunction decision of group floor gymnastics, for
22 example, would have been one good possibility, but
23 cheerleading or even cheer seems to strike a raw nerve for
24 many people. It seems to conjure up images of classical
25 sideline cheerleaders with short skirts waving pompoms, as

1 Jeff Webb described them, an imagine that plaintiffs
2 actually sought to play upon in their questioning of Coach
3 Powers. You may recall about how the team used some
4 pompoms in the one 45-second portion of one performance
5 during the year in which they were actually required by
6 Jeff Webb's company to use those pompoms, which by the way
7 he also sold to the participants.

8 But no one in this courtroom who saw the video
9 of that NCSTA meet and no one who has witnessed the team
10 in a NCSTA competition I don't think could ever confuse
11 competitive cheer, however titled, with sideline
12 cheerleading.

13 Unfortunately those people do not include
14 Dr. Lopiano, who expressed her unwaivering opinion that
15 competitive cheer is not a sport, even though she had
16 never seen a meet and she didn't think it was necessary to
17 do so during the entire year that she's been an expert in
18 this case.

19 Your Honor, I applaud Dr. Lopiano for her work
20 on behalf of women's athletics and I have no intention
21 whatsoever of belittling her accomplishments in any way.
22 She helped open the door to millions of young girls and
23 women to taste the thrill of victory and the agony of
24 defeat. But I say to this court, I implore this court,
25 don't close that door now to thousands of women, tens of

1 thousands of women of a new generation who aspire to
2 compete in a new sport -- and it is a new sport. The
3 sport of competitive cheer, however titled, clearly meets
4 any reasonable application of the OCR multi factor test
5 for determining what activities are a sport as expressed
6 both in the April 2000 seed letter and the 2008 Dear
7 Colleague letter. Indeed --

8 THE COURT: Let me jump in right there.

9 MR. BRILL: Yes.

10 THE COURT: Aren't there two levels of inquiry
11 that I have to go through? One, is this activity a sport
12 that qualifies for Title IX purposes and, two, if so, does
13 the Quinnipiac team qualify as a varsity squad, given its
14 organization activities, et cetera, et cetera?

15 In other words, I can imagine -- take any sport
16 you want, football, basketball, you know, tennis, you name
17 it, a sport that's clearly recognized by the NCAA, at a
18 particular university it wouldn't quite be there yet for
19 whatever reason, so it seems to me that logically I've got
20 to figure out maybe it's really three steps.

21 One, is it a sport per se. We've heard about
22 chess. It seems to me chess is not a sport. Two, is it a
23 sport for Title IX purposes. And three, is it a countable
24 sport at Quinnipiac given what Quinnipiac's status is.

25 MR. BRILL: Well, I think that's right although

1 I think the second and third question merge here because
2 Quinnipiac participates in this activity or sport no
3 different than the other organizations, the other schools
4 that are at this point also sponsoring varsity competitive
5 cheer teams. So it's not as if there would be some level
6 out there of competitive cheer that exists that Quinnipiac
7 is not meeting or is doing things differently. So in
8 effect I think it's the same analysis here.

9 THE COURT: Well, okay, but it seems to me that
10 that three step analysis applies not just to competitive
11 cheer but to women's outdoor track. And --

12 MR. BRILL: Well, yes, except with respect to a
13 sport that's governed by the NCAA, women's outdoor track,
14 for example, you have established rules that tell you
15 whether you have a track team or you don't have a track
16 team. And if you comply with those rules and you compete
17 the same way other NCAA teams compete, then --

18 THE COURT: Then there's a presumption --

19 MR. BRILL: There's a presumption you have a
20 team.

21 THE COURT: Right.

22 MR. BRILL: If I could -- I'm happy to answer
23 any of your questions Your Honor has as I go along. But
24 only two things have changed since Your Honor ruled in its
25 preliminary injunction decision and found that

1 Quinnipiac's cheer team would likely have all of the
2 necessary characteristics of a valid competitive sport.
3 Only two things really have changed since then.

4 First, the sport has progressed to a new level
5 with the formation last fall of the national competitive
6 cheer tumbling association, the NCSTA, by six schools that
7 sponsor or soon will sponsor varsity teams.

8 This NCSTA governing body has already adopted
9 many rules that govern competition this year, including
10 length of season, playing surphase, size of squads, et
11 cetera, and I refer Your Honor to Exhibit F T and transfer
12 pages 538 through 540 for discussion of these issues.

13 There are many more rules that have been adopted and will
14 be in place next year.

15 The NCSTA members will have to have a minimum of
16 half their competitions against other collegiate teams in
17 the NCSTA format, and Quinnipiac already has six NCSTA
18 competitions scheduled for next year, which frankly is
19 more than -- many varsity sports recognized by the NCAA or
20 otherwise only require six, sometimes five competitions to
21 constitute a legitimate season. We already have six for
22 next year scheduled under the NCSTA format. And there's a
23 national championship that's now scheduled for next spring
24 at Oregon.

25 Mr. Orleans, you know, makes an issue about the

1 NCSTA still not being incorporated and it doesn't have a
2 formal board of governors. These things are typical for a
3 sport that's starting up. Competitive cheer and the NCSTA
4 are far along, much farther than many other sports I think
5 would be at this point in terms of formality of the
6 governing organization. And it's clear that certainly the
7 schools that have adopted the sport as a varsity sport are
8 looking to the NCSTA as the governing body and that body
9 has actually been functioning and these schools are
10 following the rules and accepting them as the governing
11 organization.

12 THE COURT: Are you aware of any sport not
13 recognized as an emerging sport -- let me put it this way.
14 Any up and coming sport or any nation sport not recognized
15 as an emerging sport by the NCAA that has been counted for
16 Title IX purposes?

17 MR. BRILL: Well, certainly there are many
18 sports that are not recognized by the NCAA that are
19 counted for Title IX purposes. And I'm going to get to
20 that, Your Honor. But if you look at -- this is -- this
21 is Exhibit 105, page 66.

22 These, these are men's latest statistics on
23 men's participation and the non-championship sports,
24 archery, badminton, equestrian, rowing, rugby, sailing and
25 squash are not NCAA recognized championship sports,

1 there's no emerging sports category for men, but schools
2 self report their participation in these sports to the
3 NCAA. And, of course, they are free to count them for the
4 Title IX purposes.

5 Now, Dr. Lopiano in fact testified here
6 confirming her testimony in the U C Davis case. In that
7 case the school had three varsity, three varsity women
8 wrestlers, and wrestling is not a woman's emerging sport
9 or championship sport.

10 THE COURT: Right. Okay, but, all right, let's
11 get back to the chart you just showed. That distinguishes
12 between championship sports and non-championship sports.
13 So there isn't, for example, a national NCAA championship
14 in rowing but there is, as I recall the figures, thousands
15 of men in the country who row competitively at the varsity
16 level. That's not really what I'm talking about. What
17 I'm trying to figure out is, is there, is there a sport
18 that has not traditionally been recognized by the NCAA as
19 a sport and you can look at the alumnus for especially the
20 Winter Olympics, you know, moguls. Now maybe there's a
21 NCAA mogul competition that I'm not aware of, you know, et
22 cetera, just -- the question really is are there sports,
23 men or women's sports that you're aware of that have not
24 been recognized by the NCAA in some way, championship,
25 nonchampionship, emerging, that are nonetheless counted

1 for Title IX purposes.

2 MR. BRILL: Well, certainly the OCR letter
3 itself makes clear that the multifactor test only applies
4 to sports that are not recognized by the NCAA as an
5 emerging sport or championship sport.

6 THE COURT: Okay, but --

7 MR. BRILL: I can't, the only sport I can think
8 of off the top of my head would be, for example, women's
9 wrestling, as Dr. Lopiano testified, and those wrestlers
10 didn't even compete against other college teams, they
11 competed in open competitions. And her testimony in Davis
12 which she confirmed here is that that was a recognizable
13 sport. And if you read the Mansurian decision you'll see
14 that the, you know, Dr. Lopiano's position and the
15 plaintiff's position was that that counted for Title IX
16 participation purposes.

17 And there may be others but the point is that
18 NCAA recognition is not a sine qua non of a new sport. In
19 fact, logically it couldn't be, Your Honor, because when a
20 sport -- there's a period of time between the existence,
21 development of a sport and its recognition as an emerging
22 sport. And once it gets to being recognized as an
23 emerging sport then the multi factor test doesn't apply.

24 THE COURT: Here's what I'm trying to get at.
25 Mansurian was a fairly unique case.

1 MR. BRILL: Fairly what?

2 THE COURT: Unique case.

3 MR. BRILL: Yes.

4 THE COURT: Correct me if I'm wrong, it didn't
5 involve the same kind of counting that we're worried about
6 here. It was more of a discrimination claim by individual
7 athletes who had been kicked off the wrestling team after
8 participating as wrestlers. And the question was had they
9 been discriminated against on the basis of their gender or
10 not, whereas here we're trying to figure out whether a
11 university's overall athletic program is in or out of
12 compliance with Title IX. And so I understand Mansurian.

13 Really, what I'm trying to get at is there
14 guidance out there, are there cases out there that you can
15 point to that are similar to this situation where a
16 university is claiming we're in compliance with Title IX
17 because we're counting these athletes as varsity athletes,
18 notwithstanding that their sport is very new, not yet
19 established, et cetera.

20 MR. BRILL: I'm not aware of any cases like that
21 and I'm not aware of any court cases frankly applying the
22 OCR standards at all in determining what's a sport.

23 THE COURT: I was afraid of that.

24 (Laughter)

25 MR. BRILL: Your Honor, if -- competitive cheer

1 so easily meets so many of the factors in the eight part
2 test, even if I can't come up with another example,
3 competitive cheer so easily meets so many of the factors
4 in the multi part test that I think there would be little
5 question, frankly, about the outcome here except for the
6 second new thing which is the amicus brief that was filed
7 by the government.

8 THE COURT: Well, that raises the question Mr.
9 Orleans brought up which is if it's so clear, why did the
10 university not seek OCR's blessing?

11 MR. BRILL: Your Honor --

12 THE COURT: And I'm not looking for strategy.
13 I'm just trying to get a sense of whether this is
14 important --

15 MR. BRILL: Well, there's a lot of confusion
16 here and if I can say this, until the government's brief
17 was filed -- let me back up a bit.

18 Certainly the general understanding of the
19 university community was that OCR would not give a
20 declaratory judgment in effect as to whether something was
21 a sport. The University of Maryland had tried repeatedly
22 to get a ruling and they kept getting back letters saying
23 you have to decide on your own if you meet the
24 multi-factor test.

25 They, since 2003 there's been -- this isn't on

1 the record but you're asking me what happened, this is
2 what happened. Dr. Lopiano at the time of the preliminary
3 injunction hearing testified that there's no requirement
4 to go to OCR first and so the general understanding was
5 that you did your best to interpret the rules, and if you
6 were comfortable that you complied with the test, then
7 went ahead and treated something as a sport.

8 For the first time for this coming year, OCR
9 added this instruction for the EADA report for the coming,
10 for the 2009-2010 year which is not to be filed until
11 October, but frankly on its face it was ambiguous. First
12 sentence said the sport has to be, the activity has to be
13 primarily devoted to competition. And the second sentence
14 said don't count cheerleading or dance unless we tell you
15 in advance you can. And people shrugged and said we don't
16 know what this means.

17 And the OCR has now said as of Monday in their
18 amicus brief that, yes, the letter is required if you're
19 going to count cheerleading, and that includes competitive
20 cheer, and that, that report is due in October.

21 And Mr. McDonald testified that the NCSTA, even
22 several months ago, had decided that the best approach
23 would be to make a national approach to OCR rather than
24 having each school go to the regional office and, in fact,
25 in the NCAA gender equity guide there's a discussion about

1 competitive cheer and it indicates that there's some
2 uncertainty now about whether competitive cheer is a sport
3 or isn't, and that there's no set answer and that
4 different regional offices might have different views.
5 And, therefore, the decision of the NCSTA was to raise
6 this on a national level and take it to OCR.

7 But frankly, OCR has now, I believe, punted the
8 issue back to this court because it has said we have no
9 firm position on competitive cheer, it's up to the court
10 to make a decision based on the evidence and you should
11 apply the multi factor test that we've set out in our
12 letters. In fact, they've repeatedly emphasized in their
13 brief that an overall determination requires consideration
14 of all of the factors.

15 Now, to the extent that the government's brief
16 suggested that one or two or three of those factors
17 deserve extra weight, special emphasis, we believe for the
18 reasons stated in our brief that the government's brief
19 does not deserve deference from the court.

20 THE COURT: I reviewed your response.

21 MR. BRILL: I won't review what's in the brief
22 but I will just say that I would like to respond to a few
23 specific points.

24 New sports are not been fully formed. They do
25 not arrive with a full slate of varsity teams, post season

1 competition and NCAA conference governance, and OCR has
2 never said those are all required before you can count
3 something as a sport. In fact, as I said, the multi
4 factor test doesn't even apply once you have all those
5 things.

6 Dr. Yiamouyiannis, we put in a few pages from
7 her deposition, Your Honor, and if you read it, you've
8 seen that she was deeply involved with emerging sports
9 during her ten years at the NCAA, and she agreed in her
10 deposition that any rule that limited varsity teams to
11 competing against other varsity teams when a sport is
12 starting up would obviously make it much more difficult to
13 expand opportunities for women in college athletics, and
14 to the extent that the government is saying that's a
15 requirement, it's completely contrary to every
16 understanding of a new sport or even an emerging sport.

17 You know, it only takes, to apply for an
18 emerging sport, you need 20 schools that have either
19 varsity teams or club teams. Now, competitive cheer,
20 there's already six schools that have varsity teams and,
21 according to Mr. Webb's document, there's something like
22 12 compete only in clubs that participate in his
23 competitions and that doesn't include all the sideline
24 cheer teams that actually OCR itself has described as club
25 competitions.

1 If you look, if I can show, just put up on the
2 board for a minute the list of emerging sports that are
3 now recognized by the NCAA, and you can see that the right
4 hand column has the total number of schools for all
5 divisions. Archery, badminton, rugby and synchronized
6 swimming have less than ten teams total in all divisions.
7 And so obviously, as Dr. Lopiano and Dr. Yiamouyiannis
8 conceded, they are competing largely against club teams,
9 not against other varsity teams, even when they get
10 recognized as an emerging sport. It makes no sense to put
11 more of an obligation on competitive cheer or some other
12 sport that hasn't yet been recognized as an emerging
13 sport.

14 THE COURT: Help me understand that. My
15 understanding of the testimony in the case was that, or
16 the record in the case was that to be an emerging sport,
17 there had to be ten varsity --

18 MR. BRILL: No.

19 THE COURT: No?

20 MR. BRILL: No. The requirement is you have to
21 have 20 teams actually competing intercollegiately either
22 at the varsity or club level. They could actually, all 20
23 could be club teams. Dr. Yiamouyiannis testified to that.
24 But in order to -- the other essential is you have to have
25 ten letters of intent from the presidents of the

1 institutions that they are intending to sponsor the sport
2 as a varsity sport.

3 THE COURT: All right. So what you just showed
4 me where there are less than ten, there are at least ten
5 schools who have said you may not be varsity today but
6 we're going there.

7 MR. BRILL: Exactly.

8 THE COURT: I got you.

9 MR. BRILL: The other -- and actually bowling is
10 another example. I think Your Honor mentioned bowling
11 earlier. Bowling was one of the first emerging sports
12 recognized for women in 1994, and for many years there
13 were two, three, four, less than five schools that had
14 varsity bowling teams. They were competing against club
15 teams. Now bowling has become a championship sport.

16 But if someone had said from the outset you
17 can't count this sport unless you're only competing
18 against varsity teams, bowling wouldn't be where it is
19 today.

20 THE COURT: I'm not sure that's true. I think
21 there's two issues here. Issue one is are we going to
22 support the team, are we going to give it scholarships and
23 coaching status and so forth in hopes that we bring the
24 sport along. The other is do we today count it for Title
25 IX purposes. And so I think those are distinct inquiries

1 and they may be related but I think they are distinct, and
2 so to say that, you know, you're never going to be able to
3 count for Title IX if you don't count it early, I'm not
4 sure that's right.

5 MR. BRILL: No, my point was a slightly
6 different one, Your Honor. My point was in response to
7 the government's argument that you can't satisfy the
8 multifactor test unless you're only competing against
9 other varsity teams, and I'm saying that has never been
10 the case.

11 THE COURT: Fair enough.

12 MR. BRILL: And I understand your point but as a
13 practical matter here, if Your Honor says that
14 Quinnipiac -- competitive cheer in general or Quinnipiac
15 is not a sport for purposes of Title IX, as a practical
16 matter that's, I think it's going to put an end to it
17 because if you consider the resources that are required
18 for this sport, coach testified that the budget for last
19 year was 130 or 140,000-dollars, the operating budget, you
20 have six scholarships that are approximately, you know,
21 costs the school about 200,000-dollars each over the
22 course of four years, and so on. You can't expect a
23 school to put these resources and to continue this as a
24 club team, nonvarsity team and then try to comply with
25 Title IX by supporting another team of 30 women athletes.

1 THE COURT: Well, okay --

2 MR. BRILL: We have to allocate our resources in
3 a way that makes sense to the university and complies with
4 Title IX. Now --

5 THE COURT: Right. But the principal purpose of
6 committing those resources presumably is not to comply
7 with Title IX. Presumably the purpose is to provide this
8 opportunity for women and/or to bring the sport along and
9 be a pioneer in the sport, et cetera, et cetera. You
10 know, Title IX isn't the ultimate goal. It may be the
11 focus of this litigation but it shouldn't be the ultimate
12 goal in how a university allocates its athletic resources.
13 I hope it isn't.

14 MR. BRILL: Well, obviously we have to allocate
15 our resources in light of the requirements of Title IX,
16 but the university here has made a decision for many
17 reasons that in a time when there were limited pledge of
18 resources that we wanted to be a pioneer in this sport
19 which seemed to comply with all of the attributes of a
20 sport under OCR guidelines, to enable the university to do
21 really several things.

22 One was that Quinnipiac had an opportunity to be
23 a major national player in a new sport compared to
24 continuing or putting resources in other sports where they
25 would never get to that level. And it's a regional school

1 that doesn't usually compete with schools from Oregon,
2 Maryland, Baylor and so on, and this is a major
3 opportunity for the university in that respect.

4 THE COURT: But my point is, I really have two
5 points -- one, that major opportunity exists whether the
6 sport is counted for Title IX purposes or not. You'll be
7 out there as a pioneer whether these athletes count toward
8 Title IX or not. That's point one.

9 Point two is in terms of the resources, the
10 university committed a lot of resources, I'm sure, I
11 haven't seen the numbers, to its sideline cheer. If those
12 athletes, if those cheerleaders traveled to an away game,
13 they bought uniforms, et cetera, it wouldn't be the same
14 commitment, I understand, but the point is no one ever
15 thought sideline cheerleaders were going to count toward
16 Title IX and yet there was some commitment of resources to
17 support sideline cheer while Quinnipiac had it. So,
18 again --

19 MR. BRILL: Well, the marginal, the marginal
20 cost -- you have a sideline cheer team, the marginal cost
21 would be fairly negligible, just the travel expenses for
22 the two or three competitions that they engaged in, they
23 had a part-time coach, no scholarships, they didn't have
24 access to facilities, weight room and so on.

25 I don't want to belabor this point, but if the

1 university had infinite resources as Robin Sparks
2 suggests, well, you're putting up a medical school so why
3 don't have you continue volleyball and so on, in the ideal
4 world Quinnipiac would sponsor every sport that we could
5 think of, but we have to make choices and this is the
6 choice that was made, Your Honor. And I don't think it's
7 realistic to think that if we're wrong, that we're
8 nevertheless going to be continue to be able to devote
9 resources into continuing this sport as some kind of club
10 sport while, you know, while waiting for it to be
11 recognized as a sport under the OCR guidelines.

12 In the real world, Your Honor, schools will
13 devote resources to the sports that will count for
14 purposes of Title IX because they don't have unlimited
15 resources. It's not that they are -- it's nothing
16 nefarious but it's just as if, in any other aspect of the
17 university there may be, you know, a program that's
18 accredited or not accredited and so on and you have to
19 decide, you can't have every program for every purpose and
20 every possible student. You have to decide where to put
21 your resources.

22 THE COURT: Well, fair enough. But there's --
23 we can get off this but it seems to me at the time the
24 university committed resources to the competitive cheer
25 team, there was and today there still is substantial doubt

1 whether that team is going to count for Title IX purposes.
2 So a decision was made by somebody, not knowing that it
3 was going to count for Title IX purposes, to commit these
4 resources, and either that was something they intended to
5 do regardless of Title IX or until Title IX or whatever,
6 but the point is there was no guarantee when those
7 resources were committed that this was going to count.

8 MR. BRILL: I accept that, although Your Honor
9 did say in the preliminary injunction certainly that it
10 was likely it would be found to comply.

11 Let me just say one word about post season
12 competition. Again, it makes no sense to suggest, as the
13 government does, that the school can't have a sport, a new
14 sport, unless and until there's an NCAA championship, when
15 even the sports that rise to the level of emerging sports
16 don't have NCAA championships until many years after they
17 become emerging sports. It just, it doesn't work.

18 Let me go on to -- I may want to come back to
19 competitive cheer, Your Honor, but let me make sure I
20 touch on some of the other issues.

21 First of all, on track and field, there's really
22 been nothing new put before the court other than what was
23 presented at the preliminary injunction hearing and
24 there's been nothing presented to change the court's
25 opinion that -- in fact, I think, that decision has now

1 been confirmed by the government's brief because the
2 government has been scrutinizing this case for months.
3 They've been in touch with counsel, they've reviewed
4 the -- obviously reviewed the preliminary injunction
5 decision which is cited in their brief. They reviewed the
6 record in the case. They know full well that plaintiffs
7 have argued that track and field is improperly counted and
8 I mean it's impossible to believe that if the OCR had any
9 question about that whatsoever, they would not have raised
10 it in their amicus brief as an issue for the court.

11 THE COURT: Let me press you on the requirement
12 that cross country runners run indoor and outdoor track.

13 MR. BRILL: You know, I can't recall Coach
14 Martin's exact testimony but I know that she said that it
15 was a nonissue for her because every cross country runner
16 that she's ever recruited wanted to run indoor and outdoor
17 track, and that's what she expected, but there's no one
18 ever that didn't want to run indoor and outdoor track.
19 They come here with the expectation that they'll be able
20 to run cross country and indoor and outdoor track.

21 THE COURT: Well, if that's true then you
22 wouldn't need to require it.

23 MR. BRILL: It's not as if there's a formal
24 requirement. I think she was asked about it at her
25 deposition and she explained that, I think she may have

1 said it's something that I require but not in any formal
2 way.

3 She was responding to the intention that these,
4 you know, the athletes that she's recruiting in her view
5 always wanted to do this and it was something she expected
6 of them as well. It's never been a case where someone
7 said, well, I want to run cross country but not indoor
8 outdoor track.

9 THE COURT: Well, let's assume for a minute that
10 the coach of one of the women's fall sports required her
11 athletes to run outdoor track in the spring to get in
12 shape. And there's a high school, Central High School in
13 Bridgeport, Connecticut, won a state basketball
14 championship and the coach requires all the team members
15 to run cross country. But why? Because they are on the
16 basketball team, to get in shape. Now they are not what I
17 would call real cross country runners, they are certainly
18 the tallest team out there but they are not the fastest.

19 You know, obviously that's not the situation we
20 have here but you can understand the concern that is
21 raised if a coach is requiring participation on outdoor
22 track as a form of conditioning as opposed to a form of
23 true participation.

24 MR. BRILL: And I agree with that 100 percent,
25 Your Honor. If there was a basketball team who was being

1 required to run cross country, that's a completely
2 different situation. If you read Dr. Seemes, I don't know
3 if you read Mr. Seemes' report. He is the head of USA
4 Coaches Association and coached track for many years. It
5 is standard virtually in every school that cross country
6 runners run track and field, indoor, outdoor.

7 THE COURT: I understand.

8 MR. BRILL: And I think to get hung up on the
9 word "requirement" that she may have used in her
10 deposition doesn't really change the fact that there's
11 nothing unusual about this. It's the common practice.

12 What they are running, you know, they are taking
13 the opportunity to run distance races and some of the, you
14 know, some of these women may, they may be champion ten
15 thousand meter runs. Many of them are. I think
16 Quinnipiac had several 5,000 meter, 10,000 meter runners
17 who went to, I think some of them went to the NCAA
18 regionals or certainly went to the New England Regional
19 Tournament and they are legitimately participating in the
20 track season as talented athletes just as in the cross
21 country season.

22 THE COURT: No doubt about it. But the
23 combination of a requirement to participate and a roster
24 number significantly higher than average raises a concern
25 about whether all of those athletes are getting a genuine

1 participation opportunity. Are they receiving sufficient
2 coaching or the same level of coaching? And is this
3 simply cross country continued? Is the coach focusing on
4 the cross country runners to the exclusion or the
5 detriment of the other runners? Now, we don't have a lot
6 of evidence on that but --

7 MR. BRILL: Well, I would say --

8 THE COURT: -- that's the concern.

9 MR. BRILL: So I would say this, Your Honor.
10 Plaintiffs withdrew the testimony of Dr. Yiamouyiannis.

11 THE COURT: Right.

12 MR. BRILL: So it's not before you but there's a
13 reason they, I would state there's a reason they withdrew
14 it and they can't substitute suspicion and speculation for
15 evidence. The evidence before you in Coach Martin's
16 deposition, when you read it, and she has the results from
17 everything, is that each of these women received
18 individual coaching, they each received training, they are
19 part -- they are assistant coaches and voluntary coaches,
20 they were separated out for the different events in
21 training between the distance runners and the shorter
22 distance runners and into three or four groups during the
23 indoor outdoor seasons, and every single woman on that
24 team participated fully in the track programs.

25 There's nothing unusual about the size

1 incidentally of the cross country team which was not at
2 all the largest in the conference. And, in fact -- and
3 the track team was only 30. It's hard to compare because
4 Quinnipiac did not compete in most field events and it
5 didn't have very short distance sprinters.

6 But the evidence is it was Coach Martin and
7 you'll read this in her deposition as well as Mark
8 Thompson's testimony, it was Coach Martin who wanted more
9 runners on their team for next year. This was not
10 something that the university foisted upon her. And
11 Dr. Thompson went back to her and said are you sure that
12 you -- you know, how are you going to give these women
13 genuine opportunities, and she explained to him her plans,
14 who she had recruited. She had now a sprinter, she had a
15 high jumper. She had, she said if we want to get up to
16 the next level of competition, the schools we're aspiring
17 to compete against have more cross country runners than we
18 do. More runners means more competition for the team.
19 And he accepted her explanation and, in fact, gave
20 additional resources to her.

21 So, you know, the cross country teams in the
22 Northeast Conference range from something like seven to 30
23 in size, and the track teams from 14 or 15 up to the 50s.
24 There's no -- to say something is above average is
25 meaningless. You can't draw any conclusions from that.

1 Dr. Lopiano admitted that.

2 And, you know, putting aside the issue of this
3 requirement, there's nothing unusual -- in fact, let me
4 put it differently. The NCAA clearly counts track as
5 three sports. It has forever. The EADA form requires you
6 to, you know, to count them separately. It gives up the
7 option of combining one box but the athletes are counted
8 multiple times.

9 The book chapter from Dr. Yiamouyiannis that we
10 just put into evidence instructs that -- who's an expert
11 on Title IX -- instructs that athletes for cross country,
12 indoor track and field and outdoor track and field be
13 counted separately, and there's no evidence that any
14 single woman athlete was ever compelled or required to,
15 you know, to run in -- cross country athlete was somehow
16 required to run track against the desire of that athlete
17 to participate in those sports. So I think that that
18 distinction is really meaningless.

19 And the comparisons that they made to other
20 sports like swimming or tennis that have different seasons
21 and different surfaces, may have some logical weight but
22 the truth is that it's the governing bodies that have
23 recognized track and field and cross country as separate
24 sports and they haven't done this with respect to these
25 other sports and there's -- the OCR, you know, the OCR has

1 never said that you only count these sports separately as
2 long as you have men's and women's teams.

3 And I recognize -- obviously Mr. Orleans says
4 it's unfair because you're getting, you're counting these
5 women two or three times, but that's the way the rules are
6 set up. And they work both ways. If we had a school that
7 had a, if the school had men's and women's track teams and
8 had more men than women count -- you know, couldn't not
9 count the men because it would give an advantage to the
10 men athletes or, to put it another way, they couldn't take
11 less of a count on the men in order to reduce the
12 proportionality obligation with respect to the women. If
13 they had more men track and field athletes and they had to
14 count them three times, that would increase the need for
15 more women athletes in other sports. And so it works both
16 ways and that's the rule.

17 THE COURT: Yes, the testimony was that it's
18 extremely rare to have a two sport athlete except in this
19 context. Would it be a sensible thing for the court to
20 do, to count the number of men athletes and the number of
21 women athletes by name rather than by roster position as a
22 check on whether there has been compliance with Title IX?

23 MR. BRILL: No, that would be completely
24 contrary to OCR's guidance, as Dr. Yiamouyiannis explains
25 in her report. There's both a duplicated count and an

1 unduplicated count that's contained in the EADA forms.

2 The so called unduplicated count, which Your Honor is
3 referring to, is used for certain purposes such as
4 determining whether scholarships are proportionally
5 awarded and for other purposes.

6 The duplicated counts specifically is used for
7 determining proportionality in participation for prong
8 one. It would be revolutionary to now say, and contrary
9 to OCR guidance to say you use an unduplicated count of
10 athletes for purposes of proportionality. It would --
11 frankly, as Coach Seemes, Mr. Seemes testified in his
12 deposition, it would have profound effects on the track
13 and field programs throughout the United States, for the
14 same reason -- I mean let's be blunt -- for the same
15 reason that we're talking about the effect on competitive
16 cheer.

17 Because if schools are only going to count, if
18 the rules are changed, then there's going to be a real
19 world impact on that and resources that are devoted to
20 track and field, both indoor and outdoor, if they don't
21 count the same way, then schools have to decide how they
22 are going to allocate their resources. If OCR wants to
23 change the rules then, you know, they have the opportunity
24 to change the rules, but everybody's playing by the rules
25 that are in place.

1 I want to talk for a minute about roster
2 management. And Mr. Orleans said first of all that
3 there's something nefarious about roster management the
4 way it's used at Quinnipiac.

5 First of all, we don't have caps and we don't
6 have minimums. That's clear from Dr. Thompson's
7 testimony. Even when -- there are a number of instances
8 where women's, the coaches of women's teams wanted to add
9 athletes and he wouldn't let them, either at all or
10 without justification. The volleyball team, the women's
11 softball team and for the next year, the lacrosse coach,
12 all wanted more athletes and he turned that down.

13 THE COURT: Well, I understand that argument.
14 On the other hand, if you have a mandatory number, then
15 doesn't that number serve as both a floor and a ceiling?

16 MR. BRILL: Yes, it's a number but it's the same
17 for men and for woman. Your Honor --

18 THE COURT: It's the same except if the, if the,
19 if the target number is consistently higher than squad
20 averages for women and consistently lower than squad
21 averages for men, then the practical effect of having that
22 number is that it's a floor for women and ceiling for men,
23 isn't it?

24 MR. BRILL: No, I don't think so. I think that,
25 as Dr. Lopiano said in her report, it is, it is acceptable

1 to add women to existing teams for purposes of roster
2 management as long as the additional women have the same
3 quality participation opportunity as men and women. And
4 that roster management can satisfy prong one as long as
5 the men's teams are not depressed to the point where
6 there's no real participation opportunity and women's
7 teams are not increased to the point where the women on
8 those teams don't have a viable participation opportunity
9 which she says means coaching, competition and uniforms,
10 et cetera.

11 There's nothing wrong with saying if the NCAA
12 average for a certain team is, let's say 20, roster
13 management -- if a school is going to actually comply with
14 proportionality, there has to be a control over the
15 rosters. Otherwise you could never be sure if each coach
16 could have more or less.

17 Now, I just want to say something about the
18 women's teams though. If that, if that NCAA average is
19 20, if we had 40, the numbers might suggest that there's
20 some padding or inflation going on, but if the coach -- if
21 Dr. Thompson says, you know, I'd like you to carry two
22 more, as long as you confirm to me that you can really
23 provide an opportunity for those two more women and you
24 have the resources for them and they'll have a
25 participation opportunity, then the numbers mean nothing

1 because averages are only averages.

2 And in the NEC conference, as we saw, some
3 schools -- the range of an average may be 15.6 but the
4 people on the schools can range from five to 35 and the
5 question is go behind those numbers. You can't stop at
6 the averages. And look at the -- I mean look at what they
7 are complaining about.

8 I mean frankly it's almost at the point where
9 it's -- it's almost to the point where it's silly, Your
10 Honor, because no school could ever have effective roster
11 management to comply with prong one if you can't have some
12 deviation from the averages and that can be a little
13 deviation up for the women and deviation down for the men,
14 as long as the men's teams are not diluted of the
15 participation to participate and the women's teams have
16 the ability to provide participation opportunities.

17 I think Coach Seeley's testimony was the best
18 example because he said I don't want 27 but I've already
19 recruited 25 athletes and I have a 26th that I've been
20 talking to, and okay, I'll do 26. And it turned out, he
21 found that to be a perfect number for him. Now, without,
22 without roster management maybe he would have had 24 or
23 25, but he took that 26th athlete and everybody on that
24 team had a fair opportunity to participate during the year
25 and he's having 26 next year. He says it's a terrific

1 number and he's got even higher quality of recruits.

2 So I don't know what a school's supposed to do
3 if you can't have some flexibility in the averages that
4 what he's basically saying is, you know, every, every team
5 has to be either at the exact average at the conference of
6 the NCAA or has to be up or down by same amount. If you
7 look at this chart, you know, this is the final chart,
8 roster comparison primarily against average.

9 There are three -- I think seven or eight men's
10 teams were either at or above the NCAA average. And on
11 the women's teams -- sorry. The difference, in one case
12 the difference was three athletes, that was the women's
13 basketball coach, who asked, pleaded for more members of
14 the team.

15 THE COURT: Yes, I understand the numbers. We
16 got off on this because I was taking a little bit of issue
17 with your suggestion that we don't have floors and
18 ceilings. I think as a practical matter we do and that's
19 the only point I'm making. If you have a mandatory
20 number --

21 MR. BRILL: It's not a floor or ceiling, Your
22 Honor. Here's the difference. A floor means your number
23 is 15 but have as many as you want above the floor. And a
24 ceiling means, you know, your number is X and you can go
25 below that. But Dr. Thompson didn't allow men to go lower

1 or women to go higher without some justification. He had
2 to find that that number --

3 THE COURT: Right.

4 MR. BRILL: -- was a genuine number.

5 THE COURT: Right. But let's face it, when the
6 men's numbers are consistently low and it's a hard number,
7 as a practical matter it's a ceiling. And when the
8 woman's numbers are high, as a practical matter it's a
9 floor. Because the coaches, a woman's coach who's been
10 told take on more athletes than ideal, isn't going to want
11 to take on more athletes than the mandatory number. It's
12 just not going to happen. They are already at a number --

13 MR. BRILL: But it did happen, Your Honor. It
14 happened in three cases that we know of and Dr. -- I mean
15 we had the lacrosse coach who wanted 36 athletes instead
16 of 30 on the women's team and he said no. And you have
17 the softball coach that wanted 21 instead of 20 and he
18 said not unless you can justify it. So there is a
19 difference.

20 And the difference is that we're not just saying
21 have a number because it's a number, but this number was
22 established after a three month process in which he had to
23 assure himself that each number represented a genuine
24 opportunity for the athletes on the team. In fact, Coach
25 Sparks said he kept saying that over and over again and he

1 sent email after email.

2 THE COURT: I understand the evidence.

3 MR. BRILL: Now, Your Honor asked about the are
4 we looking at specific athletes here or -- what time did I
5 begin?

6 THE COURT: You've got like ten minutes left.

7 MR. BRILL: Okay. About what level of inquiry
8 is appropriate here. And they had the year to pore over
9 in the minutest detail every athlete on every team at
10 Quinnipiac University. Week by week throughout the
11 season, we sent the plaintiffs at the court's request
12 weekly results of every competition. They had the squad
13 lists at the beginning of the season, they had the final
14 squad list. They had the opportunity to depose coaches.
15 They had the opportunity to speak to the compliance
16 officer and the coaches.

17 And at the end of the day, what they came up
18 with is where they start, which is ceilings and caps.
19 It's all about ceilings and caps. There's no knowing --
20 certainly there's not a single piece of evidence, as
21 frankly there was at the preliminary injunction hearing,
22 of any roster number that was manipulated to produce a
23 false number by adding and then deleting athletes.

24 And when I asked Dr. Lopiano repeatedly what
25 evidence she had, what evidence she could point to about

1 anything that she disagreed with in the numbers, her only
2 response was, well, you have floors for women's teams and
3 caps for men's teams. And that's inherently unfair,
4 although her own report as well as the NCAA gender equity
5 guide both say there's floors for men's teams, floors for
6 women's teams and caps for men's teams are okay. That is
7 a permissible way to manage rosters as long as the result
8 is a fair opportunity to both the men and the women.

9 So you can't stop the inquiry, question of
10 whether they are -- even if you view our process as caps
11 and floors, which I don't think is fair, that's not the
12 end of the inquiry. You have to show some actual
13 deprivation of participation opportunities which there's
14 been no evidence of whatsoever, notwithstanding the waving
15 of the red flags and so on. No evidence.

16 And when I asked Dr. Lopiano is that the best
17 answer that you can give to my question, she admitted that
18 was, that was all she had. Which was nothing. And
19 there's simply no evidence of that kind of roster
20 manipulation. And the plaintiffs have the burden here.
21 You know, we are not -- it's not up to us to come and put
22 on evidence from 20 coaches or 400 athletes to parade to
23 the stand and say yes, I had a genuine opportunity. The
24 plaintiffs have the burden of showing there were athletes
25 that didn't have participation opportunities, that because

1 the women's basketball team has 18 or because the track
2 team has 30, that somehow there were athletes on that team
3 that didn't practice or didn't participate or didn't in
4 some way receive the full benefits of being on those
5 teams.

6 And there's no evidence in the record of that,
7 Your Honor. They failed, totally failed in carrying their
8 burden of proof, unless somehow the roster process itself
9 is going to be held to be improper, and frankly, I have to
10 say that it's hard to imagine what more Quinnipiac could
11 have done in response to the findings that came out in the
12 preliminary injunction hearing, what more Quinnipiac could
13 have done to set up a roster management process that could
14 would be genuine, fair, compliant with the law, and
15 produce a result that did provide genuine opportunities
16 for the athletes in every team while insuring
17 proportionality.

18 If someone could suggest to me a way to suggest
19 proportionality without some control over the rosters, I'd
20 like to hear it because it doesn't work. And the answer
21 is not that Quinnipiac has to keep adding teams and keep
22 adding teams and keep adding teams. You know, Title IX
23 works both ways also, and unless you have some control
24 over the roster, if you're talking about prong one
25 compliance, if you have too many women's teams, then the

1 men are going to be complaining. So you have to maintain
2 that proportionality on both sides.

3 I just want to answer quickly a few of the
4 points that Mr. Orleans made. And there's never been a
5 finding, contrary to what he said, there's no established
6 record of discrimination here. None. This court did not
7 find discrimination in this preliminary injunction
8 decision.

9 The court did not inquire into practices prior
10 to 2008, 2009. What the court said was on the record
11 reviewing the practices roster management that you didn't
12 have confidence that Quinnipiac would be complying with
13 prong one in 2009, 2010, but Quinnipiac was not, was not
14 relying on prong one prior to this past year and there's
15 been no finding that it did not comply or it did comply or
16 did not comply with any other prongs prior to this year,
17 so there's no issue of any established record of
18 discrimination here at all.

19 With respect to competitive cheer, if I can come
20 back to that for a minute, the fact is that -- the fact,
21 as I said, if it's not recognized by the NCAA which was
22 Mr. Orleans' first point, is a nonissue. If we were
23 recognized by the NCAA then the multi-factor test would
24 not apply.

25 Recruiting to me is a complete red herring. The

1 suggestion that somehow the team isn't able to obtain the
2 athletes that it needs, you heard the coach, you saw the
3 videos, you saw the quality of athletes that are on this
4 team. Recruiting takes place. It doesn't necessarily --
5 was not off campus recruiting last year but athletes were
6 recruited and women on this team were not picked up in the
7 cafeteria, as Dr. Lopiano may have suggested in her report
8 would be the case.

9 These are highly skilled gymnasts who, in fact,
10 Coach testified when she needed another athlete on the
11 team for this year, there was a, I think a graduate
12 student who had been an elite gymnast who wanted to
13 participate on the team. So there is no shortage of
14 trained and skilled athletes.

15 You know, the fact that the NEC conference
16 doesn't recognize the sport, again, this is going to be
17 the case in every sport. The athletic director, Jack
18 McDonald, testified he developed women's ice hockey and
19 lacrosse here without any conference sponsorships and he
20 put together schools in order to start participating in
21 those sports with Quinnipiac.

22 So, these are all, you know -- look, if
23 competitive cheer met every single factor on the check
24 list, and the NEC conference recognized it and the NCAA
25 sponsored a championship, then we wouldn't be here.

1 Obviously it doesn't, but the question is what's a fair
2 overall view of all these factors? And what are the most
3 important factors and why are those factors the most
4 important? And we think it's the athleticism, the
5 competitive nature, the fact that the -- internally,
6 administratively, this sport is treated as a varsity
7 sport, these athletes are treated as varsity athletes,
8 just like all other athletes at the university, and that
9 it furthers the purpose, most importantly, of Title IX.

10 It furthers the purpose of Title IX to expand
11 opportunities for women, to expand opportunities by
12 developing new sports, which if Your Honor takes a look at
13 the OCR 2008 letter, the OCR says this is the intent of
14 these factors. When we're looking at a sport that's not
15 recognized by the NCAA and we have to decide if it's a
16 sport for purposes of Title IX, we want to take a flexible
17 approach. We want to expand opportunities for women.

18 Now, you heard testimony that I think there's
19 something like 150,000 women, girls and women, just in the
20 last six months who participated in All-Star cheer
21 competitions. So we know that there's an enormous
22 interest in this sport. Coach Powers testified that she's
23 received calls from three, four, five, high school
24 federations already wanting to adopt the NCSTA meet
25 format.

1 This sport is taking off in an enormous way, and
2 a decision by this court that fails to recognize it is, I
3 think, is going to, if not a death knell, a substantial
4 obstacle to what would otherwise be an extraordinary new
5 opportunity for athletic participation for tens of
6 thousands of women. And it's not volleyball against
7 competitive cheer, I agree with you. But the issue before
8 Your Honor frankly is, you know, is competitive cheer
9 going to be recognized as a sport.

10 As we said in our brief, even if, frankly even
11 if it's not, the issue is compliance this year and
12 Dr. Lopiano with all of her calculations and permutations
13 and columns, at the end of the day, whether you look at
14 column A or column B, if you include cheer and if you
15 include track as the NCAA looks at it and as the EADA
16 looks at it, she says you're right there. She had no
17 dispute. So we really don't have to quarrel over her
18 methods of accounting. You're right there.

19 Now, frankly I don't understand how you could
20 not look at volleyball for this year because we had a
21 volleyball team and the issue is current compliance. For
22 next year, Your Honor has the projections for next year
23 and the numbers show that Quinnipiac will be in compliance
24 without the volleyball team for next year. And that's the
25 relevant inquiry, not whether you subtract out the

1 volleyball team for this year. But no court, as we say in
2 our brief, has ever held that a gap of 2 percent or less
3 has not satisfied -- not a gap but a differential of
4 2 percent or less, has failed to satisfy the prong one
5 requirements. And if you, even if Your Honor were to hold
6 that competitive cheer does not count for this year, the
7 difference is about two and-a-half percent which, again,
8 no court has ever been as low as two and-a-half percent.
9 And I would suggest to Your Honor that with these
10 circumstances that -- if you feel that competitive cheer
11 isn't there yet, we're not there yet, there's no question
12 we're going to be there next year, just as you said last
13 year at the preliminary injunction hearing, you had to
14 predict what would be likely for the coming year, last
15 year we didn't have the NCSTA, we didn't have the six
16 other varsity teams. We didn't have the majority of our
17 competitions for this year in the NCSTA format.

18 We will next year. There's going to be a
19 national championship. I mean every factor, every factor
20 next year, there is off campus recruiting, every single
21 factor, even if you viewed it as a check list of the OCR
22 letter, will be met. And I would suggest to you that even
23 if you find that we're not quite there now, that you
24 should take into account the fact that, based on, based on
25 the evidence, there is every reason to believe that, that

1 competitive cheer will certainly meet the criteria for
2 next year, and given that and this a two and-a-half
3 percent differential for this year is, you know, is less
4 than any court has ever found to be a violation that we
5 ought to be, that Your Honor should find that Quinnipiac
6 has substantially proportionally teams for this year and
7 that there's no reason -- therefore, we're not in
8 violation for this year and that there's no reason to
9 believe that we're going to be in violation next year
10 because, even without volleyball, competitive cheer will
11 most assuredly be a sport. Thank you, Your Honor.

12 THE COURT: Thank you.

13 Before you go, let me quickly follow up. Using
14 a percentage method, what percentage is substantial?

15 MR. BRILL: No court has ever found anything
16 less than 5 percent to be not substantial. I think it
17 does depend on the size of the school. I would think
18 something around between three and five percent would be
19 the borderline. But I don't think two or two and-a-half
20 percent -- I think two, two and-a-half percent is clearly
21 substantial compliance.

22 THE COURT: And is that true even if the gap in
23 athletes is -- would be sufficient to support the
24 volleyball team?

25 MR. BRILL: Yes. This notion came out of

1 nowhere. I mean have there's no court that looks at this
2 from the gap standpoint that I'm aware of. And, secondly,
3 it's a complete misinterpretation of the OCR guidance. As
4 the court in -- I forget the name of the case -- in
5 Virginia said, what the OCR said in the 1996 guidance was
6 that if you, if the gap was small enough that it would not
7 support a team, then that was a basis for finding that a
8 school was in compliance but they didn't say the converse.
9 And when they, when they defined what they meant by the
10 gap, they said you look to the average size of the women's
11 team in that school. At Quinnipiac, the average size of
12 the team, just eye balling the squad size, would be 20, in
13 the low 20s probably. So the OCR never said, well, you
14 can't eliminate a team because automatically that's going
15 to result in a gap the size of the team that's being
16 eliminated.

17 THE COURT: Okay. And did you want to comment
18 on the plaintiff's view about remedy? You mentioned
19 compliance --

20 MR. BRILL: Well, it's a class action, Your
21 Honor, and I believe that the case law is it doesn't -- I
22 mean this case has been going on one year. That's not
23 very long compared to the Brown case, for example, and it
24 is up to -- every court has said if you bring a class
25 action, it's up to the university to decide how it intends

1 to comply and reach proportionality.

2 The court doesn't say -- it's not up to the
3 court say, well, I want you to have a volleyball team with
4 12 people and you want to put some sprinters on your track
5 team and maybe you've got a few too many people on this
6 team and that team and while you're at it, why don't you
7 add a women's rugby team.

8 What these cases say is, okay, Quinnipiac, or
9 okay, Brown, we're sorry, you're not in compliance with
10 prong one. We want you to come back with a plan, the
11 plaintiffs will have an opportunity to comment on the
12 plan, the class members who are going to be affected
13 should have an opportunity to comment on the plan and then
14 the court has to decide if the plan is adequate or the
15 plan isn't adequate.

16 But out of the blue, there's no basis now for
17 specific remedy other than to say, you know, make sure
18 you're in compliance with Title IX. I mean, frankly, if
19 the only reason, putting aside track and field for a
20 minute and I talked just about competitive cheer, if the
21 court says that competitive cheer is not a team for
22 purposes of Title IX, then -- and it says that two
23 and-a-half percent gap puts us out of compliance for this
24 year, then we have to decide how we're going to get back
25 into compliance.

1 It's not obvious, you know. It may require
2 either putting, cutting another men's team or adding
3 another women's team. Simply putting the volleyball team
4 back in place doesn't necessarily -- when I add up the
5 numbers I don't think that would necessarily result in
6 compliance.

7 So it's a complicated, it's a complicated issue
8 that involves balancing of -- question of teams being
9 eliminated, teams being added, rosters being adjusted and
10 so on, and there are many other people who are affected
11 other than the main plaintiffs. I mean the track athletes
12 have a, have an interest here in what happens. So, yes I
13 think there would need to be an opportunity for
14 compliance.

15 Could I make one final comment. And that is in
16 the Colorado State case, I don't recall the sport that was
17 involved, it may have been women's softball, the court
18 said there that -- there was a permanent injunction
19 requiring the school to maintain that particular team but
20 at the same time it said but once you get into, once you
21 get into compliance with Title IX, that obligation
22 evaporates because its always going to be the decision of
23 the school to decide how it complies.

24 So Your Honor can say, okay, we're not in
25 compliance now and I want you to maintain the volleyball

1 team at least for another year, but get once we get into
2 compliance, then we don't have to maintain the volleyball
3 team or any other team.

4 THE COURT: I understand.

5 MR. BRILL: Thank you very much.

6 THE COURT: Thank you. Mr. Orleans?

7 MR. ORLEANS: Before I begin, I'm going try to
8 be as brief as I can. Were there particular questions
9 that the court wanted to ask of me? Or do you want to
10 just react as I go?

11 THE COURT: Let me react.

12 MR. ORLEANS: All right, I'm going to try. I'm
13 going start with working from the end.

14 THE COURT: I was going to say that's what's
15 fresh in my mind and I'd be interested in your response to
16 that.

17 MR. ORLEANS: With respect to the remedy, Your
18 Honor, as far as I know, in every case, every class action
19 case where the plaintiffs were members of a team that was
20 dropped, the court has started by ordering the
21 reinstatement of that team and whatever else needs to
22 happen in terms of shaping a remedy and having a hearing
23 for the class or giving the class an opportunity to weigh
24 in and giving the university an opportunity to devise a
25 compliance plan, I believe that every court that has faced

1 that situation has started by ordering the reinstatement
2 of the team from which the plaintiffs were drawn.

3 And there was a second point I wanted to make
4 about the remedy and it has slipped my mind. If it comes
5 back to me, I'll come back to it.

6 With respect to the issue of points of
7 substantial compliance percentage gap, I think the thing
8 that you have to keep in mind is that, you know, a gap of
9 2 percent at Ohio State where there might be thousands of
10 athletes is a different number of athletes that would
11 support the different team than a gap of 2 percent in a
12 small school where there are only a couple of hundred
13 athletes. So, and that's why the 1996 clarification
14 focuses, contrary I think to what defense counsel
15 suggested, focuses not on percentages but on whether,
16 whether the gap between actual and required number of
17 women would be enough to support a team.

18 THE COURT: Yes, although I think that argument
19 cuts both ways. At a small school, you know, the
20 fluctuation is going to have a more dramatic impact.

21 MR. ORLEANS: True.

22 THE COURT: So --

23 MR. ORLEANS: Okay.

24 THE COURT: I understand. I understand.

25 MR. ORLEANS: So, Your Honor asked about why

1 Quinnipiac had not gone to OCR and I think that in his
2 response defense counsel made a comment about OCR not
3 giving advisory opinions. I want to read to the court
4 from Exhibit 109 which is the 2008 Dear Colleague letter,
5 the penultimate paragraph.

6 "OCR remains available to provide technical
7 assistance on this issue to recipients on a case by case
8 basis. If you have further questions regarding the
9 application of Title IX to athletics programs or seek
10 technical assistance, please contact the OCR enforcement
11 office serving your state or territory."

12 So there is of course no actual evidence in the
13 record about what happened at Maryland five or six years
14 ago but certainly two years ago in 2008, OCR was inviting
15 schools with questions about this to seek assistance.

16 And further on that point, it just is not true,
17 I don't think, that the brief of the United States somehow
18 pushes off on the court the responsibility to make this
19 decision. I think the brief assumes that the issue is
20 before the court and that the court will decide, but I
21 don't think there's any statement in the United States
22 brief that, you know, we don't want it, the court must
23 decide this for us, and if it were presented to us we
24 would punt. That's not the way I read the U. S. brief.
25 And, as I said earlier, I think it is appropriate to weigh

1 heavily and balance the fact that the Quinnipiac and NCSTA
2 have not gone to OCR.

3 The theme of defense counsel's argument was that
4 it's really competitive cheer that's on trial and we just
5 dispute that very strongly, Your Honor. It's a false
6 choice. There's certainly no reason that Quinnipiac could
7 not honor its commitment to the competitive cheer squad
8 members and continue its effort to build this new activity
9 into a legitimate varsity sport.

10 It is a resource allocation issue. And you know
11 what? There's a cost to being a NCAA Division I athletic
12 program. If you want the prestige and the status and the
13 marketing opportunities and the recruiting opportunities
14 that come with being Division I, I think as an
15 institution, you have to be prepared to devote the
16 resources do that and you can't necessarily do it on the
17 cheap.

18 There was sort of an implicit threat there at
19 the end of Mr. Brill's remarks that, gosh, if the court
20 were to find they are not in compliance with Title IX, we
21 might have to cut more men's teams, they can't cut more
22 men's teams, not if they are going to stay in Division I.

23 So, they may have to reexamine their, some of
24 their resource allocation decisions. We think that they
25 ought to honor their commitment to competitive cheer and I

1 mentioned along those lines, there are a lot of schools in
2 the country that offer scholarships to their sideline
3 cheerleaders.

4 So there's certainly plenty of room for
5 Quinnipiac, as Your Honor suggested in some of your
6 questioning, to serve the needs and interests and
7 abilities of its students for legitimate athletic and
8 educational reasons, quite apart from the issue of Title
9 IX compliance. And if it does that, if it focuses on
10 that, it will find itself in Title IX compliance because
11 it will be providing the opportunities for women that it
12 is required to provide. Thank you.

13 THE COURT: All right, thank you all.

14 (Pause)

15 THE COURT: I have a lot of work to do. And as
16 I've told counsel I'm not going to even be here for some
17 period of time, so I want give you a good estimate of when
18 I can have a decision. It will be a matter of weeks not
19 days, but weeks not months. And I understand the time
20 pressures that are involved with the upcoming academic
21 year and it's my intention to get a decision to you as
22 quickly as I can consistent with an obligation, I think a
23 very heavy obligation, to carefully review the record and
24 consider these issues carefully.

25 So I will tell you it's my hope to have a

1 decision to you by the middle of July. Whether that is
2 possible, frankly I don't know, but that is my hope and my
3 goal.

4 And I want to thank both sides for a very
5 efficient presentation of the case. I had concerns
6 obviously that we could hear this matter in the time
7 available and I very much appreciate the efforts you've
8 gone to to cooperate with each other and to present the
9 case, as I said, efficiently.

10 What's important to me, I think, is to get the
11 record established and now to have some time to carefully
12 review it.

13 And, as I say in every case, best of luck to
14 everyone.

15 And we're going to stand in recess.

16 (Whereupon the above matter was adjourned at
17 11:25 o'clock, p. m.)
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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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