

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**

**STEPHANIE BIEDIGER, KAYLA LAWLER
ERIN OVERDEVEST, KRISTEN
CORINALDESI, and LOGAN RIKER
individually and on behalf of all
those similarly situated;
and
ROBIN LAMOTT SPARKS, individually,**

Plaintiffs,

v.

QUINNIPIAC UNIVERSITY,

Defendant.

Case No. 3:09-CV-621(SRU)

CLASS ACTION

December 9, 2009

FIRST AMENDED CLASS ACTION COMPLAINT

Plaintiffs STEPHANIE BIEDIGER, KAYLA LAWLER, ERIN OVERDEVEST, KRISTEN CORINALDESI, and LOGAN RIKER are female students and varsity athletes at Defendant QUINNIPIAC UNIVERSITY (“QU” or “Defendant”). These Plaintiffs file this action individually and on behalf of a class of all other similarly situated females (the “Student Plaintiffs”). Plaintiff ROBIN LAMOTT SPARKS is the head volleyball coach at Quinnipiac University. She files this action individually and not on behalf of a class (“Coach Sparks”). Plaintiffs respectfully file this complaint and allege as follows:

STATEMENT OF THE CASE

1. The Student Plaintiffs file this case as a class action on behalf of themselves and on behalf of a class of current, prospective, and future female students at Quinnipiac University (“QU”) who are harmed by and want to end QU’s sex discrimination in: (1) the allocation of

athletic participation opportunities; (2) the allocation of athletic financial assistance; and (3) the allocation of benefits provided to varsity athletes. They similarly file this action on behalf of females who are deterred from enrolling at QU because of the sex discrimination in QU's athletic program, including its failure to offer the varsity sports in which they want to participate (despite QU's failure to provide equal athletic participation opportunities to females).

2. The Student Plaintiffs allege that Defendant's ongoing sex discrimination in the operation of its varsity athletic program violates Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 et seq.) and the regulations adopted pursuant thereto (34 C.F.R. Part 106) (collectively, "Title IX").

3. Coach Sparks alleges that Defendant has discriminated against her and continues to discriminate against her in the terms and conditions of her employment because of the sex of the student athletes she coaches. She further alleges that Defendant's planned elimination of the women's volleyball program, and with it her job as head volleyball coach, constitutes further discrimination against her because of the sex of the student athletes she coaches.

4. Coach Sparks alleges that Defendant's ongoing sex discrimination against her because of the sex of her student athletes violates Title IX.

5. All Plaintiffs allege that Defendant has engaged in and continues to engage in retaliation against them because Plaintiffs opposed and/or complained about Defendant's sex discrimination and Title IX violations. Plaintiffs allege that this retaliation violates Title IX.

JURISDICTION AND VENUE

6. The first, second, and third legal claims on behalf of the Student Plaintiffs arise under 20 U.S.C. § 1681, et seq. and its interpreting regulations. Jurisdiction is conferred on this court by 28 U.S.C. §§ 1331, 1343(3), and 1343(4).

7. The fourth legal claim on behalf of the Coach Plaintiff arises under 20 U.S.C. § 1681, et seq. and its interpreting regulations. Jurisdiction is conferred on this court by 28 U.S.C. §§ 1331, 1343(3), and 1343(4).

8. The fifth legal claim on behalf of all Plaintiffs arises under 20 U.S.C. § 1681, et seq. and its interpreting regulations. Jurisdiction is conferred on this court by 28 U.S.C. §§ 1331, 1343(3), and 1343(4).

9. This court has jurisdiction and authority to enter declaratory and other relief pursuant to 28 U.S.C. §§ 2201 and 2202.

10. Venue is proper pursuant to 28 U.S.C. § 1391(b). These claims arose in and Defendant is located in Hamden, Connecticut, which is within the jurisdiction of this court.

THE PARTIES

11. Plaintiff Stephanie Biediger is a female student and varsity athlete at Defendant Quinnipiac University. During the school year Plaintiff resides in Hamden, Connecticut, which is within the jurisdiction of this court.

12. Plaintiff Kayla Lawler is a female student and varsity athlete at Defendant Quinnipiac University. During the school year Plaintiff resides in Hamden, Connecticut, which is within the jurisdiction of this court.

13. Plaintiff Erin Overdevest is a female student and varsity athlete at Defendant Quinnipiac University. During the school year Plaintiff resides in Hamden, Connecticut, which is within the jurisdiction of this court.

14. Plaintiff Kristen Corinaldesi is a female student and varsity at Defendant Quinnipiac University. During the school year Plaintiff resides in Hamden, Connecticut, which is within the jurisdiction of this court.

15. Plaintiff Logan Riker is a female student and varsity athlete at Defendant Quinnipiac University. During the school year Plaintiff resides in Hamden, Connecticut, which is within the jurisdiction of this court.

16. Plaintiff Robin Lamott Sparks is the head volleyball coach at Quinnipiac University. Plaintiff resides in Hamden, Connecticut, which is within the jurisdiction of this court.

17. Defendant Quinnipiac University is a private university of higher education. It is located in Hamden, Connecticut, which is within the jurisdiction of this court.

18. Quinnipiac University receives federal financial assistance and the benefits therefrom. Therefore, all programs at QU, including intercollegiate athletics, are subject to the requirements of Title IX.

CLASS ALLEGATIONS

19. The Student Plaintiffs bring this action on behalf of themselves and, pursuant to Rule 23(A) and B(2) of the Federal Rules of Civil Procedure, on behalf of all those similarly situated. In particular, the Student Plaintiffs seek to represent a class of all present, prospective, and future female students who are harmed by and want to end QU's sex discrimination in: (1) the allocation of athletic participation opportunities; (2) the allocation of athletic financial assistance; and (3) the allocation of benefits provided to varsity athletes. They also file this action on behalf of females who are deterred from enrolling at QU because of the sex discrimination in its athletic program, including its failure to offer the varsity sports in which they want to participate (despite QU's failure to provide equal athletic participation opportunities to females).

20. Each of the named Student Plaintiffs is a member of the proposed class and is now or will be injured by the ongoing sex discrimination in Defendant's varsity athletic program. Defendant's intended elimination of the women's varsity volleyball program will exacerbate this discrimination by eliminating female varsity athletic participation opportunities.

21. The Student Plaintiffs seek to represent the proposed class because joinder of all class members and all persons harmed by the ongoing sex discrimination in Defendant's varsity athletic program is not just impracticable, but impossible.

22. Joinder is impracticable because the class includes members whose identities are not currently known. On information and belief, there are present female students at QU whose names are currently unknown but who would participate in varsity athletics at QU if Defendant did not discriminate in the operation of its athletic program or if Defendant offered the sports or events in which they want to participate. There are also present female student athletes at QU who do not receive an equitable allocation of athletic financial assistance or the benefits provided to varsity athletes.

23. Joinder is impracticable because the class includes unknown and unidentifiable prospective and future students who will enroll at QU during the course of this litigation or who will be deterred from enrolling at QU because of the sex discrimination in Defendant's varsity athletic program.

24. Joinder is also impracticable because of the inherently fluid nature of the proposed class. Even though the proposed class is known to exist, the identities of its members will change during the course of this litigation due to the nature of college enrollment and athletic participation. In particular, QU is a university with an ever-changing student body whose members graduate after approximately four years of enrollment. Its varsity student athletes are

allowed only four years of athletic eligibility under the rules of the National Collegiate Athletic Association (“NCAA”). Accordingly, the membership of the class harmed by Defendant’s sex discrimination constantly changes as students graduate from QU and as new classes/groups of graduating high school students enroll as freshmen at QU.

25. It is unknown how many present, prospective, or future female students are enrolled or will enroll at QU during the course of this litigation. Nor is it known how many females would enroll as students at QU or would participate in athletics at QU if QU stopped the ongoing sex discrimination in its athletic program. The hundreds of additional class members who would apply to QU, who would be recruited by QU coaches to attend QU, and who would participate in athletics at QU if Defendant added the athletic opportunities and scholarships necessary to reach equal opportunity are too numerous to make joinder practicable.

26. The Student Plaintiffs satisfy the “commonality” requirement of Fed.R.Civ.P. 23(a)(2), because they share questions of law and fact in common with the proposed class, particularly whether QU engages in sex discrimination and violates Title IX in: (1) the allocation of athletic participation opportunities; (2) the allocation of athletic financial assistance; and (3) the allocation of treatment and benefits to varsity athletes. Because Title IX athletics claims require comparison of the sex-segregated men’s and women’s athletic opportunities as a whole (rather than individually), the issues are inherently class-based.

27. The Student Plaintiffs satisfy the “typicality” requirement of Fed.R.Civ.P. 23(a)(3), because their claims are typical of those of the proposed class: (1) they are denied or imminently will be denied an equal opportunity to participate in varsity athletics at QU because of Defendant’s ongoing sex discrimination; (2) they are or imminently will be denied an equal allocation of athletic financial assistance; and/or (3) they are denied or imminently will be denied

an equal allocation of the treatment and benefits provided to varsity athletes at QU.

28. All members of the proposed class are harmed by or imminently will be harmed by the ongoing sex discrimination in QU's varsity athletic program.

29. The Student Plaintiffs are members of the proposed class and will fairly and adequately represent the interests of the class pursuant to Fed.R.Civ.P. 23(a)(4). They intend to prosecute this action vigorously in order to secure remedies for the entire class. Moreover, the Court will be responsible for entering fair and adequate injunctive relief if and when Plaintiffs prevail.

30. The undersigned class counsel include attorneys experienced in federal civil rights litigation and class actions, particularly under Title IX, and will adequately represent the interests of the class in this action.

31. The Student Plaintiffs satisfy the class certification requirements of Fed.R.Civ.P. 23(b)(2), because Defendant has acted or refused to act on grounds generally applicable to the class thereby making appropriate final declaratory and injunctive relief with respect to the class as a whole.

32. In particular, all class members are entitled to a declaration that QU engages in sex discrimination and violates Title IX because Defendant either violates Title IX as to all female students or it does not. Moreover, all class members are entitled to injunctive relief (1) to restrain QU from eliminating any women's varsity sports and/or to require QU to add more women's varsity sports; (2) to require QU to allocate more athletic financial assistance to female athletes; and (3) to provide female athletes with the same treatment and benefits provided to male athletes.

THE REQUIREMENTS OF TITLE IX

33. Title IX, enacted in 1972, provides in relevant part:

No 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).

34. The Civil Rights Restoration Act of 1987 made plain Congress' intent that “program or activity,” as used in Title IX, applies to any program or activity offered by an educational institution that receives federal financial assistance – whether or not the program itself receives such assistance. 20 U.S.C. § 1687. Because QU receives federal financial assistance, its athletic program is subject to Title IX and QU must comply with its requirements.

35. In the statute, Congress expressly delegated authority to the United States Department of Health, Education and Welfare (“HEW”) to promulgate regulations interpreting Title IX. 20 U.S.C. §1682. In 1975, HEW promulgated these regulations at 45 C.F.R. Part 86. The United States Department of Education (“DOE”) later adopted these regulations and codified them at 34 C.F.R. Part 106 (collectively, the “Regulations”). These regulations are enforced by the Office for Civil Rights (“OCR”) within DOE. The Regulations are attached hereto as Exhibit 1.

36. The Regulations require that federal fund recipients like QU undertake remedial and affirmative efforts to eliminate sex discrimination. 34 C.F.R. ' 106.3(a) & (b). They further direct schools to evaluate their own policies and actions; to modify any policies and actions that are discriminatory; and to take remedial steps to eliminate the effects of discriminatory actions. 34 C.F.R. ' 106.3(c). These mandates apply whether or not anyone has complained about discrimination.

37. On information and belief, Defendant has not undertaken sufficient remedial or affirmative action to remedy the historical and ongoing sex discrimination in its athletic program.

38. The Regulations require that recipients like Defendant adopt nondiscrimination policies and grievance procedures, appoint and train a Title IX officer to receive and investigate sex discrimination complaints, and disseminate this information to all students, faculty, and employees. 34 C.F.R. §§ 106.8 & 106.9.

39. The Regulations further require that recipients confirm and promise compliance by filing an Assurance of Compliance with DOE each time they apply for or receive federal financial assistance. 34 C.F.R. § 106.4. The Assurance is a condition precedent to the receipt of federal funds. In the Assurance, schools must assure DOE that they comply with Title IX and that they will continue to do so. The Assurance also commits applicants/recipients “to take whatever remedial action is necessary in accordance with § 106.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination.” 34 C.F.R. § 106.4. A blank copy of DOE’s Assurance of Compliance Form is attached hereto as Exhibit 2.

40. On information and belief, QU has completed and submitted many Assurance of Compliance forms to DOE and has received federal funds from DOE even though QU’s athletic program has never complied with Title IX.

41. The Regulations include specific prohibitions that state:

in providing any aid, benefit, or service to a student,
a recipient shall not, on the basis of sex

- (1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
- (2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such benefit or service;

....

(6) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit, or service to students or employees.

42. The Regulations also prohibit sex discrimination in the recruitment of students.

Schools may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to § 106.3(a), and may choose to undertake such efforts as affirmative action pursuant to § 106.3(b).

43. On information and belief, Defendant has not undertaken sufficient remedial or affirmative recruiting efforts to ensure that it offers female students an equal opportunity to participate in varsity athletics; nor has it provided its women's teams with the resources necessary to adequately recruit female athletes with NCAA Division I athletic skills.

44. The Regulations prohibit sex discrimination in the allocation of athletic scholarships. In particular, 34 C.F.R. § 106.37(c) provides:

To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

45. Regulation 34 C.F.R § 106.41(a) requires that recipients provide athletic equity at each separate level of competition. In particular, it states:

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and the recipient shall provide any such athletics separately on such basis.

46. The Regulations identify ten (10) non-exclusive areas in which recipients must

provide equal athletic opportunity. These include:

1. Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
2. The provision of equipment and supplies;
3. Scheduling of games and practice time;
4. Travel and per diem allowance;
5. Opportunity to receive coaching and academic tutoring;
6. Assignment and compensation of coaches and tutors;
7. Provision of locker rooms, practice and competitive facilities;
8. Provision of medical and training services;
9. Provision of housing and dining facilities and services; and
10. Publicity.

34 C.F.R. § 106.41(c). A school's "failure to provide necessary funds for teams for one sex" also may be indicative of sex discrimination. Id.

47. In 1979, OCR issued a policy interpretation of Title IX and the Regulations in order to provide recipients with more specific guidance about the statute's application to intercollegiate athletics. This policy interpretation is found at 44 Federal Register 71,413 (1979) (the "Policy Interpretation"). A copy of the Policy Interpretation is attached hereto as Exhibit 3.

48. The Policy Interpretation notes that the Regulations address club and varsity sports separately and states that "club teams will not be considered to be intercollegiate teams except in those instances where they regularly participate in varsity competition." 44 F.R. at 71413-71414 n.1. Recipients must provide equal opportunity at each level of competition.

49. The Policy Interpretation provides that, in order to comply with Title IX and 34

C.F.R. § 106.41(c), schools must provide equal athletic opportunities in three general areas: (1) athletic participation (34 C.F.R. § 106.41 (c)(1), (2) athletic benefits to those who already have athletic participation opportunities (34 C.F.R. § 106.41(c)(2)-(9)), and (3) athletic financial assistance (34 C.F.R. § 106.37). See Policy Interpretation, 44 F.R. at 71,414.

50. According to the Policy Interpretation, compliance in the area of athletic participation opportunities is determined by the following Three-Part Test:

- (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments;
- (2) where the members of one sex have been and are under-represented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
- (3) where the members of one sex are under-represented among intercollegiate athletes and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

See 44 Fed.Reg. 71,418

51. This Three-Part Test was further clarified after notice and comment in OCR's 1996 Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (the "1996 OCR Clarification"). A copy of the 1996 OCR Clarification is attached hereto as Exhibit 4.

52. Compliance in the area of equal athletic benefits is assessed under the factors set forth in 34 C.F.R. 106.41(c) plus recruitment and support services. The specific requirements are detailed in the Policy Interpretation. See 44 F.R. at 17,415-71,417.

53. Compliance in the area of equal athletic financial assistance is assessed pursuant to 34 C.F.R. §106.37 and the Policy Interpretation. See 44 F.R. at 71,415. OCR's application of

these requirements is detailed in a “Dear Colleague” letter dated July 23, 1998, which incorporated OCR’s July 23, 1998, guidance to Bowling Green University. A copy of the “Dear Colleague” letter is attached hereto as Exhibit 5.

54. Title IX delegates to OCR the authority to investigate and enforce the statute. 20 U.S.C. §1682. OCR uses the guidelines described above when it investigates and enforces the Title IX statute. OCR also provides its guidance materials to all recipients and makes them available on its website (www.ed.gov/ocr).

55. All twelve federal courts of appeal that have considered OCR’s regulations and policy guidelines, including the Three-Part Test, have held that they are valid interpretations of the statute and have accorded them substantial deference in applying Title IX and/or in assessing Title IX compliance.

56. The Regulations require that sponsors of intercollegiate athletics (such as Defendant) take such remedial actions as are necessary to overcome the effects of sex discrimination in violation of Title IX. See 34 C.F.R. § 106.3(a). On information and belief, Defendant has never provided females with an equal opportunity to participate in varsity athletics and has not taken sufficient remedial actions to satisfy its obligations under Title IX.

57. The Regulations gave recipients only one year to come into full compliance with all Title IX requirements -- except athletics. 34 C.F.R. § 106.41(d) gave colleges three years -- until July 1978 -- to come into full compliance with Title IX’s athletic provisions. The regulation expressly sets the three-year deadline as an outer limit for compliance and obligates schools to comply “as expeditiously as possible but in no event later than three years from the effective date of this regulation.” On information and belief, Defendant did not comply with the athletic regulations by the 1978 compliance deadline or at any time thereafter. Today, more than 30 years

later, Defendant still does not fully comply with Title IX.

58. The Regulations expressly prohibit employment discrimination in educational programs. 34 C.F.R. § 106.51 et seq. (Subpart E). In particular, Section 106.51(a)(1) states:

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment... under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

59. Section 106.51(a)(3) states: “A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination.”

60. Title IX’s prohibition of discrimination on the basis of sex covers, among other things: compensation, job assignments, fringe benefits, termination, and any other term, condition, or privilege of employment. 34 C.F.R. § 106.52(b). Title IX prohibits sex discrimination in employment based upon the sex of the employee and based upon the sex of the students taught or athletes coached by the employee.

GENERAL FACTUAL ALLEGATIONS

61. Quinnipiac University sponsors a broad varsity, intercollegiate athletic program. It sponsors separate sports and separate teams for both men and women, including: men’s ice hockey, women’s ice hockey, men’s basketball, women’s basketball, men’s cross country, women’s cross country, men’s lacrosse, women’s lacrosse, men’s soccer, women’s soccer, men’s tennis, women’s tennis, men’s baseball, women’s softball, women’s field hockey, and women’s volleyball. Until this year, QU also sponsored men’s golf (but not women’s golf).

62. QU also purports to offer women’s indoor track and women’s outdoor track. Until this academic year, QU also purported to offer men’s indoor track and men’s outdoor track.

On information and belief, QU does not now and did not previously sponsor genuine women's or men's track teams of any kind, does not offer women genuine athletic participation opportunities in track, and thus cannot count any students as "track" athletes for purposes of Title IX.

63. On information and belief, QU does not offer genuine athletic participation opportunities in track sprints, hurdles, throwing, jumping, or pole vaulting. QU does not recruit athletes to participate in these events and does not offer athletic scholarships to anyone to participate in these events.

64. On information and belief, QU's purported track program consists only of cross country runners who can already participate in spring track events as cross country runners under NCAA rules. Thus, calling and counting female cross country runners as "track" athletes does not provide them – let alone any other students - with any additional athletic participation opportunities.

65. Even if QU did or does sponsor a genuine women's track program, it cannot, for purposes of Title IX, count twice athletes who run both indoor and outdoor track, because they are the same sport -- just as it cannot (and does not) count twice athletes who participate in baseball, softball, lacrosse, tennis, golf (before its elimination this year), or any other sport even though they participate in the same sport in different venues, in different seasons, or in different academic terms.

66. In choosing which sports it will offer to the students of each sex, QU chooses how many varsity athletic participation opportunities it provides to male students and how many athletic participation opportunities it provides to female students. This fact makes athletics unlike other educational programs in which male and female students participate together or compete against each other for the same opportunities or class slots on an equal basis.

67. On information and belief, QU chooses and has chosen which sports it provides to each sex in a manner that provides and has provided its male students with proportionally more opportunities to participate in varsity intercollegiate athletics than it has provided its female students, thus denying female students an equal opportunity to participate in this educational program.

68. Quinnipiac University is a member of the NCAA and participates at the highest level of intercollegiate competition -- Division I. As such, QU offers athletic financial assistance (i.e., athletic scholarships) to members of its varsity athletic teams.

69. Like other Division I schools, QU recruits high school students to apply to and to enroll at QU for the purpose of participating on its varsity athletic teams. QU also offers athletic financial assistance to these high school recruits in order to entice them to apply to and to enroll at QU.

70. Most of the named Student Plaintiffs were recruited to attend QU in order to participate on its women's varsity volleyball team. They expected to participate in volleyball during each of their years at QU and planned their academic, personal, and financial lives accordingly. They would not have enrolled at QU but for the opportunity to participate in women's varsity volleyball and to receive athletic financial assistance.

71. In March, 2009, QU announced its intention to eliminate women's volleyball, men's golf, and men's outdoor track.

72. After QU's announcement, the named Student Plaintiffs and/or Coach Sparks opposed and complained about the planned elimination of the women's varsity volleyball program. They demanded that QU not eliminate the program, but QU instead affirmed its intent to do so and informed Coach Sparks that her job would end as of July 1, 2009.

73. On March 27, 2009, Plaintiff counsel sent Defendant a letter objecting to the planned elimination of the women's varsity volleyball program, explaining why the elimination of the program would constitute sex discrimination in violation of Title IX, and requesting an opportunity to discuss continuation of the volleyball program. QU failed to respond to the letter until it was notified of the pendency of this lawsuit, and then rejected Plaintiffs' demand.

74. In April, 2009, Plaintiffs filed their original complaint in this action, along with a motion for preliminary injunction to enjoin QU from eliminating the volleyball program or any other women's team at QU.

75. The Court held a hearing on the motion for preliminary injunction in May, 2009. On May 22, 2009, the Court entered a preliminary injunction, barring QU from eliminating any women's team, from reducing its support for the women's volleyball team, and from terminating Coach Sparks pending trial or further order of the Court.

INJUNCTIVE RELIEF

76. Plaintiffs are entitled to injunctive relief that restrains Defendant from continuing to discriminate on the basis of sex in: (1) the allocation of athletic participation opportunities; (2) the allocation of athletic financial assistance; and (3) the allocation of the benefits provided to varsity athletes.

77. In particular, Plaintiffs are entitled to injunctive relief that restrains Defendant from eliminating any women's varsity athletic team and that requires Defendant to add new women's varsity athletic teams in new sports in order to expand the number of women's athletic participation opportunities until QU complies with Title IX.

78. Plaintiffs are further entitled to injunctive relief that requires QU either to allocate more athletic financial assistance to women's teams or to allocate its existing athletic financial

assistance in a nondiscriminatory manner.

79. Plaintiffs are also entitled to injunctive relief that requires QU to provide its female athletes with the same benefits it already provides its male athletes.

80. Failure to grant the requested injunctive relief will cause irreparable harm by continuing Defendant's sex discrimination against its present, prospective, and future female students (including Plaintiffs). Such discrimination will forever deny them an equal opportunity to participate in the valuable educational program of varsity intercollegiate athletics B one that provides academic, physical, psychological, social, and even economic benefits for the rest of the participants' lives. There is no adequate remedy at law for this harm.

81. The continuing, irreparable harm caused by Defendant's discriminatory actions far outweighs any possible harm that granting the injunctive relief might cause Defendant, because the requested injunctive relief is already mandated by federal law and because QU was already required to comply with that law more than 30 years ago.

82. Restraining Defendant's elimination of the varsity women's volleyball program in particular merely maintains the status quo. Defendant will suffer no harm by keeping the women's varsity volleyball program except the monetary cost of the program that it has already borne for more than 25 years.

83. The lifelong harm caused to Plaintiffs by Defendant's sex discrimination is irreparable and can never be compensated with money. This harm far outweighs any monetary cost incurred by Defendant. Importantly, Defendant need not incur additional costs to comply with the law. It could choose to allocate its athletic opportunities, athletic financial assistance, and athletic benefits more equitably by merely shifting its longstanding favoritism toward men to a more equal allocation among men and women. Meanwhile, Defendant will gain public relations

and enrollment advantages – and avoid future OCR enforcement investigations - by coming into compliance with Title IX and by offering more opportunities for its female students.

84. Congress decided that ending sex discrimination in education is in the public interest when it enacted Title IX. It has reaffirmed that public interest over the past 37 years by defeating each and every attempt that has been made to weaken Title IX. The injunctive relief that Plaintiffs request will promote the public interest in that it will increase equal opportunities for female students in educational athletics, will end sex discrimination, will promote compliance with federal law, and will stop the use of federal funds for discriminatory purposes.

85. Coach Sparks is entitled to the injunctive relief she requests (restraining Defendant from eliminating the volleyball program and her job as volleyball coach and requiring Defendant to provide her nondiscriminatory employment terms and conditions) for the same reasons that the Student Plaintiffs are entitled to such relief.

ATTORNEYS' FEES

86. Plaintiffs have been required to retain the undersigned attorneys to prosecute this action. Plaintiffs are entitled to recover reasonable attorneys' fees and expenses pursuant to 42 U.S.C. § 1988.

FIRST CLAIM FOR RELIEF: TITLE IX
(Unequal Allocation of Athletic Participation Opportunities)
(on behalf of Student Plaintiffs and the proposed class)

87. Plaintiffs reallege and incorporate herein by this reference all of the foregoing paragraphs of this complaint.

88. The Student Plaintiffs bring this claim as a class action as set forth in the class allegations.

89. Defendant determines the number of athletic participation opportunities that it will provide to male and female students by choosing which sports it will offer to students of each sex and by choosing how many athletes it will reasonably allow to participate on each sports team.

90. On information and belief, Defendant fails to provide female students an equal opportunity to participate in varsity intercollegiate athletics. This failure constitutes intentional sex discrimination in violation of Title IX and 34 C.F.R. § 106.41(c)(1).

91. On information and belief, Defendant fails to comply with each prong of the Three-Part Test outlined above. In particular, Plaintiffs allege that:

- (1) The ratio of female to male athletes at Defendant is not substantially proportionate to the overall ratio of female to male full time undergraduate students at Defendant;
- (2) Defendant does not have a history or continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of its female students; and
- (3) Defendant has failed to fully and effectively accommodate the athletic interests and abilities of its female students.

92. Under the 1996 OCR Clarification, enrollment and athletic participation opportunities are “substantially proportionate” if the number of additional athletic participation opportunities required to increase the athletic participation percentage to the enrollment

percentage is too small to sustain a viable varsity team. See OCR Clarification at p. 5, examples A&B.

93 For purposes of prong one of the Three Part Test, athletic participation opportunities are measured by counting the actual number of athletes who receive a genuine athletic participation opportunity. See Policy Interpretation at 71,415; 1996 OCR Clarification at 3.

94 The Equity in Athletics Disclosure Act (“EADA”)(20 U.S.C. §1092(g)) requires that Defendant provide DOE with certain information about its athletic program, including its enrollment and athletic participation numbers. According to the Defendant’s EADA reports that Plaintiffs have reviewed, Defendant does not provide female students with varsity athletic participation opportunities in a ratio that is substantially proportionate to female enrollment. Accordingly, in order to comply with prong one, QU cannot eliminate existing women’s teams but instead must add more women’s teams.

95 On information and belief, QU already requires its existing women’s teams to carry more female athletes on their rosters than are reasonable or necessary, so that these excess athletes do not actually exist, do not actually compete, or do not actually receive a genuine NCAA Division I athletic experience. Accordingly, QU cannot merely add more women to its existing teams but instead must add more women’s teams.

96. On information and belief Defendant misrepresents the number of athletes on its existing teams in order to falsely appear to comply with prong one of the Three-Part Test when it does not in fact.

97. On information and belief, QU has made such misrepresentations to Plaintiffs, DOE, the NCAA, and in this action. Indeed, Plaintiffs already proved some of this misrepresentation at the hearing on their motion for preliminary injunction. QU has furthered such misrepresentations by claiming Title IX compliance on the Assurance of Compliance forms it submits to DOE in order to obtain federal funding.

98. On information and belief, Defendant currently misrepresents or in the recent past has misrepresented its athletic participation numbers in some or all of the following ways:

- a. Over-reporting the number of women athletes on teams
- b. Under-reporting the number of male athletes on teams
- c. Manipulating the team squad sizes around the first competition date
- d. Counting some team squad sizes based upon their preseason or nontraditional season rosters rather than based upon their competition season rosters
- e. Padding the size of women's teams until after the first date of competition and then cutting or forcing the extra women to quit
- f. Padding the size of women's teams so that they are too large to provide some members a genuine NCAA Division I varsity opportunity, include some members who do not have the skills to participate at the Division I level, and distract resources and coaching from the athletes who have the Division I skills and actually will compete
- g. Claiming it sponsors a genuine women's track team when it does not have sprinters, hurdlers, throwers, or jumpers and when it thus can never win any track meet in which athletes purportedly compete
- h. Claiming it has women's indoor and outdoor track teams and then counting athletes who purportedly compete on such teams as if they competed in two separate sports
- i. Counting participants in competitive cheer as athletes for purposes of Title IX even though QU knows or should know that OCR has never accepted any cheer program as a sport, QU itself has never treated cheer as a sport, no female ever asked that cheer be treated as a sport, and insufficient competition exists for such a sport (even if it existed) at this point in time

Some or all of these counting schemes lead to misreporting of the number and gender ratio of QU's athletic participation opportunities, thus contributing to inaccurate representations about whether QU complies with prong one of the Three-Part Test.

99. On information and belief, QU has made such misrepresentations and continues to make such misrepresentations even though it knows they do not accurately reflect the genuine athletic participation opportunities provided to female students..

100. On information and belief, Defendant failed to meet the July, 1978, deadline for compliance with Title IX's requirement for equity in athletic participation opportunities. On further information and belief, Defendant has never met this Title IX requirement and has not added any new female varsity sports in over 10 years. Thus, Defendant cannot show a history or continuing progress of program expansion for women. Instead, Defendant is threatening to shrink, rather than expand, its women's athletic program, by eliminating women's varsity volleyball.

101. Defendant does not fully and effectively accommodate the athletic interests and abilities of its present, prospective, or future students. On information and belief, there are present, prospective, and future students at QU (including Plaintiffs) who have the interest or ability to participate in sports that Defendant either plans to eliminate or does not sponsor (e.g., volleyball, track, bowling, fencing, golf, gymnastics, rowing, swimming). If QU added female participation opportunities in these sports, there are many females in the geographic area with the interest and ability to participate in them.

102. On information and belief, there are many other prospective and future students who are deterred or will be deterred from enrolling at QU because it does not offer additional sports. If QU added female participation opportunities in these sports, there are many females in

the geographic area from which QU draws most of its students with the interest and ability to participate in them.

103. On information and belief there are prospective and future students who participate in these sports in Connecticut and neighboring states and who have the interest and ability to participate in these sports in college. For example, high schools and high school athletic associations in Connecticut and throughout the geographic region sponsor many women's sports not offered by QU.

104. On information and belief, Connecticut high schools and the Connecticut Interscholastic Athletic Conference ("CIAC"), offer sports and championships in women's volleyball, bowling, golf, gymnastics, swimming, and track.

105. On information and belief, high schools and high school athletic associations in neighboring states provide athletic participation opportunities for females in volleyball, bowling, golf, gymnastics, swimming, track, rowing, rifle, fencing, and ski.

106. On information and belief, the Council of New England Secondary Schools Principals' Associations hosts region-wide high school championships for female athletes in golf, gymnastics, and swimming. Thus, there are many prospective and future QU female students in Connecticut and New England alone that play and want to play sports that QU does not offer for its female students.

107. On information and belief, if QU hired a coach to recruit female students to participate in sports that QU either wants to eliminate or does not sponsor, if QU offered athletic scholarships in these sports, and if QU provided equitable athletic benefits to athletes who participate in these sports, then QU could offer several more varsity athletic participation opportunities for female students and thus could more fully and effectively accommodate their

athletic interests and abilities.

108. QU must continue to add new women's sports to meet this large, unmet interest among present, prospective, and future students until QU can meet another prong of the Three-Part Test.

109. Competition exists for QU to participate in intercollegiate volleyball and in the sports that QU should add to accommodate the large unmet interest of its present, prospective, and future female students.

110. Competition clearly exists in volleyball because QU has offered the sport for many years, as have other schools in QU's athletic conferences.

111. NCAA member schools sponsor teams in and the NCAA itself sponsors women's national championships in basketball, bowling, crew/rowing, cross country, equestrian, fencing, field hockey, golf, gymnastics, ice hockey, lacrosse, rifle, ski, soccer, softball, swimming & diving, tennis, track, volleyball, and water polo. Thus, there is competition available for QU in these sports. Moreover, the fact that numerous NCAA member schools recruit females to participate in these sports shows that there are present, prospective, and future students who have the interest and ability to participate in them.

112. QU is a member of the Northeast Conference ("NEC"). NEC women's sports include basketball, bowling, cross country, field hockey, golf, lacrosse, soccer, softball, swimming & diving, tennis, track, and volleyball. Thus, there is competition available for QU in these sports. Moreover, the fact that other schools in QU's own athletic conference recruit females to participate in these sports shows that there are present, prospective, and future students who have the interest and ability to participate in them.

113. On information and belief, QU sponsors ice hockey even though the NEC does not

sponsor this sport. Accordingly, QU joined a separate athletic conference, the Eastern Collegiate Athletic Conference (“ECAC”), to give its ice hockey teams intercollegiate competition. On information and belief, the ECAC sponsors the following women’s sports: volleyball, basketball, softball, field hockey, soccer, lacrosse, tennis, cross country, track, bowling, golf, gymnastics, rowing, swimming, and water polo. Thus, there is competition available for QU in these sports. Moreover, the fact that other schools in QU’s own athletic conference recruit females to participate in these sports shows that there are present, prospective, and future students who have the interest and ability to participate in them.

114. On information and belief, QU has never surveyed its past, present, or prospective students to assess their athletic interests or abilities or to determine if they would enroll at QU if it offered opportunities in more sports for them.

115. Because QU has never provided enough athletic participation opportunities for its female students, it has a continuing remedial and affirmative obligation to expand opportunities until it reaches equality. Defendant has failed and continues to fail to meet this obligation.

116. Defendant will exacerbate its existing pattern and practice of sex discrimination in its allocation of athletic participation opportunities if it is not restrained from eliminating women’s sports teams such as varsity volleyball.

117. All QU students would benefit if QU stopped discriminating in the operation of its athletic program and if QU offered its female students more sports participation opportunities.

118. On information and belief, in order to obtain or retain its NCAA Division I status, QU was required to engage in a self-study of its athletic program. The 2006 report of that study indicates that QU knows that it does not offer female students an equal opportunity to participate in varsity athletics and that it does not comply with Title IX. Nonetheless, Defendant plans

imminently to decrease rather than increase competitive opportunities for its female students in this education program.

119. On information and belief, QU cannot eliminate any more men's varsity intercollegiate sports without jeopardizing its membership in NCAA Division I. Thus, QU must add more women's opportunities rather than cut men's opportunities in order to comply with the equal athletic participation opportunity requirements of Title IX.

120. Plaintiffs are harmed by Defendant's failure to provide its female students with an equal opportunity to participate in varsity athletics because they want to participate in sports that QU either does not offer or that QU intends to eliminate. Such harm includes lost educational opportunities, lost athletic financial assistance, emotional distress, pain, anxiety, and other damages to be proven at trial. Accordingly, they are entitled to the relief requested herein.

SECOND CLAIM FOR RELIEF: TITLE IX
(Unequal Allocation of Athletic Financial Assistance)
(on behalf of Student Plaintiffs and the proposed class)

121. Plaintiffs reallege and incorporate herein by this reference all of the foregoing paragraphs of this complaint.

122. The Student Plaintiffs bring this claim as a class action as set forth under the class allegations.

123. QU provides athletic financial assistance to some of its varsity athletes.

124. Under Title IX, QU must provide its female students with an equal allocation of any athletic financial assistance that it provides. Under 34 C.F.R. §106.37, an equal allocation means that QU must provide its female athletes with athletic financial assistance in the same proportion that it allocates athletic participation opportunities.

125. On information and belief, Defendant fails to provide female student athletes with an equal allocation of athletic financial assistance. This failure constitutes intentional sex discrimination in violation of Title IX and 34 C.F.R. § 106.37.

126. On information and belief, QU has not sufficiently increased the amount of athletic financial assistance it provides to female athletes to match any purported increase in female athletic participation opportunities. QU has failed to increase the athletic financial assistance available to its women's teams even though it has significantly increased the number of women athletes on those teams. As a result, it is not only more difficult to recruit athletes, but also to recruit athletes with sufficient skill to participate at the Division I level.

127. Plaintiffs are harmed by Defendant's failure to provide its female students with an equal allocation of athletic financial assistance. Such harm includes lost educational opportunities and financial assistance and lost quality in participation opportunities. It also includes emotional distress, pain, anxiety, and other damages to be proven at trial. Accordingly, they are entitled to the relief requested herein.

THIRD CLAIM FOR RELIEF: TITLE IX
(Unequal Allocation of Athletic Treatment & Benefits)
(on behalf of Student Plaintiffs and the proposed class)

128. Plaintiffs reallege and incorporate herein by this reference all of the foregoing paragraphs of this complaint.

129. The Student Plaintiffs bring this claim as a class action as set forth under the class allegations.

130. QU provides its varsity student athletes with certain benefits, including but not limited to, equipment, supplies, uniforms, locker rooms, scheduling for competitions,

transportation and accommodations for travel, per diem for travel, coaching, tutoring and academic support services, practice and competition facilities, medical and training services, weight training and conditioning services, housing and dining services, sports information and publicity services, recruiting, video support, and other services.

131. Under Title IX and 34 C.F.R. §106.41(c), QU must allocate these benefits equally between male athletes and female athletes. On a program-wide basis, it must provide female athletes with benefits that are comparable to those that it provides to male athletes.

132. On information and belief, Defendant fails to provide female student athletes with an equal allocation of these benefits. This failure constitutes intentional sex discrimination in violation of Title IX.

133. On information and belief, QU has not sufficiently increased the amount of benefits (or the resources and budgets necessary to purchase the benefits) it provides to female athletes to match its purported increase in female athletic participation opportunities.

134. On information and belief, QU has failed to increase or provide sufficient benefits (or the resources and budgets necessary to purchase the benefits) to its women's varsity athletic teams despite requiring that they carry significantly more athletes. Meanwhile, QU has not decreased the benefits that it provides to men's varsity athletic teams even though they now carry significantly fewer athletes. As a result, while each male athlete now receives more or better benefits, each female athlete now receives fewer or worse benefits than in prior years.

135. On information and belief, Defendant fails to provide equal athletic benefits in some or all of the categories set forth in the Regulations and the Policy Interpretation, including but not limited to:

1. The provision of equipment, uniforms, and supplies;

2. Scheduling of games and practice time;
3. Travel, transportation, and per diem allowance;
4. Opportunity to receive coaching and academic tutoring;
5. Assignment and compensation of coaches and tutors;
6. Provision of locker rooms, practice and competitive facilities;
7. Provision of medical and training services;
8. Provision of housing and dining facilities and services;
9. Publicity & sports information services;
10. Administrative support;
11. Recruiting resources and support; and
12. Resources necessary to provide any of the foregoing benefits or to provide the female athletes with a genuine Division I athletic experience.

136. Plaintiffs are harmed by Defendant's failure to provide its female student athletes with an equal allocation of benefits and resources. Such harm includes lost educational opportunities and lost competitive advantage and less quality in participation opportunities. It also includes emotional distress, pain, anxiety, and other damages to be proven at trial. Accordingly, they are entitled to the relief requested herein.

FOURTH CLAIM FOR RELIEF: TITLE IX
(Discrimination in Terms and Conditions of Employment, & Termination)
(on behalf of Coach Sparks)

147. Plaintiffs reallege and incorporate herein by this reference the foregoing paragraphs of this complaint.

138. On information and belief, in 2006 QU considered eliminating certain women's

sports, including volleyball. However, after conducting the self-evaluation required to maintain its NCAA Division I status, QU determined that it was not in compliance with Title IX and that it could not eliminate a women's sport without violating Title IX or jeopardizing its NCAA certification.

139. In August, 2007, QU hired Coach Sparks to be the head volleyball coach. Knowing that QU considered eliminating volleyball in 2006, Coach Sparks asked about QU's commitment to the volleyball program. QU assured Coach Sparks that it intended to keep and fully support the women's volleyball program into the future.

140. Based upon these promises, Coach Sparks accepted the job and moved her family from Troy, New York, to Hamden Connecticut. Coach Sparks, as the primary income earner in her family, would not have uprooted herself, her husband, and her daughter and would not have accepted a reduction in her earnings but for the promises made to her about QU's long-term commitment to the volleyball program.

141. Coach Sparks began recruiting athletes for the volleyball team soon after her hiring. She began training and coaching the existing athletes in August, 2007, and coached them throughout the fall 2007 competition season. Although college volleyball teams play their regular season games during the fall, they practice, condition, and scrimmage nearly year-round. Thus, coaches must train, coach, counsel, recruit, and operate the program year-round. They also must monitor the academic performance of their athletes year-round.

142. Despite Defendant's assurances to Coach Sparks, in March 2009, QU announced its intention to eliminate women's varsity volleyball and Coach Sparks' job effective July 2009.

143. Defendant's elimination of Coach Sparks' job and her volleyball program constitutes discrimination against her based upon the sex of the athletes she coaches. This

intentional discrimination violates Title IX.

144. Despite QU's promises to fully support Coach Sparks and the women's volleyball team, it has not done so. Instead, QU has discriminated against and continues to discriminate against Coach Sparks in the compensation, terms, and conditions of her employment because of the sex of the athletes she coaches. This intentional discrimination also violates Title IX. This discrimination has included, among other things:

- a. Coach Sparks must perform more work than men's coaches because she has less institutional support. She must prepare and maintain her own court and clean it up afterwards. She must put more time into coaching, counseling, and monitoring the academic progress of her athletes because she does not have any full time assistant coaches or any adequately paid part-time coaches. She also does not have the support of an equipment manager or a director of volleyball operations. Sometimes Coach Sparks even must launder her team's uniforms.
- b. QU does not provide Coach Sparks enough athletic scholarships to recruit a full, competitive Division I team, thus making it more difficult for her to do her job and to develop a successful program.
- c. QU does not provide Coach Sparks with adequate administrative or secretarial support to run the daily operations of the volleyball program.
- d. QU does not provide Coach Sparks with the resources necessary to recruit enough athletes with the skill to compete at the Division I level, which has adversely affected her competitive success, recruiting, and professional reputation.
- e. QU does not provide Coach Sparks with any full time assistant coaches or other support personnel to help run the program, coach, tutor, counsel, and otherwise monitor the athletes on her team,

f. QU does not provide Coach Sparks with sufficient assistance in the promotion, marketing, and publicity of her program.

g. Coach Sparks does not have access to a locker facility.

h. QU denied Coach Sparks access to QU facilities to run team practices in the off-season. She was also prevented from starting volleyball practices at the same time as other volleyball teams, thus putting her and her team at a significant, competitive and recruiting disadvantage.

i. QU does not provide Coach Sparks with the resources necessary to run the volleyball program at the Division I level, which has adversely affected her competitive success, recruiting, and professional reputation.

j. Coach Sparks does not have access to the video and media equipment necessary to analyze her team's performance.

k. Because the women's volleyball team does not have adequate support from an athletic trainer, strength & conditioning coach, assistant coaches, graduate assistant coaches, academic advisors, sports information support, or secretarial support, Coach Sparks must work much harder and longer to provide these missing needs herself – without receiving additional pay.

145. As a result of Defendant's discrimination, Coach Sparks was forced to work significantly more for less money, benefits, and personal time and was forced to do so with significantly fewer resources, thereby making her job more difficult and reducing her chances for competitive success, which in turn, has adversely affected her professional reputation.

146. As a result of Defendant's actions, Coach Sparks has been and will be harmed. Such harm includes significantly more work, lost employment, lost compensation and benefits, lost leisure and family time, and lost professional status and reputation. It also includes emotional

distress, pain, humiliation, anxiety, and other damages to be proven at trial.

147. Coach Sparks seeks an injunction to prevent elimination of the volleyball program and her job. She seeks continued employment as head coach of the volleyball program, but without discrimination in the terms and conditions of that employment, including pay and benefits and the financial and administrative resources necessary to fully and properly perform her job, develop her skills and career, and operate her team at the Division I level.

FIFTH CLAIM FOR RELIEF: TITLE IX RETALIATION
(on behalf of the named Plaintiffs)

148. Plaintiffs reallege and incorporate herein by this reference the foregoing paragraphs of this complaint.

149. The named Plaintiffs complained about sex discrimination in QU's athletic program, including its attempt to eliminate the women's volleyball program and Coach Sparks' job. Plaintiffs, through counsel, also sent QU a demand letter and filed this legal action.

150. In response to these complaints, QU has taken adverse actions against the named Plaintiffs. On information and belief, these adverse actions include some or all of the following, among other things

- a. Stating that Plaintiffs and/or their law suit are the reason for QU's termination of men's teams.
- b. Stating that Plaintiffs and/or their law suit are taking resources away from academic programs.
- c. Threatening to cut men's teams after Plaintiffs filed this action, and doing so after the Court granted Plaintiffs' motion for preliminary injunction.

d. Stating that Plaintiffs and/or their lawsuit are the reason for any purported changes in QU's operation of its cross country program, thus fostering animosity toward Plaintiffs among both male and female runners.

e. Pressuring the coaches of women's teams to increase their squad sizes more than necessary and blaming Plaintiffs and/or their law suit for it.

f. Pressuring the coaches of men's teams to decrease their squad sizes more than necessary and blaming Plaintiffs and/or their law suit for it.

g. Creating a hostile environment toward Plaintiffs.

h. Creating a climate of fear within the athletic department to deter others from complaining about discrimination or from testifying for Plaintiffs.

i. Reducing the support previously provided to the volleyball program.

j. Denying the volleyball team access to facilities during the nontraditional portion of their season.

k. Failing to provide the volleyball team with adequate sports information, medical, training, and administrative support and resources, and failing to publicize or promote the academic, community, or athletic achievements of the volleyball team this season.

l. Ordering Coach Sparks to vacate her office after she requested copies of QU's EADA reports (even though the men's coaches whose teams were eliminated were not ejected).

151. QU took these adverse actions in response to and because Plaintiffs opposed QU's sex discrimination and filed this action. QU took these adverse actions against Plaintiffs with the intent to harm, retaliate, and intentionally discriminate against them. Such actions constitute retaliation and intentional discrimination in violation of Title IX.

152. On information and belief, QU's retaliatory animosity towards Plaintiffs is so great

that QU has derided Plaintiffs' complaints in the press and within QU and its athletic department, making their employment and education environment more hostile.

153. On information and belief, QU's retaliatory animosity towards Plaintiffs is so great that QU has blamed them for QU's purported elimination of men's sports teams, knowingly creating a hostile environment among their peers.

154. On information and belief, QU's retaliatory animosity towards Plaintiffs is so great that QU is willing to spend significant amounts of money to prevent reinstatement of the volleyball program. For example, QU is spending significantly larger amounts of money to start a purported competitive cheer team than it provided to women's volleyball --- even though QU purported to eliminate volleyball because of financial hardship. This new cheer team now uses the Burt Kahn court -- even though QU also purported to eliminate volleyball because it wanted to turn the Burt Kahn court into an alumni facility.

155. On information and belief, QU did not start a cheer program in order to provide genuine athletic participation opportunities for female students but instead to make sure that it could eliminate the women's volleyball program in retaliation for their exposure of QU's ongoing sex discrimination.

156. On information and belief, QU's large infusion of resources into its competitive cheer program did not take place until after Plaintiffs filed this action. QU's animosity is so intense and illogical that QU apparently is willing to spend more money to eliminate the women's volleyball team than it would cost to keep it.

157. On information and belief, Defendant is willing to look for a more difficult or more costly way to comply with Title IX now just to spite the volleyball team and to keep it from being reinstated. There is no logical explanation for this behavior other than retaliatory animosity,

especially when no one asked QU to start calling its cheer program a “sport” and no female is being offered a new athletic opportunity.

158. Plaintiffs have been harmed and will continue to be harmed by Defendant’s retaliatory actions. Such harm includes reduced benefits, a less quality program, a compromised future for the program, and a hostile work and education environment. The harm also includes the potential loss of athletic participation opportunities and athletic financial assistance. It also includes emotional distress, pain, humiliation anxiety, and other damages to be proven at trial. Accordingly, they are entitled to the relief requested herein.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully pray that this Court:

A. Certify the first, second, and third claims as a class action on behalf of all present, prospective, and future female students at Defendant who are harmed by and want to end QU’s sex discrimination in (1) the allocation of athletic participation opportunities; (2) the allocation of athletic financial assistance; and (3) the allocation of benefits provided to varsity athletes.

Plaintiffs further request that these claims be certified on behalf of females who are deterred from enrolling at QU because of the sex discrimination in QU’s athletic program, including its failure to offer the varsity sports in which they want to participate.

B. Enter an order declaring that Defendant has engaged in a past and continuing pattern and practice of discrimination against female students on the basis of sex in (1) the allocation of athletic participation opportunities; (2) the allocation of athletic financial assistance; and (3) the allocation of benefits provided to varsity athletes in violation of Title IX and the regulations promulgated thereunder.

C. Issue an injunction that restrains Defendant from continuing to discriminate against female students on the basis of sex; restrains Defendant from eliminating the women's varsity volleyball program (or any women's athletic opportunities); requires Defendant to provide females with an equal opportunity to participate in varsity intercollegiate athletics by sponsoring additional women's sports based upon the interests and abilities of Defendant's present, prospective, and future students; requires Defendant to provide female athletes with equal access to athletic financial assistance; and requires Defendant to provide female athletes with equal athletic benefits and resources.

D. Issue an injunction that restrains Defendant from eliminating Coach Sparks' employment and requires Defendant to continue her employment as head volleyball coach at QU but without the discrimination in the terms, conditions, and resources of that employment.

E. Award the Student Plaintiffs compensatory damages and other monetary relief as permitted by law.

F. Award Coach Sparks back pay and benefits, compensatory damages, and other monetary relief as permitted by law.

G. Award Plaintiffs their reasonable attorneys' fees and expenses.

H. Order such other and further relief as the Court deems appropriate.

PLAINTIFFS DEMAND A TRIAL BY JURY OF ALL ISSUES TRIABLE TO A JURY.

Dated: December 9, 2009

Respectfully submitted by:

/s/ Jonathan B. Orleans

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CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2009, a copy of the foregoing First Amended Class Action Complaint (with Exhibits 1-5) was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/
Jonathan B. Orleans (ct05440)

Bridgeport/73061.1/JORLEANS/804316v1

EXHIBIT 2

United States Department of Education, Office for Civil Rights**ASSURANCE OF COMPLIANCE – CIVIL RIGHTS CERTIFICATE**

TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, TITLE IX OF THE EDUCATION AMENDMENTS OF 1972, SECTION 504 OF THE REHABILITATION ACT OF 1973, THE AGE DISCRIMINATION ACT OF 1975, AND THE BOY SCOUTS OF AMERICA EQUAL ACCESS ACT OF 2001

The applicant or recipient (hereinafter applicant) provides this assurance in consideration of and for the purpose of obtaining Federal grants, loans and contracts (except contracts of insurance or guaranty), property, discounts, other Federal financial assistance from the United States Department of Education (Department), or funds made available through the Department. This assurance applies to all Federal financial assistance from or funds made available through the Department, including any that an applicant may seek in the future.

The applicant assures that it will comply with:

1. Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000d *et seq.*, which prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving Federal financial assistance.
2. Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. 1681 *et seq.*, which prohibits discrimination on the basis of sex in any education program or activity receiving Federal financial assistance.
3. Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794, which prohibits discrimination on the basis of handicap in any program or activity receiving Federal financial assistance.
4. The Age Discrimination Act of 1975, as amended, 42 U.S.C. 6101 *et seq.*, which prohibits discrimination on the basis of age in any program or activity receiving Federal financial assistance.
5. If applicable, the Boy Scouts of America Equal Access Act of 2001, 20 U.S.C. 7905, which requires equal access for the Boy Scouts of America and other designated youth groups to meet at public schools. This law applies to any public elementary school, public secondary school, local educational agency, or State educational agency that has a designated open forum or limited public forum and that receives funds made available through the Department.
6. All regulations, guidelines, and standards lawfully adopted under the above statutes by the Department.

The applicant agrees that compliance with this Assurance constitutes a condition of continued receipt of Federal financial assistance from or funds made available through the Department, and that it is binding upon the applicant, its successors, transferees, and assignees for the period during which this assistance or these funds are provided. The applicant further assures that all contractors, subcontractors, subgrantees, or others with whom it arranges to provide services or benefits are not discriminating in violation of the above statutes, regulations, guidelines, and standards. In the event of failure to comply, the applicant understands that this assistance or these funds can be terminated and the applicant denied the right to receive further assistance or funds. The applicant also understands that the Department may, at its discretion, seek a court order requiring compliance with the terms of the Assurance or seek other appropriate judicial relief.

The person or persons whose signature(s) appear(s) below is/are authorized to commit the applicant to the above provisions.

_____ Date PLEASE RETURN TO: U.S. Department of Education Office for Civil Rights 400 Maryland Avenue, SW Washington, DC 20202-1100	_____ Authorized Official(s) _____ Title of Authorized Official(s) _____ Name of Institution or Agency _____ Street _____ City, State, Zip Code
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Paperwork Burden Statement

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless such collection displays a valid OMB control number. The valid OMB control number for this information collection is 1870-0503. The time required to complete this information collection is estimated to average 20 minutes per response, including the time to review instructions and complete the information collection. **If you have any comments concerning the accuracy of the time estimate(s) or suggestions for improving this form, please write to:** U.S. Department of Education, Washington, D.C. 20202-4651. **If you have comments or concerns regarding the status of your individual submission of this form, write directly to:** U.S. Department of Education, Office for Civil Rights, 400 Maryland Avenue, SW, Washington, DC 20202-1100.

EXHIBIT 4



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

JAN 16 1996

Dear Colleague:

It is my pleasure to send you the enclosed "Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test" (the Clarification).

As you know, the Office for Civil Rights (OCR) enforces Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex in education programs and activities. The regulation implementing Title IX and the Department's Intercollegiate Athletics Policy Interpretation published in 1979--both of which followed publication for notice and the receipt, review and consideration--of extensive comments--specifically address intercollegiate athletics. Since becoming Assistant Secretary, I have recognized the need to provide additional clarification regarding what is commonly referred to as the "three-part test," a test used to determine whether students of both sexes are provided nondiscriminatory opportunities to participate in athletics. The three-part test is described in the Department's 1979 Policy Interpretation.

Accordingly, on September 20, 1995, OCR circulated to over 4500 interested parties a draft of the proposed Clarification, soliciting comments about whether the document provided sufficient clarity to assist institutions in their efforts to comply with Title IX. As indicated when circulating the draft of the Clarification, the objective of the Clarification is to respond to requests for specific guidance about the existing standards that have guided the enforcement of Title IX in the area of intercollegiate athletics. Further, the Clarification is limited to an elaboration of the "three-part test." This test, which has generated the majority of the questions that have been raised about Title IX compliance, is a portion of a larger analytical framework reflected in the 1979 Policy Interpretation.

OCR appreciates the efforts of the more than 200 individuals who commented on the draft of the Clarification. In addition to providing specific comments regarding clarity, some parties suggested that the Clarification did not go far enough in protecting women's sports. Others, by contrast, suggested that the Clarification, or the Policy Interpretation itself, provided more protection for women's sports than intended by Title IX. However, it would not be appropriate to revise the 1979 Policy Interpretation, and adherence to its provisions shaped OCR's consideration of these comments. The Policy Interpretation has

Page 2 - Dear Colleague

guided OCR's enforcement in the area of athletics for over fifteen years, enjoying the bipartisan support of Congress. The Policy Interpretation has also enjoyed the support of every court that has addressed issues of Title IX athletics. As one recent court decision recognized, the "three-part test" draws its "essence" from the Title IX statute.

The draft has been revised to incorporate suggestions that OCR received regarding how to make the document more useful and clearer. For instance, the Clarification now has additional examples to illustrate how to meet part one of the three-part test and makes clear that the term "developing interests" under part two of the test includes interests that already exist at the institution. The document also clarifies that an institution can choose which part of the test it plans to meet. In addition, it further clarifies how Title IX requires OCR to count participation opportunities and why Title IX does not require an institution, under part three of the test, to accommodate the interests and abilities of potential students.

OCR also received requests for clarification that relate primarily to fact- or institution-specific situations that only apply to a small number of athletes or institutions. These comments are more appropriately handled on an individual basis and, accordingly, OCR will follow-up on these comments and questions in the context of OCR's ongoing technical assistance efforts.

It is important to outline several points about the final document.

The Clarification confirms that institutions need to comply only with any one part of the three-part test in order to provide nondiscriminatory participation opportunities for individuals of both sexes. The first part of the test--substantial proportionality--focuses on the participation rates of men and women at an institution and affords an institution a "safe harbor" for establishing that it provides nondiscriminatory participation opportunities. An institution that does not provide substantially proportional participation opportunities for men and women may comply with Title IX by satisfying either part two or part three of the test. The second part--history and continuing practice--is an examination of an institution's good faith expansion of athletic opportunities through its response to developing interests of the underrepresented sex at that institution. The third part--fully and effectively accommodating interests and abilities of the underrepresented sex--centers on the inquiry of whether there are concrete and viable interests among the underrepresented sex that should be accommodated by an institution.

In addition, the Clarification does not provide strict numerical formulas or "cookie cutter" answers to the issues that are inherently case- and fact-specific. Such an effort not only would belie the meaning of Title IX, but would at the same time deprive

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institutions of the flexibility to which they are entitled when deciding how best to comply with the law.

Several parties who provided comments expressed opposition to the three-part test. The crux of the arguments made on behalf of those opposed to the three-part test is that the test does not really provide three different ways to comply. Opponents of the test assert, therefore, that the test improperly establishes arbitrary quotas. Similarly, they also argue that the three-part test runs counter to the intent of Title IX because it measures gender discrimination by underrepresentation and requires the full accommodation of only one sex. However, this understanding of Title IX and the three-part test is wrong.

First, it is clear from the Clarification that there are three different avenues of compliance. Institutions have flexibility in providing nondiscriminatory participation opportunities to their students, and OCR does not require quotas. For example, if an institution chooses to and does comply with part three of the test, OCR will not require it to provide substantially proportionate participation opportunities to, or demonstrate a history and continuing practice of program expansion that is responsive to the developing interests of, the underrepresented sex. In fact, if an institution believes that its female students are less interested and able to play intercollegiate sports, that institution may continue to provide more athletic opportunities to men than to women, or even to add opportunities for men, as long as the recipient can show that its female students are not being denied opportunities, i.e., that women's interests and abilities are fully and effectively accommodated. The fact that each part of the three-part test considers participation rates does not mean, as some opponents of the test have suggested, that the three parts do not provide different ways to comply with Title IX.

Second, it is appropriate for parts two and three of the test to focus only on the underrepresented sex. Indeed, such a focus is required because Title IX, by definition, addresses discrimination. Notably, Title IX's athletic provisions are unique in permitting institutions--notwithstanding the long history of discrimination based on sex in athletics programs--to establish separate athletic programs on the basis of sex, thus allowing institutions to determine the number of athletic opportunities that are available to students of each sex. (By contrast, Title VI of the Civil Rights Act of 1964 forbids institutions from providing separate athletic programs on the basis of race or national origin.)

OCR focuses on the interests and abilities of the underrepresented sex only if the institution provides proportionately fewer athletic opportunities to members of one sex and has failed to make a good faith effort to expand its program for the underrepresented sex. Thus, the Policy Interpretation requires the full accommodation of the underrepresented sex only to the extent necessary to provide

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equal athletic opportunity, i.e., only where an institution has failed to respond to the interests and abilities of the underrepresented sex when it allocated a disproportionately large number of opportunities for athletes of the other sex.

What is clear then--because, for example, part three of the three-part test permits evidence that underrepresentation is caused not by discrimination but by lack of interest--is that underrepresentation alone is not the measure of discrimination. Substantial proportionality merely provides institutions with a safe harbor. Even if this were not the case and proportional opportunities were the only test, the "quota" criticism would be misplaced. Quotas are impermissible where opportunities are required to be created without regard to sex. However, schools are permitted to create athletic participation opportunities based on sex. Where they do so unequally, that is a legitimate measure of unequal opportunity under Title IX. OCR has chosen to make substantial proportionality only one of three alternative measures.

Several parties also suggested that, in determining the number of participation opportunities offered by an institution, OCR count unfilled slots, i.e., those positions on a team that an institution claims the team can support but which are not filled by actual athletes. OCR must, however, count actual athletes because participation opportunities must be real, not illusory. Moreover, this makes sense because, under other parts of the Policy Interpretation, OCR considers the quality and kind of other benefits and opportunities offered to male and female athletes in determining overall whether an institution provides equal athletic opportunity. In this context, OCR must consider actual benefits provided to real students.

OCR also received comments that indicate that there is still confusion about the elimination and capping of men's teams in the context of Title IX compliance. The rules here are straightforward. An institution can choose to eliminate or cap teams as a way of complying with part one of the three-part test. However, nothing in the Clarification requires that an institution cap or eliminate participation opportunities for men. In fact, cutting or capping men's teams will not help an institution comply with part two or part three of the test because these tests measure an institution's positive, ongoing response to the interests and abilities of the underrepresented sex. Ultimately, Title IX provides institutions with flexibility and choice regarding how they will provide nondiscriminatory participation opportunities.

Finally, several parties suggested that OCR provide more information regarding the specific elements of an appropriate assessment of student interest and ability. The Policy Interpretation is intended to give institutions flexibility to determine interests and abilities consistent with the unique circumstances and needs of an institution. We recognize, however,

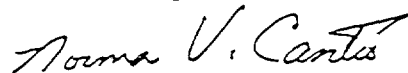
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that it might be useful to share ideas on good assessment strategies. Accordingly, OCR will work to identify, and encourage institutions to share, good strategies that institutions have developed, as well as to facilitate discussions among institutions regarding potential assessment techniques.

OCR recognizes that the question of how to comply with Title IX and to provide equal athletic opportunities for all students is a significant challenge that many institutions face today, especially in the face of increasing budget constraints. It has been OCR's experience, however, that institutions committed to maintaining their men's program have been able to do so--and comply with Title IX--notwithstanding limited athletic budgets. In many cases, OCR and these institutions have worked together to find creative solutions that ensured equal opportunities in intercollegiate athletics. OCR is similarly prepared to join with other institutions in assisting them to address their own situations.

OCR is committed to continuing to work in partnership with colleges and universities to ensure that the promise of Title IX becomes a reality for all students. Thank you for your continuing interest in this subject.

Sincerely,



Norma V. Cantú
Assistant Secretary
for Civil Rights

Enclosure

CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE:
THE THREE-PART TEST

The Office for Civil Rights (OCR) enforces Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. (Title IX), which prohibits discrimination on the basis of sex in education programs and activities by recipients of federal funds. The regulation implementing Title IX, at 34 C.F.R. Part 106, effective July 21, 1975, contains specific provisions governing athletic programs, at 34 C.F.R. § 106.41, and the awarding of athletic scholarships, at 34 C.F.R. § 106.37(c). Further clarification of the Title IX regulatory requirements is provided by the Intercollegiate Athletics Policy Interpretation, issued December 11, 1979 (44 Fed. Reg. 71413 et seq. (1979)).¹

The Title IX regulation provides that if an institution sponsors an athletic program it must provide equal athletic opportunities for members of both sexes. Among other factors, the regulation requires that an institution must effectively accommodate the athletic interests and abilities of students of both sexes to the extent necessary to provide equal athletic opportunity.

The 1979 Policy Interpretation provides that as part of this determination OCR will apply the following three-part test to assess whether an institution is providing nondiscriminatory participation opportunities for individuals of both sexes:

1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
2. Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or
3. Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a history and continuing practice of program expansion, as described above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

44 Fed. Reg. at 71418.

¹ The Policy Interpretation is designed for intercollegiate athletics. However, its general principles, and those of this Clarification, often will apply to elementary and secondary interscholastic athletic programs, which are also covered by the regulation. See 44 Fed. Reg. 71413.

Thus, the three-part test furnishes an institution with three individual avenues to choose from when determining how it will provide individuals of each sex with nondiscriminatory opportunities to participate in intercollegiate athletics. If an institution has met any part of the three-part test, OCR will determine that the institution is meeting this requirement.

It is important to note that under the Policy Interpretation the requirement to provide nondiscriminatory participation opportunities is only one of many factors that OCR examines to determine if an institution is in compliance with the athletics provision of Title IX. OCR also considers the quality of competition offered to members of both sexes in order to determine whether an institution effectively accommodates the interests and abilities of its students.

In addition, when an "overall determination of compliance" is made by OCR, 44 Fed. Reg. 71417, 71418, OCR examines the institution's program as a whole. Thus, OCR considers the effective accommodation of interests and abilities in conjunction with equivalence in the availability, quality and kinds of other athletic benefits and opportunities provided male and female athletes to determine whether an institution provides equal athletic opportunity as required by Title IX. These other benefits include coaching, equipment, practice and competitive facilities, recruitment, scheduling of games, and publicity, among others. An institution's failure to provide nondiscriminatory participation opportunities usually amounts to a denial of equal athletic opportunity because these opportunities provide access to all other athletic benefits, treatment, and services.

This Clarification provides specific factors that guide an analysis of each part of the three-part test. In addition, it provides examples to demonstrate, in concrete terms, how these factors will be considered. These examples are intended to be illustrative, and the conclusions drawn in each example are based solely on the facts included in the example.

THREE-PART TEST -- Part One: Are Participation Opportunities Substantially Proportionate to Enrollment?

Under part one of the three-part test (part one), where an institution provides intercollegiate level athletic participation opportunities for male and female students in numbers substantially proportionate to their respective full-time undergraduate enrollments, OCR will find that the institution is providing nondiscriminatory participation opportunities for individuals of both sexes.

OCR's analysis begins with a determination of the number of participation opportunities afforded to male and female athletes in

the intercollegiate athletic program. The Policy Interpretation defines participants as those athletes:

- a. Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport's season; and
- b. Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and
- c. Who are listed on the eligibility or squad lists maintained for each sport, or
- d. Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.

44 Fed. Reg. at 71415.

OCR uses this definition of participant to determine the number of participation opportunities provided by an institution for purposes of the three-part test.

Under this definition, OCR considers a sport's season to commence on the date of a team's first intercollegiate competitive event and to conclude on the date of the team's final intercollegiate competitive event. As a general rule, all athletes who are listed on a team's squad or eligibility list and are on the team as of the team's first competitive event are counted as participants by OCR. In determining the number of participation opportunities for the purposes of the interests and abilities analysis, an athlete who participates in more than one sport will be counted as a participant in each sport in which he or she participates.

In determining participation opportunities, OCR includes, among others, those athletes who do not receive scholarships (e.g., walk-ons), those athletes who compete on teams sponsored by the institution even though the team may be required to raise some or all of its operating funds, and those athletes who practice but may not compete. OCR's investigations reveal that these athletes receive numerous benefits and services, such as training and practice time, coaching, tutoring services, locker room facilities, and equipment, as well as important non-tangible benefits derived from being a member of an intercollegiate athletic team. Because these are significant benefits, and because receipt of these benefits does not depend on their cost to the institution or whether the athlete competes, it is necessary to count all athletes who receive such benefits when determining the number of athletic opportunities provided to men and women.

OCR's analysis next determines whether athletic opportunities are substantially proportionate. The Title IX regulation allows institutions to operate separate athletic programs for men and women. Accordingly, the regulation allows an institution to control the respective number of participation opportunities offered to men and women. Thus, it could be argued that to satisfy part one there should be no difference between the participation rate in an institution's intercollegiate athletic program and its full-time undergraduate student enrollment.

However, because 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--the Policy Interpretation examines whether participation opportunities are "substantially" proportionate to enrollment rates. Because this determination 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.

As an example of a determination under part one: If an institution's enrollment is 52 percent male and 48 percent female and 52 percent of the participants in the athletic program are male and 48 percent female, then the institution would clearly satisfy part one. However, OCR recognizes that natural fluctuations in an institution's enrollment and/or participation rates may affect the percentages in a subsequent year. For instance, if the institution's admissions the following year resulted in an enrollment rate of 51 percent males and 49 percent females, while the participation rates of males and females in the athletic program remained constant, the institution would continue to satisfy part one because it would be unreasonable to expect the institution to fine tune its program in response to this change in enrollment.

As another example, over the past five years an institution has had a consistent enrollment rate for women of 50 percent. During this time period, it has been expanding its program for women in order to reach proportionality. In the year that the institution reaches its goal--i.e., 50 percent of the participants in its athletic program are female--its enrollment rate for women increases to 52 percent. Under these circumstances, the institution would satisfy part one.

OCR would also consider opportunities to be substantially proportionate when the number of opportunities that would be required to achieve proportionality would not 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. As a frame of reference in assessing this situation, OCR may consider the average size of teams offered for the underrepresented sex, a number which would vary by institution.

For instance, Institution A is a university with a total of 600 athletes. While women make up 52 percent of the university's enrollment, they only represent 47 percent of its athletes. If the university provided women with 52 percent of athletic opportunities, approximately 62 additional women would be able to participate. Because this is a significant number of unaccommodated women, it is likely that a viable sport could be added. If so, Institution A has not met part one.

As another example, at Institution B women also make up 52 percent of the university's enrollment and represent 47 percent of Institution B's athletes. Institution B's athletic program consists of only 60 participants. If the University provided women with 52 percent of athletic opportunities, approximately 6 additional women would be able to participate. Since 6 participants are unlikely to support a viable team, Institution B would meet part one.

THREE-PART TEST -- Part Two: Is there a History and Continuing Practice of Program Expansion for the Underrepresented Sex?

Under part two of the three-part test (part two), an institution can show that it has a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the underrepresented sex. In effect, part two looks at an institution's past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion.²

OCR will review the entire history of the athletic program, focusing on the participation opportunities provided for the underrepresented sex. First, OCR will assess whether past actions of the institution have expanded participation opportunities for the underrepresented sex in a manner that was demonstrably responsive to their developing interests and abilities. Developing

² Part two focuses on whether an institution has expanded the number of intercollegiate participation opportunities provided to the underrepresented sex. Improvements in the quality of competition, and of other athletic benefits, provided to women athletes, while not considered under the three-part test, can be considered by OCR in making an overall determination of compliance with the athletics provision of Title IX.

interests include interests that already exist at the institution.³ There are no fixed intervals of time within which an institution must have added participation opportunities. Neither is a particular number of sports dispositive. Rather, the focus is on whether the program expansion was responsive to developing interests and abilities of the underrepresented sex. In addition, the institution must demonstrate a continuing (i.e., present) practice of program expansion as warranted by developing interests and abilities.

OCR will consider the following factors, among others, as evidence that may indicate a history of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex:

- an institution's record of adding intercollegiate teams, or upgrading teams to intercollegiate status, for the underrepresented sex;
- an institution's record of increasing the numbers of participants in intercollegiate athletics who are members of the underrepresented sex; and
- an institution's affirmative responses to requests by students or others for addition or elevation of sports.

OCR will consider the following factors, among others, as evidence that may indicate a continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex:

- an institution's current implementation of a nondiscriminatory policy or procedure for requesting the addition of sports (including the elevation of club or intramural teams) and the effective communication of the policy or procedure to students; and
- an institution's current implementation of a plan of program expansion that is responsive to developing interests and abilities.

OCR would also find persuasive an institution's efforts to monitor developing interests and abilities of the underrepresented sex, for

³ However, under this part of the test an institution is not required, as it is under part three, to accommodate all interests and abilities of the underrepresented sex. Moreover, under part two an institution has flexibility in choosing which teams it adds for the underrepresented sex, as long as it can show overall a history and continuing practice of program expansion for members of that sex.

example, by conducting periodic nondiscriminatory assessments of developing interests and abilities and taking timely actions in response to the results.

In the event that an institution eliminated any team for the underrepresented sex, OCR would evaluate the circumstances surrounding this action in assessing whether the institution could satisfy part two of the test. However, OCR will not find a history and continuing practice of program expansion where an institution increases the proportional participation opportunities for the underrepresented sex by reducing opportunities for the overrepresented sex alone or by reducing participation opportunities for the overrepresented sex to a proportionately greater degree than for the underrepresented sex. This is because part two considers an institution's good faith remedial efforts through actual program expansion. It is only necessary to examine part two if one sex is overrepresented in the athletic program. Cuts in the program for the underrepresented sex, even when coupled with cuts in the program for the overrepresented sex, cannot be considered remedial because they burden members of the sex already disadvantaged by the present program. However, an institution that has eliminated some participation opportunities for the underrepresented sex can still meet part two if, overall, it can show a history and continuing practice of program expansion for that sex.

In addition, OCR will not find that an institution satisfies part two where it established teams for the underrepresented sex only at the initiation of its program for the underrepresented sex or where it merely promises to expand its program for the underrepresented sex at some time in the future.

The following examples are intended to illustrate the principles discussed above.

At the inception of its women's program in the mid-1970s, Institution C established seven teams for women. In 1984 it added a women's varsity team at the request of students and coaches. In 1990 it upgraded a women's club sport to varsity team status based on a request by the club members and an NCAA survey that showed a significant increase in girls high school participation in that sport. Institution C is currently implementing a plan to add a varsity women's team in the spring of 1996 that has been identified by a regional study as an emerging women's sport in the region. The addition of these teams resulted in an increased percentage of women participating in varsity athletics at the institution. Based on these facts, OCR would find Institution C in compliance with part two because it has a history of program expansion and is continuing to expand its program for women in response to their developing interests and abilities.

By 1980, Institution D established seven teams for women.

Institution D added a women's varsity team in 1983 based on the requests of students and coaches. In 1991 it added a women's varsity team after an NCAA survey showed a significant increase in girls' high school participation in that sport. In 1993 Institution D eliminated a viable women's team and a viable men's team in an effort to reduce its athletic budget. It has taken no action relating to the underrepresented sex since 1993. Based on these facts, OCR would not find Institution D in compliance with part two. Institution D cannot show a continuing practice of program expansion that is responsive to the developing interests and abilities of the underrepresented sex where its only action since 1991 with regard to the underrepresented sex was to eliminate a team for which there was interest, ability and available competition.

In the mid-1970s, Institution E established five teams for women. In 1979 it added a women's varsity team. In 1984 it upgraded a women's club sport with twenty-five participants to varsity team status. At that time it eliminated a women's varsity team that had eight members. In 1987 and 1989 Institution E added women's varsity teams that were identified by a significant number of its enrolled and incoming female students when surveyed regarding their athletic interests and abilities. During this time it also increased the size of an existing women's team to provide opportunities for women who expressed interest in playing that sport. Within the past year, it added a women's varsity team based on a nationwide survey of the most popular girls high school teams. Based on the addition of these teams, the percentage of women participating in varsity athletics at the institution has increased. Based on these facts, OCR would find Institution E in compliance with part two because it has a history of program expansion and the elimination of the team in 1984 took place within the context of continuing program expansion for the underrepresented sex that is responsive to their developing interests.

Institution F started its women's program in the early 1970s with four teams. It did not add to its women's program until 1987 when, based on requests of students and coaches, it upgraded a women's club sport to varsity team status and expanded the size of several existing women's teams to accommodate significant expressed interest by students. In 1990 it surveyed its enrolled and incoming female students; based on that survey and a survey of the most popular sports played by women in the region, Institution F agreed to add three new women's teams by 1997. It added a women's team in 1991 and 1994. Institution F is implementing a plan to add a women's team by the spring of 1997. Based on these facts, OCR would find Institution F in compliance with part two. Institution F's program history since 1987 shows that it is committed to program expansion for the underrepresented sex and it is continuing to expand its women's program in light of women's developing interests and abilities.

THREE-PART TEST -- Part Three: Is the Institution Fully and Effectively Accommodating the Interests and Abilities of the Underrepresented Sex?

Under part three of the three-part test (part three) OCR determines whether an institution is fully and effectively accommodating the interests and abilities of its students who are members of the underrepresented sex--including students who are admitted to the institution though not yet enrolled. Title IX provides that a recipient must provide equal athletic opportunity to its students. Accordingly, the Policy Interpretation does not require an institution to accommodate the interests and abilities of potential students.⁴

While disproportionately high athletic participation rates by an institution's students of the overrepresented sex (as compared to their enrollment rates) may indicate that an institution is not providing equal athletic opportunities to its students of the underrepresented sex, an institution can satisfy part three where there is evidence that the imbalance does not reflect discrimination, i.e., where it can be demonstrated that, notwithstanding disproportionately low participation rates by the institution's students of the underrepresented sex, the interests and abilities of these students are, in fact, being fully and effectively accommodated.

In making this determination, OCR will consider whether there is (a) unmet interest in a particular sport; (b) sufficient ability to sustain a team in the sport; and (c) a reasonable expectation of competition for the team. If all three conditions are present OCR will find that an institution has not fully and effectively accommodated the interests and abilities of the underrepresented sex.

If an institution has recently eliminated a viable team from the intercollegiate program, OCR will find that there is sufficient interest, ability, and available competition to sustain an intercollegiate team in that sport unless an institution can provide strong evidence that interest, ability, or available competition no longer exists.

- a) Is there sufficient unmet interest to support an intercollegiate team?

⁴ However, OCR does examine an institution's recruitment practices under another part of the Policy Interpretation. See 44 Fed. Reg. 71417. Accordingly, where an institution recruits potential student athletes for its men's teams, it must ensure that women's teams are provided with substantially equal opportunities to recruit potential student athletes.

OCR will determine whether there is sufficient unmet interest among the institution's students who are members of the underrepresented sex to sustain an intercollegiate team. OCR will look for interest by the underrepresented sex as expressed through the following indicators, among others:

- requests by students and admitted students that a particular sport be added;
- requests that an existing club sport be elevated to intercollegiate team status;
- participation in particular club or intramural sports;
- interviews with students, admitted students, coaches, administrators and others regarding interest in particular sports;
- results of questionnaires of students and admitted students regarding interests in particular sports; and
- participation in particular interscholastic sports by admitted students.

In addition, OCR will look at participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students in order to ascertain likely interest and ability of its students and admitted students in particular sport(s).⁵ For example, where OCR's investigation finds that a substantial number of high schools from the relevant region offer a particular sport which the institution does not offer for the underrepresented sex, OCR will ask the institution to provide a basis for any assertion that its students and admitted students are not interested in playing that sport. OCR may also interview students, admitted students, coaches, and others regarding interest in that sport.

An institution may evaluate its athletic program to assess the athletic interest of its students of the underrepresented sex using nondiscriminatory methods of its choosing. Accordingly, institutions have flexibility in choosing a nondiscriminatory method of determining athletic interests and abilities provided they meet certain requirements. See 44 Fed. Reg. at 71417. These assessments may use straightforward and inexpensive techniques, such as a student questionnaire or an open forum, to identify

⁵ While these indications of interest may be helpful to OCR in ascertaining likely interest on campus, particularly in the absence of more direct indicia, an institution is expected to meet the actual interests and abilities of its students and admitted students.

students' interests and abilities. Thus, while OCR expects that an institution's assessment should reach a wide audience of students and should be open-ended regarding the sports students can express interest in, OCR does not require elaborate scientific validation of assessments.

An institution's evaluation of interest should be done periodically so that the institution can identify in a timely and responsive manner any developing interests and abilities of the underrepresented sex. The evaluation should also take into account sports played in the high schools and communities from which the institution draws its students both as an indication of possible interest on campus and to permit the institution to plan to meet the interests of admitted students of the underrepresented sex.

b) Is there sufficient ability to sustain an intercollegiate team?

Second, OCR will determine whether there is sufficient ability among interested students of the underrepresented sex to sustain an intercollegiate team. OCR will examine indications of ability such as:

- the athletic experience and accomplishments--in interscholastic, club or intramural competition--of students and admitted students interested in playing the sport;
- opinions of coaches, administrators, and athletes at the institution regarding whether interested students and admitted students have the potential to sustain a varsity team; and
- if the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team.

Neither a poor competitive record nor the inability of interested students or admitted students to play at the same level of competition engaged in by the institution's other athletes is conclusive evidence of lack of ability. It is sufficient that interested students and admitted students have the potential to sustain an intercollegiate team.

c) Is there a reasonable expectation of competition for the team?

Finally, OCR determines whether there is a reasonable expectation of intercollegiate competition for a particular sport in the institution's normal competitive region. In evaluating available competition, OCR will look at available competitive opportunities in the geographic area in which the institution's athletes primarily compete, including:

- competitive opportunities offered by other schools against

which the institution competes; and

- competitive opportunities offered by other schools in the institution's geographic area, including those offered by schools against which the institution does not now compete.

Under the Policy Interpretation, the institution may also be required to actively encourage the development of intercollegiate competition for a sport for members of the underrepresented sex when overall athletic opportunities within its competitive region have been historically limited for members of that sex.

CONCLUSION

This discussion clarifies that institutions have three distinct ways to provide individuals of each sex with nondiscriminatory participation opportunities. The three-part test gives institutions flexibility and control over their athletics programs. For instance, the test allows institutions to respond to different levels of interest by its male and female students. Moreover, nothing in the three-part test requires an institution to eliminate participation opportunities for men.

At the same time, this flexibility must be used by institutions consistent with Title IX's requirement that they not discriminate on the basis of sex. OCR recognizes that institutions face challenges in providing nondiscriminatory participation opportunities for their students and will continue to assist institutions in finding ways to meet these challenges.

EXHIBIT 5



Print

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Dear Colleague Letter: Bowling Green State University*OFFICE FOR CIVIL RIGHTS
THE ASSISTANT SECRETARY**July 23, 1998*

Dear Colleague:

The Office for Civil Rights (OCR) of the U.S. Department of Education is currently investigating twenty-five complaints which allege discrimination in the awarding of athletic scholarships in intercollegiate athletics programs. Your institution is among these complaints.

OCR is investigating these complaints under the jurisdiction of Title IX of the Education Amendments of 1972 (Title IX) which prohibits discrimination on the basis of sex in any education program or activity, including the athletic program, which receives Federal funds. Regarding the award of intercollegiate athletics scholarships, Title IX requires that such scholarships be made available to the separate men's and women's athletic programs in a manner which is "substantially proportionate" to the participation rates of male and female athletes.

In response to a specific request for guidance on this matter, our office recently issued a written response to the General Counsel of Bowling Green State University. I am forwarding a copy of this letter for your reference. This letter clarifies the coverage of Title IX and its regulations as they apply to both academic and athletic programs and discusses specifically the 1979 Intercollegiate Athletics Policy Interpretation of the "substantially proportionate" provision of Title IX as it relates to the funding of athletic scholarships for men's and women's intercollegiate athletics programs.

If OCR staff may be of further assistance, please do not hesitate to contact Dr. Mary Frances O'Shea, national Coordinator for Title IX Athletics, at (312)886-8434, or your local OCR office. We look forward to working cooperatively with you. Sincerely, /s/ Norma V. Cantú Assistant Secretary Office for Civil Rights Enclosure

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202-
July 23, 1998

Ms. Nancy S. Footer
General Counsel
Bowling Green State University
308 McFall Center
Bowling Green, Ohio 43403-0010

Dear Ms. Footer:

This is in response to your letter requesting guidance in meeting the requirements of Title IX, specifically as it relates to the equitable apportionment of athletic financial aid. Please accept my apology for the delay in responding. As you know, the Office for Civil Rights (OCR) enforces Title IX of the Education Amendments of 1972, 20 U.S.C. § 1682, which prohibits discrimination on the basis of sex in education programs and activities.

The regulation implementing Title IX and the Department's Intercollegiate Athletics Policy Interpretation published in 1979 -- both of which followed publication for notice and the receipt, review, and consideration of extensive comments -- specifically address intercollegiate athletics. You have asked us to provide clarification regarding how educational institutions can provide intercollegiate athletes with nondiscriminatory opportunities to receive athletic financial aid. Under the Policy Interpretation, the equitable apportioning of a college's intercollegiate athletics scholarship fund for the separate budgets of its men's and women's programs -- which Title IX permits to be segregated -- requires that the total amounts of scholarship aid made available to the two budgets are "substantially proportionate" to the participation rates of male and female athletes. 44 Fed. Reg. 71413, 71415 (1979)).

In responding, I wish (1) to clarify the coverage of Title IX and its regulations as they apply to both academic and athletic programs, and (2) to provide specific guidance about the existing standards that have guided the enforcement of Title IX in the area of athletic financial aid, particularly the Policy Interpretation's "substantially proportionate" provision as it relates to a college's funding of the athletic scholarships budgets for its men's and women's teams. At the outset, I want to clarify that, wholly apart from any obligation with respect to scholarships, an institution with an intercollegiate athletics program has an independent Title IX obligation to provide its students with nondiscriminatory athletic participation opportunities. The scope of that separate obligation is not addressed in this letter, but was addressed in a Clarification issued on January 16, 1996.

Title IX Coverage: Athletics versus Academic Programs

Title IX is an anti-discrimination statute that prohibits discrimination on the basis of sex in any education program or activity receiving federal financial assistance, including athletic programs. Thus, in both academics and athletics, Title IX guarantees that all students, regardless of gender, have equitable opportunities to participate in the education program. This guarantee does not impose quotas based on gender, either in classrooms or in athletic programs. Indeed, the imposition of any such strict numerical requirement concerning students would be inconsistent with Title IX itself, which is designed to protect the rights of all students and to provide equitable opportunities for all students.

Additionally, Title IX recognizes the uniqueness of intercollegiate athletics by permitting a college or university to have separate athletic programs, and teams, for men and women. This allows colleges and universities to allocate athletic opportunities and benefits on the basis of sex. Because of this unique circumstance, arguments that OCR's athletics compliance standards create quotas are misplaced. In contrast to other antidiscrimination statutes, Title IX compliance cannot be determined simply on the basis of whether an institution makes sex-specific decisions, because invariably they do. Accordingly, the statute instead requires institutions to provide equitable opportunities to both male and female athletes in all aspects of its two separate athletic programs. As the court in the Brown University case stated, "[i]n this unique context, Title IX operates to ensure that the gender-segregated allocation of athletic opportunities does not disadvantage either gender. Rather than create a quota or preference, this unavoidable gender-conscious comparison merely provides for the allocation of athletic resources and participation opportunities between the sexes in a non-discriminatory manner." *Cohen v. Brown University*, 101 F.3d 155, 177 (1st Cir. 1996), cert. denied, 117 S. Ct. 1469 (1997). The remainder of this letter addresses the application of Title IX only to athletic scholarships.

Athletics: Scholarship Requirements

With regard to athletic financial assistance, the regulations promulgated under Title IX provide that, when a college or university awards athletic scholarships, these scholarship awards must be granted to "members of each sex in proportion to the number of students of each sex participating in... intercollegiate athletics." 34 C.F.R. 106.37(c). Since 1979, OCR has interpreted this regulation in conformity with its published "Policy Interpretation: Title IX and Intercollegiate Athletics," 44 Fed. Reg. 71413 (December 11, 1979). The Policy Interpretation does not require colleges to grant the same number of scholarships to men and women, nor does it require that individual scholarships be of equal value. What it does require is that, at a particular college or university, "the total amount of scholarship aid made available to men and women must be substantially proportionate to their [overall] participation rates" at that institution. *Id.* at 71415. It is important to note that the Policy Interpretation only applies to teams that regularly compete in varsity competition. *Id.* at 71413 and n. 1.

Under the Policy Interpretation, OCR conducts a "financial comparison to determine whether proportionately equal amounts of financial assistance (scholarship aid) are available to men's and women's athletic programs." *Id.* The Policy Interpretation goes on to state that "[i]nstitutions may be found in compliance if this comparison results in substantially equal amounts or if a disparity can be explained by adjustments to take into account legitimate nondiscriminatory factors." *Id.*

A "disparity" in awarding athletic financial assistance refers to the difference between the aggregate amount of money athletes of one sex received in one year, and the amount they would have received if their share of the entire annual budget for athletic scholarships had been awarded in proportion to their participation rates. Thus, for example, if men account for 60% of a school's intercollegiate athletes, the Policy Interpretation presumes that -- absent legitimate nondiscriminatory factors that may cause a disparity -- the men's athletic program will receive approximately 60% of the entire annual scholarship budget and the women's athletic program will receive approximately 40% of those funds. This presumption reflects the fact that colleges typically allocate scholarship funds among their athletic teams, and that such teams are expressly segregated by sex. Colleges' allocation of the scholarship budget among teams, therefore, is invariably sex-based, in the sense that an allocation to a particular team necessarily benefits one sex to the exclusion of the other. See Brown, 101 F.3d at 177. Where, as here, disparate treatment is inevitable and a college's allocation of scholarship funds is "at the discretion of the institution," Brown, 101 F.3d at 177, the statute's nondiscrimination requirement obliges colleges to ensure that men's and women's separate activities receive equitable treatment. *Cf. United States v. Virginia*, 518 U.S. 515, 554 (1996).

Nevertheless, in keeping with the Policy Interpretation's allowance for disparities from "substantially proportionate" awards to the men's and women's programs based on legitimate nondiscriminatory factors, OCR judges each matter on a case-by-case basis with due regard for the unique factual situation presented by each case. For example, OCR recognizes that disparities may be explained by actions taken to promote athletic program development, and by differences between in-state and out-of-state tuition at public colleges. 44 Fed. Reg. at 71415. Disparities might also be explained, for example, by legitimate efforts undertaken to comply with Title IX requirements, such as participation requirements. See, e.g., *Gonyo v. Drake Univ.*, 879 F. Supp. 1000, 1005-06 (S.D. Iowa 1995). Similarly, disparities may be explained by unexpected fluctuations in the participation rates of males and females. For example, a disparity may be explained if an athlete who had accepted an athletic scholarship decided at the last minute to enroll at another school. It is important to note that it is not enough for a college or university merely to assert a nondiscriminatory justification. Instead, it will be required to demonstrate that its asserted rationale is in fact reasonable and does not reflect underlying discrimination. For instance, if a college consistently awards a greater number of out-of-state scholarships to men, it may be required to demonstrate that this does not reflect discriminatory recruitment practices. Similarly, if a university asserts the phase-in of scholarships for a new team as a justification for a disparity, the university may be required to demonstrate that the time frame for phasing-in of scholarships is reasonable in light of college sports practices to aggressively recruit athletes to build start-up teams quickly.

In order to ensure equity for athletes of both sexes, the test for determining whether the two scholarship budgets are "substantially proportionate" to the respective participation rates of athletes of each sex necessarily has a high threshold. The Policy Interpretation does not, however, require colleges to achieve exact proportionality down to the last dollar. The "substantially proportionate" test permits a small variance from exact proportionality. OCR recognizes that, in practice, some leeway is necessary to avoid requiring colleges to unreasonably fine-tune their scholarship budgets.

When evaluating each scholarship program on a case-by-case basis, OCR's first step will be to adjust any disparity to take into account all the legitimate nondiscriminatory reasons provided by the college, such as the extra costs for out-of-state tuition discussed earlier. If any unexplained disparity in the scholarship budget for athletes of either gender is 1% or less for the entire budget for athletic scholarships, there will be a strong presumption that such a disparity is reasonable and based on legitimate and nondiscriminatory factors. Conversely, there will be a strong presumption that an unexplained disparity of more than 1% is in violation of the "substantially proportionate" requirement.

Thus, for example, if men are 60% of the athletes, OCR would expect that the men's athletic scholarship budget would be within 59%-61% of the total budget for athletic scholarships for all athletes, after accounting for legitimate nondiscriminatory reasons for any larger disparity. Of course, OCR will continue to judge each case in terms of its particular facts. For example, at those colleges where 1% of the entire athletic scholarship budget is less than the value of one full scholarship, OCR will presume that a disparity of up to the value of one full scholarship is equitable and nondiscriminatory. On the other hand, even if an institution consistently has less than a 1% disparity, the presumption of compliance with Title IX might still be rebutted if, for example, there is direct evidence of discriminatory intent.

OCR recognizes that there has been some confusion in the past with respect to the Title IX compliance standards for scholarships. OCR's 1990 Title IX Investigator's Manual correctly stated that one would expect proportionality in the awarding of scholarships, absent a legitimate, nondiscriminatory justification. But that Manual also indicated that compliance with the "substantially proportionate" test could depend, in part, upon certain statistical tests. In some cases, application of such a statistical test would result in a determination of compliance despite the existence of a disparity as large as 3-5%.

We would like to clarify that use of such statistical tests is not appropriate in these circumstances. Those tests, which are used in some other discrimination contexts to determine whether the disparities in the allocation of benefits to different groups are the result of chance, are inapposite in the athletic scholarship context because a college has direct control over its allocation of financial aid to men's and women's teams, and because such decisions necessarily are sex-based in the sense that an allocation to a particular team will affect only one sex. See Brown, 101 F.3d at 176-78 (explaining why college athletics "presents a distinctly different situation from admissions and employment," and why athletics requires a different analysis than that used in such other contexts "in order to determine the existence vel non of discrimination"). In the typical case where aid is expressly allocated among sex-segregated teams, chance simply is not a possible explanation for disproportionate aid to one sex. Where a college does not make a substantially proportionate allocation to sex-segregated teams, the burden should be on the college to provide legitimate, nondiscriminatory reasons for the disproportionate allocation. Therefore, the use of statistical tests will not be helpful in determining whether a disparity in the allocations for the two separate athletic scholarship budgets is nondiscriminatory.

While a statistical test is not relevant in determining discrimination, the confusion caused by the manual's inclusion of a statistical test resulted in misunderstandings. Therefore, OCR is providing this clarification regarding the substantial proportionality provision found in the 1979 Policy Interpretation to confirm the substance of a longstanding standard. In order to ensure full understanding, OCR will apply the presumptions and case-by-case analysis described in this letter for the 1998-99 academic year. OCR strongly encourages recipients to award athletic financial assistance to women athletes in the 1997-98 academic year consistent with this policy clarification, both as a matter of fairness and in order to ensure that they are moving towards the policy clarification stated in this letter.

I trust that this letter responds to the questions the University has regarding the "substantially proportionate" provision of the Policy Interpretation in the context of the funding for an institution's two separate athletic scholarship budgets for male and female athletes. I am sending a copy of this letter as technical assistance to the complainants and the other 24 recipients also currently involved with OCR on the issue of awarding athletic financial

assistance. We will be in contact with you shortly to continue to work with the University regarding this matter and to discuss other points raised in your letter. If you have any questions regarding this letter, please contact me at (312) 886-8387.

Sincerely yours,

/s/

Dr. Mary Frances O'Shea

National Coordinator for Title IX Athletics

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