

10-3302-CV

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellees,

LESLEY RIKER, on behalf of her minor daughter,

Plaintiff,

v.

QUINNIPIAC UNIVERSITY,

Defendant -Appellant.

On Appeal from the United States District Court
for the District of Connecticut (Bridgeport)

BRIEF FOR *AMICI CURIAE* NATIONAL WOMEN'S LAW CENTER, ET AL. IN SUPPORT OF PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE

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STATEMENT AND INTERESTS OF *AMICI CURIAE*

Amici curiae National Women’s Law Center (“NWLC”), *et al.* seek leave to file this brief for the reasons set forth in the accompanying motion.¹ NWLC is a non-profit legal advocacy organization dedicated to the advancement and protection of women’s rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunities in education for girls and women through full enforcement of Title IX in all arenas, including interscholastic and intercollegiate athletics. NWLC is joined in filing this brief by twenty organizations that share a longstanding commitment to civil rights and equality in education for all students. The individual organizations are described in the attached Addendum. (Add. 1-6.)

SUMMARY OF ARGUMENT

Since its enactment in 1972, Title IX has played a vital role in breaking down the barriers for female students at all educational levels. By prohibiting sex discrimination in schools’ athletic programs, Title IX has enabled millions of girls and women across the country to participate in athletics and to reap the many benefits that result from playing sports.

¹ Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and Local Rule 29.1, *amici* state that: *amici* and their counsel authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity—other than *amici*, their members, and their counsel—made a monetary contribution to the preparation or submission of this brief.

But there is still a long way to go before Title IX's goal of equal educational opportunity is fully achieved. Even today, many schools fail to provide their female students with equal opportunities to participate in competitive sports. And unfortunately, some schools engage in deceptive practices—such as manipulating team rosters to inflate the numbers of women and deflate the numbers of men, and counting extracurricular activities as varsity sports—to give the illusion of compliance with Title IX. Careful scrutiny of schools' reporting practices is therefore essential to ensure that schools are providing women and girls with genuine and equal opportunities to participate in sports.

In this case, the district court properly held that Quinnipiac University (“Quinnipiac”) is violating Title IX by not providing equal opportunities for its female students to participate in sports. Quinnipiac has a long history of engaging in gender discrimination in its athletic program. Adding insult to injury, instead of adding genuine participation opportunities for its female students as required by Title IX, Quinnipiac chose to manipulate its team rosters to create the appearance of compliance.

Even after the district court found that Quinnipiac was violating Title IX and entered a preliminary injunction prohibiting the cutting of the women's volleyball team—which was the basis for the lawsuit—Quinnipiac failed to remedy the gender discrimination in its athletics program. Rather than create opportunities for

its female students to participate in competitive sports, Quinnipiac continues to seek to eliminate women's volleyball and claims compliance with Title IX by calling its new cheerleading squad a varsity team and counting its members as varsity athletes. It does this even though Quinnipiac's cheer squad is not providing athletic participation opportunities that are qualitatively equal to those provided by other varsity teams. Through these and other maneuvers, Quinnipiac attempts to increase its reported total number of female athletes without actually providing equal opportunities for its female students to participate in varsity sports. Quinnipiac's conduct must not be condoned, and the district court's decision should be upheld.

ARGUMENT

I. FULL ENFORCEMENT OF TITLE IX IS CRITICAL TO ENSURE EQUAL ACCESS TO THE SUBSTANTIAL BENEFITS THAT ARISE FROM PARTICIPATION IN SPORTS.

Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. §§ 1681 *et seq.*, bars sex discrimination in all schools that receive federal funding, including in their athletic programs. Over the past four decades, Title IX has opened the doors for girls and women to play sports, receive scholarships, and obtain other important benefits that flow from participating in sports. Nevertheless, Title IX's goal of equal opportunity in sports has yet to be realized. The disparities that still exist today reflect a collective emphasis on men's sports at

the secondary and college levels, and are compounded by manipulative practices employed by schools when they report the numbers of women participating in their athletic programs. Close scrutiny of reporting practices in school athletic programs is therefore needed to ensure equal opportunities for women and girls to participate in and benefit from sports.

A. Participating in Sports Provides Substantial Benefits for Women and Girls.

Participating in sports is highly beneficial for women and girls. There are, of course, substantial health benefits. Playing sports allows women and girls to maintain physical fitness by regularly engaging in physical exercise. Such activity significantly reduces a young woman's chance of developing heart disease, osteoporosis, breast cancer, and other health-related problems.² And women who play sports at a young age have a lower risk of obesity in later years.³

Women and girls also benefit psychologically from athletics. Young women who play sports have a higher level of self-esteem, a lower incidence of depression, and a more positive body image than young women who do not play

² National Women's Law Center, *The Battle for Gender Equity in Athletics in Elementary and Secondary Schools* 2-3 (Mar. 2011), available at <http://www.nwlc.org/resource/battle-gender-equity-athletics-elementary-and-secondary-schools> ("*Battle in Elementary and Secondary Schools*").

³ *Id.* at 3.

sports.⁴ Female athletes also develop the ability to work with a team, to perform under pressure, to set goals, and to take criticism.⁵ In addition, female student-athletes exhibit more responsible social behavior than their non-athletic peers: they are less likely to smoke or use drugs and have lower rates of teenage pregnancy.⁶

Playing sports also keeps students engaged in school. Young women who play sports are more likely to graduate from high school, have higher grades, and score higher on standardized tests than non-athletes.⁷ Also, the availability of athletic scholarships dramatically increases a young woman's ability to pursue a college education and to choose from a wider range of colleges and universities.⁸

⁴ *Id.* at 4; Women's Sports Foundation, *Her Life Depends on It: Sport, Physical Activity and the Health and Well-Being of American Girls* 22-23, 26 (May 2004), available at <http://www.womenssportsfoundation.org/home/research/articles-and-reports/mental-and-physical-health/her-life-depends-on-it> ("*Her Life Depends on It*").

⁵ See National Federation of State High School Associations, *The Case for High School Activities* 5, 15, 18 (2008), available at <http://www.nfhs.org/WorkArea/DownloadAsset.aspx?id=3288> ("*High School Activities*").

⁶ *Battle in Elementary and Secondary Schools*, *supra* note 2, at 3.

⁷ *High School Activities*, *supra* note 5, at 12.

⁸ National Women's Law Center, *The Battle for Gender Equity in Athletics in Colleges and Universities* 2 (Aug. 2011), available at http://www.nwlc.org/sites/default/files/pdfs/2011_8_battle_in_college_athletics_final.pdf ("*Battle in Colleges and Universities*").

Participating in sports is especially important for minority women and girls. Minority female athletes get better grades than their non-athlete peers.⁹ In particular, African-American female athletes are 15% more likely to graduate from college,¹⁰ and Hispanic female athletes are more likely to graduate from high school and attend college.¹¹

Sports participation also contributes to increased employment opportunities. A recent study concluded that an increase in female sports participation leads to an increase in women's labor force participation and greater female participation in previously male-dominated occupations, particularly high-skill, high-wage ones.¹² In addition, more than four out of five executive businesswomen played sports growing up, and the vast majority reported that the lessons they learned on the playing field contributed to their success in business.¹³ Female and minority

⁹ Women's Sports Foundation, *Minorities in Sports: The Effect of Varsity Sports Participation on the Social, Educational, and Career Mobility of Minority Students* 5 (Aug. 15, 1989), available at <http://www.eric.ed.gov/PDFS/ED312356.pdf> ("Minorities in Sports").

¹⁰ Crowe, *Graduation Rates Fall for Most Players*, L.A. Times, Nov. 21, 2000, available at <http://articles.latimes.com/2000/nov/21/sports/sp-55276>.

¹¹ *Her Life Depends on It*, *supra* note 4, at 31.

¹² Stevenson, *Beyond the Classroom: Using Title IX to Measure the Return to High School Sports* 23-24 (Nat'l Bureau of Econ. Research, Working Paper No. 15728, 2010), available at <http://www.nber.org/papers/w15728.pdf>.

¹³ *Battle in Colleges and Universities*, *supra* note 8, at 2.

athletes are also more likely to aspire to hold leadership positions later in life than their peers who are not athletes.¹⁴

B. Despite Important Advances Made Under Title IX, Women and Girls Have Not Yet Achieved Equity in Athletics.

Since its enactment in 1972, Title IX has led to impressive gains in the athletic opportunities available to women and girls in the United States. While fewer than 32,000 women participated in college sports prior to the enactment of Title IX, that number has expanded nearly six-fold to more than 182,000 women during the 2008-2009 academic year.¹⁵ Similarly, the number of girls participating in high school sports has increased more than ten-fold, from roughly 295,000 in 1972 to more than 3.2 million girls today.¹⁶ This increase in participation has not only allowed more women and girls to enjoy the substantial benefits that come from playing sports, but has also contributed to less negative stereotyping of female athletes and more professional opportunities for women in sports.

Despite these important advances over the past forty years, female students at all levels nationwide still have fewer opportunities to participate in sports than do male students, and they are often not treated equally when they do participate.

¹⁴ *Minorities in Sports*, *supra* note 9.

¹⁵ *Battle in Colleges and Universities*, *supra* note 8, at 1 & n.3.

¹⁶ *Battle in Elementary and Secondary Schools*, *supra* note 2, at 1.

At the high school level, girls represent roughly 50% of the students but only about 41% of all student-athletes.¹⁷ This means that approximately 1.3 million more boys than girls are playing sports.¹⁸ Female athletes often face inequitable treatment, with their teams frequently relegated to inferior facilities, assigned to disadvantageous times for practicing or competing, and, in this time of tight budgets, subject to greater cuts in the number of games scheduled in a season.¹⁹

The discrimination that girls face in high school unfortunately persists at the college level. For example:

- Colleges and universities provide fewer athletic participation opportunities to female students than to male students. Although women represent 53% of all undergraduate students at NCAA Division I schools, they are provided with only 43% of the opportunities to play sports at those schools.²⁰

¹⁷ National Federation of State High School Associations, *2009-10 High School Athletics Participation Survey* (2010), available at <http://www.nfhs.org/content.aspx?id=3282>.

¹⁸ *Battle in Elementary and Secondary Schools*, *supra* note 2, at 1.

¹⁹ *Id.* at 1-2.

²⁰ *True Grit and Title IX*, N.Y. Times, Feb. 16, 2011, available at <http://www.nytimes.com/2011/02/17/opinion/17thu3.html>; NCAA, *2005-06 NCAA Gender-Equity Report* 9, 22 (July 2008), available at <http://www.ncaa.org/wps/wcm/connect/0462e7804e0d4e469171f11ad6fc8b25/GenderEquityRept-Final.pdf?MOD=AJPERES&CACHEID=0462e7804e0d4e469171f11ad6fc8b25> (“*Gender Equity Report*”).

- Colleges and universities spend far less on women's sports than they do on men's sports. In 2005-2006, only 34% of the total money spent on athletics at NCAA Division I schools was allocated to women's sports.²¹
- Colleges and universities provide fewer athletic scholarship dollars to female athletes than to male athletes. In 2005-2006, only 45% of the total athletic scholarship dollars were allocated to female students at Division I schools—a difference that amounts to an average of over \$136 million more per year in athletic scholarships for male athletes than female athletes.²²
- Colleges and universities' recruiting efforts are primarily directed toward men's sports. In 2005-2006, only 32% of the total money spent on recruiting at Division I schools was used for women's sports.²³

As these statistics demonstrate, there is still much to be done to achieve true gender equality—in terms of participation opportunities, scholarships, and other benefits and support—in secondary school and college sports programs.

²¹ *Gender-Equity Report, supra* note 20, at 22.

²² *Id.*

²³ *Id.*

C. Careful Scrutiny of Reporting Practices in Athletic Programs Is Needed To Ensure Equal Opportunities for Women in Sports.

Each year, most colleges and universities must report the numbers of men and women participating in their athletic programs to the U.S. Department of Education pursuant to the Equity in Athletics Disclosure Act (“EADA”).²⁴ Unfortunately, many schools engage in practices designed to artificially inflate the reported numbers of female athletes at their schools in order to give the appearance of complying with Title IX. As the *New York Times* recently reported, “many institutions have resorted to subterfuge to make it look as if they are offering more spots to women.”²⁵ Some schools, for instance, report as female athletes for purposes of Title IX compliance: women who never practiced or competed and did not even know they were designated as members of a sports team, or women who quit a team immediately after the season started.²⁶

In addition, some schools artificially deflate their reported numbers of male athletes by adding men to teams only after a season starts so as not to be counted in the schools’ EADA reports. As a result of counting methods such as these that overstate the number of women and understate the number of men in an athletic

²⁴ See 20 U.S.C. § 1092. The reported data are available at <http://ope.ed.gov/athletics/>.

²⁵ Thomas, *College Teams, Relying on Deception, Undermine Gender Equity*, N.Y. Times, Apr. 25, 2011, available at <http://www.nytimes.com/2011/04/26/sports/26titleix.html?pagewanted=all>.

²⁶ *Id.*

program, schools may appear—on the surface—to comply with Title IX even though they are not actually providing equal participation opportunities for women.

As the district court found in this case, Quinnipiac is one of the schools that employs misleading counting practices to create the appearance of compliance with Title IX. During the 2007-2008 academic year, for example, Quinnipiac sought to inflate its reported number of female athletes by requiring a *minimum* number of athletes to participate on women's teams. (A-70-72.) This practice required coaches to increase the numbers of women listed on their team rosters to meet a gender floor, without providing meaningful participation opportunities for those women. (A-90-91.) At the same time, it set a ceiling for the number of athletes on men's teams. (A-67-68.) Another disturbing tactic involved Quinnipiac's manipulating of several rosters by adding athletes to men's teams and removing athletes from women's teams *after* reporting its participation numbers to the Department of Education. (A-66-72.)

In addition to these deceptive practices, Quinnipiac counted students who were listed as members of the women's cross-country, indoor track, and outdoor track teams two—or even three—times each when reporting the number of women participating in its athletic program. However, many of these women did not receive genuine participation opportunities on the indoor and outdoor track teams and therefore should not have been counted multiple times. (SPA-72-84.) As a

result of these double- and triple-counting practices, Quinnipiac further overstated the number of female athletes that it reported for purposes of showing Title IX compliance. (SPA-83-84.)

Left unchecked, schools that engage in deceptive counting practices may appear to comply with Title IX while, in reality, they continue to discriminate on the basis of sex. Such practices deprive women of equal athletic participation opportunities and seriously undermine the important goals of Title IX. Careful scrutiny of schools' counting and reporting practices is therefore necessary to ensure equality in providing students with genuine sports participation opportunities, as required by Title IX.

II. COMPETITIVE CHEER IS NOT A VARSITY SPORT FOR TITLE IX PURPOSES AT THIS TIME.

Quinnipiac claims that it is complying with Title IX by counting its recently-created competitive cheer squad as a varsity team. Competitive cheer is, without a doubt, an activity that requires athletic skill. In its current form, however, competitive cheer does not rise to the level of a varsity sport under Title IX because it lacks the organization, competition, and benefits that other varsity sports provide. Despite these shortcomings, many high schools and colleges have declared that competitive cheer and similar activities are varsity sports for Title IX purposes to boost their reported numbers of female athletes. But elevating activities such as competitive cheer to varsity sport status—before they actually

meet the standard for being a varsity sport—cuts against the goals of Title IX by allowing schools to create the appearance of equal opportunity without actually providing the same quality of opportunities to women as are provided to men.

A. Contrary to OCR’s Consistent Position, Many Educational Institutions and Organizations Have Inappropriately Attempted To Classify Cheerleading and Similar Activities as Varsity Sports for Title IX Purposes.

Activities such as cheerleading, drill team, and danceline have frequently found themselves at the center of disputes over how educational institutions should implement Title IX’s mandate of providing equal sports participation opportunities for men and women. Despite the athletic components that such activities may possess, they have, for good reason, always been viewed by the U.S. Department of Education’s Office for Civil Rights (“OCR”) as extracurricular activities rather than sports. (*See* A-1635; A-1638; Add. 7, 10-13.) Unlike other athletic activities that are considered sports, the primary purpose of these activities is not competition but rather the support of other teams. Nonetheless, many schools have attempted over the years to improperly characterize these activities as varsity sports to bolster the numbers of female athletes that they report for Title IX compliance purposes.

For example, in the mid-1990s, the Minnesota State High School League’s Representative Assembly considered recognizing danceline as a sport. Similar to cheerleading, danceline is an activity primarily directed at supporting other sports

teams—usually male teams—by performing during breaks at games. The effort was opposed by numerous organizations—including the Women’s Sports Foundation, the Minnesota Coalition for Girls Athletics, and the Minnesota Department of Children, Families and Learning—due to concerns that the change in status would be used to pave the way for Minnesota school districts to improperly include danceline members in their rosters of female athletes for Title IX purposes. On multiple occasions, inquiries were sent to OCR regarding Minnesota’s danceline program and related activities. Each time, OCR confirmed that danceline, cheerleading, drill team, and similar programs are presumed to be extracurricular activities that do not qualify as varsity sports for Title IX purposes. (A-1634-1638; Add. 7.)

Despite OCR’s clear position, similar efforts continued to be proposed and pursued elsewhere over the years. In the late 1990s, the Nebraska School Activities Association considered recognizing activities such as cheerleading, drill team, dance, and pompom squad as sports for Title IX purposes. And in the early 2000s, the Michigan High School Athletic Association attempted to establish competitive cheer as a sport for Title IX purposes. These educational institutions sought to count these activities as varsity sports in lieu of adding genuine sports participation opportunities for girls. Again, OCR consistently advised that such

programs are presumed to be extracurricular activities and not sports for Title IX compliance purposes. (Add. 10-13.)

B. While Competitive Cheer Is Athletically Demanding, It Is Premature To Count It as a Varsity Sport Under Title IX.

To bolster the effort to convert sideline cheerleading into a sport, some institutions such as Quinnipiac have created what they call “competitive cheer” squads. Rather than using their performances to support other teams, these teams compete against each other. Competitive cheer undoubtedly requires a high degree of athleticism from its participants, and it may eventually rise to a level where it will provide participation opportunities similar to those offered by other varsity sports counted under Title IX. That time, however, has not yet come, since an activity’s recognition as a sport for Title IX purposes does not hinge solely upon the athleticism involved.

In 2008, OCR promulgated a detailed set of guidelines to assist schools in determining whether an activity should be considered an interscholastic or intercollegiate sport under Title IX. (A-1640-1643.) The guidelines focus on how a particular activity is structured and administered as well as how its participants prepare and compete in relation to established varsity sports. They are designed to ensure that male and female students are being offered qualitatively equivalent athletic participation opportunities. Only when the new activity is similar enough to other recognized varsity sports in terms of the factors listed in OCR’s 2008 letter

does it rise to a level that warrants consideration as a sport for Title IX purposes. Otherwise, the activity cannot be counted and cannot be used to displace genuine sports participation opportunities that would otherwise be made available.

The fact that OCR—in applying these guidelines—has yet to recognize competitive cheer as a varsity sport for Title IX purposes is not to say that such activities cannot or should not be sponsored by schools. Quite the contrary. Many high schools and colleges across the country already sponsor such activities, and they can continue to do so for those who are interested. Schools may also choose to continue developing or altering competitive cheer until it meets the criteria for being counted as an interscholastic or intercollegiate sport.²⁷ Prematurely counting these activities as varsity sports, however, so that schools can count their participants for Title IX purposes amounts to little more than attempting to fit a square peg into a round hole and allows schools to provide their female students with fewer genuine sports participation opportunities. Such re-categorization to give the illusion of Title IX compliance does not serve the long-term interests of either the participants themselves or female athletes in general.

In recent years, several schools have created competitive cheer squads and labeled them as sports teams. The University of Maryland, for example, did so in

²⁷ As mentioned in Plaintiffs-Appellees' brief (at pages 39-40), several schools are seeking to establish "stunt and tumbling" as a new sport derived from cheer.

2004.²⁸ But Maryland's decision to elevate competitive cheer for women rather than offer other established varsity sports such as ice hockey and rowing was met with well-deserved skepticism and criticism, given that the competitive cheer squad did not participate in varsity-level competitions, was not organized by a national governing body, and has not been recognized by OCR as a sport.²⁹

In this case, Quinnipiac followed suit and prematurely elevated its competitive cheer squad to the varsity level in 2009 and then proceeded to count the squad's members on its roster of female athletes for Title IX compliance purposes. Through the proper application of OCR's detailed guidelines and the weighing of the factors contained therein, the district court correctly recognized that Quinnipiac's competitive cheer squad did not qualify as a varsity sport and therefore its members should not have been counted under Title IX. Specifically, the competitive cheer squad is easily differentiated from other varsity sports programs at Quinnipiac due to the lack of off-campus recruiting, the lack of structure and rules for competitions, the inconsistency in the level of competitor against which the squad competed, and a post-season championship that was open

²⁸ See Pennington, *Colleges; From Sideline to Stage, With Lift from Title IX*, N.Y. Times, Apr. 4, 2004, available at <http://www.nytimes.com/2004/04/04/sports/colleges-from-sideline-to-stage-with-lift-from-title-ix.html>.

²⁹ See *id.*; Thomas, *Born on Sideline, Cheering Clamors to Be Sport*, N.Y. Times, May 22, 2011, available at <http://www.nytimes.com/2011/05/23/sports/gender-games-born-on-sideline-cheering-clamors-to-be-sport.html?pagewanted=all> ("*Born on the Sideline*").

to anyone and lacked any sort of progressive playoff system or other qualifying criteria. (SPA-59-69.) These shortcomings are significant, as they go to the heart of what differentiates participation in a varsity sports program from other activities: the opportunity to field the best possible athletes against consistently high-caliber opponents under a structured and unchanging set of rules in the hope of qualifying for the post-season championships. These are the hallmarks of a varsity sport, and they define what it means to provide legitimate participation opportunities under Title IX. Without them, Quinnipiac's competitive cheer squad—despite its athletic demands—cannot be considered a varsity sport, and as the district court correctly concluded, Quinnipiac should not have counted its participants for Title IX compliance.

C. Elevating Competitive Cheer to Varsity Status at This Time Deprives Female Students of Genuine Sports Participation Opportunities.

Over the years, many educational institutions have attempted to count cheerleading and similar activities as sports as a means of increasing the reported number of female athletes at their schools. Such changes, however, often have little to do with any genuine interest in furthering the spirit of Title IX by creating equal sports participation opportunities for men and women. Rather, they are all too frequently driven by an interest in merely giving the *appearance* of Title IX compliance and avoiding the addition of genuine sports participation opportunities

for women. Indeed, as the American Association of Cheerleading Coaches & Advisors has noted, to include cheerleading for Title IX purposes would “only serve to count existing programs for compliance, without creating any new opportunities.” (Add. 9.)

Even worse, treating cheer squads as sports for Title IX purposes not only fails to create new sports participation opportunities for women, but in some cases may actually *decrease* the number of such opportunities at a school. That is precisely the situation in this case. Quinnipiac seeks to use its competitive cheer squad as a way to *eliminate* its women’s volleyball team. There is no dispute that the volleyball team, which has been competing at the varsity level for years, provides its members with genuine sports participation opportunities—as defined by the volleyball program’s structure, organization, team preparation, and competition—in a manner consistent with other varsity sports at the university. By trying to replace the women’s volleyball team with the unestablished competitive cheer activity, Quinnipiac seeks to deprive its female students of genuine sports participation opportunities while simultaneously claiming that its actions achieve

compliance with Title IX. Such gamesmanship cannot be tolerated if Title IX's goal of providing equal sports participation opportunities is to be achieved.³⁰

III. OCR'S 1996 CLARIFICATION PROVIDES CLEAR AND REASONABLE GUIDELINES FOR DETERMINING WHETHER A SCHOOL HAS PROVIDED "SUBSTANTIALLY PROPORTIONATE" PARTICIPATION OPPORTUNITIES.

In 1979, the then Department of Health, Education and Welfare issued a Policy Interpretation that set forth a three-part test for determining whether a school is providing equal participation opportunities as required by Title IX. The test provides three independent ways for a school to show that it is providing equal participation opportunities, one of which is to show that such opportunities are provided in numbers "substantially proportionate" to male and female enrollments. OCR's 1996 Clarification provides more detail for determining when sports participation opportunities are considered "substantially proportionate" to student enrollment. It makes clear that the focus is on the *numbers* of participation opportunities afforded (or not afforded) to male and female students, rather than the percentage of any gender-based disparity between participation and enrollment. The 1996 Clarification explains that, if a gender-based disparity exists, a school will not be considered to have achieved "substantial proportionality" if the number

³⁰ We do not suggest that Quinnipiac should abandon its competitive cheer program—it can continue to develop the program and improve the level of competition for its participants. But Quinnipiac cannot supplant an existing sport or fail to offer new varsity sport opportunities by pointing to its competitive cheer squad, which at this time does not meet the criteria for being counted as a sport under Title IX.

of additional participation opportunities that would be required to achieve proportionality is sufficient to sustain a viable team. As explained below, the guidance provided by OCR's 1996 Clarification is reasonable and practicable, consistent with the case law, and entitled to deference.

A. The 1996 Clarification Properly Focuses on the *Number* of Sports Participation Opportunities Afforded to Male and Female Students.

When assessing whether a school complies with Title IX by providing “substantially proportionate” participation opportunities, OCR “begins with a determination of the *number* of participation opportunities afforded to male and female athletes in the intercollegiate athletic program.” (A-1798-1799 (emphasis added).) Although it could be argued that there should be no difference between the percentages of athletes who are male/female and the percentages of enrolled students who are male/female, OCR recognizes that such exact proportionality would not always be a reasonable requirement. (A-1800.) For example, according to the 1996 Clarification, schools cannot be expected to achieve exact proportionality when there are natural fluctuations in enrollment or sports participation. (A-1800.) For this reason, OCR requires only “substantial proportionality.” (A-1798-1801.)

The 1996 Clarification explains how to determine whether a school has provided “substantially proportionate” sports participation opportunities. It

provides that if a gender-based disparity exists between participation and enrollment and it is not attributable to natural fluctuations, then OCR looks at the *number* of additional participation opportunities that would be required to achieve exact proportionality—which is the “participation gap.” (A-1800-1801.) If the participation gap is sufficient “to sustain a viable team,” then the school’s participation opportunities are *not* substantially proportionate. (A-1800-1801.) The 1996 Clarification additionally explains that OCR may consider “the average size of teams offered for the underrepresented sex” at the particular school in question. (A-1801.)

The 1996 Clarification provides two examples that make clear that the percentage gap translates into very different participation gaps depending on the size of a school’s athletic program. Thus, the participation gap is appropriately the relevant measure for determining whether a school satisfies “substantial proportionality”:

School	Total Athletes	Enrollment	Sports Participation	Percentage Disparity	Participation Gap	Substantially Proportionate?
A	600	52% women	47% women	5%	62 women	No
B	60	52% women	47% women	5%	6 women	Yes

(A-1801.) In the first example, Institution A is a university with 600 total athletes, where women make up 52% of the university’s student body but only 47% of its athletes. In the second example, Institution B is a university with only 60 total athletes, where women make up 52% of the university’s student body but only

47% of its athletes. In both cases, there is a 5% disparity between the percentage of students who are women and the percentage of athletes who are women.

The participation gap, however, is vastly different: it is 62 women in the first example and only 6 women in the second example. The 1996 Clarification concludes that Institution B has provided substantially proportionate participation opportunities because a gap of only 6 female students is not enough to field an average team. (A-1801.) In contrast, Institution A has *not* provided substantially proportionate opportunities because the participation gap, which consists of 62 female students, is enough to create an additional women's team. (A-1801.)

In both examples, the percentage disparity is the same, but the *number* of opportunities required to overcome the participation gap at Institution A is much larger. Therefore, OCR relies on the participation gap to determine whether a school is in fact providing equal opportunity to its female students and thus satisfying "substantial proportionality." To do otherwise and focus solely on the percentage difference would allow many schools to continue *not* to provide equal participation opportunities to women and girls.

1. OCR's 1996 Clarification Is Reasonable and Practicable.

The 1996 Clarification's focus on the participation gap in determining whether a school has provided "substantially proportionate" opportunities is both reasonable and practicable. As shown above, this approach makes sense because it

focuses on the number of *individuals* who have been deprived of opportunities to participate equally in athletics at a particular school. As a result, OCR's guidelines appropriately consider the real impact of a school's decisions about how to allocate participation opportunities between its male and female students.

The 1996 Clarification also takes into account that it is not reasonable to require a school to close its participation gap if that gap translates into only a small number of students. (A-1800-1801.) But at the same time, OCR makes clear that when the participation gap consists of a large enough number of students such that "a viable sport could be added," then the school is expected to accommodate those students. (A-1801.)

2. OCR's 1996 Clarification Is Entitled to Deference.

Both parties agree that OCR's regulations, policy interpretations, and letters should be followed in determining whether Quinnipiac violated Title IX. (SPA-54.) Moreover, OCR's interpretations of its own regulations regarding Title IX, including the 1996 Clarification, are owed deference. The Second Circuit, along with the many other Circuits that have addressed the question, has accorded deference to the Department of Education's Title IX regulations and policies, including the 1979 Policy Interpretation establishing the three-part test that includes the "substantial proportionality" prong as one means of compliance. *See McCormick ex rel. McCormick v. School Dist. of Mamaroneck*, 370 F.3d 275, 290-

92 (2d Cir. 2004); *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993) (“The degree of deference is particularly high in Title IX cases because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX.”); *Williams v. School Dist. of Bethlehem*, 998 F.2d 168, 170-71 (3d Cir. 1991); *Pederson v. La. State Univ.*, 213 F.3d 858, 877-79 (5th Cir. 2000); *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 615 (6th Cir. 2002); *Kelley v. Bd. of Trustees of Univ. of Illinois*, 35 F.3d 265, 270-72 (7th Cir. 1994); *Chalenor v. Univ. of North Dakota*, 291 F.3d 1042, 1046-47 (8th Cir. 2002); *Neal v. Bd. of Trustees of Cal. State Univ.*, 198 F.3d 763, 770-72 (9th Cir. 1999); *Roberts v. Colorado State Bd. of Agriculture*, 998 F.2d 824, 828 (10th Cir. 1993); *see also Equity in Athletics v. Dep’t of Education*, 504 F. Supp. 2d 88, 102-05 (W.D. Va. 2007), *aff’d*, 291 F. App’x 517 (4th Cir. 2008); *Nat’l Wrestling Coaches Ass’n v. Dep’t of Education*, 263 F. Supp. 2d 82, 94-96 (D.D.C. 2003), *aff’d*, 366 F.3d 930 (D.C. Cir. 2004).

Like the 1979 Policy Interpretation, the 1996 Clarification is a reasonable interpretation of OCR’s own regulations that is entitled to deference. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 150 (1991). Indeed, the other appellate courts that have addressed the 1996 Clarification have held that it deserves deference. *See, e.g., Chalenor v. University*

of North Dakota, 291 F.3d 1042, 1046-47 (8th Cir. 2002); *Mansourian v. Regents of Univ. of California*, 602 F.3d 957, 965 n.9 (9th Cir. 2010). There is no reason for the Second Circuit to deviate from that approach.

B. The District Court Correctly Applied the 1996 Clarification’s Guidelines in Finding That Quinnipiac Failed To Provide “Substantially Proportionate” Participation Opportunities.

In this case, the district court properly applied OCR’s guidelines in the 1996 Clarification and correctly determined that Quinnipiac failed to provide “substantially proportionate” sports participation opportunities for its female students.

First, the district court properly calculated the numbers of participation opportunities afforded to male and female athletes. The court determined that Quinnipiac provided legitimate participation opportunities to 233 female students and 167 male students. The court then recognized that those participation opportunities did not mirror the composition of the student body: 61.87% of Quinnipiac’s undergraduates were women but only 58.25% of its varsity athletes were women, resulting in a 3.62% disparity between participation and enrollment. (SPA-89.)

Next, the district court examined the cause of this disparity. The court determined that the disparity was not caused by natural fluctuations in enrollment or sports participation at Quinnipiac, or by “unexpected factors.” (SPA-90-91; *see*

also QU Br. 70.) Rather, the court observed, Quinnipiac had carefully managed its teams' rosters, taking "meticulous steps to ensure that its roster targets were met over the course of the year." (SPA-90-91.) The court thus found that the disparity in participation opportunities was caused by Quinnipiac's own roster management efforts and its decision to eliminate the women's volleyball team.

Finally, the district court determined that the disparity, which represented a participation gap of 38 female athletes, was sufficient to sustain a viable varsity team. The district court considered the average size of a women's varsity team to assess whether 38 athletes could sustain a viable team. Based on Quinnipiac's 2009-2010 roster targets, the court found that the mean size of a women's team was 22 members with a median size of 24. (SPA-91.) Furthermore, considering that Quinnipiac attempted to create a new competitive cheer team with 30 participants in order to satisfy its obligations under Title IX, 38 athletes would clearly be sufficient to sustain a varsity women's team. Accordingly, the district court properly concluded that Quinnipiac had not provided "substantially proportionate" participation opportunities for its female students.

Quinnipiac ignores the relevant legal standards and urges this Court to reject the district court's careful analysis, arguing instead that "substantial proportionality" should not be determined by considering whether the "participation gap" is large enough to create a team. (QU Br. 72.) Specifically,

Quinnipiac contends that the 3.62% disparity between participation and enrollment was, by itself, small enough to establish substantial proportionality. (QU Br. 67-69.) But this contention is contrary to the 1996 Clarification and is not supported by the cases relied upon by Quinnipiac.

First, Quinnipiac cites *Equity in Athletics, Inc. v. Department of Education*, 639 F.3d 91 (4th Cir. 2011), to suggest that a disparity of 2% must be substantially proportionate as a matter of law. (QU Br. 68.) But the court made no such holding. In that case, James Madison University (“JMU”) eliminated seven men’s teams and three women’s teams, which resulted in a 1.15% disparity between participation and enrollment (in favor of women). *Equity in Athletics*, 639 F.3d at 97.³¹ The court found that the plaintiff had failed to establish a Title IX violation, noting that the percentage disparity “was insufficient by itself to establish a violation under Title IX.” *Id.* at 110. The plaintiff did not present other evidence, such as the size of JMU’s athletic program or the average size of a varsity team at JMU, and did not calculate the number of students in the participation gap. *See id.* The court therefore affirmed the dismissal of the plaintiff’s claim because the

³¹ Although Quinnipiac refers to a 2% disparity in *Equity in Athletics* (QU Br. 68), the court’s opinion states that the record in that case actually showed a disparity of “not much above 1%.” *Equity in Athletics*, 639 F.3d at 110.

plaintiff chose to rely solely on the percentage difference rather than follow the guidance provided by the 1996 Clarification. *See id.*³²

Quinnipiac also relies on *Boulahanis v. Board of Regents*, 198 F.3d 633, 639 (7th Cir. 1999), to suggest that a 3% disparity must result in a finding of substantial proportionality. (QU Br. 68.) Again, however, the court made no such holding. In that case, Illinois State University eliminated its men's soccer and wrestling teams as part of its plan for achieving Title IX compliance. *Boulahanis*, 198 F.3d at 636. The plaintiffs, who were former members of those men's teams, alleged that the university violated Title IX on its face by considering the sex of the participants in deciding which teams to cut. *Id.* The court rejected that contention, finding that “[OCR’s] substantial proportionality rule must be read to allow the elimination of men’s athletic programs to achieve compliance with Title IX.” *Id.* at 638. The court never considered whether the resulting 3% disparity was substantially proportionate, since “[t]he plaintiffs-appellants [did] not contend that this disparity is outside the requirements of substantial proportionality.” *Id.* at 639.

Quinnipiac’s reliance on *Miami University Wrestling Club v. Miami University*, 302 F.3d 608 (6th Cir. 2002), to suggest that a 2% disparity established substantial proportionality, is also misplaced. (QU Br. 68-69.) The definition of

³² When referring to the *percentage* disparity, the court also observed that “DOE has not specified a magic number at which substantial proportionality is achieved.” *Equity in Athletics*, 639 F.3d at 110.

substantial proportionality was not even at issue in that case. Instead, the case involved Miami University's decision to cut its men's wrestling, tennis, and soccer teams in an effort to reach Title IX compliance. *Miami*, 302 F.3d at 609-10. The university's action resulted in a 2% disparity in which *women* athletes were still underrepresented. *Id.* at 611. Nevertheless, the plaintiffs, who were former members of the *men's* teams, alleged that the university's elimination of their teams violated Title IX. *Id.* at 615. The court rejected that argument, noting that "[t]he statute focuses on opportunities for the underrepresented gender." *Id.* At no point did the court consider whether a 2% disparity was substantially proportionate.

Finally, Quinnipiac argues that a "good faith effort" to comply with Title IX should justify a finding of substantial proportionality. (QU Br. 70-72.) But even if Quinnipiac had shown "good faith," that simply is not a factor under the "substantially proportionate" prong.³³ Tellingly, Quinnipiac does not cite any basis for importing a "good faith" standard into the analysis. Nor can it, since no judicial or administrative interpretation of Title IX has suggested that there is a "good faith" defense for a school that fails to provide "substantially proportionate" participation opportunities. Rather, as explained above, the 1996 Clarification

³³ The 1996 Clarification does take "good faith" into account, but only under the second part of the test, which is not relevant here. (*See* A-1793 ("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.").)

outlines reasonable and tangible standards for determining whether schools are providing athletic participation opportunities to their male and female students in numbers substantially proportionate to their respective enrollments. Quinnipiac's attempt to expand the "substantially proportionate" prong to include a subjective test of "good faith," therefore, must fail.³⁴

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully support affirmance of the district court's judgment.

Respectfully submitted,

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³⁴ Even if "good faith" were an appropriate factor to consider (which it is not), Quinnipiac can in no way show that its actions—including its deceptive roster management practices, its decision to eliminate the women's volleyball team, and its attempt to count its cheer squad as a sport—constituted good faith.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B), the brief contains 6,898 words.
2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(C), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

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ADDENDUM

Statements of Interest for *Amici Curiae*

American Association of University Women

For 130 years, the American Association of University Women (AAUW), an organization of 100,000 members, has been a catalyst for the advancement of women and their transformations of American society. In more than 1000 communities across the country, AAUW members work to promote education and equity for all women and girls, lifelong learning, and positive societal change. AAUW plays a major role in mobilizing advocates nationwide on AAUW's priority issues, and chief among them is gender equity in education. Therefore, AAUW supports the vigorous enforcement of Title IX, and believes that the expansion of athletic opportunities for girls and women must continue at both the high school and college levels, because it is important not only for the participants themselves but for the benefit of the greater community as well.

Asian American Justice Center

The Asian American Justice Center (AAJC), member of Asian American Center for Advancing Justice, is a national non-profit, non-partisan organization whose mission is to advance the human and civil rights of Asian Americans and build and promote a fair and equitable society for all. Founded in 1991, AAJC engages in litigation, public policy, advocacy and community education on a range of issues of importance to the civil rights community. Committed to supporting policies that enable individuals to advance in and make their fullest contributions to society, AAJC has a long-standing record of advocating for equal opportunity in the educational setting.

Business and Professional Women's Foundation

Business and Professional Women's Foundation (BPW Foundation) has been a leader in workplace equity issues for women since its founding in 1919. Today, BPW Foundation engages the public through research, education, policy, and knowledge to create systematic change – change that empowers individuals to transform workplaces for women and their families. Over its long history, BPW Foundation has a track record of supporting Title IX and was one of the first organizations to advocate for and lead in the fight for passage of Title IX in 1972. Title IX aligns with BPW Foundation's mission of addressing and solving workplace equity issues for women because equity must start in the education of our girls. Title IX addresses important areas that impact the development of girls including access and admission to higher education, career and technical education, athletics, and equity in math, science and technology education which all influence women's eventual success in the workplace. Therefore BPW Foundation fully supports strong enforcement of Title IX and all other civil rights laws pertaining to education.

California Women's Law Center

Founded in 1989, the California Women's Law Center ("CWLC") is dedicated to addressing the comprehensive and unique legal needs of women and girls. Through systemic change, CWLC seeks to ensure that opportunities for women and girls are free from unjust

social, economic, and political constraints. CWLC is committed to the eradication of gender discrimination in education and the enforcement of Title IX.

Connecticut Women's Education and Legal Fund

The Connecticut Women's Education and Legal Fund (CWEALF) is a non-profit women's rights organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF defends the rights of individuals in the courts, educational institutions, workplaces and in their private lives. Since 1973, CWEALF has provided legal education and advocacy and conducted research and public policy work to advance women's rights.

Feminist Majority Foundation

The Feminist Majority Foundation, a 501(c)(3) non-profit organization founded in 1987, is dedicated to the pursuit of women's equality, utilizing research and action to empower women economically, socially and politically. FMF advocates for the robust enforcement of Title IX and other laws prohibiting discrimination and advancing equality for women in educational institutions, and to that end has participated in numerous *amicus curiae* briefs involving equal education claims under Title IX.

Legal Aid Society – Employment Law Center

The Legal Aid Society – Employment Law Center (“LAS-ELC”) is a non-profit public interest law firm whose mission is to protect, preserve, and advance the rights of individuals from traditionally under-represented communities in cases involving access to education and employment non-discrimination. Since 1970, the LAS-ELC has represented plaintiffs in cases of special import to communities of color, women, recent immigrants, individuals with disabilities, and the working poor. The LAS-ELC's Project for Fair Play in Sports: Scoring Equality for Girls K-12 focuses on bringing claims on behalf of female athletes in low income communities who have been denied equal participation opportunities and equal treatment and benefits in violation of Title IX. Such cases include *Cruz v. Alhambra*, CV 04-1460 CV ABC (Mcx) (C.D. Cal.) and *Ollier v. Sweetwater* 07cv714-L (WMc) (S.D.Cal.). The LAS-ELC's interest in vigorously enforcing this country's antidiscrimination laws is longstanding.

Legal Voice

Legal Voice (formerly the Northwest Women's Law Center) is a regional non-profit public interest organization that works to advance the legal rights of all women through litigation, legislation, education and the provision of legal information and referral services. Since its founding in 1978, Legal Voice has been dedicated to protecting and securing equal rights for women, girls, and their families, including their rights to equality in education and athletics. Toward that end, Legal Voice has participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country, including numerous cases establishing girls' and women's rights to be free from sex discrimination in schools. Legal Voice continues to serve as a regional expert and leading advocate in litigation and in legislative efforts to protect equal educational opportunity for women and girls.

National Association for Girls and Women in Sport

Founded in 1899, the National Association for Girls and Women in Sport (NAGWS), mission is to raise awareness of how legal, political, and social justice issues impact ALL girls and women in sport. NAGWS is part of the American Alliance for Health, Physical Education, Recreation and Dance (AAHPERD) which has 22,000 active members. NAGWS works to promote equity for all women and girls in sport, through education, research, leadership development and programming, including the appropriate application and interpretation of Title IX

National Association of Commissions for Women

The National Association of Commissions for Women (NACW) is the only professional organization for women's commissions across the country. As such, it has grassroots contacts with hundreds of thousands of constituents who work on the issues impacting women and girls. NACW supports the *amicus* brief filed in the case of *Biediger et al. v. Quinnipiac*, believing firmly in not only Title IX to promote and enforce equal opportunities for women and girls, but in its fair and just application.

National Association of Social Workers, National and Connecticut Chapter

The National Association of Social Workers (NASW) is the largest professional membership organization of social workers in the world, comprised of nearly 145,000 social workers, with chapters located in all fifty states, the District of Columbia, the Virgin Islands, Guam, Puerto Rico, and internationally. The Connecticut Chapter of NASW has 3,279 members. Since its inception in 1955, NASW has worked to develop and maintain high standards of professional practice, to advance sound social policies, and to strengthen and unify the social work profession. Its activities in furtherance of these goals include promulgating professional standards, enforcing the NASW Code of Ethics, conducting research and publishing materials relevant to the profession, and providing continuing education. NASW recognizes that discrimination and prejudice directed against any group are not only damaging to the social, emotional, and economic well-being of the affected group's members, but also to society in general. NASW has long been committed to working toward the elimination of all forms of discrimination against women. The *NASW Code of Ethics* directs social workers to "engage in social and political action that seeks to ensure that all people have equal access to the resources, employment, services, and opportunities they require to meet their basic human needs and to develop fully" . . . and to "act to prevent and eliminate domination of, exploitation of, and discrimination against any person, group, or class on the basis of . . . sex." NASW policies support "vigorous enforcement of Title IX" and "developing practices and programs that empower women and girls, enabling them to resist gender stereotypes; . . . develop positive self-esteem and body image; . . . and challenge sexual double standards, so girls and women might develop the power and sense of entitlement that fuels self-advocacy." NATIONAL ASSOCIATION OF SOCIAL WORKERS, *Women's Issues*, SOCIAL WORK SPEAKS, 367, 371 (2009, 8th ed.). Accordingly, given NASW's policies and the work of its members, NASW has expertise that will assist the Court in reaching a proper resolution of the questions presented in this case.

National Council of Jewish Women

The National Council of Jewish Women (NCJW) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that the organization believes that "equal rights and equal opportunities for women must be guaranteed." Consistent with our Resolutions, NCJW joins this brief.

National Council of La Raza

The National Council of La Raza (NCLR) is a private, nonprofit, nonpartisan organization established in 1968 to reduce poverty and discrimination and improve life opportunities for Hispanic Americans. NCLR works toward this goal through two primary, complementary approaches: capacity-building assistance to support and strengthen Hispanic community-based organizations and applied research, policy analysis, and advocacy. NCLR believes that denying young women and girls the opportunity to participate in athletics denies them the physical and psychological benefits of playing sports, as well as the opportunity to develop leadership skills, and places them at a disadvantage in school and the workplace. Nationally, a little more than half (58%) of Hispanic girls graduate from high school. Ensuring a school environment which provides athletic and other opportunities on an equitable basis is critical to improving the educational experiences of millions of Hispanic schoolchildren.

National Education Association

The National Education Association (NEA) is a nationwide employee organization with approximately 3.2 million members, the vast majority of whom are employed by public school districts, colleges and universities. NEA is strongly committed to ending gender discrimination by educational institutions and firmly supports the vigorous enforcement of Title IX. To this end, the NEA Representative Assembly, its highest governing body, has adopted Resolution C-39 -- "Gender Equity in Athletic Programs," which provides:

The National Education Association believes that at all educational levels female and male students must have equal opportunity to participate in athletic programs. The Association urges that athletic funds for facilities, equipment, and remuneration of staff be allocated equally between female and male programs.

National Partnership for Women & Families

The National Partnership for Women & Families, founded in 1971, formerly the Women's Legal Defense Fund, is a national advocacy organization that develops and promotes public policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. The National Partnership has a longstanding commitment to equal opportunity for women and to monitoring the enforcement of antidiscrimination laws. The National Partnership has devoted significant resources to combating

sex and race discrimination in education and has filed numerous briefs *amicus curiae* to advance women's opportunities in education.

Sargent Shriver National Center on Poverty Law

The Sargent Shriver National Center on Poverty Law (Shriver Center) champions social justice through fair laws and policies so that people can move out of poverty permanently. Our methods blend advocacy, communication, and strategic leadership on issues affecting low-income people. National in scope, the Shriver Center's work extends from the Beltway to state capitols and into communities building strategic alliances. Through its Women's Law and Policy Project, the Shriver Center works on issues related to girls and women's access to education at all levels that provide fair and equal opportunities both in the classroom and on the playing fields. Discriminatory policies and practices have a negative impact on girls and young women's immediate and long-term educational and employment opportunities, and their economic security. Nondiscrimination in all aspects of education is vital if women are ever to obtain true economic well-being. The Shriver Center has a strong interest in the enforcement of Title IX and the eradication of unfair and unjust policies and practices that limit girls and young women's educational opportunities and serve as a barrier to economic equity.

Southwest Women's Law Center

The Southwest Women's Law Center is a nonprofit public interest organization based in Albuquerque, New Mexico. Its mission is to create the opportunity for women to realize their full economic and personal potential by: (i) eliminating gender bias, discrimination and harassment; (ii) lifting women and their families out of poverty; and (iii) ensuring that women have full control over their reproductive lives through access to comprehensive reproductive health services and information. The Center is active in monitoring Title IX compliance in New Mexico and worked to enact the School Athletics Equity Act in 2009.

Women's Law Center of Maryland

The Women's Law Center of Maryland, Inc. is a nonprofit, membership organization with a mission of improving and protecting the legal rights of women, particularly regarding gender discrimination, sexual harassment, employment law and family law. Through its direct services and advocacy, the Women's Law Center seeks to protect women and girls from discrimination and ensure that they have equal opportunity to participate in all academic, athletic and employment opportunities.

Women's Law Project

The Women's Law Project (WLP) is a non-profit public interest law firm with offices in Philadelphia and Pittsburgh, PA. Founded in 1974, the WLP's mission is to create a more just and equitable society by advancing the rights and status of all women throughout their lives. To this end, we engage in high-impact litigation, advocacy, and education. The WLP has a strong interest in the eradication of discrimination against women and girls in athletics and the availability of strong and effective remedies under Title IX of the Education Amendments of 1972. The WLP has worked throughout its history to eliminate sex discrimination in athletics

and education, representing student athletes, coaches, and other players in the athletic arena in their efforts to achieve equal treatment and equal opportunity, and pursuing public policy and educational initiatives aimed at realizing Title IX's goal of equality in athletics.

Women's Sports Foundation

The Women's Sports Foundation (WSF) is a nonprofit educational organization dedicated to expanding opportunities for girls and women to participate in sports and fitness and to creating an educated public that supports gender equity in sports. The WSF distributes over \$1 million per year in grants and scholarships to female athletes and girls' sports programs, answers over 100,000 inquiries per year concerning Title IX and other women's sports related questions, and administers award programs to increase public awareness about the achievements of girls and women in sports.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

APR 15 1995

April 26, 1995

Ms. Kathleen Corradino
President
Minnesota Coalition of Organizations
for Sex Equity in Education
1711 Laurel
St. Paul, Minnesota 55104

Dear Ms. Corradino:

Thank you for your letter dated January 9, 1995, in which you raised concerns about efforts in Minnesota to have danceline considered a sport, rather than an extracurricular support activity. The attachments to your letter document those efforts. You ask that the Office for Civil Rights (OCR) amend the guidelines regarding extracurricular support activities under Title IX of the Education Amendments of 1972 (Title IX) to include "danceline, skateline and other support activities." In the interim, you ask for an interpretation concerning these activities.

I apologize for the delay in responding to your letter. The delay was prompted by our need to thoroughly consider the concerns you raised, as well as those raised by others, regarding OCR's position on activities such as cheerleaders, drill teams, and dancelines, for purposes of Title IX compliance.

In 1975, OCR issued a memorandum to Chief State School Officers, Superintendents of Local Educational Agencies, and College and University Presidents, entitled "Elimination of Sex Discrimination in Athletic Programs." I am enclosing a copy of that memorandum for your reference. On page three, it provides that "drill teams, cheerleaders and the like" are covered under Title IX as extracurricular activities, rather than as part of the athletic program. OCR's policy and practice has been to include activities such as danceline, skateline, and pep squads under the "and the like" language of the 1975 document. OCR continues to consider these activities as extracurricular activities under Title IX.

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Page 2 - Ms. Kathleen Corradino

Thank you again for your letter, and your efforts to promote gender equity in athletics.

Sincerely,



Norma V. Cantú
Assistant Secretary
for Civil Rights

Enclosure

cc: Linda McGovern, Acting Regional Civil Rights Director,
Region V



AMERICAN ASSOCIATION OF CHEERLEADING COACHES & ADVISORS

P.O. Box 508
Cordova, TN 38018-0508
(901) 387-4300 Ext. 4595
1-800-533-6583
FAX (901) 387-4357

To: Mary Frances O'Shea
From: Jim Lord, Executive Director
Date: 8/26/98
Re: Position paper on cheerleading and Title IX

Ms. O'Shea,

I am the new Executive Director for the American Association of Cheerleading Coaches and Advisors. Our focus is on cheerleading safety and coaches' education and certification.

In looking through past newsletters, I noticed an excerpt from a position paper by the OCR concerning cheerleading and Title IX compliance. If possible, could you please send a copy of the full paper to me at the above address?

Our position on cheerleading is that it is a highly athletic activity, but that its main function is to promote school spirit through crowd leadership and support of the athletic teams. Competition is available, but is certainly not the primary purpose of school cheerleading squads. It is also our opinion that acceptance as a Title IX activity will not enhance cheerleading nor increase athletic opportunities for females. Quite the opposite, it will only serve to count existing programs for compliance, without creating any new opportunities.

Thank you for sending your position paper. If the AACCA can be of any further assistance to you, please give me a call at 800-533-6583.

The AACCA is a national not-for-profit association dedicated to providing education and safety services to cheerleading coaches and advisors.

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS
Midwestern Division
Kansas City Office



(816) 880-4200
FAX: (816) 891-0644
TDD: (816) 891-0582

10220 North Executive Hills Boulevard, 8th Floor
Kansas City, Missouri 64153-1367

OCT 13 1998

Dr. Ron Osborn
2425 South 41st Street
Omaha, Nebraska 68105-2905

Ref: Title IX and NSAA

Dear Dr. Osborn,

Thank you for your September 25, 1998 letter. In this letter, you expressed concern that the Nebraska School Activities Association (NSAA) has a proposal in front of its legislative body to implement regulations that make cheerleading, drill-teams, dance, or pompon squads count as athletic opportunities for females "as a basis for compliance "

Enclosed please find documentation outlining the Office for Civil Rights' (OCR) policy on cheerleading, drill teams, etc., as athletic teams for females. Please be advised that the participation and membership policies for cheerleading, drill teams, etc., are not included in athletics investigations, but are investigated under 34 C.F.R. § 106.31 of the regulation implementing Title IX of the Education Amendments of 1972 (education programs and activities). Allegations of sex discrimination in the provision of such organizations in the support of athletics teams are investigated under the program component of publicity (34 C.F.R. § 106.41(c)(10)). Therefore, OCR does not mandate how any State or local educational agency classifies cheerleading, drill teams, and other similar activities, for their own purposes. However, OCR would not consider such activities to qualify as athletics for determining compliance under the Title IX regulation. Rather, OCR's practice has been to include such activities as extracurricular activities.

If you have any further questions regarding this matter, please contact Kristin Kandt, Attorney, at (816) 880-4247 (voice), or (816) 891-0582 (telecommunications for the deaf)

Sincerely,

A handwritten signature in cursive script that reads "Jody A. Van Wey".

Jody A. Van Wey
Case Resolution Director

Our mission is to ensure equal access to education and to provide educational excellence throughout the Nation through the vigorous enforcement of civil rights

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2346



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
BANK ONE CENTER, SUITE 750
600 SUPERIOR AVENUE, EAST
CLEVELAND, OHIO 44114-2611

OCT 18 2001

Ms. Suzanne M. Martin
Assistant Director
Michigan High School Athletic Association
1661 Ramblewood Drive
East Lansing, Michigan 48823-7392

Dear Ms. Martin:

This letter is in response to your correspondence requesting our assistance in determining whether competitive cheer as operated in the state of Michigan may be considered a sport under Title IX. The Office for Civil Rights (OCR) enforces Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. § 1681 *et seq.*, and its implementing regulation at 34 C.F.R. Part 106. OCR is happy to provide technical assistance regarding compliance with Title IX so that organizations may conduct their own assessment of their programs. The Title IX implementing regulation states in relevant part: "[n]o 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" 34 C.F.R. § 106.41(a).

Historically, OCR has followed the policy first announced in the September 1975 letter to Chief State School Officers, Superintendents of Local Educational Agencies, and College and University Presidents, which stated, in part, that ". . . drill teams, cheerleaders and the like, which are covered more generally as extracurricular activities . . . are not part of the institution's 'athletic program' within the meaning of the [Title IX] regulation." Notwithstanding this general presumption, OCR's compliance approach is to assess each activity on a case-by-case basis. We take into account, just as you did in your assessment, the five factors and other relevant information identified in OCR's letter of April 11, 2000, to David Stead, Executive Director of the Minnesota State High School League (copy enclosed for your immediate reference).

In your letter, you assert that competitive cheerleading in Michigan "meets all reasonable criteria for a sport." In support of this conclusion, you submitted twelve exhibits along with your narrative description of competitive cheerleading in Michigan, including information about specific circumstances in

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certain schools. This material tends to support in several ways the characterization of MHSAA-sanctioned competitive cheerleading as a Title IX sport in that it specifies the season of sport, identifies the eligibility requirements and standardized judging criteria used by registered officials, notes the availability of some state and conference championships and scholarship monies, and certifies that this activity is recognized as a sport by MHSAA and interscholastic athletics conferences within Michigan.

In addition to the material you submitted, we recommend that, before you conclude that competitive cheerleading in the state of Michigan generally satisfies the Title IX standard for a sport, you look more closely at the actual operation of competitive cheerleading programs at your member schools and consider information from a broader selection of high school athletic programs. The following areas would be relevant for your consideration:

- **Relationship of competitive cheerleading to high school athletics departments and other sports:** If you intend that MHSAA-sponsored competitive cheer should be considered as a sport throughout the state, what information does your organization collect or maintain indicating that competitive cheer is generally administered by high school athletic offices in schools throughout the state, other than the information you provided about the Michigan Center High School. Alternatively, if you contend that MHSAA-sponsored competitive cheer should be considered as a sport within and among certain school districts and not necessarily statewide, what information, other than that relating to the Michigan Center High School, supports that position? What information does your organization collect or maintain that demonstrates that competitive cheer is included within districts' athletics department budgets for uniforms, equipment, supplies, coaches' pay, and other support given by the districts to their interscholastic athletic teams?
- **Team selection, preparation, and competition:** You submitted information indicating that Michigan Center High School conducts try-outs for prospective competitive cheer team members. Included in your information is a statement that students must submit three teacher recommendations and a typed statement of purpose. What is the rationale for requiring teacher recommendations and a statement of purpose and are such items commonly required by all Michigan high schools with respect to selection for competitive cheer and other sports? Do these requirements at Michigan Center High School reflect a practice statewide of holding a single try-out/selection process for both competitive cheer and sideline cheer? What information do you collect or maintain regarding the selection process in other school districts? How do the prescribed minimum number and average number of opportunities for competition during the competitive cheer season compare with those prescribed in other sports? Do participants in competitive cheer have their own practice schedule, separate from participants in sideline cheer? Your letter identified that certain school districts in the state of Michigan participate in conference championships held by the Wolverine Conference of Southwest Lower Michigan and the Big 8 Southwestern Michigan Athletic Conference. Are there other conferences in which other school districts in the state participate?

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- **Relationship between competitive and sideline cheerleading:** Does the MHSAA regulate sideline cheerleading? What are the similarities and differences between competitive cheer and sideline cheer competitive events? Are separate try-outs and practice sessions held for competitive and sideline cheer? To what extent has the National Federation of High School Associations Spirit Rules Book been adopted by the MHSAA and what is the purpose for its use?
- **Scholarships and recognition:** In your supporting documents you identified the eligibility requirements of competitive cheer participants for varsity letters and similar awards. Are these eligibility requirements applicable for districts other than those identified in the supporting documents?

The specific comments provided above are intended to assist you in identifying the information that we believe is pertinent in making your assessment of whether competitive cheer constitutes a sport for Title IX purposes. Once you have collected this information, we would be happy to provide further technical assistance. Please do not hesitate to contact me at (216) 522-4970 if you have any questions about this letter or if I may otherwise be of assistance.

Sincerely,

/s/

Harry A. Orris
 Director, Cleveland Office
 Midwestern Division

Enclosure



Last update October 18, 2001 (ts)