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	:	Class Action Case No. 3:09-CV-621(SRU)
v.	:	
QUINNIPIAC UNIVERSITY, DEFENDANT	:	June 27, 2012

PLAINTIFFS' POST-HEARING MEMORANDUM

Plaintiffs Stephanie Biediger, Kayla Lawler, Erin Overdevest, Kristen Corinaldesi, and Logan Riker, on behalf the certified class of present, prospective and future female students at Quinnipiac University, submit this Post-Hearing Memorandum setting forth the principal reasons why the Court should deny Defendant's Motion to Lift Injunction.

I. LEGAL STANDARD

As the moving party, Defendant bears the burden to prove the existence of significantly changed factual circumstances that justify lifting the injunction. To satisfy this burden, Defendant must show that: (1) the objective of the court's original order has been achieved, and (2) a durable remedy has been implemented. *Horne v. Flores*, 129 S.Ct. 2579, 2595 (2009). "A 'durable' remedy means a remedy that gives the Court confidence that defendants will not resume their violations of plaintiffs' constitutional rights once judicial oversight ends." *Evans v. Fenty*, 701 F. Supp. 2d 126, 171 (D.D.C. 2010), *appeal dismissed,* 10-5109, 2010 WL 3447241

(D.C. Cir. Aug. 27, 2010). Even where a defendant has recently achieved compliance with an injunction, "assessment over time is the most reliable way in which to judge whether the Decree's objectives have been achieved." *Frew v. Suehs*, 775 F. Supp. 2d 930 (E.D. Tex. 2011). Similarly, in *Evans v. Fenty*, 701 F. Supp. 2d 126, 172 (D.D.C. 2010), the court denied the defendants' motion to lift the injunction because, given the defendants' history of violations, the structural changes did not "translate into proof of a durable remedy . . . [since] it is simply too soon to tell whether they will result in improved outcomes for the plaintiffs, and, if so, whether the improvements will be sustained absent judicial involvement."

In considering whether Quinnipiac has met its burden, the Court should recall its prior determinations that participation opportunities must be real, not illusory, and that a genuine opportunity "must allow an athlete to receive the same benefits and experience that she would receive if she played on another established varsity squad." (2010 Decision at 52) Thus, although the parties have not yet tried Plaintiffs' claim of unequal treatment, the Court should take into account the record evidence that strongly suggests discrimination by Quinnipiac in the allocation of benefits such as competition, practice, exercise and training facilities, coaching, and recruiting, as these factors affect the quality of experience of female student-athletes. If the Court concludes (mistakenly, in Plaintiffs' view) that Quinnipiac has demonstrated Title IX compliance, the court should also weigh in the balance Quinnipiac's years of failure to effectively accommodate the interests and abilities of members of both sexes, its recent history of dishonesty and roster manipulations, and its obstinate refusal to reconsider its decision to eliminate the volleyball program, in deciding whether the court is satisfied that a "durable remedy" has been achieved.

II. ACROBATICS & TUMBLING PARTICIPANTS SHOULD NOT BE COUNTED TOWARD TITLE IX COMPLIANCE

Since 2010, Quinnipiac's acrobatics and tumbling ("A&T") program has adopted a new name, and appears to play only against collegiate competition and under a consistent set of rules. But the court should not count A&T participants toward Title IX compliance because A&T still is not recognized as a sport by either OCR or the NCAA, there is insufficient Division I varsity competition, and the so-called "national championship" remains an open invitational tournament for all of the existing varsity teams. A&T is still some time away from qualifying for recognition as a sport for Title IX purposes.

The evidence at the hearing showed that both the National Collegiate Acrobatics and Tumbling Association ("NCATA") and STUNT, a competing organization sponsoring a similar cheer-based "sport," have submitted proposals to the NCAA Committee On Women's Athletics for recognition as an emerging sport for women. The CWA requested that the NCATA and STUNT resolve their disagreements and submit a joint proposal, but the two organizations have not done so. NCATA's proposal fails to meet the CWA's established requirements. Moreover, although the CWA requested NCATA and STUNT to obtain a ruling from OCR, neither organization has obtained such a ruling. Although Quinnipiac claims that OCR will not offer "advisory opinions" as to whether an activity is a sport, OCR certainly offers "technical guidance" to schools that request it. Quinnipiac presented no evidence that any NCATA school has sought such guidance from OCR. There is no basis to believe that the NCAA will recognize either A&T or stunt as an emerging sport in the near future.

Even if the Court were inclined to consider A&T a "sport" at this time for purposes of measuring Title IX compliance, Quinnipiac's A&T athletes do not receive the same level of competitive opportunities as the men's teams. No men's team at Quinnipiac so consistently

plays non-Division I opponents, plays such a small universe of opponents (some multiple times), or lacks a genuine opportunity to compete for a championship. Quinnipiac thus should not be permitted to count its A&T participants toward Title IX proportionality.

III. RUGBY PARTICIPANTS SHOULD NOT BE COUNTED TOWARD TITLE IX COMPLIANCE

Quinnipiac's women's rugby team played its first season in 2011-12. The program was established not on the basis of any demonstration or assessment of interest among Quinnipiac students or prospective students, but apparently because the Quinnipiac administration considered it a relatively inexpensive way to create a large number of roster slots. Rugby is not a sport sponsored by the Northeast Conference, and no other school in the conference fields a team. Indeed, there is only one other Division I varsity team in the entire country. In 2010-11, there were only five women's varsity teams at all Division levels, and since 2003-03 there have never been more than five. Most of Quinnipiac's competition is against collegiate club teams. Quinnipiac does not participate in the national collegiate championship tournament sponsored by USA Rugby, considering its schedule dangerous to the health of the athletes, but if it did participate it would play primarily against club competition. Few of Quinnipiac's players have been recruited either from high school or from other colleges to play rugby.

The court should not count Quinnipiac's rugby players as "participants" for purposes of Title IX compliance because they clearly do not receive a quality of experience equal to Quinnipiac's male athletes. No men's team at Quinnipiac consistently faces non-varsity or non-Division I competition. No male athletes at Quinnipiac compete outside any regional collegiate conference, or are deprived of rivalries with other college varsity teams in the NEC or the region. All of Quinnipiac's men's teams participate in conference championships and are eligible for

national championships. No men's team at Quinnipiac has such a low proportion of recruited athletes.

By selecting rugby as its new women's sport, Quinnipiac has staked its ability to comply with Title IX on a sport that in 10 years as an NCAA emerging sport has resoundingly failed to generate sufficient support among colleges and universities to become a championship sport. Although the CWA has indicated that it may extend rugby's time to demonstrate acceptance at the varsity level, its future as an emerging sport is in doubt at the very least. Quinnipiac presented no evidence to suggest that it is likely to succeed (or has even made serious attempts) in convincing other schools in the NEC or in other regional conferences (such as the Ivy League) to establish varsity women's rugby teams.

Quinnipiac will argue that schools will be discouraged from adopting emerging sports for women if they may not count participants in those sports for purposes of complying with Title IX. The argument does not withstand scrutiny. First, Quinnipiac placed itself in a difficult position by seeking to eliminate an established women's sport. Forced to rely upon prong one of the three-part test under Title IX's "effective accommodation" requirement, Quinnipiac must show that the opportunities it provides to women in emerging sports are equal in every significant way to those it provides to its male athletes. Had Quinnipiac not eliminated the volleyball program, it could rely on prong two or prong three of the three-part test. In that context, a school could point to its sponsorship of emerging sports as part of its continuing expansion of athletic opportunities for women, or as a response to demonstrated interest and/or abilities among female students. As a practical matter a school that had not recently cut a women's team would be less likely to face a Title IX challenge, and it would be appropriate for a court to be more flexible in its approach to fashioning relief in the event of any litigation.

Moreover, as the Court pointed out at trial, there are a number of potential reasons why a school might sponsor an emerging sport to comply with NCAA requirements and obtain NCAA revenue-sharing payments, apart from Title IX obligations. Finally, it hardly needs repeating that Quinnipiac's obligations under the law trump any NCAA regulations or policies.

If Quinnipiac is serious about expanding athletic opportunities for women, it will continue to support rugby and A&T. But until they provide a quality of experience that is equal to that received by the University's male athletes, this Court's injunction should remain in place.

IV. CERTAIN RUNNERS SHOULD NOT BE MULTIPLE-COUNTED

The court should not triple-count female runners who actually compete in fewer than three sports, or double-count those who actually compete in only one sport, because the athletes obtain no additional benefit from "participating" on an additional team.

The definition of "participant" must be interpreted in light of common sense and the statutory purpose. The appropriate focus is on the perspective of the athlete; does she receive any opportunities or benefits by virtue of her membership on a second or third team that she did not receive as a participant on her first team? This approach embraces the counting of "bench" players who practice and receive other varsity benefits, but does not require the counting of non-competing athletes in a second or third sport who merely fill roster slots to create the appearance of Title IX compliance. The Court essentially endorsed this approach in its 2010 Decision.

Although Quinnipiac has disclaimed any formal "requirement" that cross-country runners also participate in track, that claim deserves little credence. It is clear that whatever is stated aloud, Coach Martin expects her cross-country athletes to run indoor and outdoor track. (Recall Tracy Flynn's testimony about the cross-country athlete who came to her with concerns about the consequences she might face if she quit the indoor track team.) And in any event, the cross-

country runners would train in three seasons even if they were not rostered on the track and field teams. Under NCAA rules, they could even compete in a limited number of track meets. The teams practice together during the entire school year, and in the absence of the NCAA-required practice records it is impossible to tell who practiced regularly or what she practiced. The evidence does not permit the Court to find that any cross-country runner who did not actually compete in indoor or outdoor track received any additional tangible or intangible benefit from her membership on the indoor and/or outdoor track teams. Multiple-counting such athletes cannot be justified.

Nothing of significance has yet changed in Quinnipiac's women's running program. For all of the reasons that the court refused in 2010 to multiple-count cross country runners who did not actually compete in indoor or outdoor track, it should do the same today.

V. OTHER COUNTING ISSUES

Plaintiffs submit that the evidence demonstrates the existence of several other issues affecting the reliability of Quinnipiac's count of participants, including the following:

(a) The definition of "participant" relied upon to a significant degree by both parties requires, *inter alia*, that an athlete be "participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season" in order to be counted. But Quinnipiac cannot establish with reliability the numbers of student athletes who qualify as participants on its athletic teams because it failed to keep records of which athletes practiced regularly, despite clear NCAA requirements.

(b) The regulation also provides for counting athletes who *because of injury* do not receive varsity benefits, do not practice, or are not listed on a team's squad list, but who continue to receive athletic financial aid. Yet Defendant's expert counted as a participant any athlete who

received aid, regardless of the reason he or she did not meet the other criteria. He justified this approach by pointing to the "investment" the school makes in the athlete, without taking into account the fact that in many cases the athletes involved received only a fraction of a full scholarship, or the fact that allowing the student to retain the scholarship is a matter within the school's discretion.

(c) As Plaintiffs pointed out at the hearing, Quinnipiac's system of gathering roster information depends entirely on the veracity of the coaches, who, as was seen at the preliminary injunction hearing, have incentives to tell the administrators what they want to hear, while doing what they can to make their teams more competitive. Quinnipiac has not established record-keeping or auditing practices that would be likely to uncover either inadvertent or intentional inaccuracies.

VI. LEVELS OF COMPETITION

Quinnipiac fails the "competition test" set forth in the Title IX regulation and the 1979 Policy Interpretation. Significantly, the parties agree that Quinnipiac has an obligation "to provide equal opportunity . . . in the levels of competition available to members of both sexes." (Title IX Regulation, 45 CFR § 86.41) The parties dispute the meaning of the term "levels of competition." Defendant's approach – calculating that men's teams play 100% of their competitions at the Division I level and women's teams play 95.85% of their competitions at the Division I level, but concluding that this discrepancy is acceptable based upon a plucked-from-thin-air 5% "safe harbor" – is not consistent with the text of the Policy Interpretation, which requires that proportionally similar numbers of male and female *athletes* – not teams – receive equivalently advanced competition opportunities.

Plaintiffs' approach takes into account additional components of "levels of competition," recognizing that more advanced competition opportunities typically require and are accompanied by other types of institutional support. Plaintiffs' analysis of these factors is contained in Dr. Lopiano's report. Importantly, however, even if the Court accepts (as it should not) the proposition that the only factor that matters for purposes of the competition test is whether the competition occurs at the Division I, Division II, Division III, or club level, it remains the case that a significantly disproportionate number of Quinnipiac's female athletes compete with greater frequency below the Division I level than the University's male athletes. Quinnipiac discriminates against its female student-athletes in that it does not offer them an equal opportunity to compete at an equally advanced level.

VII. EQUITY AND REMEDY

. Equity and fairness require that the Court leave the injunction in place. Women have experienced years of discrimination in Quinnipiac's athletics program, which remains to a significant extent unremedied. There is little indication that Quinnipiac has made a real commitment to women's sports or to Title IX compliance; the evidence suggests, rather, the Quinnipiac is intent on creating the appearance of compliance without providing genuine equality of opportunity. Had the Plaintiffs not come forward in this action, there is no reason to think that Quinnipiac would have made even the meager improvements we have seen in the past three years.

Quinnipiac continues to use roster management as a tool for gaming the system. Although Mr. Thompson denies that the roster targets are "floors" for the women's teams, the

experience of the golf coach when he was short of his target belies that assertion. The Court should be skeptical of coaches' testimony that they are content with their targets.

It should be remembered, moreover, that this case arose because Quinnipiac sought to drop an existing women's sport at a time when it was not in compliance with Title IX. Such conduct should have consequences. Plaintiffs believe it would be fair under the circumstances to prevent Quinnipiac from dropping any women's sports until it is in compliance with Title IX in all of its aspects – specifically including the equal benefits/equal treatment requirements.

The volleyball team deserves an opportunity to compete without the threat of elimination over its head; no men's team has faced a similar threat since 2009, because Quinnipiac cannot eliminate a men's team and retain its Division I status. The threat of elimination makes recruiting difficult; the inability to recruit makes the team uncompetitive in the conference. In short, Quinnipiac's treatment of the volleyball team has made the experience much less than it should have been for the named plaintiffs and their teammates. The only effective remedy for this problem is an injunction of sufficient duration to allow several years of recruiting high school students without having to tell them that the program is subject to elimination at any time.

Plaintiffs further renew their request that the court appoint a neutral monitor to audit, on an ongoing, real-time basis, Quinnipiac's compliance with Title IX and to bring to the immediate attention of the court and the parties any questions or concerns about Quinnipiac's policies or practices.

Conclusion

For all of the foregoing reasons, Plaintiffs urge that Defendant's Motion to Lift Injunction be denied.

RESPECTFULLY SUBMITTED,
THE PLAINTIFFS

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of June, 2012, a copy of the foregoing *PLAINTIFFS' POST-HEARING MEMORANDUM* 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.

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