10-3302

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STEPHANIE BIEDIGER, Individually and on behalf of all those similarly situated, KAYLA LAWLER, Individually and on behalf of all those similarly situated, ERIN OVERDEVEST, Individually and on behalf of all those similarly situated, KRISTEN CORINALDESI, Individually and on behalf of all those similarly situated, L.R., Individually and on behalf of all those similarly situated, ROBIN L. SPARKS, Individually, LOGAN RIKER, Individually and on behalf of all those similarly situated,

Plaintiffs-Appellees

LESLEY RIKER, on behalf of her minor daughter,

Plaintiff

v.

Quinnipiac University,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE

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INTEREST OF AMICUS CURIAE

The United States has a direct and substantial interest in the subject matter of this appeal, which involves an interpretation of Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. 1681 *et seq.* Pursuant to 34 C.F.R. 106.41(a) *et seq.*, the United States Department of Education's (Education) Office for Civil Rights (OCR) ensures that recipients of federal funds do not discriminate on the basis of sex in any offered interscholastic, intercollegiate, club, or intramural athletic program. By Executive Order, the United States Department of Justice also coordinates the implementation and enforcement by executive agencies of the nondiscrimination provisions of Title IX. See Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980). Consistent with that responsibility, the Department has participated in numerous Title IX athletics cases, both as amicus curiae and as plaintiff-intervenor. The Department filed an amicus brief in the district court in the instant suit.

STATEMENT OF THE ISSUES

The United States will address the following issues:

1. Whether the district court erred in concluding that Quinnipiac's competitive cheerleading program did not constitute a sport under Title IX during the 2009-10 school year.

2. Whether the district court erred in concluding that Quinnipiac did not offer athletic opportunities to its female students that were substantially proportional with female undergraduate enrollment, in violation of Title IX.

STATEMENT OF THE CASE

In March 2009, Quinnipiac University announced its plans to cut its women's volleyball team, men's golf team, and men's outdoor track team and to create a competitive cheerleading team for the 2009-10 season. *Biediger* v. *Quinnipiac*, 728 F. Supp. 2d 62, 63 (D. Conn. 2010). Plaintiffs-appellees filed suit, alleging that Quinnipiac's decision to eliminate the volleyball team violated Title IX. *Ibid.* On May 22, 2009, the district court entered a preliminary injunction against Quinnipiac, holding that the University had deprived female athletes of equal athletic participation opportunities through its roster management practices, *ibid.*, and enjoined Quinnipiac from (1) eliminating its women's varsity volleyball team or any other women's teams; (2) terminating the employment of the coaches of the volleyball team; (3) reducing support to the volleyball team or any other women's team; and (4) restricting or denying the volleyball team's access to facilities, coaching, training, or competitive opportunities. *Biediger* v. *Quinnipiac*, No. 3:09cv621, Ruling and Order Granting Preliminary Injunction (Doc. 51) at 38-39.

After a four-day bench trial in June 2010, the district court held that Quinnipiac had failed to provide equal athletic opportunities to its female students. *Quinnipiac*, 728 F. Supp. 2d at 113. The court held that while Quinnipiac was not engaging in roster manipulation in violation of Title IX, see *id.* at 69-73, the University's roster targets "suggest[ed] that any lack of proportionality between the University's athletics program and its undergraduate population is not due to 'natural fluctuations in [the] institution's enrollment and/or participation rates.'" *Id.* at 110 (citation omitted). The court next held that, because of the "intertwined relationship between the [women's] cross-country and track programs" and the fact that injured and "redshirted" female cross-country athletes received no additional benefits from their participation on the indoor and outdoor track teams, those athletes should be removed from Quinnipiac's indoor track and outdoor track Title IX rosters. See *id.* at 103-107. Finally, the court held that although competitive cheerleading was plainly an "athletic endeavor" that "requires strength, agility, and grace," the facts regarding Quinnipiac's competitive cheerleading squad showed that it was not yet a sport that could be counted for purposes of Title IX compliance. *Id.* at 94-101.

After removing from Quinnipiac's rosters the 30 members of the cheerleading squad and the 11 injured and redshirted cross-country runners on the indoor and outdoor track teams, the court concluded that there was a 3.62%

disparity between the percentage of women in Quinnipiac's student body and the percentage of female athletes. *Quinnipiac*, 728 F. Supp. 2d at 111. Examining the matter under OCR guidelines, the court observed that the disparity amounted to 38 additional female athletes, enough to sustain a new varsity team. *Ibid.*; see also *id.* at 72. The court held that, under the circumstances of this case, the participation gap was sufficient to prove that Quinnipiac had not complied with Title IX. *Id.* at 112-114.

SUMMARY OF THE ARGUMENT

On the record presented, the district court reasonably concluded that Quinnipiac University had violated Title IX. The court properly examined OCR's guidelines to conclude that Quinnipiac's competitive cheerleading squad should not be considered an intercollegiate varsity sport under Title IX. The district court also properly examined OCR's guidelines to hold that, in the context of Quinnipiac's athletics program, a 38-athlete participation gap was large enough to constitute a Title IX violation. As the district court correctly held, OCR guidelines call for a holistic examination of whether a University's program is substantially proportional, and OCR makes this determination on a case-by-case basis rather than through the use of a statistical test. In this regard, OCR considers whether the disparity amounts to a large enough number of athletes sufficient to constitute a viable team. The district court reasonably applied OCR guidelines in concluding

that, under the facts of this case, Quinnipiac's athletics program is not substantially proportional.

ARGUMENT

I

OCR'S TITLE IX GUIDELINES ARE DUE SUBSTANTIAL DEFERENCE, AND PROVIDE THE APPROPRIATE FRAMEWORK FOR EXAMINING THE ISSUES PRESENTED IN THIS CASE

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681(a). On July 21, 1975, the Secretary of the Department of Health, Education, and Welfare (HEW) issued regulations under Title IX that prohibit discrimination in athletic programs offered by a recipient of federal funds. 34 C.F.R. 106.41(a); see also 45 C.F.R. 86.41(c).[1] The regulations require recipients to provide equal athletic opportunity for members of both sexes, and specify that among the factors to be considered in determining whether equal opportunities are available are "[w]hether the selection of sports and levels of

[1] By operation of law, all of HEW's determinations, rules, and regulations continued in effect after Congress created the Department of Education in 1980. See 20 U.S.C. 3505(a); see also Pub. L. No. 96-88, § 201, 93 Stat. 671 (1979) (20 U.S.C. 3411); Exec. Order No. 12,212, 45 Fed. Reg. 29,557 (May 2, 1980).

competition effectively accommodate the interests and abilities of members of both sexes." 34 C.F.R. 106.41(c)(1).

In 1979, the Secretary of HEW published a policy interpretation "clarif[ying] the meaning of 'equal opportunity' in intercollegiate athletics." 44 Fed. Reg. 71,414 (Dec. 11, 1979) (1979 Policy Interpretation). The 1979 Policy Interpretation sets forth a three-part test (the Three-Part Test) for assessing Title IX compliance with regard to athletic participation opportunities. At issue in this case is the the first prong of that test: "[w]hether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments." 44 Fed. Reg. 71,418.

In response to questions regarding the Three-Part Test, and which athletic opportunities can be counted for purposes of Title IX under the regulations, Education issued a number of "Dear Colleague" letters to augment the 1979 Policy Interpretation. Two of those letters are relevant here, the first issued in January 1996, and the second in September 2008. See J.A. 1797-1808,[2] Jan. 16, 1996, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (1996 Clarification); J.A. 1640-1643, Sept. 17, 2008, Letter from Stephanie

[2] All sites to "J.A." refer to the page number in the Joint Appendix.

Monroe, the then-Assistant Secretary for Civil Rights of the Department of Education (2008 Letter).

This Court has held that both the 1975 regulation and 1979 Policy Interpretation are due substantial deference in reviewing Title IX matters. See *McCormick* v. *School Dist. of Mamaroneck*, 370 F.3d 275, 288-290 (2d Cir. 2004) ("The Department of Education's athletics regulations set forth the standards for assessing an athletics program's compliance with section 901 of Title IX. We defer to the interpretation of Title IX that these regulations provide. The degree of deference is particularly high in Title IX cases because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX.") (internal quotation marks and citations omitted). Moreover, as the district court held, "[t]he remaining administrative interpretations of that regulation," including the "1996 Clarification and accompanying letter * * * and the 2008 OCR Letter[,] are also owed deference," as they both "represent OCR's interpretation of its own regulations" and "create a reasonable and persuasive method * * * for determining which activities count as sports for Title IX purposes." *Biediger* v. *Quinnipiac*, 728 F. Supp. 2d 62, 92-93 (D. Conn. 2010); see also *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150 (1991) ("It is well established that an agency's construction of its own

regulations is entitled to substantial deference.") (internal quotation marks and citation omitted).

II

THE DISTRICT COURT DID NOT ERR IN ANALYZING OCR'S GUIDELINES AND HOLDING THAT QUINNIPIAC'S COMPETITIVE CHEERLEADING PROGRAM DID NOT CONSTITUTE A SPORT FOR PURPOSES OF TITLE IX

The district court properly analyzed the guidelines set forth in OCR's 2008 Letter and reasonably concluded that, in the 2009-10 school year, Quinnipiac's competitive cheerleading program did not constitute an intercollegiate varsity sport for purposes of Title IX. As the district court stated, "for an athletic opportunity to count under Title IX, it must be genuine, meaning that it must take place in the course of playing an actual 'sport' and it must allow an athlete to receive the same benefits and experiences that she would receive if she played on another established varsity squad." *Biediger* v. *Quinnipiac*, 728 F. Supp. 2d 62, 91 (D. Conn. 2010). To this end, the 2008 Letter sets forth two broad categories that are to be considered in evaluating whether the activity in question provides athletic participation opportunities that are consistent with those offered by the "established varsity sports in the institution's * * * athletics program": program structure and administration, and team preparation and competition. See J.A. 1641-1643. The 2008 Letter makes clear that OCR's determinations are "fact-specific," and conducted on a "case-by-case" basis, and that the determinations

include an examination of all of the factors in the Letter. J.A. 1641, 1643. As discussed further below, whether a program includes competition against intercollegiate varsity opponents in a manner consistent with established varsity sports is an essential aspect of this analysis.

In this case, both the underlying record, and the district court's own fact-specific examination vis-à-vis the OCR guidelines, support the court's conclusion that Quinnipiac's competitive cheerleading program did not constitute an intercollegiate varsity sport for purposes of Title IX during the 2009-10 school year.[3] It is true that all Title IX determinations are to be made on a case-by-case basis. See J.A. 1641. For this reason, our discussion here is limited to the question whether Quinnipiac's 2009-10 cheer team was a varsity sport. Competitive

[3] The district court properly recognized that before the specific factors set forth in OCR's 2008 Letter are examined, the Letter allows for consideration of whether a presumption applies in favor of a particular athletic program constituting a sport. See J.A. 1641; *Quinnipiac*, 728 F. Supp. 2d at 89-90. As explained in the Letter, OCR will presume that an institution's established sports can be counted under Title IX when (1) the institution is a member of an intercollegiate athletic association, such as the NCAA; (2) the organizational requirements of such an association satisfy the factors identified in the Letter; and (3) compliance with such requirements is "not discretionary." J.A. 1641; see also *Quinnipiac*, 728 F. Supp. 2d at 89-90. The Letter also indicates that this presumption can be rebutted by evidence demonstrating that the institution is not offering the activity in a manner that satisfies the factors in the Letter. Because the NCAA does not recognize competitive cheerleading as a sport, see *Quinnipiac*, 728 F. Supp. 2d at 78-79, the district court properly concluded that "competitive cheer is not entitled to any presumption in favor of it being considered a sport under Title IX," and turned to an examination of the factors set forth in the 2008 Letter, *id.* at 94-95.

cheerleading is by no means categorically disqualified from consideration as a varsity sport, and under appropriate circumstances it could well be found to provide athletic opportunities for Title IX purposes. But in this case, as the district court held and as discussed below, there were crucial – and, ultimately, dispositive – differences between Quinnipiac's 2009-10 cheer team and its other varsity sports.

A. Program Structure And Administration

The first broad set of factors described in the 2008 Letter calls for an examination of an activity's program structure and administration in relation to an institution's established varsity sports. The Letter includes two subsets of considerations for determining whether the activity's program structure and administration is conducted in a manner consistent with established varsity sports. First, the Letter directs an inquiry into whether the operating budget, support services, and coaching staff are provided in a manner consistent with established varsity sports. J.A. 1641. Second, the Letter requires an analysis of whether participants can receive athletic scholarships and awards, and are recruited in a manner consistent with established varsity sports. J.A. 1641.

The record supports the district court's conclusion that the cheerleading program's budget, scholarships, awards, benefits, and coaching were generally "consistent with the administration of Quinnipiac's other varsity teams." See

generally *Quinnipiac*, 728 F. Supp. 2d at 95; see also J.A. 1034, 1059, 1087, 1109-1125 (Coach Powers describing the team's operating budget, practice time, community service and academic study requirements, uniforms, trainers, and scholarships).

As the district court found, however, some differences existed in administration between competitive cheer and other sports at Quinnipiac. Because Coach Powers did not pass the NCAA recruiting test until June 2010, she was not able to recruit off campus in the 2009-10 school year. J.A. 1055-1056, 1086. Therefore, in "2009-10 * * * all members of the competitive cheer team were selected from the pool of current Quinnipiac students." *Quinnipiac*, 728 F. Supp. 2d at 95. While a student may "receive[] a genuine participation opportunity even though he or she was not recruited[,]" the district court reasonably concluded that "a serious Division I team usually must engage in some off-campus recruiting in order to field a competitive squad." *Ibid.* Moreover, the district court appropriately took into account that this lack of recruitment was "inconsistent with the manner in which the University's other teams filled their rosters." *Id.* at 96. In addition, the team could not receive catastrophic insurance through the NCAA and therefore had to purchase it separately. J.A. 1053.

B. Team Preparation And Competition

The second set of factors in the 2008 Letter relates to various aspects of team preparation and competition that OCR considers when examining whether a team prepares for and "engages in competitions" in a manner consistent with established varsity sports in an institution's intercollegiate program. These factors include: (1) whether practice opportunities are consistent with established varsity sports; (2) whether regular season competitive opportunities differ quantitatively or qualitatively from established varsity sports and whether the team competes against intercollegiate varsity opponents in a manner consistent with established varsity sports; (3) whether pre- or post-season competition is available and consistent with other varsity sports; and (4) whether the primary purpose of the activity is athletic competition at the intercollegiate varsity level. See J.A. 1642-1643. While the district court's examination of the cheerleading team's practice opportunities showed that the team in some ways operated similarly to Quinnipiac's established varsity sports, the district court was correct to conclude that the team's competitive opportunities and the quality of its competition ultimately precluded it from being considered on the University's Title IX roster.

1. Practice Opportunities

As the district court found, the practice opportunities for the competitive cheer squad appear to have been consistent with the remainder of Quinnipiac's

athletic program. *Quinnipiac*, 728 F. Supp. 2d at 96; see also J.A. 1062, 1112 (Powers' testimony regarding the team's practice schedule both in the pre-season and regular season).

2. Regular Season Competitive Opportunities

Turning to the regular season competitive opportunities, however, the district court correctly concluded that, on the facts of this case, "major and, ultimately, dispositive distinctions" were evident between Quinnipiac's competitive cheer squad and other NCAA sports. See *Quinnipiac*, 728 F. Supp. 2d at 96. The 2008 Letter requires an analysis of whether a team's regular season competitive opportunities differ quantitatively or qualitatively from established varsity sports, and whether the team competes against intercollegiate varsity opponents in a manner consistent with established varsity sports. To assist in making this determination, the Letter directs an inquiry into whether the number of competitions and length of play are predetermined by a governing athletics organization, an athletic conference, or a consortium of institutions; whether the competitive schedule reflects the abilities of the team; and whether the activity has a defined season and whether the season is determined by a governing athletics organization, an athletic conference, or a consortium. J.A. 1642. Examining Quinnipiac's cheer competition schedule as a whole, the district court did not err in

concluding that the program had dispositive shortcomings when compared with Quinnipiac's established varsity sports.

a. Length Of Season, Number Of Competitions, And Length Of Play

The court found that Quinnipiac joined and helped establish the National Competitive Stunt and Tumbling Association (NCSTA) with seven other postsecondary schools, five of which purported to field varsity competitive cheer squads for the 2009-2010 academic year. *Quinnipiac*, 728 F. Supp. 2d at 82. At its first organizational meeting in September 2009, the NCSTA set up rules of competition for competitive cheer. *Ibid.* As the district court observed, although the NCSTA did determine that there would be a 132-day cheer season for the 2009-10 school year, and that each team should participate in no fewer than eight competitions, it "did not establish a maximum number of competitive cheer competitions; rules for what kind of teams its member schools could play against; or what kinds of scoring systems would be permissible at non-NCSTA competitive cheer competitions." *Quinnipiac*, 728 F. Supp. 2d at 97. "It also d[id] not appear that the NCSTA's rules for the minimum number of meets or the length of a season were enforceable." *Ibid.* Furthermore, "the NCSTA could not even threaten to exclude violators from participating in the post-season – a stick that the NCAA uses to deter and punish its member schools for violating its rules – because the

2009-10 post-season was administered by * * * a third-party organization over which the NCSTA had no authority." *Ibid.*

Of the ten competitions in which the competitive cheer team participated, only two were under the NCSTA format. *Biediger* v. *Quinnipiac*, No. 3:09cv621, Doc. 145 at 8 ¶ 18. The district court found that, during these ten competitions, "at least five different scoring rules" were used. *Quinnipiac*, 728 F. Supp. 2d at 104. Each of the other scoring systems had its own rules and regulations (J.A. 1062-1102); versus these other systems, the NCSTA system removed some of what Coach Powers described as "subjective scores" from the scoring sheet (J.A. 1088-1089). Powers testified that, "depending on the company," non-NCSTA competitions ranged from "two minutes and 15 seconds" to "two minutes and 30 seconds." J.A. 1088. NCSTA competition routines are two minutes and 30 seconds. J.A. 1089. As the district court held, "[n]o other varsity sport was subject to multiple sets of governing bodies, and every other Quinnipiac varsity team could prepare for games knowing that the rules of competition would remain constant." *Quinnipiac*, 728 F. Supp. 2d at 97; cf. National Collegiate Athletic Association Bylaws at 213-222, available at http://www.ncaapublications.com/productdownloads/D110.pdf (defining, among other things, the play season, number of games within a season, and competition guidelines for member institutions).

b. Competitive Schedule

The district court did not err in concluding that the competitive schedule of the cheerleading team should be of even greater concern in this Title IX analysis. See *Quinnipiac*, 728 F. Supp. 2d at 96-97. The 2008 Letter asks whether a team's competitive schedule reflects the abilities of the team in relation to whether the team competes against intercollegiate varsity opponents, and whether the regular season competitive opportunities differ quantitatively or qualitatively from established varsity sports. J.A. 1642. Quinnipiac's competitive cheer schedule in 2009-10, however, included competitions against teams coming from a number of different academic and competitive backgrounds, with a range of styles. According to testimony from Coach Powers, the squad's competitors included other collegiate varsity squads, non-scholastic all-star teams, collegiate sideline teams, private gym teams, and club teams. J.A. 1065-1093. As the district court found, the main focus of some of these teams is audience entertainment, not athletic competition; still others have no scholastic affiliations whatsoever. See *Quinnipiac*, 728 F. Supp. 2d at 97-98. No other Quinnipiac varsity team played against non-collegiate competition as part of its season. See *ibid.*

The district court found that the squad's competition included high school teams, and deemed this fact especially significant in reaching its decision. See *Quinnipiac*, 728 F. Supp. 2d at 97-98. It is unclear from the record, however,

whether Quinnipiac actually competed against high school teams; while Powers described some of the competitions as having included high school athletes, she also stated that the team competed only against college squads. Cf. J.A. 1090, 1092 with J.A. 1127-1128. The question whether the team competed against high school teams notwithstanding, it is still clear from the record that the team did compete against club teams, non-scholastic all-star teams, and college sideline teams. See J.A. 1071, 1074-1075, 1092. The district court was correct in concluding that, examined under the OCR guidelines, such a competitive schedule cannot be said to be qualitatively consistent with the structure and administration of competition for Quinnipiac's established varsity sports.

3. Post-Season Events

In addition to examining regular season opportunities, the 2008 Letter also looks at post-season opportunities, to the extent they exist for the athletic program. Specifically, the Letter asks whether "state, national, or conference championships exist for the activity," and whether "participation in post-season competition is dependent on or related to regular season results in a manner consistent with established varsity sports." J.A. 1643. The district court did not err in concluding that, here again, Quinnipiac's competitive cheerleading program fell short. As the district court found, for the cheerleading squad's final competition, "[h]ow * * * schools fared in their regular seasons was irrelevant to their success." *Quinnipiac*,

728 F. Supp. 2d at 98. Rather, the post-season event, run by a private company, was "open to all schools' cheerleading teams; there was no progressive playoff system or entrance qualification. * * * In fact, being a competitive cheerleading team was not a prerequisite to participating in the * * * event." *Ibid.*

Furthermore, the "championship failed to provide a form of competition in keeping with Quinnipiac's season." *Quinnipiac*, 728 F. Supp. 2d at 98. Indeed, the scoring system used in the event was contrary to the primary purpose of competitive cheerleading, in that it awarded points for crowd response, a key characteristic of non-competitive sideline cheer. See J.A. 1096-1097. The crowd response portion involved using "poms and signs and props and megaphones," and trying to "engage the crowd to respond back to you in a cheer," and "award[ed] you more points for the amount of pro[p]s you use[d] to engage the crowd." J.A. 1096-1097. As the district court observed, "at no [other] point in the 2009-10 season * * * was [the] team's score ever determined by the ability to coax a reaction from the audience; furthermore, [Coach Powers] testified that raising the crowd's spirit is a hallmark of sideline, not competitive, cheer, and was an activity that the NCSTA explicitly rejected from its format." *Quinnipiac*, 728 F. Supp. 2d at 98-99. As the district court held, "that kind of abrupt switch in the rules – a switch for which the squad has not prepared, that was at odds with the skills its members honed over the season, and that clashed with the athletic image the team

sought to project" – was "inconsistent with the post-season of any other varsity team." *Id.* at 99.

Quinnipiac's contention that OCR rules do not *require* post-season competition (see Quinnipiac Br. 62) is irrelevant here. As the University itself acknowledges, "'if post-season competition opportunities are available' then the nature of the post-season competition should be considered." See Quinnipiac Br. 62 (quoting J.A. 1643); cf. J.A. 1642 ("If pre-season and/or post-season competition exists for the activity," OCR inquires "whether the activity provides an opportunity for student athletes to engage in the pre-season and/or post-season competition in a manner consistent with established varsity sports").

4. Primary Purpose

The final factor included in the 2008 Letter is an examination of whether an activity's primary purpose is athletic competition at the intercollegiate varsity level. Sub-factors include whether the activity is governed by a specific set of rules, including objective, standardized criteria, and whether participation in the post-season is dependent on or related to regular season results. J.A. 1642-1643.

While, as the district court found, it is plain that the "purpose of the competitive cheer team is to compete, and not to cheer others," *Quinnipiac*, 728 F. Supp. 2d at 99, for the reasons discussed above, the cheer team's primary purpose was not to compete at the collegiate varsity level. The team also did not meet

some of the sub-factors: it competed against club teams, non-scholastic all-star teams, and college sideline teams, and competitions took place according to the rules of at least five different organizations. And, again, the post-season was not based on the team's performance during the regular season, but was open to all comers.

* * * * *

Taken together, an examination of the factors described above supports the district court's conclusion that "the University's competitive cheer team cannot count as a sport under Title IX." *Quinnipiac*, 728 F. Supp. 2d at 99. To be sure, the participants are clearly athletes, and the University has treated them as such by providing the types of benefits and coaching received by other varsity teams. Nonetheless, as the district court concluded, several critical factors – the quality of the team's competitive season and inconsistent rules, and lack of a progressive playoff, as well as lack of off-campus recruitment and inability to obtain NCAA catastrophic insurance – indicate that the 2009-10 cheer team did not provide an experience comparable to Quinnipiac's other varsity sports. The district court's decision to exclude the 30 members of the cheer team in evaluating whether the University complied with Title IX should be affirmed.

III

THE DISTRICT COURT REASONABLY CONCLUDED THAT A 38-ATHLETE PARTICIPTION GAP AMOUNTED TO A TITLE IX VIOLATION IN THE CONTEXT OF THIS CASE

The district court found that there was a 38-athlete gap between the number of female athletes at Quinnipiac and the number of female athletes necessary for complete proportionality, and that this participation gap was sufficient to hold that Quinnipiac had violated Title IX. See *Biediger* v. *Quinnipiac*, 728 F. Supp. 2d 62, 111-113 (D. Conn. 2010); see also *id.* at 112 n.27. The district court rested its conclusion upon the fact that "38 female athletes would be sufficient to sustain an independent varsity squad." *Id.* at 112. Quinnipiac argues, however, that, contrary to the district court's analysis, "the test for proportionality is not whether the 'participation gap' is large enough to create a team" (Quinnipiac Br. 72), and that the percentage disparity present here is not sufficient to constitute a violation of Title IX (Quinnipiac Br. 67). The University's argument, however, overlooks the clear language of the 1996 Clarification, which supports the district court's conclusion in this case.

In examining whether a university is providing nondiscriminatory participation opportunities for individuals of both sexes, OCR asks "[w]hether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments."

J.A. 1797. This test provides a way to ensure that although "[t]he Title IX regulation allows institutions to operate separate athletic programs for men and women," those institutions still "provide equal athletic opportunities for members of both sexes." See J.A. 1797, 1800.

Given that the OCR regulations "allow[] an institution to control the respective number of participation opportunities offered to men and women[,] * * * it could be argued that * * * there should be no difference between the participation rate in an institution's intercollegiate athletic program and its full-time undergraduate student enrollment." J.A. 1800. However, "because in some circumstances it may be unreasonable to expect an institution to achieve exact proportionality," OCR "has not specified a magic number at which substantial proportionality is achieved." *Equity In Athletics, Inc.* v. *Department of Educ.*, 639 F.3d 91, 110 (4th Cir. 2011); see also J.A. 1800 ("In some circumstances it may be unreasonable to expect an institution to achieve exact proportionality – for instance, because of natural fluctuations in enrollment and participation rates or because it would be unreasonable to expect an institution to add athletic opportunities in light of the small number of students that would have to be accommodated to achieve exact proportionality."). Instead, recognizing that any examination of substantial proportionality "depends on the institution's specific circumstances and the size of its athletic program, OCR makes this determination

on a case-by-case basis, rather than through use of a statistical test." J.A. 1800; see also *Equity In Athletics,* 639 F.3d at 110 ("[T]he DOE has expressly noted that determinations of what constitutes 'substantially proportionate' under the first prong of the Three-Part Test should be made on a case-by-case basis," and the Department relies on such an individual analysis "rather than * * * a statistical test.") (internal quotation marks, citation, and parenthetical omitted); *Brust* v. *Regents of the Univ. of Cal.*, No. 2:07-cv-1488, 2007 U.S. Dist. LEXIS 91303, at *9 (E.D. Cal. Dec. 12, 1997) ("Courts have followed the Office for Civil Rights instructions to its Title IX investigators that '[t]here is no set ratio that constitutes "substantially proportionate" or that, when not met, results in a disparity or a violation.'") (citation omitted).

This individualized examination inquires whether it would be unreasonable to expect an institution to achieve exact proportionality (1) "because of natural fluctuations in enrollment and participation rates," or (2) "because it would be unreasonable to expect an institution to add athletic opportunities in light of the small number of students that would have to be accommodated to achieve exact proportionality." J.A. 1800. As part of the latter inquiry, OCR considers whether the number of female athletes necessary to close the disparity would be "sufficient to sustain a viable team, i.e., a team for which there is a sufficient number of interested and able students and enough available competition to sustain an

intercollegiate team." See J.A. 1800-1801. OCR has specified that, "[a]s a frame of reference in assessing this situation, [it] may consider the average size of teams offered for the underrepresented sex, a number which would vary by institution." J.A. 1801.

Such an examination is extremely important to the enforcement of Title IX. If only statistical disparities were analyzed, schools with large numbers of student athletes – such as Quinnipiac – might well be able to eliminate viable women's teams without creating large percentage disparities. See J.A. 1801 (noting, for example, that in an institution with 600 athletes, a 5 percent participation gap would amount to 62 additional women being able to participate). In order to ensure that schools are not unjustly penalized, however, OCR considers "the average size of teams offered for the underrepresented sex, a number which would vary by institution." J.A. 1801.

The district court properly analyzed the 1996 Clarification and reasonably concluded that the 38-athlete participation gap it found in this case amounted to a Title IX violation. See *Quinnipiac*, 728 F. Supp. 2d at 112-113. The record shows that the size of Quinnipiac's women's teams during the 2009-10 school year ranged from 10 students on the tennis team to 30 students on the indoor and outdoor track teams. See *Quinnipiac*, 728 F. Supp. 2d at 71 (chart). The district court found that the "mean size for Quinnipiac's women's teams was 22 members,

and the median team size was 24 members." *Id*. at 112. As the court held, it would thus "appear that the additional 38 athletes would certainly be enough to support an additional varsity team, especially when one considers that Quinnipiac's women's rosters tended to be bigger than the national and conference averages." See *ibid.* Moreover, the court reasonably found that the University's plans to expand various women's sports teams in the 2010-11 school year further confirmed that 38 athletes were sufficient to constitute a viable squad and that "an independent sports team could be created from the shortfall of participation opportunities." See *id.* at 112-113.

The district court also reasonably held that the disparity between female enrollment at Quinnipiac and the number of female athletes was not "attributable to a surge of women enrolling" at the University. See *Quinnipiac*, 728 F. Supp. 2d at 111-112; cf. J.A. 1800 ("In some circumstances it may be unreasonable to expect an institution to achieve exact proportionality * * * because of natural fluctuations in enrollment and participation rates."). The district court observed that Quinnipiac's 2009-10 enrollment was consistent with its predictions, and that the University "carefully selected its teams' roster targets, and * * * took meticulous steps to ensure that its roster targets were met." See *id.* at 112. Although Quinnipiac notes in its brief that the University population increased by .27% from the 2008-09 school year to the 2009-10 school year (Quinnipiac Br.

71), this small percentage increase cannot be said to conflict with the district court's findings that Quinnipiac's enrollment was "consistent with [its] expectations." *Quinnipiac*, 728 F. Supp. 2d at 112.

In sum, the district court correctly looked beyond the bare statistical disparity to consider whether that disparity "reflects Quinnipiac's deliberate planning and not other external events beyond the University's control," *Quinnipiac*, 728 F. Supp. 2d at 113, and whether, in the context of Quinnipiac's athletic program, the 38-athlete disparity is large enough to support a viable team. Based on its consideration of those factors the district court reasonably found that, under the 1996 Clarification, Quinnipiac had violated Title IX.

CONCLUSION

For the reasons stated above, the district court's judgment should be affirmed on the issues discussed in this brief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief does not exceed the type-volume limitation imposed by Federal Rule of Appellate Procedure 29. The brief was prepared using Microsoft Office Word 2007 and contains 5907 words of proportionally spaced text. The typeface is Times New Roman, 14-point font.

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Date: September 7, 2011

CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2011, I electronically filed the foregoing Brief for United States as Amicus Curiae with the United States Court of Appeals for the Second Circuit by using the CM/ECF system, which will accomplish service to all counsel in this case.

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