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,	)	CIVIL ACTION NO. 3:09-cv-00621-SRU
Plaintiffs,	)	
v.	)	
QUINNIPIAC UNIVERSITY, Defendant.	)	September 16, 2010

PLAINTIFFS' RESPONSE TO DEFENDANT'S PROPOSED COMPLIANCE PLAN

Plaintiffs submit this document as their preliminary response to Defendant Quinnipiac University's Proposed Compliance Plan ("Proposed Plan") (Doc. 182). Plaintiffs state herein their preliminary objections to and concerns about certain aspects of the Proposed Plan. Plaintiffs anticipate that the Court will conduct further proceedings before entering any order with respect to the Proposed Plan. Plaintiffs request an opportunity to conduct discovery regarding the basis for and development of the Proposed Plan and a more detailed explanation of its terms before any hearing on the Proposed Plan takes place.

Objections and Concerns

Enrollment Assumptions

The Proposed Plan does not explain the basis for its enrollment assumptions. In order to comply with Prong One, the number of varsity athletic participation opportunities that QU offers to female students must be substantially proportionate to full time undergraduate enrollment, with any "gap" smaller than the number of students required to field a varsity team. QU, like all institutions of higher education, must have engaged in long-term strategic planning regarding its projected enrollment. Yet the Proposed Plan includes no such information. QU has put increasing emphasis on educating for the health professions in recent years. Because those majors tend to attract more female students, it is plausible to expect that QU's enrollment will trend toward a higher percentage of female undergraduates. If this is the case, then QU's athletic department must plan accordingly. The Proposed Plan does not account for any projected change in the composition of the student body; indeed, it includes no projection at all for academic year 2011-2012, much less any future year. QU must plan for Title IX compliance not just now or next year, but for the foreseeable future. Thus, Plaintiffs believe that any plan approved by the Court must include enrollment projections and account for them in the athletic program.

Squad Sizes

The Proposed Plan fails to explain or justify the suspiciously large squad sizes listed for some of the women's teams. QU proposes to field teams with more women than the average NEC squad sizes in basketball, field hockey, golf, ice hockey, lacrosse, soccer, softball, tennis, cross country, and volleyball. It's women's basketball,

field hockey, golf, ice hockey, lacrosse, and cross country teams are all projected to be larger than average NCAA Division I squads. In cross country, QU plans to carry 7 more athletes than the NCAA Division I average – enough to field an entire race team.

As the United States' trial brief explained, it is not enough for QU to merely claim to carry certain numbers of students on its teams. The University must actually provide all of those women with genuine Division I varsity athletic participation opportunities. Abundant preliminary injunction and trial testimony indicated that QU fails to provide such opportunities for its "extra" athletes. As Plaintiffs showed at trial – a showing they expect to buttress when their discriminatory treatment claim is tried – QU does not provide its bloated women's teams with the resources necessary to give each member genuine varsity benefits. The Proposed Plan does not address this issue at all. For example, has QU hired (or will it hire) more coaches to support the extra athletes? Has it purchased more uniforms and equipment? Has it increased travel and transportation budgets so that large squads can travel to away games? Has it hired more training and conditioning personnel for the extra women? Has it increased the teams' recruiting budgets so that the coaches can recruit Division I athletes, and not trawl the dining halls for unqualified walk-ons to meet their mandatory roster floors? Has the University increased scholarship budgets to entice more qualified women to join its teams despite their unwieldy rosters?

Several of the women's squads set forth in the Proposed Plan are, as in past years, simply too large for Division I. The women on these teams cannot receive the same benefits received by QU's male athletes, or that are expected at the Division I level. By its very nature, Division I is the top, most elite level of college competition. It

is not the level where "everyone plays." Legitimate Division I programs do not pad teams with people who lack Division I skills, or who are not likely to contribute to the team. If that is what QU wants to do in its women's program, then it should do the same for its men's teams, and it should reclassify its athletic program to Division III. But as long as QU retains NCAA Division I status, it cannot be permitted to pad women's teams in order to improve the "optics" of its Title IX participation statistics.

Accordingly, the Court should either reject QU's bloated proposed women's rosters or require QU to justify its different treatment of women and men in the floors and limits it imposes on their teams. QU should be required to provide legitimate reasons for its unusually large women's squads and to demonstrate that it has substantially increased the resources provided to those teams – especially by adding coaching, scholarship, and recruiting dollars – in order to offer those extra women genuine Division I varsity opportunities without detracting from the experiences of the women who actually compete.

Cross Country

Plaintiffs especially object to QU's proposal to carry 24 women but only 13 men in its cross country program. Cross country coach Carolyn Martin's emails stated that 14 male cross country runners were enough to fill complete varsity and junior varsity squads – with room to account for injuries. If 14 male runners are sufficient for varsity and junior varsity, and if only 7 runners can participate in a race (and only 5 of those can score), what can be the legitimate basis for expanding the women's cross country team to 24 runners – nearly double the size of the men's team? Ten to fourteen of those women will never run a single varsity race – or any race at all. They clearly will

not be treated as or receive the opportunities expected by Division I varsity cross country athletes.

If 24 runners were a reasonable squad size, then QU would want 24 runners on its men's team. The fact that the women's roster is so much larger than the men's roster shows that QU is again merely playing with numbers. That is not what Title IX is intended to achieve. QU instead should be offering those 11 extra slots as genuine varsity opportunities in new sports – sports in which the participants can actually participate and receive varsity benefits.

Counting Runners

Plaintiffs continue to maintain that for purposes of Title IX, running is one sport with different seasonal segments – just like baseball, softball, lacrosse, crew, tennis, and golf. Running 400 meters indoors is not substantively different from running 400 outdoors, just as playing tennis indoors is not substantively different from playing tennis outdoors. Thus runners should not be counted more than once. Counting them twice is a premeditated scheme to avoid Title IX compliance – especially when a school offers only women's running and not men's running and when a school offers only running, not track & field.

The Proposed Plan projects rosters of 35 women for indoor track and 35 women for outdoor track – almost certainly the exact same women, and almost certainly including the cross country runners, despite the University's promise that runners will not be required to participate in more than one season. There is no other pair of different sports that has any significant degree of such overlap – and certainly not 100% overlap.

Even if QU is allowed to count its runners twice for competing in the same events in February and in March, who are these 35 expected women? In 2009-2010, QU claimed 30 track runners – but 18 of those were cross country runners who were required to participate in track. If the 12 "track only" athletes return (which is not assured given that none of them was recruited, none received a scholarship, and few of them were even remotely competitive in the NEC), who are the additional 23 track athletes? QU did not have time after the trial to recruit 23 Division I track athletes – long after the national letter of intent deadline, long after the admissions deadline, and long after the acceptance deadline. Plaintiffs do not believe that it is plausible that QU will have 35 legitimate track athletes during the 2010-2011 academic year.

Plaintiffs strongly support the creation, expansion, and full funding of a women's track & field team at QU. The Proposed Plan does not indicate that QU has any intent to improve the quality of the track program. Plaintiffs submit that any plan approved by the Court should require QU to end its practice of double or triple counting cross country runners.

Varsity Benefits for Track Athletes

Plaintiffs continue to support the position of the United States that QU cannot count any athletes on a team as varsity athletes for purposes of Title IX unless and until QU provides those athletes with all of the benefits of varsity status. If QU proposes to count track athletes for Title IX purposes, it should be required to demonstrate that it will actually treat its track athletes as Division I varsity athletes. QU must provide its female track athletes with the same varsity benefits it provides its male athletes, including adequate facilities and coaching. So long as QU schedules all of its men's teams with

85-100% of the maximum permitted number of competitions, it must do the same for its women's teams – and not the bare minimum it does for track. So long as QU schedules its men's teams to compete in scored competitions, it must do the same for women's track – not indoor track scrimmages without scoring. So long as QU provides travel, transportation, and training for its men's teams, it must provide equal benefits to its women's track team so that they can actually compete. So long as QU provides its men's teams with athletic scholarships, it must provide scholarships for women's track (which it does not currently do). So long as QU recruits genuine Division I athletes to participate on its men's teams, it must provide the resources necessary for its track coach to do so for the women's track team. So long as QU recruits male athletes to fill the different positions in each sport (e.g., baseball pitchers, catchers, infielders, and outfielders), it must recruit female athletes to fill the different types of positions in the sport of track & field. So long as QU fails to sponsor a real track team, so long as it merely enters its cross country runners in distance track events, so long as it fails to provide its track athletes with varsity benefits and a genuine varsity experience, QU cannot count 35 women track athletes – let alone double that many – for Title IX compliance.

In its Memorandum of Decision (Doc. 171), the Court clearly was troubled by certain aspects of the QU track program, noting that "structuring a team to make [winning a championship] impossible . . . does suggest that the participation opportunity is deficient when compared to the experience of other varsity athletes …." Decision at 79. The Court also noted that "there are reasons to doubt that all cross-country runners who participate in the winter indoor track season and in the spring outdoor track season

receive genuine participation opportunities." Id. at 82-83. In its Proposed Plan, the University purports to address the Court's concerns by promising that it will no longer require cross country runners to participate in track as well, but utterly fails to address the quality of the experience offered to its female runners.

Again, Plaintiffs fully support the creation and expansion of a full women's track team at QU. Plaintiffs recognize that this may not be an objective that can be achieved instantaneously, but the Proposed Plan does not indicate that QU intends to work toward this objective, or how it will do so if it does. The Court should require the University to submit a Compliance Plan that adequately addresses these issues.

Volleyball

Plaintiffs support the continuation of varsity women's volleyball at QU. Volleyball is the third most popular sport among high school girls and women. Eliminating women's volleyball would be akin to eliminating men's basketball, which is the third most popular sport for males. Neither action would make pedagogical or athletic sense. Plaintiffs are therefore concerned by the implicit suggestion in the Proposed Plan that volleyball will be eliminated when it is no longer necessary to maintain the program for Title IX purposes. Plaintiffs believe that the University's decisions to offer and/or eliminate sports should take into account all pertinent athletic, educational, and other considerations, including but certainly not limited to the requirements of Title IX.

Golf

Plaintiffs support, in principle, the establishment of a women's golf team at QU. Plaintiffs doubt, however, that Defendant can actually recruit a suitable coach and qualified Division I student athletes to field a genuinely competitive varsity team in the

current academic year. The time for recruiting college golfers, especially Division I golfers, ended many months ago. The application and admissions deadlines also passed several months ago. It would not be acceptable for QU to merely ask existing students to join the golf team if those students are not qualified to compete at the Division I level. Plaintiffs reserve the right to contest any aspect of the proposed varsity women's golf team as details of its establishment, funding, facilities and coaching resources emerge.

Rugby

QU proposes to add women's rugby for the 2011-2012 academic year. The Proposed Plan indicates that QU will use the 2010-2011 academic year to hire a coach, recruit student athletes this year, and "to the extent feasible, the coach will organize a club team in the 2011-2012 academic year." Unfortunately, the proposed addition of rugby probably is not adequate to ensure that QU's female student athletes receive genuine competitive athletic opportunities which are equal to the opportunities offered to the Defendant's male students.

First, the Defendant's proposal to field a 35-member women's rugby team in 2011-12 is entirely unrealistic. According to the National Federation of High Schools, only 14 high schools in the entire country sponsor women's rugby. Thus, there is no high school pipeline for female college rugby players. It is highly unlikely that QU can recruit 35 varsity quality athletes for a rugby team by 2011-2012. The Proposed Plan offers no details about how QU plans to do so.

Second, in order to comply with Title IX, QU must offer its female athletes the same level of competition that it offers its male athletes. If all the men's teams are

Division I, then all the women's teams must be Division I. Yet QU proposes to offer only club rugby for women. Indeed, that is all that QU could offer for women, because varsity women's rugby essentially does not exist at the college level – or even at the high school level. According to the most recent data available from the NCAA, as of 2008-09 only one Division I college had designated women's rugby as a varsity sport.[1] There simply is no competition available for a varsity women's rugby team at any college level, let alone the Division I level. It is not sufficient that QU might be able to offer a limited club rugby schedule. QU has chosen to be Division I and must offer its women athletes Division I opportunities.

The Proposed Plan sheds no light on how QU expects to arrange varsity-level competition for its rugby team. Women's rugby is not presently offered as a varsity sport by other schools in the Northeast Conference ("NEC"), to which the Defendant belongs. Thus, it is likely that even if the Defendant were eventually able to field a full-blown women's varsity rugby team, the QU team would be forced to compete primarily against club teams, and may have little if any local competition at either the club or varsity level. None of the Defendant's men's varsity teams are required to compete primarily against club teams, or to travel regularly outside of the Northeast to find competition. Where, as here, the Defendant offers robust, fully-established varsity competition to its male student athletes, allowing the Defendant to offer only club-level competition for a women's "varsity" team in 2011-12 would simply continue the University's discrimination against female student athletes in continued violation of Title IX.

[1] One Division II and three Division III schools fielded varsity women's rugby teams in 2008-09.

QU's continued efforts to count, for Title IX purposes, the non-varsity opportunities it provides for women in such activities as cheer and rugby suggest that QU does not understand the requirement that it provide genuine Division I varsity athletic participation opportunities to its female students, or that it is not serious about complying with Title IX. A school legitimately trying to increase participation opportunities would look at which sports are most popular among its prospective students – or in the areas from which it recruits its students. It would survey its current and prospective students. It would focus on sports that its athletic conference supports. QU apparently did none of this. Its Proposed Plan offers no explanation for its decision process.

Volleyball remains the third most popular sport in the nation and it is sponsored by the NEC and NCAA. Swimming and bowling are played at the high school level, are sponsored by the NEC, and have NCAA championships. Track is the most popular sport for females in at both the high school and college level. These are the sports that QU should be keeping, expanding, or adding. Competition in these sports is available at the same Division I level that QU provides to all its men.

Women's rugby, however, is not played in more than negligible numbers at the high school level anywhere in the nation. It is played by only one Division I school. It is not sponsored by the NEC, and the NCAA does not offer a post-season championship in it. Unless QU has convinced other NEC schools to add women's rugby, the NEC to offer a championship, and the NCAA to offer a post-season, QU's proposal to add rugby is disingenuous. It cannot possibly offer genuine varsity athletic participation

opportunities – let alone Division I opportunities – in women's rugby by 2011-2012, or at any time in the foreseeable future. [2]

Continued Court Supervision is Necessary

QU's athletic program has never complied with Title IX. Its Proposed Plan is inadequate to assure compliance by 2011-2012. Moreover, its history of roster manipulations and failures to understand (or, perhaps, to take seriously) its Title IX obligations suggest that continued Court monitoring will be necessary to assure compliance. QU must comply with Title IX not just for one year or two years, but into the indefinite future. Thus, the Court should retain jurisdiction to oversee QU's ongoing compliance efforts until QU has maintained Title IX compliance for a reasonable number of years, and demonstrates that it can reasonably be expected to continue to do so in the future.

In view of the Defendant's demonstrated, historical failure to comply with its obligations under Title IX, and the uncertain and speculative nature of its Proposed Plan, Plaintiffs submit that QU should be enjoined from eliminating any existing women's team until it has demonstrated consistent Title IX compliance for an extended period of time.

Further Proceedings

Defendant has submitted the bare bones outline of a plan for Title IX compliance, but has provided no supporting information to demonstrate that the plan is likely to be appropriately implemented. For example, Defendant has not indicated what financial

[2] While rugby is currently recognized by the NCAA as an emerging sport for women, the dearth of schools offering rugby as a varsity sport suggests it may not maintain that status. In any event, Plaintiffs do not question rugby's designation as a "sport," but contend that at present and for the foreseeable future, it does not offer genuine varsity participation opportunities.

resources it will devote to establishing its new women's teams, how it will recruit varsity-level golfers and rugby players in less than a year's time, what facilities the new teams will use, or who they will compete against. Nor has the University provided any insight into the basis for its decision to offer women's rugby, shown that there is any demand among its current or prospective students for varsity women's rugby, or suggested that the NEC has any plans to make rugby an NEC sport. Finally, the University has offered no justification for its planned roster sizes, despite the trial evidence that called its squad sizes into question. Before the Court takes action with respect to the Proposed Plan, Plaintiffs should be given the opportunity to conduct limited, focused discovery into these and related issues, and the Court should hold an evidentiary hearing.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that on September 16, 2010 a copy of the foregoing "*PLAINTIFFS' RESPONSE TO DEFENDANT'S PROPOSED COMPLIANCE PLAN*" 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.

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