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A SPORTING CHANCE: *BIEDIGER V. QUINNIPIAC UNIVERSITY* AND WHAT CONSTITUTES A SPORT FOR PURPOSES OF TITLE IX

JAMES J. HEFFERAN, JR.*

I. INTRODUCTION

At the 2012 Summer Olympics in London, women comprised over half the members of the United States Olympic team.¹ Female athletes accounted for fifty-eight medals, which represented fifty-six percent of the United States' total medal count of 104.² These totals stand in stark contrast to the 1972 Summer Olympics in Munich, where American women won only twenty-two medals, representing twenty-three percent of the American total.³ What accounts for the remarkable growth in female athletic participation and success over this forty-year period? The obvious answer is that this period coincides with the enactment of Title IX of the Education Amendments of 1972.⁴

"Title IX . . . is widely recognized as the source of [the] vast expansion of athletic opportunities for women in the nation's schools and universities"⁵

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1. MATTHEW J. MITTEN ET AL., SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS 771 (3d ed. 2013).

2. *Id.*

3. *Id.*

4. *See generally* 20 U.S.C. § 1681 (2016).

5. *Mansourian v. Regents of the Univ. of Cal.*, 602 F.3d 957, 961 (9th Cir. 2010); *see also McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 286 (2d Cir. 2004) ("The participation of girls and women in high school and college sports has increased dramatically since

In 1972, the year Title IX was enacted, only 30,000 women participated in collegiate varsity or recreational sports.⁶ By the 2011–2012 school year, 195,657 women participated in intercollegiate athletics sponsored by the National Collegiate Athletic Association (NCAA).⁷

Not only has Title IX “had a tremendous impact on women’s opportunities in intercollegiate athletics,” it has also “enabled women to reap the myriad benefits of participation in athletic programs.”⁸ Courts have long recognized the manifold benefits student-athletes derive from participating in sports:

For college students, athletics offers [sic] an opportunity to exacuate [sic] leadership skills, learn teamwork, build self-confidence, and perfect self-discipline. In addition, for many student-athletes, physical skills are a passport to college admissions and scholarships, allowing them to attend otherwise inaccessible schools. These opportunities, and the lessons learned on the playing fields, are invaluable in attaining career and life successes in and out of professional sports.⁹

Ironically, given its significant contributions to female athletic participation, Title IX itself does not specifically mention athletics. Rather, the statute “require[s] the promulgation of regulations to achieve gender equity in educational opportunities.”¹⁰ The resulting regulations require schools to “provide equal athletic opportunity for members of both sexes,” through “selection of sports and levels of competition [which] effectively accommodate the interests and [abilities] of members of both sexes[.]”¹¹ Thus, whether a school complies with Title IX by offering equal athletic opportunities to women turns in large part on whether the sports offered effectively accommodate the interests of female students.

Title IX was enacted.”).

6. MITTEN ET AL., *supra* note 1, at 772.

7. *Id.* at 775. Throughout the 1970s, women athletes competed at the intercollegiate level under the auspices of the Association for Intercollegiate Athletics for Women (AIAW). *Id.* at 772. “In 1980, however, the NCAA began offering national championships for women” and effectively absorbed the women’s athletics programs at its member institutions. *Id.* Following an unsuccessful antitrust suit against the NCAA, the AIAW disbanded. *Id.*

8. Nat’l Wrestling Coaches Ass’n v. U.S. Dep’t of Educ., 263 F. Supp. 2d 82, 93–94 (D.D.C. 2003).

9. Cohen v. Brown Univ., 991 F.2d 888, 891 (1st Cir. 1993).

10. MITTEN ET AL., *supra* note 1, at 773.

11. 34 C.F.R. § 106.41(c)(1) (2016).

This, of course, begs the question of what exactly constitutes a sport for purposes of the Title IX analysis. Surprisingly, there has been little guidance from either courts or those individuals and agencies responsible for enforcement of Title IX as to which athletic activities are considered sports for Title IX compliance purposes.¹² This is not merely an idle academic exercise. As discussed in more detail later in the Article, adopting an overly-broad definition of “sport” runs the risk of “watering-down” women’s sports for purposes of Title IX compliance.¹³ In 2008, the Office of Civil Rights (OCR) of the United States Department of Education (DOE) issued a policy letter that, for the first time, directly addressed the question of what will be considered a “sport” for purposes of Title IX compliance.¹⁴ Subsequently, in a series of decisions issued between 2010 and 2013 in the case of *Biediger v. Quinnipiac University*, the United States District Court for the District of Connecticut and the United States Court of Appeals for the Second Circuit became the first federal courts to consider the analysis set forth in the 2008 OCR Letter and to attempt to define “sport” within the context of Title IX.¹⁵

Part II of this Article explores in some detail the historical background of Title IX. Particular attention is paid to the level of deference given by courts to the regulations and various other pronouncements on the subject issued by the relevant government agencies and individuals tasked with enforcing Title IX. Part III analyzes the three *Biediger* decisions that directly address the issue of what constitutes a “sport” for purposes of Title IX. Part IV discusses the implications of the *Biediger* decisions for future Title IX litigation. Finally, this Article concludes that the *Biediger* decisions represent an appropriate balancing of the relevant factors and provide an important bulwark against the temptation of schools to take short cuts toward Title IX compliance in these challenging economic times.

12. Ephraim Glatt, *Defining “Sport” Under Title IX: Cheerleading, Biediger v. Quinnipiac University, and the Proper Scope of Agency Deference*, 19 SPORTS L.J. 297, 298 (2012) (noting the long-running debate among lawyers and academics regarding this issue).

13. Erin E. Buzuvis, *The Feminist Case for the NCAA’s Recognition of Competitive Cheer as an Emerging Sport for Women*, 52 B.C. L. REV. 439, 464 (2011).

14. See Stephanie Monroe, Assistant Secretary for Civil Rights, *Dear Colleague Letter*, OFF. FOR CIV. RTS., U.S. DEP’T EDUC. (Sept. 17, 2008), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20080917.pdf>; see also Glatt, *supra* note 12, at 308.

15. See generally *Biediger v. Quinnipiac Univ.*, 691 F.3d 85 (2d Cir. 2012); *Biediger v. Quinnipiac Univ.*, 928 F. Supp. 2d 414 (D. Conn. 2013); *Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62 (D. Conn. 2010). The United States District Court for the District of Connecticut also issued another decision granting the plaintiffs a preliminary injunction, an opinion beyond the scope of the present analysis. See *Biediger v. Quinnipiac Univ.*, 616 F. Supp. 2d 277, 298 (D. Conn. 2009).

II. HISTORICAL BACKGROUND

A. *Enactment of Title IX*

“Title IX was Congress’s response to significant concerns about discrimination against women in education.”¹⁶ The hearings leading up to the enactment of Title IX elicited over 1,200 pages of testimony, “documenting ‘massive, persistent patterns of discrimination against women’ in colleges and universities.”¹⁷ Congress intended the statute to serve a dual purpose: “‘to avoid the use of federal resources to support discriminatory practices,’ and ‘to provide individual citizens effective protection against those practices.’”¹⁸ Section 901 of Title IX provides, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”¹⁹

Interestingly, given the topic with which Title IX has subsequently become most associated, the language of the statute itself makes no mention of athletics. Rather, Title IX constitutes “a broad prohibition of gender-based discrimination in all programmatic aspects of educational institutions.”²⁰ Congress designed “[t]he statute [to] sketch[] wide policy lines, leaving the details to regulating agencies.”²¹ Moreover, because Congress adopted Title IX as a floor amendment, Title IX lacks the usual committee report and other secondary legislative materials, which led to confusion regarding the statute’s scope.²² Indeed, “[t]he issue of discrimination against women in athletics programs of schools was mentioned only briefly during the congressional debates leading up to Title IX’s enactment.”²³ In light of the uncertainty over

16. *Neal v. Bd. of Trs.*, 198 F.3d 763, 766 (9th Cir. 1999).

17. *Nat’l Wrestling Coaches Ass’n v. U.S. Dep’t of Educ.*, 263 F. Supp. 2d 82, 87 (D.D.C. 2003) (quoting 118 Cong. Rec. 5804 (daily ed. Feb. 28, 1972) (statement of Sen. Bayh)) (citing Education Amendments of 1972, Pub. L. No. 92–318, §§ 901–05, 86 Stat. 373, 373–75 (1972)).

18. *Id.* (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979)).

19. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2016). The provision “is patterned after Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.” *Nat’l Wrestling Coaches Ass’n*, 263 F. Supp. 2d at 87 (citing Education Amendments § 901; *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 514, 529 (1982); 118 Cong. Rec. 5802, 5803, 5807 (daily ed. Feb. 28, 1972) (statement of Sen. Bayh)).

20. *Cohen v. Brown Univ.*, 991 F.2d 888, 894 (1st Cir. 1993).

21. *Id.* at 893.

22. *Id.*; Glatt, *supra* note 12, at 300.

23. *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 286 (2d Cir. 2004); *see also Cohen*, 991 F.2d at 893 (noting “there were apparently only two mentions of intercollegiate athletics during the congressional debate”).

whether athletics fell within the scope of Title IX, “for the first few years after it was passed, no court applied Title IX to find discrimination in an educational athletic setting.”²⁴

B. The 1975 Regulations

In 1974, Congress made it clear that Title IX encompassed athletics when it enacted section 844 of the Education Amendments of 1974 (known as the Javits Amendment), which provided that

The Secretary of . . . H[ealth,] E[ducation, and] W[elfare] shall prepare and publish . . . proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs *which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.*²⁵

“On June 20, 1974, [the Department of] H[ealth,] E[ducation, and] W[elfare] (HEW) published its proposed regulations implementing Title IX,” which included provisions specifically “address[ing] [Title IX]’s application to athletic programs.”²⁶ HEW followed the requisite notice and comment procedures and, “[a]fter considering over 9,700 comments, suggestions, and objections . . . published [its] final regulations implementing Title IX on June 4, 1975.”²⁷ President Ford signed the regulations on May 27, 1975, after which they were submitted to Congress for review pursuant to the General Education Provisions Act (GEPA).²⁸ Congress subsequently held six days of hearings on the regulation and did not disapprove them within the forty-five days allowed

24. Glatt, *supra* note 12, at 300–01.

25. OFFICE FOR CIVIL RIGHTS, A POLICY INTERPRETATION: TITLE IX AND INTERCOLLEGIATE ATHLETICS (1979) [hereinafter POLICY INTERPRETATION] (alteration in original) (emphasis added); *see also* *Equity in Athletics, Inc. v. Dep’t of Educ.*, 639 F.3d 91, 95 (4th Cir. 2011); *McCormick*, 370 F.3d at 287; *Kelley v. Bd. of Trs.*, 35 F.3d 265, 268 (7th Cir. 1994); *Nat’l Wrestling Coaches Ass’n v. U.S. Dep’t of Educ.*, 263 F. Supp. 2d 82, 88 (D.D.C. 2003); Glatt, *supra* note 12, at 301.

26. *Equity in Athletics, Inc.*, 639 F.3d at 95 (citing 39 Fed. Reg. 22,227, 22,236 (June 20, 1974)); *see also* *McCormick*, 370 F.3d at 287.

27. *Equity in Athletics, Inc. v. Dep’t of Educ.*, 675 F. Supp. 2d 660, 664 (W.D. Va. 2009); *see also* *Equity in Athletics*, 639 F.3d at 95; *McCormick*, 370 F.3d at 287.

28. POLICY INTERPRETATION, *supra* note 25.

under GEPA; accordingly, the regulations became effective on July 21, 1975.²⁹

The regulation applying Title IX to the athletic programs of educational institutions receiving federal funding remains effective today and “is the only regulation that discusses the application of Title IX to athletics.”³⁰ It states as follows:

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.³¹

While this language appears to mandate co-ed teams, the regulation also recognizes that schools may offer separate teams for each gender as long as “either the sport in which the team competes is a contact sport or the institution offers comparable teams in the sport to both genders.”³² However, regardless of whether or not a school offers gender-segregated teams, “[a] recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes.”³³ The regulation goes on to provide a non-exhaustive list of ten factors relevant to the determination of whether a school is providing equal athletic opportunities to members of both sexes:

In determining whether equal opportunities are available the Director will consider, among other factors:

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice time;
- (4) Travel and per diem allowance;
- (5) Opportunity to receive coaching and academic

29. *Id.*; *McCormick*, 370 F.3d at 287; *Equity in Athletics*, 675 F. Supp. 2d at 664.

30. Glatt, *supra* note 12, at 302; *see also Nat'l Wrestling Coaches Ass'n*, 263 F. Supp. 2d at 88.

31. 34 C.F.R. § 106.41(a) (2016).

32. *Cohen v. Brown Univ.*, 991 F.2d 888, 896 (1st Cir. 1993); *see also* § 106.41(b).

33. § 106.41(c).

- tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services;
- (10) Publicity.³⁴

Title IX claims based on the failure of an institution to provide equal athletic opportunities to members of both sexes fall into two categories based on the factors listed in the regulation. “Effective accommodation” claims derive from the first factor and concern “a school’s allocation of athletic participation opportunities to its female and male students.”³⁵ “Equal treatment” claims, on the other hand, focus on the remaining factors, which have been interpreted to require “equivalence in the availability, quality and kinds of other athletic benefits and opportunities provided male and female athletes,”³⁶ and typically “allege sex-based differences in the schedules, equipment, coaching, and other factors affecting participants in athletics.”³⁷ Regardless of whether a school provides equal athletic benefits to both sexes in the sports offered, the school may still be in violation of Title IX based solely on its failure to effectively accommodate the interests and abilities of student-athletes of both sexes under the first factor.³⁸

Courts have accorded the 1975 Regulations substantial deference. Where Congress entrusted the administration of a statute to an executive agency and explicitly left a gap in the statute for the agency to fill, the United States Supreme Court has deemed this to be “an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.”³⁹ “Such . . . regulations are given controlling weight unless they are arbitrary,

34. *Id.*; see also *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 92 (2d Cir. 2012).

35. *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 291 (2d Cir. 2004); see also *Biediger*, 691 F.3d at 92.

36. *Mansourian v. Regents of the Univ. of Cal.*, 602 F.3d 957, 964 (9th Cir. 2010) (citation omitted).

37. *Id.* at 965; see also *McCormick*, 370 F.3d at 291. Most appellate decisions in the Title IX context involve effective accommodation claims, as opposed to equal treatment claims. *Id.*

38. *Mansourian*, 602 F.3d at 965; *Kelley v. Bd. of Trs.*, 35 F.3d 265, 268 (7th Cir. 1994); Glatt, *supra* note 12, at 302.

39. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

capricious, or manifestly contrary to the statute.”⁴⁰ Courts have consistently found that Congress explicitly delegated to HEW (and, ultimately, DOE) the task of issuing “regulations containing ‘reasonable provisions considering the nature of particular sports’” “with respect to ‘intercollegiate athletic activities’” under Title IX.⁴¹ Moreover, the ensuing regulations were held to be “neither ‘arbitrary . . . [n]or manifestly contrary to the statute.’”⁴² Therefore, the 1975 Regulations have received “considerable deference.”⁴³

C. The 1979 Policy Interpretation

Unfortunately, while the 1975 Regulations clarified whether Title IX applied to athletics, they “did little to clarify [many of the] issues arising from that application.”⁴⁴ Over the next three years, HEW “received nearly 100 complaints alleging discrimination in athletics against more than 50 institutions of higher education.”⁴⁵ In the course of investigating these complaints and attempting to answer questions from educational institutions, HEW decided it needed to further explain the regulations “so as to provide a framework within which the complaints can be resolved, and to provide institutions of higher education with additional guidance on the requirements for compliance with Title IX in intercollegiate athletic programs.”⁴⁶

40. *Id.* at 844. Indeed, the Supreme Court “ha[s] long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.” *Id.* (citation omitted).

41. *Kelley*, 35 F.3d at 270 (quoting Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484, 612 (1974)); *see also McCormick*, 370 F.3d at 288; *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993); *Equity in Athletics, Inc. v. Dep’t of Educ.*, 675 F. Supp. 2d 660, 675 (W.D. Va. 2009).

42. *Kelley*, 35 F.3d at 270 (alteration and omission in original) (quoting *Chevron U.S.A., Inc.*, 467 U.S. at 844).

43. *Id.*; *Nat’l Wrestling Coaches Ass’n v. U.S. Dep’t of Educ.*, 263 F. Supp. 2d 82, 96 (D.D.C. 2003); *see also Cohen*, 991 F.2d at 895 (“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.”); Glatt, *supra* note 12, at 312 (stating that the regulations “are awarded substantial deference under *Chevron*”); *cf. Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62, 92 (D. Conn. 2010) (finding the 1975 Regulations “a reasonable interpretation of Title IX promulgated by HEW (and, today, enforced by OCR) according to specific congressional delegation,” mandating “‘particularly high deference’ under . . . *Chevron*.”).

44. Glatt, *supra* note 12, at 302.

45. POLICY INTERPRETATION, *supra* note 25; *see also McCormick*, 370 F.3d at 290 (quoting POLICY INTERPRETATION, *supra* note 25); *Kelley*, 35 F.3d at 271 n.7; *Cohen*, 991 F.2d at 896; Glatt, *supra* note 12, at 302.

46. POLICY INTERPRETATION, *supra* note 25; *see also McCormick*, 370 F.3d at 290 (Policy Interpretation was proposed “to provide additional guidance to schools on the requirements of Title IX compliance”); *Kelley*, 35 F.3d at 271 n.7 (Policy Interpretation was promulgated to enable schools “to establish whether they were in compliance with Title IX”); *Cohen*, 991 F.2d at 896 (Policy

To that end, on December 11, 1978, HEW published a proposed Policy Interpretation of the intercollegiate athletic provisions of Title IX for public comment.⁴⁷ In the months that followed, HEW received “[o]ver 700 comments reflecting a broad range of opinion.”⁴⁸ Agency staff also “visited eight universities in June and July, 1979, to see how the proposed policy and other suggested alternatives would apply in actual practice at individual campuses.”⁴⁹ “The final Policy Interpretation[, published on December 11, 1979,] reflects the many comments HEW received and the results of the individual campus visits.”⁵⁰

The Policy Interpretation “applies to any public or private institution . . . that operates an educational program or activity which receives or benefits from [federal] financial assistance,” including “educational institutions whose students participate in [federally] funded or guaranteed student loan or assistance programs.”⁵¹ Its stated goals are: (1) to “clarif[y] the meaning of ‘equal opportunity’ in intercollegiate athletics,” as set forth in the 1975 Regulations; (2) to “explain[] the factors and standards set out in the law and regulation” which will be considered in determining whether an institution’s intercollegiate athletics program is in compliance with the equal opportunity requirements of the regulations; and (3) to “provide[] guidance to assist institutions in determining whether any disparities which may exist between men’s and women’s programs are justifiable and nondiscriminatory.”⁵² The Policy Interpretation sets forth the requirements necessary to achieve compliance within three major areas of Title IX: (1) athletic financial assistance (i.e., scholarships); (2) equivalence in other athletic benefits and opportunities (the factors laid out in 34 C.F.R. § 106.41(c)(2)–(10)); and (3) effective accommodation of student interests and abilities (the factor laid out in 34 C.F.R. § 106.41(c)(1)).⁵³ A university is in violation of Title IX if it violates any one of these three major areas of investigation.⁵⁴

Interpretation was implemented to “encourage self-policing and thereby winnow complaints”).

47. POLICY INTERPRETATION, *supra* note 25; *see also* *Equity in Athletics, Inc. v. Dep’t of Educ.*, 675 F. Supp. 2d 660, 664 (W.D. Va. 2009).

48. POLICY INTERPRETATION, *supra* note 25.

49. *Id.*; *see also* *Equity in Athletics, Inc.*, 675 F. Supp. 2d at 664–65.

50. POLICY INTERPRETATION, *supra* note 25; *see also* *McCormick*, 370 F.3d at 290.

51. POLICY INTERPRETATION, *supra* note 25.

52. *Id.*; *see also* *Equity in Athletics, Inc.*, 675 F. Supp. 2d at 665; *Nat’l Wrestling Coaches Ass’n v. U.S. Dep’t of Educ.*, 263 F. Supp. 2d 82, 89 (D.D.C. 2003).

53. *Cohen v. Brown Univ.*, 991 F.2d 888, 897 (1st Cir. 1993); *Nat’l Wrestling Coaches Ass’n*, 263 F. Supp. 2d at 89 n.3; POLICY INTERPRETATION, *supra* note 25.

54. *Nat’l Wrestling Coaches Ass’n*, 263 F. Supp. 2d at 89 n.3. Thus, a school may be in violation of Title IX if it ineffectively accommodates students’ interests and abilities, even if it meets the athletic

As to the effective accommodation of student interests and abilities, “the governing principle in this area is that the athletic interests and abilities of male and female students must be equally effectively accommodated.”⁵⁵ In assessing compliance with this area, the agency examines three factors:

- a. The determination of athletic interests and abilities of students;
- b. The selection of sports offered; and
- c. The levels of competition available including the opportunity for team competition.⁵⁶

Under the third factor—levels of competition—the Policy Interpretation states that “[i]n effectively accommodating the interests and abilities of male and female athletes, institutions must provide both the opportunity for individuals of each sex to participate in intercollegiate competition, *and* for athletes of each sex to have competitive team schedules which equally reflect their abilities.”⁵⁷ Thus, compliance under this third factor is measured by reference to two separate benchmarks: “(1) equity in athletic opportunities; and (2) equity in competition.”⁵⁸ Whether a university meets these obligations is determined under two distinct tests, both of which must be satisfied to comply with this component of Title IX’s mandate.⁵⁹

As to whether a university is providing equal opportunity for individuals of each sex to participate in intercollegiate competition, compliance is assessed in any of the following ways:

(1) Whether intercollegiate level participation opportunities for

financial assistance and equivalence in other athletics benefits and opportunities prongs. *See Cohen*, 991 F.2d at 897. “In other words, an institution that offers women a smaller number of athletic opportunities than the statute requires may not rectify that violation simply by lavishing more resources on those women or achieving equivalence in other respects.” *Id.*

55. POLICY INTERPRETATION, *supra* note 25; *see also McCormick*, 370 F.3d at 291.

56. POLICY INTERPRETATION, *supra* note 25; *see also Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir. 1993) (quoting POLICY INTERPRETATION, *supra* note 25); *Nat’l Wrestling Coaches Ass’n*, 263 F. Supp. 2d at 90 (quoting POLICY INTERPRETATION, *supra* note 25).

57. POLICY INTERPRETATION, *supra* note 25 (emphasis added); *see also McCormick*, 370 F.3d at 300 (quoting POLICY INTERPRETATION, *supra* note 25); *Biediger v. Quinnipiac Univ.*, 928 F. Supp. 2d 414, 437 (D. Conn. 2013) (quoting POLICY INTERPRETATION, *supra* note 25); *Nat’l Wrestling Coaches Ass’n*, 263 F. Supp. 2d at 91 (quoting POLICY INTERPRETATION, *supra* note 25).

58. *Biediger*, 928 F. Supp. 2d at 437.

59. *Id.*

male and female students are provided in numbers substantially proportionate to their respective enrollments; or
 (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
 (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.⁶⁰

This is the famous (or infamous) “three-part test,” the application of which forms the crux of most Title IX litigation.⁶¹ “The test is applied to assess whether an institution is providing nondiscriminatory *participation opportunities* to individuals of both sexes”⁶² The three prongs of the test establish “safe harbors,” and a university is in compliance with Title IX as long as it meets any one of the three prongs.⁶³

As to the second benchmark—equity in competition—the Policy Interpretation sets forth a two-part “levels of competition” test.⁶⁴ Compliance is assessed by examining the following:

(1) Whether the competitive schedules for men’s and women’s teams, on a program-wide basis, afford

60. POLICY INTERPRETATION, *supra* note 25; *see also* Biediger v. Quinnipiac Univ., 691 F.3d 85, 92–93 (2d Cir. 2012) (quoting POLICY INTERPRETATION, *supra* note 25); *Equity in Athletics, Inc. v. Dep’t of Educ.*, 639 F.3d 91, 96 (4th Cir. 2011) (quoting POLICY INTERPRETATION, *supra* note 25); *Mansourian v. Regents of the Univ. of Cal.*, 602 F.3d 957, 965 (9th Cir. 2010) (quoting POLICY INTERPRETATION, *supra* note 25); *McCormick*, 370 F.3d at 300 (quoting POLICY INTERPRETATION, *supra* note 25); *Roberts*, 998 F.2d at 828–29 (quoting POLICY INTERPRETATION, *supra* note 25); *Cohen v. Brown Univ.*, 991 F.2d 888, 897 (1st Cir. 1993) (quoting POLICY INTERPRETATION, *supra* note 25); *Nat’l Wrestling Coaches Ass’n*, 263 F. Supp. 2d at 91 (quoting POLICY INTERPRETATION, *supra* note 25).

61. *McCormick*, 370 F.3d at 300.

62. *Id.*

63. *Id.*; *Mansourian*, 602 F.3d at 965; *Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62, 88 (D. Conn. 2010).

64. *See Biediger*, 928 F. Supp. 2d at 437.

proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities; or
(2) Whether the institution can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex.⁶⁵

Informal agency rulings such as the Policy Interpretation, which are not arrived at after a formal adjudication or notice-and-comment rulemaking, are not entitled to *Chevron*-level deference.⁶⁶ Still, as the Supreme Court acknowledged in *Skidmore v. Swift & Co.*,⁶⁷ such rulings “are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case,” and are therefore “entitled to respect.”⁶⁸ “[These] rulings, interpretations and opinions . . . while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”⁶⁹ Unlike the more lenient standard in *Chevron*, whether such pronouncements receive deference in a given case “will depend upon the thoroughness evident in [their] consideration, the validity of [their] reasoning, [their] consistency with earlier and later pronouncements, and all those factors which give [them] power to persuade, if lacking power to control.”⁷⁰

However, some informal agency pronouncements lacking the force of law are still entitled to “substantial deference.”⁷¹ “Because applying an agency’s regulation to complex or changing circumstances calls upon the agency’s unique expertise and policymaking prerogatives,” courts will “presume that the power authoritatively to interpret its own regulations is a component of the agency’s delegated lawmaking powers.”⁷² Accordingly, if the informal agency pronouncement is an interpretation of the agency’s own regulation, and the

65. POLICY INTERPRETATION, *supra* note 25; *see also Roberts*, 998 F.2d at 829 (quoting POLICY INTERPRETATION, *supra* note 25); *Biediger*, 928 F. Supp. 2d at 439 (quoting POLICY INTERPRETATION, *supra* note 25).

66. *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000); *see also Glatt*, *supra* note 12, at 312–13.

67. *See generally* 323 U.S. 134 (1944).

68. *Id.* at 139–40.

69. *Id.* at 140.

70. *Id.*; *see also Christensen*, 529 U.S. at 586–87; *Glatt*, *supra* note 12, at 313.

71. *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 150 (1991) (quoting *Lyng v. Payne*, 476 U.S. 926, 939 (1986)).

72. *Id.* at 151.

language of the regulation is ambiguous, courts will give effect to the agency's interpretation as long as it is "reasonable" and "sensibly conforms to the purpose and wording of the regulations."⁷³ Courts will, therefore, defer to the agency's interpretation "unless that interpretation is 'plainly erroneous or inconsistent with the regulation[s] or there is any other reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.'"⁷⁴

The Policy Interpretation, though an informal agency pronouncement, is accorded the substantial level of deference discussed above. Courts have determined that "the regulatory language that the policy interpretation construes describes how an institution can provide 'equal athletic opportunity for members of both sexes' and 'effectively accommodate the interests and abilities of members of both sexes.'"⁷⁵ The applicable language from the 1975 Regulations has been found to have been "written at a high level of abstraction and, as a result, is ambiguous," as evidenced by "the high number of suits that arose immediately after the promulgation of the regulation[s]."⁷⁶ Accordingly, the Policy Interpretation has been deemed "a reasonable and 'considered interpretation of the regulation[s],' which is entitled to "controlling deference."⁷⁷ Indeed, "every court that has confronted the issue has held that the 1979 Policy Interpretation constitutes a reasonable and considered interpretation of § [106].41, and thus, that it is entitled to deference."⁷⁸

73. *Id.* at 150–51 (quoting *N. Ind. Pub. Serv. Co. v. Porter Cty. Chapter of Izaak Walton League of Am., Inc.*, 423 U.S. 12, 15 (1975)); *Christensen*, 529 U.S. at 588; *see also* *Kelley v. Bd. of Trs., Univ. of Ill.*, 35 F.3d 265, 271 (7th Cir. 1994).

74. *Mullins v. City of New York*, 653 F.3d 104, 106 (2d Cir. 2011) (alteration in original) (quoting *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2261 (2011)); *see also* *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1046 (8th Cir. 2002) (deferring to any reasonable construction by the agency, "even though its interpretation might 'not be the best or most natural one by grammatical or other standards.'") (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 702 (1991)); *Equity in Athletics, Inc. v. Dep't of Educ.*, 675 F. Supp. 2d 660, 675 (W.D. Va. 2009).

75. *Chalenor*, 291 F.3d at 1046–47 (quoting 34 C.F.R. § 106.41(c) (2000)).

76. *Id.* at 1047.

77. *Id.* (citation omitted).

78. *Equity in Athletics, Inc.*, 675 F. Supp. 2d at 675; *see also, e.g.*, *Mansourian v. Regents of the Univ. of Cal.*, 602 F.3d 957, 965 n.9 (9th Cir. 2010) (holding that the Policy Interpretation is entitled to deference under *Chevron* and *Martin*); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir. 1993) (deferring "substantially" to the Policy Interpretation as an "effectively legislative" agency interpretation of its own regulations, "pursuant to a statutory delegation"); *Cohen v. Brown Univ.*, 991 F.2d 888, 896–97 (1st Cir. 1993) (according the Policy Interpretation "substantial deference" as a "considered interpretation of the regulation"); *Biediger v. Quinnipiac Univ.*, 928 F. Supp. 2d 414, 440 (D. Conn. 2013) ("The Second Circuit has held that courts owe the 1979 Policy Interpretation . . . a high degree of deference."); *Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62, 92 (D. Conn. 2010) (finding the Policy Interpretation subject to deference under either *Chevron* or *Skidmore* because "it is both persuasive and not unreasonable") (citation omitted); *Nat'l Wrestling Coaches Ass'n v. U.S. Dep't*

Shortly after publication of the Policy Interpretation in 1979, Congress enacted the Department of Education Organization Act of 1979, which divided HEW into two new agencies—the Department of Health and Human Services (HHS) and DOE.⁷⁹ The existing Title IX regulations promulgated by HEW were left with HHS, and DOE duplicated and re-codified them.⁸⁰ However, all of HEW's educational functions were transferred to DOE, and DOE became the principal locus of Title IX enforcement activity, treating the 1975 HEW Regulations as its own.⁸¹ Accordingly, courts have “treat[ed] DOE as the [administrative] agency charged with administering Title IX.”⁸²

D. Developments in the 1980s

The regulatory regime contemplated by the 1975 Regulations and the Policy Interpretation hit a roadblock in 1984, when the United States Supreme Court held in *Grove City College v. Bell*⁸³ that Title IX was “program-specific.”⁸⁴ This meant that “only the particular program that received federal financial assistance could be regulated under Title IX, as opposed to the entire institution.”⁸⁵ As the First Circuit observed, “[b]ecause few athletic departments are direct recipients of federal funds—most federal money for universities is channeled through financial aid offices or invested directly in research grants—*Grove City* cabined Title IX and placed virtually all collegiate athletic programs beyond its reach.”⁸⁶

of Educ., 263 F. Supp. 2d 82, 96 (D.D.C. 2003) (according “considerable deference” to the Policy Interpretation “based on findings that it does not violate the statute or regulations, exceed the agency’s statutory authority, or offend constitutional principles of Equal Protection”); cf. *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 96–97 (2d Cir. 2012) (erroneously citing *McCormick* for the proposition that the Policy Interpretation is entitled to “high deference” under *Chevron*, when *McCormick* refrained from determining which level of deference to apply to the Policy Interpretation).

79. *Nat’l Wrestling Coaches Ass’n*, 263 F. Supp. 2d at 91; see also *Equity in Athletics, Inc. v. Dep’t of Educ.*, 639 F.3d 91, 96 (4th Cir. 2011); *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 287 (2d Cir. 2004); *Cohen*, 991 F.2d at 895.

80. *McCormick*, 370 F.3d at 287; *Cohen*, 991 F.2d at 895; *Nat’l Wrestling Coaches Ass’n*, 263 F. Supp. 2d at 91–92.

81. *Equity in Athletics, Inc.*, 639 F.3d at 96; *McCormick*, 370 F.3d at 287, 290; *Cohen*, 991 F.2d at 895; *Equity in Athletics, Inc.*, 675 F. Supp. 2d at 676.

82. *Biediger*, 691 F.3d at 96 n.4; see also *McCormick*, 370 F.3d at 287 (quoting *Biediger*, 691 F.3d at 96 n.4); *Cohen*, 991 F.2d at 895.

83. See generally 465 U.S. 555 (1984).

84. *McCormick*, 370 F.3d at 287; *Cohen*, 991 F.2d at 894; *Equity in Athletics, Inc.*, 675 F. Supp. 2d at 665.

85. *Equity in Athletics, Inc.*, 675 F. Supp. 2d at 665; see also *McCormick*, 370 F.3d at 287; *Cohen*, 991 F.2d at 894.

86. *Cohen*, 991 F.2d at 894.

In response to *Grove City*, Congress enacted the Civil Rights Restoration Act of 1987.⁸⁷ The Civil Rights Restoration Act reinstated the institution-wide application of Title IX and requires that if any part of an educational institution receives federal funds, then the institution as a whole must comply with Title IX.⁸⁸ While the Civil Rights Restoration Act does not specifically reference athletics, “the record of the floor debate leaves little doubt that the enactment was aimed, in part, at creating a more level playing field for female athletes.”⁸⁹ As a result, courts consider it “crystal clear that Title IX applies to athletic programs operated by any school receiving federal funding for any of its educational programs and activities, and not just to those athletic programs which directly receive[] federal dollars.”⁹⁰

E. Letters of Clarification

Since the 1980s, OCR, the sub-agency of DOE tasked with enforcing Title IX, has issued several letters of clarification relating to the three-prong test, as well as a letter addressing which activities constitute a sport for Title IX purposes.⁹¹

1. The 1996 Clarification

Recognizing “the need to provide additional clarification regarding what is commonly referred to as the ‘three-part test,’ [and] to respond to requests for specific guidance about the existing standards that have guided the enforcement of Title IX in the area of intercollegiate athletics,” on September 20, 1995, OCR circulated a draft of a proposed policy clarification to over 4,500 interested parties, “soliciting comments about whether the document provided sufficient clarity to assist institutions in their efforts to comply with Title IX.”⁹²

87. See Title IX of the Education Amendments of 1972, 20 U.S.C. § 1687 (2016).

88. *McCormick*, 370 F.3d at 287; *Cohen*, 991 F.2d at 894; *Equity in Athletics, Inc.*, 675 F. Supp. 2d at 666.

89. *Cohen*, 991 F.2d at 894.

90. *Equity in Athletics, Inc.*, 675 F. Supp. 2d at 666 (quoting *Nat’l Wrestling Coaches Ass’n v. U.S. Dep’t of Educ.*, 263 F. Supp. 2d 82, 94 (D.D.C. 2003)).

91. Rachel Schwarz, Note, *Timeout! Getting Back to What Title IX Intended and Encouraging Courts and the Office of Civil Rights to Re-Evaluate the Three-Prong Compliance Test*, 20 WASH. & LEE J. CIV. RTS. & SOC. JUST. 633, 646 (2014); see also *Biediger v. Quinnipiac Univ.*, 928 F. Supp. 2d 414, 440 (D. Conn. 2013).

92. Norma V. Cantú, Assistant Secretary for Civil Rights, *Dear Colleague Letter*, OFF. FOR CIV. RTS., U.S. DEP’T EDUC. (Jan. 16, 1996), <http://www2.ed.gov/print/about/offices/list/ocr/docs/clarific.html>; see also *Equity in Athletics, Inc.*, 675 F. Supp. 2d at 666; *Nat’l Wrestling Coaches Ass’n*, 263 F. Supp. 2d at 92.

DOE also published a notice in the Federal Register announcing the availability of the draft clarification.⁹³ After receiving comments from over 200 individuals as to whether the proposed clarification provided the appropriate level of clarity, on January 16, 1996, DOE released the final version of the policy clarification.⁹⁴

The final version of the policy clarification “provides specific factors that guide an analysis of each part of the three-part test . . . [and] provides examples to demonstrate, in concrete terms, how these factors will be considered.”⁹⁵ In particular, the 1996 Clarification emphasizes that

[T]he three-part test furnishes an institution with three individual avenues to choose from when determining how it will provide individuals of each sex with nondiscriminatory opportunities to participate in intercollegiate athletics. If an institution has met any part of the three-part test, OCR will determine that the institution is meeting this requirement.⁹⁶

As to the first prong of the three-part test—substantial proportionality—the 1996 Clarification states that “where an institution provides intercollegiate level athletic participation opportunities for male and female students in numbers substantially proportionate to their respective full-time undergraduate enrollments, OCR will find that the institution is providing nondiscriminatory participation opportunities for individuals of both sexes.”⁹⁷ The first step in this analysis entails “a determination of the number of participation opportunities afforded to male and female athletes in the intercollegiate athletic program.”⁹⁸ This, in turn, begs the question of who exactly may be counted as a “participant” for purposes of this analysis.

93. *Equity in Athletics, Inc.*, 675 F. Supp. 2d at 666.

94. *Nat'l Wrestling Coaches Ass'n*, 263 F. Supp. 2d at 92; *see also Equity in Athletics, Inc.*, 675 F. Supp. 2d at 666; Cantú, *supra* note 92.

95. Cantú, *supra* note 92; *see also Equity in Athletics, Inc.*, 675 F. Supp. 2d at 666; *Nat'l Wrestling Coaches Ass'n*, 263 F. Supp. 2d at 92–93 (quoting Cantú, *supra* note 92).

96. Cantú, *supra* note 92 (noting “that an institution can choose which part of the test it plans to meet,” and it “need . . . comply only with any one part of the three-part test in order to provide nondiscriminatory participation opportunities for individuals of both sexes.”); *see also Equity in Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 97 (4th Cir. 2011); *Equity in Athletics, Inc.*, 675 F. Supp. 2d at 666; *Nat'l Wrestling Coaches Ass'n*, 263 F. Supp. 2d at 93 (quoting Cantú, *supra* note 92).

97. Cantú, *supra* note 92 (noting that the substantial proportionality prong “focuses on the participation rates of men and women at an institution and affords an institution a ‘safe harbor’ for establishing that it provides nondiscriminatory participation opportunities.”).

98. *Id.* (emphasizing that the clarification “further clarifies how Title IX requires OCR to count participation opportunities”); *see also Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 93 (2d Cir. 2012); *Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62, 88 (D. Conn. 2010).

The Policy Interpretation defines participants as those athletes:

- a. Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport's season; and
- b. Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and
- c. Who are listed on the eligibility or squad lists maintained for each sport; or
- d. Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.⁹⁹

The 1996 Clarification reiterates that the definition of “participant” is quite broad indeed. A “participant” does not need “to meet minimum criteria of playing time or athletic ability.”¹⁰⁰ The definition includes not only scholarship athletes receiving playing time, but “those athletes who do not receive scholarships (e.g., walk-ons), those athletes who compete on teams sponsored by the institution even though the team may be required to raise some or all of its operating funds, and those athletes who practice but may not compete.”¹⁰¹ In general, “all athletes who are listed on a team’s squad or eligibility list and are on the team as of the team’s first competitive event are counted as participants by OCR.”¹⁰² Student-athletes who participate in more than one sport may be counted as a participant in each sport in which they participate.¹⁰³ Notwithstanding this broad definition of “participant,”

99. Cantú, *supra* note 92 (quoting language from the Policy Interpretation as the “definition of participant to determine the number of participation opportunities provided by an institution for purposes of the three-part test.”).

100. *Biediger*, 691 F.3d at 93; *see also Biediger*, 728 F. Supp. 2d at 88 (quoting *Biediger*, 691 F.3d at 93); Cantú, *supra* note 92.

101. Cantú, *supra* note 92; *see also Biediger*, 728 F. Supp. 2d at 89 (quoting Cantú, *supra* note 92). This is because OCR determined “that these athletes receive numerous benefits and services, such as training and practice time, coaching, tutoring services, locker room facilities, and equipment, as well as important non-tangible benefits derived from being a member of an intercollegiate athletic team.” Cantú, *supra* note 92.

102. Cantú, *supra* note 92; *accord Biediger*, 691 F.3d at 93.

103. Cantú, *supra* note 92; *see also Biediger*, 691 F.3d at 93; *Mansourian v. Regents of the Univ. of Cal.*, 602 F.3d 957, 966 (9th Cir. 2010).

however, OCR cautions that only “actual” athletes may be counted, “because participation opportunities must be real, not illusory.”¹⁰⁴ This means that the student-athlete must be “offer[ed] the same benefits as would be provided to other *bona fide* athletes.”¹⁰⁵

Unfortunately, while OCR devoted much of its attention in the 1996 Clarification to which student-athletes may be counted as participants under the substantial proportionality prong, it neglected to devote the same coverage to the related issue of which activities qualify as participation opportunities. The only insight on this topic offered in the 1996 Clarification is the brief statement that “the requirement to provide nondiscriminatory participation opportunities is only one of many factors that OCR examines to determine if an institution is in compliance with the athletics provision of Title IX.”¹⁰⁶ “OCR also considers *the quality of competition* offered to members of both sexes in order to determine whether an institution effectively accommodates the interests and abilities of its students.”¹⁰⁷

Once all male and female participants are counted, the second step in the analysis is to determine whether athletic opportunities at the institution are substantially proportionate to the percentages of male and female undergraduate enrollment at the institution.¹⁰⁸ The 1996 Clarification makes clear that substantial proportionality does not mean exact proportionality.¹⁰⁹ “Because this determination depends on the institution’s specific circumstances and the size of its athletic program, OCR makes this determination on a case-by-case basis, rather than . . . us[ing] . . . a statistical test.”¹¹⁰ OCR further clarified that it would

consider [participation] opportunities . . . substantially

104. Cantú, *supra* note 92; *see also* *Mansourian*, 602 F.3d at 965–66 (defining participants as “the number of . . . athletes who actually participate in varsity athletics”); *Nat’l Wrestling Coaches Ass’n v. U.S. Dep’t of Educ.*, 263 F. Supp. 2d 82, 93 (D.D.C. 2003) (citing 1996 Clarification as “making it clear that the number of actual athletes on a team, as opposed to the number of slots available on a team, is used”).

105. *Biediger*, 691 F.3d at 93; *Biediger*, 728 F. Supp. 2d at 89.

106. Cantú, *supra* note 92.

107. *Id.* (emphasis added); *see also* *Nat’l Wrestling Coaches Ass’n*, 263 F. Supp. 2d at 93.

108. *Biediger*, 691 F.3d at 94; *Biediger v. Quinnipiac Univ.*, 928 F. Supp. 2d 414, 440 (D. Conn. 2013); *Biediger*, 728 F. Supp. 2d at 89; Cantú, *supra* note 92.

109. Cantú, *supra* note 92; *see also* *Cohen v. Brown Univ.*, 991 F.2d 888, 894 (1st Cir. 1993) (holding “that, while Title IX prohibits discrimination, it does not mandate strict numerical equality between the gender balance of a college’s athletic program and the gender balance of its student body.”).

110. Cantú, *supra* note 92; *see also* *Biediger*, 691 F.3d at 94; *Biediger*, 928 F. Supp. 2d at 440; *Biediger*, 728 F. Supp. 2d at 89.

proportionate when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team, i.e., a team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team.¹¹¹

Consistent with the 1996 Clarification statement that exact proportionality is not required, no case to date has found “a disparity of two percentage points or less . . . to manifest a lack of substantial proportionality.”¹¹²

OCR also used its explanation of substantial proportionality in the 1996 Clarification to respond to critics who claimed that Title IX established an impermissible quota system. The statute itself states that Title IX shall not

be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area.¹¹³

In essence, this means that “a court assessing Title IX compliance may not find a violation *solely* because there is a disparity between the gender composition of an educational institution’s student constituency, on the one hand, and its athletic programs, on the other hand.”¹¹⁴ This does not, however, preclude consideration of such statistical disparities.¹¹⁵ Pursuant to a proviso also found in Title IX, “a Title IX plaintiff in an athletic discrimination suit must accompany statistical evidence of disparate impact with some further

111. Cantú, *supra* note 92; *see also Biediger*, 691 F.3d at 94; *Biediger*, 928 F. Supp. 2d at 440; *Biediger*, 728 F. Supp. 2d at 89. “So, for example, if a school has five fewer female athletes than needed to reach exact proportionality, OCR would find the athletic program to be substantially proportional because no varsity team can be sustained with so few participants.” *Biediger*, 728 F. Supp. 2d at 89.

112. *Biediger*, 691 F.3d at 106; *see also Biediger*, 728 F. Supp. 2d at 111.

113. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(b) (2016); *see also Cohen*, 991 F.2d at 894 (quoting § 1681(b)); *Nat’l Wrestling Coaches Ass’n v. U.S. Dep’t of Educ.*, 263 F. Supp. 2d 82, 87 (D.D.C. 2003) (quoting § 1681(b)).

114. *Cohen*, 991 F.2d at 895.

115. *Id.*; *Nat’l Wrestling Coaches Ass’n*, 263 F. Supp. 2d at 87.

evidence of discrimination, such as unmet need amongst the members of the disadvantaged gender.”¹¹⁶

OCR further elaborated on these principles in the Cantú Letter accompanying the 1996 Clarification. The Cantú Letter reiterated that “underrepresentation alone is not the measure of discrimination [and] [s]ubstantial proportionality merely provides institutions with a safe harbor.”¹¹⁷ Thus, “OCR does not require quotas.”¹¹⁸ Substantial proportionality is only one of three alternative measures, meaning that “[a]n institution that does not provide substantially proportional participation opportunities for men and women may comply with Title IX by satisfying either part two or part three of the test.”¹¹⁹

Finally, recognizing that “institutions face challenges in providing nondiscriminatory participation opportunities for their students,” OCR emphasized that “[t]he three-part test gives institutions flexibility and control over their athletics programs.”¹²⁰ Such flexibility is indicative of “a society that cherishes academic freedom” and a judicial system that “recognizes that universities deserve great leeway in their operations.”¹²¹

116. *Cohen*, 991 F.2d at 895; *see also Nat'l Wrestling Coaches Ass'n*, 263 F. Supp. 2d at 87–88 (quoting § 1681); *cf. Kelley v. Bd. of Trs., Univ. of Ill.*, 35 F.3d 265, 268, 270 (7th Cir. 1994) (“In essence the policy interpretation establishes a presumption that ‘effective accommodation’ has been achieved if males and females at a school participate in intercollegiate sports in numbers substantially proportionate to the number of students of each sex enrolled at the institution . . . [I]f the percentage of student-athletes of a particular sex is substantially proportionate to the percentage of students of that sex in the general student population, the athletic interests of that sex are presumed to have been accommodated.”).

117. Cantú, *supra* note 92.

118. *Id.*

119. *Id.* “For example, if an institution chooses to and does comply with part three of the test, OCR will not require it to provide substantially proportionate participation opportunities to, or demonstrate a history and continuing practice of program expansion that is responsive to the developing interests of, the underrepresented sex.” *Id.*

120. *Id.* (“Ultimately, Title IX provides institutions with flexibility and choice regarding how they will provide nondiscriminatory participation opportunities.”); *see also Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 94 (2d Cir. 2012); *Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62, 89 (D. Conn. 2010).

121. *Cohen*, 991 F.2d at 906. Judicial reticence to interfere in the operations of higher education likely also explains the tendency of courts, even when finding a Title IX violation, to require the university in question to propose a compliance plan in the first instance rather than simply mandating the creation or deletion of particular teams. *Id.* Congress itself has expressed a preference for voluntary compliance with Title IX. *Nat'l Wrestling Coaches Ass'n*, 263 F. Supp. 2d at 88 n.2 (citing Title IX of the Education Amendments of 1972, 20 U.S.C. § 1682 (2016)). Consistent with such preference, the “DoE ‘has not terminated its funding for any postsecondary institution for violation of [T]itle IX,’ but rather has secured compliance through ‘complaint investigations, compliance reviews, and the issuance of policy guidance.’ . . . The agency’s ‘approach to enforcement emphasizes collaboration and negotiation.’” *Id.* (quoting U.S. GOV'T ACCOUNTABILITY OFFICE, GENDER EQUITY: MEN'S AND WOMEN'S PARTICIPATION IN HIGHER EDUCATION 5 (2000)) (internal citation omitted).

[S]trict numerical formulas or ‘cookie cutter’ answers to the issues that are inherently case- and fact-specific . . . not only would belie the meaning of Title IX, but would at the same time deprive institutions of the flexibility to which they are entitled when deciding how best to comply with the law.¹²²

Accordingly, rather than “pour[ing] ever-increasing sums into its athletic establishment,” an institution may also comply with the substantial proportionality prong “by subtraction and downgrading, that is, by reducing opportunities for the overrepresented gender while keeping opportunities stable for the underrepresented gender (or reducing them to a much lesser extent).”¹²³ Schools, therefore, “can choose to eliminate or cap teams as a way of complying with part one of the three-part test.”¹²⁴ At the same time, however, “nothing in the three-part test requires an institution to eliminate participation opportunities for men.”¹²⁵

Finally, courts accord the 1996 Clarification “substantial deference,”

Although the district court has the power to order specific relief if the institution wishes to continue receiving federal funds . . . the many routes to Title IX compliance make specific relief most useful in situations where the institution, after a judicial determination of noncompliance, demonstrates an unwillingness or inability to exercise its discretion in a way that brings it into compliance with Title IX.

Cohen, 991 F.2d at 906–07 (internal citation omitted); *see also* Glatt, *supra* note 12, at 302 (“Although the OCR has the authority to revoke federal funding from violating schools, it has never taken such action. Rather, the OCR usually works with universities to help ensure compliance.”) (citation omitted) (citing Greg Garber, *Three-Pronged Test Makes True Compliance Vague*, ESPN, <http://espn.go.com/gen/womenandsports/020619enforce.html> (last updated June 19, 2012)).

122. Cantú, *supra* note 92.

123. *Cohen*, 991 F.2d at 898 n.15.

124. Cantú, *supra* note 92; *see also* *Biediger*, 691 F.3d at 94; *Biediger*, 728 F. Supp. 2d at 89; *cf.* *Cohen*, 991 F.2d at 905.

In an era where the practices of higher education must adjust to stunted revenues, careening costs, and changing demographics, colleges might well be obliged to curb spending on programs, like athletics, that do not lie at the epicenter of their institutional mission. Title IX does not purport to override financial necessity.

Cohen, 991 F.2d at 905. Indeed, “Title IX does not require institutions to fund any particular number or type of athletic opportunities—only that they provide those opportunities in a nondiscriminatory fashion if they wish to receive federal funds.” *Id.* at 906.

125. Cantú, *supra* note 92.

because it “reflect[s] reasonable agency interpretations of ambiguities in its own regulation, and there is no reason to think that the agency’s interpretations do not reflect its ‘fair and considered judgment on the matter in question.’”¹²⁶

2. The April 11, 2000 Letter

Although the 1996 Clarification provided great detail about which student-athletes count as “participants” for purposes of the substantial proportionality prong, neither it nor any of the agency promulgations that preceded it provided much guidance as to which athletic activities count toward determining the male and female participation opportunities at a given institution.¹²⁷ In other words, what exactly constitutes a “sport” for purposes of Title IX? Even after the 1996 Clarification, “no procedure or formula existed for a university to determine which sports teams counted toward the ‘substantial proportionality’ requirement.”¹²⁸ In 2000, OCR issued a letter in response to a request by the Minnesota State High School League that discussed “the agency’s standards for distinguishing [a] ‘sport[]’ from [an] ‘extracurricular activit[y]’ for purposes of Title IX [compliance].”¹²⁹

In this April 11, 2000 Letter, OCR recognized, “As part of its responsibility for enforcing the Title IX provisions regarding athletic programs, [it] must determine” which activities are part of an institution’s athletic program.¹³⁰ However, “OCR does not rely on a specific definition of a sport.”¹³¹ Rather, OCR makes a case-by-case determination based, in part,

126. *Biediger*, 691 F.3d at 97 (quoting *Mullins v. City of New York*, 653 F.3d 104, 113–14 (2d Cir.2011)); *see also* *Mansourian v. Regents of the Univ. of Cal.*, 602 F.3d 957, 965 n.9 (9th Cir. 2010) (noting that the Ninth Circuit and other circuits have held that the 1996 Clarification is entitled to deference under *Chevron* and *Martin*); *Biediger v. Quinnipiac Univ.*, 928 F. Supp. 2d 414, 445 (D. Conn. 2013) (stating the 1996 Clarification is entitled to “substantial deference”); *Biediger*, 728 F. Supp. 2d at 92 (observing that circuit courts have deemed the 1996 Clarification is “deserving of deference”).

127. *See* Glatt, *supra* note 12, at 304 (finding that “the 1979 Policy Interpretation largely ignored the meaning of the word ‘athletic.’”).

128. *Id.*

129. Letter from Dr. Mary Frances O’Shea, Nat’l Coordinator for Title IX Athletics, Office for Civil Rights, to David V. Stead, Exec. Dir., Minn. State High Sch. League (Apr. 11, 2000) (on file with the United States Department of Education); *see also* *Biediger*, 928 F. Supp. 2d at 444; *Biediger*, 728 F. Supp. 2d at 91.

130. Letter from Dr. Mary Frances O’Shea to David V. Stead, *supra* note 129.

131. *Id.* While OCR does not rely on a specific definition of “sport,” other jurisdictions have undertaken such an endeavor. For instance, the California Education Code defines “extracurricular activity”

as a program that has all of the following characteristics:

(A) The program is supervised or financed by the school district.

on the purpose of the activity, the specification of seasons and competitions, and the adoption of official rules and personnel requirements.¹³² The determination of what constitutes a sport for purposes of Title IX would also take into consideration factors identified by athletic organizations or associations to differentiate between support activity and a sport.¹³³

OCR then enumerated the types of inquiries it would make and the process it would follow in assessing whether an activity constitutes a sport.¹³⁴

In determining whether an activity is a sport OCR will consider . . .

- whether selection for the team is based upon objective factors related primarily to athletic ability;
- . . .
- whether the team prepares for and engages in competition in the same way as other teams in the athletic program with respect to coaching, recruitment, budget, try outs and eligibility, and length and number of practice sessions and competitive opportunities;

(B) Pupils participating in the program represent the school district.

(C) Pupils exercise some degree of freedom in either the selection, planning, or control of the program.

(D) The program includes both preparation for performance and performance before an audience or spectators.

CAL. EDUC. CODE § 35160.5(a)(1) (2016). The California Education Code further defines “[i]nterscholastic athletics . . . as ‘those policies, programs, and activities that are formulated or executed in conjunction with, or in contemplation of, athletic contests between two or more schools, either public or private.’” *Id.* § 35179(f).

132. Letter from Dr. Mary Frances O’Shea to David V. Stead, *supra* note 129. OCR made clear that it does not “rely solely on a claim by the institution that the activity is part of the athletic program.” *Id.*

133. *Id.* OCR’s definition of “sport” is similar to the NCAA’s definition, which states “[A] sport shall be defined as an institutional activity involving physical exertion with the purpose of competition . . . within a defined competitive season(s) . . . and standardized rules with rating/scoring systems ratified by official regulatory agencies and governing bodies.” CRITERIA FOR EMERGING SPORTS, NCAA.ORG, (n.d.), <http://www.ncaa.org/sites/default/files/Criteria+for+Emerging+Sports.pdf>.

134. Letter from Dr. Mary Frances O’Shea to David V. Stead, *supra* note 129.

- whether the activity is administered by the athletic department; and
- . . .
- whether state, national, and conference championships exist for the activity¹³⁵

If, after analysis of these factors, it is evident that the purpose of the team is primarily to support and promote other athletes, then the team will not be considered to be engaged in a sport.¹³⁶

OCR further provided that it would also consider the following non-exhaustive list of “other evidence relevant to the activity, which might demonstrate that it is part of an institution’s athletic program”:

- “whether the activity is recognized as part of the interscholastic or intercollegiate athletic program by the athletic conference to which the institution belongs and by organized state and national interscholastic or intercollegiate athletic associations;”
- whether organizations knowledgeable about the activity agree that it should be recognized as an athletic sport;
- whether there is a specified season for the activity which has a recognized commencement and ends in a championship;
- whether there are specified regulations for the activity governing the activity such as coaching, recruitment, eligibility, and the length and number of practice sessions and competitive opportunities;
- “whether a state, national, or conference rule book or manual has been adopted for the activity;”
- “whether there is state, national, or conference regulation of competition officials along with standardized criteria upon which the competition may be judged; and,

135. *Id.*

136. *See id.*

- whether participants in the activity/sport are eligible to receive scholarships and athletics awards (e.g., varsity awards).¹³⁷

3. The September 17, 2008 Letter

Following the April 11, 2000 Letter, it would be another eight years before OCR issued a further pronouncement regarding what constitutes a “sport” for purposes of Title IX.¹³⁸ “In September 2008, Stephanie Monroe, the Assistant Secretary for Civil Rights for the OCR, wrote an official letter” addressed to all universities through a generic “Dear Colleague” format.¹³⁹ The Letter’s stated purpose was to “provide[] clarifying information to help institutions determine which intercollegiate or interscholastic athletic activities can be counted for the purpose of *Title IX* compliance.”¹⁴⁰ It reiterated that in determining whether an institution provides equal athletic opportunities in compliance with Title IX, the opportunities provided must take place within the context of an intercollegiate or interscholastic sport.¹⁴¹ However, “OCR does not have a specific definition of the term ‘sport.’”¹⁴² Rather, “OCR considers several factors related to an activity’s structure, administration, team preparation and competition . . . when determining whether an activity is a sport that can be counted as part of an institution’s intercollegiate or interscholastic athletics program for the purpose of determining compliance with 34 C.F.R. § 106.41(c).”¹⁴³ The Letter proceeded to describe these factors

137. *Id.*

138. In the meantime, the “DOE issued an Additional Clarification [in 2005], emphasizing that institutions could demonstrate compliance under any prong of the Three-Part Test.” *Equity in Athletics, Inc. v. Dep’t of Educ.*, 639 F.3d 91, 97 (4th Cir. 2011).

139. Glatt, *supra* note 12, at 305.

140. Monroe, *supra* note 14, at 1.

141. *Id.*; *see also* *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 93 (2d Cir. 2012) (stating “that a genuine athletic participation opportunity must take place in the context of a ‘sport.’”); *Biediger v. Quinnipiac Univ.*, 928 F. Supp. 2d 414, 442 (D. Conn. 2013) (describing the 2008 Letter as “explain[ing] that, for an athletic activity to be counted in the substantial-proportionality analysis, the activity must take place in the context of an authentic varsity ‘sport.’”); *Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62, 89 (D. Conn. 2010) (noting that pursuant to the 2008 Letter, “for an athletic participation opportunity to be counted in the substantial proportionality analysis, that participation opportunity must take place in the context of an intercollegiate varsity ‘sport.’”).

142. Monroe, *supra* note 14, at 1; *see also* Glatt, *supra* note 12, at 305; Jacqueline R. Liguori, Case Note, *Sticking the Landing: How the Second Circuit’s Decision in Biediger v. Quinnipiac Univ. Can Help Competitive Cheerleading Achieve “Sport” Status Under Title IX*, 21 JEFFREY S. MOORAD SPORTS L.J. 153, 162 (2014).

143. Monroe, *supra* note 14, at 1–2; *see also* *Biediger*, 728 F. Supp. 2d at 89 (quoting Monroe, *supra* note 14, at 2).

in greater detail.

As an initial matter, if the institution is a member of an athletic organization, such as the NCAA or a state high school athletic association, as long as the requirements of such organization satisfy the factors set forth in the Letter and compliance is not discretionary, “OCR will presume that such an institution’s established sports can be counted under *Title IX*.”¹⁴⁴ However, “[t]his presumption can be rebutted by evidence demonstrating that the institution is not offering the activity in a manner that satisfies the factors below.”¹⁴⁵ In those situations where the presumption does not apply or has been rebutted, “OCR will evaluate an institution’s activit[ies] on a case-by-case basis [and] consider the factors below to make an overall determination of whether the activity can be considered part of the institution’s intercollegiate or interscholastic athletics program for the purpose of *Title IX* compliance.”¹⁴⁶ These factors are grouped under two main prongs: (1) program structure and administration, and (2) team preparation and competition.¹⁴⁷

As to program structure and administration, OCR “tak[es] into account the unique aspects inherent in the nature and basic operation of specific sports, [and] considers whether the activity is structured and administered in a manner consistent with established intercollegiate or interscholastic varsity sports in the institution’s athletics program.”¹⁴⁸ Specifically, OCR evaluates the following components:

A. Whether the operating budget, support services (including academic, sports medicine and strength and conditioning support) and coaching staff are administered by the athletics department or another entity, and are provided in a manner consistent with established varsity sports; and

B. Whether the participants in the activity are eligible to receive athletic scholarships and athletic awards (e.g., varsity

144. Monroe, *supra* note 14, at 2; *see also Biediger*, 691 F.3d at 93–94; *Biediger*, 928 F. Supp. 2d at 442; *Biediger*, 728 F. Supp. 2d at 89–90 (quoting Monroe, *supra* note 14, at 2); Glatt, *supra* note 12, at 305.

145. Monroe, *supra* note 14, at 2.

146. *Id.*; *see also Biediger*, 691 F.3d at 94; *Biediger*, 928 F. Supp. 2d at 442 (noting that OCR will consider “a multitude of factors” bearing on whether an activity constitutes a sport); *Biediger*, 728 F. Supp. 2d at 90 (describing “a bevy of factors” to be considered by OCR in determining whether an activity amounts to a sport); Glatt, *supra* note 12, at 305.

147. Monroe, *supra* note 14, at 2–4.

148. *Id.* at 2.

awards) if available to athletes in established varsity sports; to the extent that an institution recruits participants in its athletics program, whether participants in the activity are recruited in a manner consistent with established varsity sports.¹⁴⁹

In terms of team preparation and competition, OCR “tak[es] into account the unique aspects inherent in the nature and basic operation of specific sports, [and] considers whether the team prepares for and engages in competition in a manner consistent with established varsity sports in the institution’s intercollegiate or interscholastic athletics program.”¹⁵⁰ Specifically, OCR evaluates all of the following factors:

- A. Whether the practice opportunities (e.g., number, length and quality) are available in a manner consistent with established varsity sports in the institution’s athletics program; and
- B. Whether the regular season competitive opportunities differ quantitatively and/or qualitatively from established varsity sports; whether the team competes against intercollegiate or interscholastic varsity opponents in a manner consistent with established varsity sports;

When analyzing this factor, the following may be taken into consideration:

- 1. Whether the number of competitions and length of play are predetermined by a governing athletics organization, an athletic conference, or a consortium of institutions;
- 2. Whether the competitive schedule reflects the abilities of the team; and
- 3. Whether the activity has a defined season; whether the season is determined by a governing athletics

149. *Id.*; see also *Biediger*, 928 F. Supp. 2d at 442–43 (quoting *Monroe*, *supra* note 14, at 2); *Biediger*, 728 F. Supp. 2d at 90 (quoting *Monroe*, *supra* note 14, at 2); Glatt, *supra* note 12, at 307 (“A team may only be counted for Title IX purposes if it receives similar resources to and is organized in a manner consistent with other university teams. Athletic scholarships and recruiting factor into this part of the analysis.”) (citation omitted) (citing *Monroe*, *supra* note 14).

150. *Monroe*, *supra* note 14, at 3.

organization, an athletic conference, or a consortium.

C. If pre-season and/or post-season competition exists for the activity, whether the activity provides an opportunity for student athletes to engage in the pre-season and/or post-season competition in a manner consistent with established varsity sports; for example, whether state, national and/or conference championships exist for the activity; and

D. Whether the primary purpose of the activity is to provide athletic competition at the intercollegiate or interscholastic varsity levels rather than to support or promote other athletic activities.

When analyzing this factor, the following may be taken into consideration:

1. Whether the activity is governed by a specific set of rules of play adopted by a state, national, or conference organization and/or consistent with established varsity sports, which include objective, standardized criteria by which competition must be judged;
2. Whether resources for the activity (e.g., practice and competition schedules, coaching staff) are based on the competitive needs of the team;
3. If post-season competition opportunities are available, whether participation in post-season competition is dependent on or related to regular season results in a manner consistent with established varsity sports; and
4. Whether the selection of teams/participants is based on factors related primarily to athletic ability.¹⁵¹

151. *Id.* at 3–4 (footnote omitted); *see also Biediger*, 928 F. Supp. 2d at 443 (quoting *Monroe*, *supra* note 14, at 3–4); *Biediger*, 728 F. Supp. 2d at 90–91. Or, as one author put it:

An “athletic opportunity” exists only when a team has competitive opportunities that match those of other university teams. If the team in question’s schedule, postseason play, or practice opportunities are incomparable to those of other university teams, then the questionable group does not qualify as a sports team for the purposes of Title IX. This focus on competition leads to an inquiry into the availability of opponents

Assistant Secretary Monroe concluded the letter with the following:

It is OCR's policy to encourage compliance with the *Title IX* athletics regulations in a flexible manner that expands, rather than limits, student athletic opportunities. By disseminating this list of factors, OCR intends to provide institutions with information to include new sports in their athletics programs, such as those athletic activities not yet recognized by governing athletics organizations and those featured at the Olympic games, if they so choose. Expanding interscholastic and intercollegiate competitive athletic opportunities through new sports can benefit students by creating and stimulating student interest in athletics, taking advantage of athletic opportunities specific to a particular competitive region, and providing the opportunity for access to a wide array of competitive athletic activities.¹⁵²

Although the 2008 Letter sets forth in detail the factors used to determine whether an activity is a sport, it does not indicate how those factors should be balanced.¹⁵³ Instead, "how those factors are balanced will depend on the circumstances of each case, and th[e] balancing should always be performed with an eye towards whether the participants in a putative sport are receiving genuine athletic participation opportunities provided to athletes in other established varsity sports."¹⁵⁴

F. Cheerleading as a Sport

One activity that has often tested the parameters of what constitutes a sport is cheerleading. Almost since the inception of Title IX, agencies, courts, and scholars have debated whether cheerleading may be counted as a sport,

from other institutions. Without an adequate pool of possible competitors from other universities, the sport in question cannot count as an "athletic opportunity."

Glatt, *supra* note 12, at 307 (footnotes omitted) (citing Monroe, *supra* note 14).

152. Monroe, *supra* note 14, at 4; *Biediger*, 728 F. Supp. 2d at 91 (quoting Monroe, *supra* note 14, at 4).

153. *Biediger*, 728 F. Supp. 2d at 100.

154. *Id.*; *see also Biediger*, 928 F. Supp. 2d at 443 ("Whether an activity is a 'sport' will depend on the facts specific to the institution and will be decided based on the totality of those factors.").

whether for reasons of Title IX compliance or for other purposes.

1. Agency Pronouncements

OCR first addressed cheerleading as early as 1975. In a letter to various school and university officials, Peter E. Holmes, Director of OCR, stated that “drill teams, cheerleaders and the like, which are covered more generally as extracurricular activities . . . are not a part of the institution’s ‘athletic program’ within the meaning of the regulation.”¹⁵⁵ Following this pronouncement, OCR did not address cheerleading again for another twenty-five years. In April 2000, Dr. Mary Frances O’Shea, National Coordinator for Title IX Athletics for OCR, wrote to the Executive Director of the Minnesota State High School League, reiterating that “[c]onsistent with earlier policy statements, there is a presumption by OCR that cheerleading and other like activities are extracurricular activities and are not considered sports for Title IX purposes.”¹⁵⁶

Following a request from the Minnesota State High School League for further clarification, Dr. O’Shea wrote a second letter, dated May 24, 2000. In this letter, Dr. O’Shea acknowledged that Title IX “does not provide definitions for . . . ‘cheerleading’ and ‘other like activities,’ nor does OCR have definitions of these activities.”¹⁵⁷ However, OCR took the position that “the term cheerleading in this context includes both competitive and sideline cheer; other like activities would include all extracurricular activities similar to drill teams and cheerleading, such as danceline, skateline, and pep squads.”¹⁵⁸

155. Memorandum from Peter E. Holmes, Dir., Office for Civil Rights, to Chief State Sch. Officers, Superintendents of Local Educ. Agencies & Coll. & Univ. Presidents, at 4 (Sept. 1975) (on file with the United States Department of Health, Education, and Welfare/Offices for Civil Rights); *see also* McCormick *ex rel.* McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 282 n.8 (2d Cir. 2004) (quoting Memorandum from Peter E. Holmes to Chief State Sch. Officers, *supra* note 155); *Biediger*, 928 F. Supp. 2d at 445 n.37 (stating that HEW ruled in 1975 that cheerleading was an extracurricular activity and not a sport); *Biediger*, 728 F. Supp. 2d at 91 n.23 (stating that HEW ruled in 1975 that cheerleading was an extracurricular activity and not a sport); Glatt, *supra* note 12, at 308 (noting that OCR warned schools in 1975 “that . . . cheerleading . . . may not be considered part of an institution’s ‘athletic program.’”); Liguori, *supra* note 142, at 163 (“As early as 1975, OCR took the position that cheerleading was presumptively not a sport.”).

156. Letter from Dr. Mary Frances O’Shea to David V. Stead, *supra* note 129; *Biediger*, 928 F. Supp. 2d at 445 (quoting Letter from Dr. Mary Frances O’Shea to David V. Stead, *supra* note 129); *Biediger*, 728 F. Supp. 2d at 91 (quoting Letter from Dr. Mary Frances O’Shea to David V. Stead, *supra* note 129); Glatt, *supra* note 12, at 308.

157. Letter from Dr. Mary Frances O’Shea, Nat’l Coordinator for Title IX Athletics, Office for Civil Rights, to David V. Stead, Exec. Dir., Minn. State High Sch. League (May 24, 2000) (on file with the United States Department of Education).

158. *Id.*; *see also* *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 94 (2d Cir. 2012) ([I]n 2000, OCR had issued two letters stating that cheerleading, whether of the sideline or competitive variety, was

Indeed, over the years, several athletic associations asked OCR to evaluate whether sideline and competitive cheerleading could be considered part of a school's athletic program, and "[i]n each case, based on the information submitted for evaluation, OCR did not recognize as a sport any of the identified activities."¹⁵⁹

Such was the case in 2009, when OCR investigated a complaint that Foster High School (Foster) in the Tukwila School District (Tukwila) in Washington discriminated against its female high school students by not providing them with equal athletic participation opportunities in its sports programs.¹⁶⁰ In defending against the allegations, Tukwila asserted that OCR should count participants in the Foster cheer program in determining the district's compliance with Title IX.¹⁶¹ During the relevant time period, twelve girls participated in Foster's cheer program.¹⁶² The Washington Interscholastic Activities Association (WIAA), the governing state athletic association, allowed its member schools to offer cheerleading as either a sport or an activity, and published rules governing cheer programs.¹⁶³ The applicable rules for cheerleading as a sport set the dates of the regular season from November 3 through January 24, set the minimum number of practice days at ten, and set the maximum number of interscholastic contests during the season at ten.¹⁶⁴ The WIAA sponsored a cheerleading state championship.¹⁶⁵ To qualify, a squad must have performed in at least ten school events, participated in at least one WIAA or school-sponsored competition, and

presumptively not a sport, and that team members could not be counted as athletes under Title IX."); *Biediger*, 928 F. Supp. 2d at 445 (quoting Letter from Dr. Mary Frances O'Shea to David V. Stead, *supra* note 157); *Biediger*, 728 F. Supp. 2d at 91–92 (quoting Letter from Dr. Mary Frances O'Shea to David V. Stead, *supra* note 157); Glatt, *supra* note 12, at 308 (referring to Letter from Dr. Mary Frances O'Shea to David V. Stead, *supra* note 157).

159. Letter from Dr. Mary Frances O'Shea to David V. Stead, *supra* note 157; *Biediger*, 691 F.3d at 94 (observing that "since 2000, OCR has never recognized an intercollegiate varsity cheerleading program to be a sport for Title IX purposes."); *Biediger*, 928 F. Supp. 2d at 445 (noting that "the OCR has never held a varsity cheerleading . . . program to be a sport for Title IX purposes"); *Biediger*, 728 F. Supp. 2d at 92 (stating "that, since 2000, OCR has never held an intercollegiate varsity cheerleading program to be a sport for Title IX purposes.").

160. Letter from Gary D. Jackson, Dir., Seattle Office, U.S. Dep't of Educ., to Herb Dempsey, at 1 (Dec. 16, 2009) (on file with Author).

161. *Id.* at 3.

162. *Id.*

163. *Id.*

164. *Id.* A separate set of rules governed cheerleading as an activity. *Id.* These rules created a WIAA spirit committee, allowed the relevant season and practices to be defined by individual school districts, designated the winter season as competitive cheerleading season, and stated that "cheerleading activities should center on the leading or directing of fans." *Id.*

165. *Id.*

achieved a minimum qualifying score.¹⁶⁶

Foster's cheerleading team "served as both [a] spirit and competitive squad[.]"¹⁶⁷ Its athletic conference the Seamount League considered cheer a year-round activity, but did not hold its own cheer competitions.¹⁶⁸ The district's "cheerleading squad participated in two competitions during the 2007–2008 school year but did not participate in any competitions during the 2008–2009 school year."¹⁶⁹ The 2008–2009 "squad performed at all home and away football and boys' and girls' basketball games[.]" as well as monthly school assemblies.¹⁷⁰ Team members were required to pay approximately \$600 to participate in these activities.¹⁷¹ The payments were for items such as "form-fitting uniforms, embroidered warm-ups, embroidered briefs, beanies, sports bra, raincoat, shoes, bags, and pom-poms."¹⁷² In contrast, "[p]articipants on the school's other athletic teams did not have a requirement that they pay to participate. For those sports, each team member purchased his or her shoes but was not required to purchase his or her uniform or warm-ups."¹⁷³ The district's high school produced its own cheerleading guidelines, which stated that

[T]he mission of the cheerleading squad is to promote and uphold school spirit, unity, and pride; to represent the school to the highest degree; to set an example of good behavior and sportsmanship at all times, whether in uniform or not; and to encourage school spirit and pride in the school.¹⁷⁴

The guidelines made no mention of cheerleading competition.¹⁷⁵

In determining whether Tukwila provided equal athletic opportunities, OCR looked at whether the opportunities were provided in the context of a "sport."¹⁷⁶ OCR again stressed that it

166. *Id.*

167. *Id.*

168. *Id.* at 4.

169. *Id.*

170. *Id.* "During the . . . school year, there were . . . 9 football [games], 23 boys [sic] basketball [games], and 23 girls [sic] basketball games." *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 5.

175. *Id.*

176. *Id.* at 8.

does not use a specific definition of the term sport but instead considers several factors related to an activity's structure, administration, team preparation, and competition, when determining whether an activity is a sport that OCR counts as part of a district's interscholastic athletics program for the purpose of determining compliance with 34 C.F.R. 106.41(c)(1).¹⁷⁷

In the case at hand, OCR decided not to include Foster's cheerleading program "as an athletic activity for purposes of determining the [female] participation rate[] . . . in the district's interscholastic athletics program."¹⁷⁸ OCR delineated the following considerations in support of its determination:

Participants in the district's cheerleading . . . program[] are required to pay a substantial fee in order to participate; there is no competition within the Seamount League; the squads participate in a limited number of competitions; the mission, guidance, and rules for the activities emphasize performance rather than competition; and the focus of the activities is on supporting the school's sports rather than competition.¹⁷⁹

Therefore, based on its weighing of the numerous factors, OCR found that "on balance" Foster's cheerleading program was not a sport because it was "not comparable" to the district's "established varsity sports."¹⁸⁰

In sum, there is not a single instance to date in which OCR found any form of intercollegiate varsity cheerleading program—competitive or otherwise—to be a sport for Title IX purposes.¹⁸¹ However, notwithstanding the consistent pattern of contrary pronouncements and determinations detailed above, OCR has not completely foreclosed the possibility of cheerleading one day being considered a sport whose participants may be counted for purposes of Title IX.

177. *Id.*

178. *Id.* at 5.

179. *Id.*

180. *Id.* at 8; *see also* Buzuvis, *supra* note 13, at 446–47.

181. *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 94, 103 (2d Cir. 2012); *Biediger v. Quinnipiac Univ.*, 928 F. Supp. 2d 414, 445 (D. Conn. 2013); *Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62, 92 (D. Conn. 2010); *cf.* Kristina Sowder et al., *Defining "Sport,"* MOMENTUM MEDIA (Feb./Mar. 2004), <http://www.momentummedia.com/articles/am/am1602/cheerdefine.htm> ("[D]espite popularity and an increasingly competitive focus, dance and cheerleading are not uniformly recognized as sports by the Office for Civil Rights (OCR), the NCAA, the NFHS, or the Women's Sports Foundation.").

While steadfastly maintaining its presumption that cheerleading activities are not countable participation opportunities, OCR has always been careful to state that any determination as to whether a particular school's program constitutes a sport must be made on a case-by-case basis.¹⁸² This "leav[es] open the possibility for a different conclusion with respect to a particular cheerleading program."¹⁸³

2. Non-Title IX Case Law

Although *Biediger* is the first decision to comprehensively analyze whether cheerleading constitutes a sport for purposes of Title IX, a handful of cases have discussed the question outside of the Title IX context.¹⁸⁴ The subject appears to arise most frequently in the insurance context. In *Garcia v. St. Bernard Parish School Board*,¹⁸⁵ the Supreme Court of Louisiana considered "whether the insurance policy issued to the [defendant] School Board excluded coverage for an injury sustained by a high school cheerleader while performing [a] . . . stunt during a football game."¹⁸⁶ The plaintiff was tossing another cheerleader as part of a maneuver known as a basket toss "when the tossed cheerleader landed on [plaintiff's] knee," injuring her.¹⁸⁷ "Plaintiff filed [a] negligence action against the [School] Board and its general liability insurer."¹⁸⁸ The policy provision in question stated that "the insurance does not apply . . . to any person while practicing for or participating in any contest or exhibition of an athletic or sports nature sponsored by the named insured."¹⁸⁹ "The insurer moved for a summary judgment, asserting that the pertinent policy provision excluded coverage for [plaintiff's] injury" because she was

182. *Biediger*, 928 F. Supp. 2d at 445; Letter from Dr. Mary Frances O'Shea to David V. Stead, *supra* note 129.

183. *Biediger*, 691 F.3d at 103.

184. See, e.g., *Wicker v. Mesa Cty. Valley Sch. Dist. #51*, No. 05-cv-806-WYD-CBS, 2007 WL 595629, at *5, 8–9 (D. Colo. Feb. 21, 2007) (finding that the defendant school district offered no authority for counting participants on the cheerleading team as part of the total number of athletic participants in assessing substantial proportionality, but granting summary judgment to the school district on the third prong of the three-prong test); *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 282 n.8 (2d Cir. 2004) (noting that while the defendant school district listed cheerleading as a sport, and plaintiffs did not dispute the categorization, "[t]he case [did] not require [the court] to make a determination about whether cheerleading . . . [was] a sport within the meaning of . . . Title IX," although expressing skepticism that it was).

185. See generally 576 So.2d 975 (La. 1991).

186. *Id.* at 975.

187. *Id.* at 976.

188. *Id.*

189. *Id.* at 975.

“participating in an exhibition of a sports nature sponsored by [defendant].”¹⁹⁰

In order for the exclusion to apply, the court required the insurer to prove each of the following:

(1) [T]hat the event in which the person was injured was a contest or exhibition; (2) that the contest or exhibition was of an athletic or sports nature; (3) that the contest or exhibition was sponsored by the named insured; and (4) that the injured person was practicing for or participating in the contest or exhibition at the time of the injury.¹⁹¹

“[W]hile conceding that [plaintiff] was not a participant in the football contest, [the insurer] argue[d] that a cheerleader, while leading cheers at a football game, is participating in an exhibition and that cheerleading itself is of an athletic nature.”¹⁹²

The court disagreed:

The risks normally encountered in a sports contest which the policy provision clearly intended to exclude under the circumstances of this case were injuries sustained in the football game. None of the cases reviewed from other jurisdictions involved an injury in an exhibition ancillary to the principal contest sponsored by the insured. While a school board typically sponsors additional activities incidental to football contests, such as performances by cheerleaders, bands, pep squads, flag squads, drill teams and the like, these groups are not participants in the football contest, and an injury to a member of these groups during a football game is not clearly within the contemplation of the policy provision.¹⁹³

The court conceded that “the policy provision may apply to injuries during *cheerleading contests, either intramural or in competition among several schools*, but here there was no contest and no winner to be chosen.”¹⁹⁴

190. *Id.* at 976.

191. *Id.* at 976–77.

192. *Id.* at 977.

193. *Id.*

194. *Id.* (emphasis added).

Moreover, the exclusion could also apply “to injuries during an exhibition of cheerleading which is an independent event sponsored by the school, but here there was no . . . cheerleading exhibition independent of the football contest.”¹⁹⁵ However, the court noted that, “even if this cheerleading were an exhibition contemplated by the [exclusion],” it was not “of an athletic or sports nature.”¹⁹⁶ While the acrobatic stunt in which the plaintiff was participating at the time of her injury was of an athletic nature, “a cheerleader at a football game, for most of the game except for a few acrobatic stunts, is not generally engaged in activities of an athletic or sports nature.”¹⁹⁷ Thus, the policy provision at issue did “not clearly exclud[e] injuries sustained while cheerleading at a football game sponsored by the named insured.”¹⁹⁸

While other courts have likewise concluded that cheerleading should not be considered a sport,¹⁹⁹ the Supreme Court of Wisconsin reached a contrary result based on the language and definitions of a state statute. In *Noffke v. Bakke*, both plaintiff and defendant were varsity high school basketball cheerleaders.²⁰⁰ One night, the parties were practicing a cheerleading stunt prior to a game, without any mats.²⁰¹ During the stunt, plaintiff fell backward and struck her head on the tile floor, resulting in injury.²⁰² Plaintiff brought suit, alleging that defendant’s negligence in failing to properly spot her during the stunt caused her injuries.²⁰³ Defendant “moved for summary judgment asserting that he was immune from liability” pursuant to a state statute.²⁰⁴

195. *Id.*

196. *Id.* at 977 n.2.

197. *Id.*

198. *Id.* at 977.

199. *See, e.g.,* *Hinterberger v. Iroquois Sch. Dist.*, 548 F. App’x 50, 53 n.1 (3d Cir. 2013) (“At the time of Hinterberger’s accident, the PIAA did not officially recognize cheerleading as a sport and accordingly did not issue rules pertaining to cheerleading.”); *Hinterberger v. Iroquois Sch. Dist.*, 898 F. Supp. 2d 772, 781 (W.D. Pa. 2012) (“Cheerleading is not an activity sanctioned by the Pennsylvania Interscholastic Athletic Association, as it is not recognized as a sport. Accordingly, neither the PIAA nor the Commonwealth of Pennsylvania have adopted any rules or regulations regarding the conduct of high school cheerleading practices, performances, or competitions.”); *Gonzalez v. Univ. Sys. of N.H.*, No. 451217, 2005 WL 530806, at *2 (Conn. Super. Ct. Jan. 28, 2005) (“Cheerleading was not a sport or athletic event but, rather, a self-governing special interest club with twelve members.”); *Hacker v. Colonial League*, 56 Pa. D. & C.4th 281, 287 (Pa. Com. Pl. 2001) (“The Colonial League contends that it does not recognize cheerleading as a sport, however, it does recognize that it is an activity which supports and enhances interscholastic athletic contests.”).

200. 2009 WI 10, ¶¶ 3–4, 760 N.W.2d 156.

201. *Id.* ¶ 3.

202. *Id.*

203. *Id.* ¶ 6.

204. *Id.* ¶ 7 (citing WIS. STAT. § 895.525(4m)(a) (2016)).

The statute in question, which addressed the liability of contact sport participants, provided:

A participant in a recreational activity that includes physical contact between persons in a sport involving amateur teams, including teams in recreational, municipal, high school and college leagues, may be liable for an injury inflicted on another participant during and as part of that sport in a tort action only if the participant who caused the injury acted recklessly or with intent to cause injury.²⁰⁵

For purposes of the statute, “recreational activity” meant the following:

[A]ny activity undertaken for the purpose of exercise, relaxation or pleasure, including practice or instruction in any such activity. “Recreational activity” includes hunting, fishing, trapping, camping, bowling, billiards, picnicking, exploring caves, nature study, dancing, bicycling, horseback riding, horseshoe-pitching, bird-watching, motorcycling, operating an all-terrain vehicle, ballooning, curling, throwing darts, hang gliding, hiking, tobogganing, sledding, sleigh riding, snowmobiling, skiing, skating, participation in water sports, weight and fitness training, sight-seeing, rock-climbing, cutting or removing wood, climbing observation towers, animal training, harvesting the products of nature, sport shooting *and any other sport, game or educational activity*.²⁰⁶

Thus, to be entitled to statutory “immunity, a defendant must be (1) participating in a recreational activity; (2) that recreational activity must include physical contact between persons; (3) the persons must be participating in a sport; and (4) the sport must involve amateur teams.”²⁰⁷

The plaintiff argued that the statute “provide[d] immunity only to those persons . . . competing in a contact sport.”²⁰⁸ Because cheerleading was neither competitive nor a contact sport, according to the plaintiff, the

205. *Id.* ¶ 14 (quoting § 895.525(4m)(a)).

206. *Id.* ¶ 15 (quoting § 895.525(2)).

207. *Id.* ¶ 16.

208. *Id.* ¶ 13.

defendant was not entitled to immunity.²⁰⁹ The defendant countered by arguing “that the plain language of the statute render[ed] him immune from negligence because cheerleading involve[d] physical contact.”²¹⁰ The court agreed with the defendant and held that he was “immune from liability because he was participating in a recreational activity that includes physical contact between persons in a sport involving amateur teams.”²¹¹

The court began its analysis by finding that cheerleading indisputably constituted a recreational activity.²¹² Although recognizing that “the question of whether cheerleading is a sport has apparently ‘been a matter of public debate,’”²¹³ the court also readily concluded that cheerleading was a sport, because it was “[a]n activity involving physical exertion and skill that is governed by a set of rules or customs.”²¹⁴ It did not matter that the parties were not engaged in competition at the time of plaintiff’s injury, because, while “a sport is ‘often undertaken competitively,’ the definition does not require competition,” neither does the statute.²¹⁵ Moreover, “cheerleaders often engage in competition with the opponent’s cheerleaders not only during a game but also during organized competitions.”²¹⁶ Finally, the court believed that to “constru[e] the word ‘sport’ to exclude cheerleading . . . is inconsistent with the purpose of the statute.”²¹⁷

Having held that cheerleading constituted both a recreational activity and a sport, the court further concluded that the parties’ activity involved amateur teams and physical contact as well.²¹⁸ Accordingly, because cheerleaders such as the defendant “participate in a recreational activity that includes physical

209. *Id.*

210. *Id.*

211. *Id.* ¶¶ 3, 58.

212. *Id.* ¶¶ 13, 16.

213. *Id.* ¶ 32 n.10.

214. *Id.* ¶ 32 (quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1742 (3d ed. 1992)).

215. *Id.* ¶ 17 n.3.

216. *Id.* ¶ 31 n.8.

217. *Id.* ¶ 32. Indeed, the court felt that the parties themselves had impliedly recognized that cheerleading constituted a sport by focusing the majority of their arguments on the “physical contact” requirement of the statute. *See id.* ¶ 32 n.10.

218. *Id.* ¶ 23. Specifically, the court noted that “cheerleaders are on amateur teams because a team is ‘[a] group organized to work together’ and cheerleaders . . . are a group dedicated to leading fan participation and taking part in competitions.” *Id.* ¶ 17 (alteration in original) (citation omitted) (quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 214, at 1842). Cheerleading also “involves a significant amount of physical contact between the cheerleaders that at times results in a forceful interaction between the participants,” including “when one person is tossed high into the air and then caught by those same tossers.” *Id.* ¶ 23.

contact between persons in a sport involving amateur teams,” they are immune from negligence actions.²¹⁹

Other courts in other jurisdictions have echoed *Noffke* in construing cheerleading as a sport, albeit outside the parameters of Title IX.²²⁰

III. THE *BIEDIGER* DECISIONS

In the course of the *Biediger* litigation, the United States District Court for the District of Connecticut and the United States Court of Appeals for the Second Circuit became the first federal courts to apply OCR’s test for determining what constitutes a sport for purposes of Title IX.²²¹ The activity at issue was competitive cheerleading.²²² “Competitive cheer[leading] is an outgrowth of traditional sideline cheerleading. . . . [involving] many of the moves and techniques that sideline cheer[leaders] . . .” use.²²³ However, while

219. *Id.*

220. *See, e.g.,* Patterson v. Mut. of Omaha Ins. Co., 743 F.3d 1160, 1162 (8th Cir. 2014) (“It may surprise some to learn that cheerleading is, by some measures, the second most dangerous college *sport* in the country.”) (emphasis added); Brindisi v. Regano, 20 F. App’x 508, 510 n.1 (6th Cir. 2001) (noting, in dicta, that “[c]heerleading is probably as much a sport as those more traditionally conceived like football and soccer. . . . Cheerleading is more dangerous, in terms of serious injuries per minute of participation, than all but two mens’ [sic] high school sports. . . . Cheerleaders compete in national and even international competitions. . . . The internet portal yahoo.com lists ‘cheerleading’ under its category ‘sports.’” (citations omitted) (citing *Fontes v. Irvine Unified Sch. Dist.*, 30 Cal. Rptr. 2d 521, 524 (1994); *Am. Cheerleader*, <http://www.americancheerleader.com> (last visited Mar. 13, 2016)); *White v. Cleary*, No. 09–4324 (PGS), 2012 WL 924338, at *1 (D.N.J. Mar. 19, 2012) (noting that the defendant school district recognized cheerleading as a sport and paid cheerleading coaches according to its coach salary guide); *Williams v. Clinton Cent. Sch. Dist.*, 872 N.Y.S.2d 262, 263 (App. Div. 2009) (“by performing her cheerleading routine on a bare wood gym floor . . . ‘plaintiff assumed the risks of the *sport* in which she voluntarily engaged.’” (emphasis added) (quoting *Fisher v. Syosset Cent. Sch. Dist.*, 694 N.Y.S.2d 691, 691 (App. Div. 1999)); *Rendine v. St. John’s Univ.*, 735 N.Y.S.2d 173, 174 (App. Div. 2001) (finding that “plaintiff assumed the risks of the *sport* in which she voluntarily engaged including the obvious risk that she might fall onto the floor while she and her partner were performing the stunt.”) (emphasis added) (citing *Fisher*, 694 N.Y.S.2d at 691); *Fisher*, 694 N.Y.S.2d at 692 (holding that “plaintiff[,], who voluntarily participated in extracurricular, school-sponsored cheerleading activities, [and] hurt her thumb while practicing a maneuver,” had “assumed the risks of the *sport* in which she voluntarily engaged, including the obvious risk that she might fall onto the hard floor where the team was practicing.”) (emphasis added); *see also* Sowder et al., *supra* note 181 (advocating that cheerleading be considered a sport, based on surveys of NCAA schools, because it is “characterized by fitness . . . [involves] the physical elements that typically define sport (endurance, strength, power, agility, flexibility),” and has “structure, organization, and competition . . . [and] identified rules and judging criteria”).

221. *Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62, 94 (D. Conn. 2010); *Biediger v. Quinnipiac Univ.*, 691 F.3d 85 (2d Cir. 2012).

222. Buzuvis, *supra* note 13, at 439 (recognizing the district court in *Biediger* as “the first federal court to consider whether competitive cheer could count as a varsity sport for purposes of gender equity under Title IX.”).

223. *Biediger*, 728 F. Supp. 2d at 78.

sideline cheerleading primarily involves entertaining audiences and soliciting crowd responses at other teams' games, competitive cheerleaders "compete to win."²²⁴ Competitive cheerleaders do not use the props commonly associated with sideline cheerleading—items such as pom-poms, megaphones, and signs.²²⁵ They wear uniforms similar to volleyball players, rather than traditional sideline cheerleading uniforms.²²⁶ Finally, competitive cheerleading "emphasize[s] the more gymnastic elements of sideline cheerleading, such as aerial maneuvers, floor tumbling, and balancing exercises, to the exclusion of those activities intended to rally the watching audience."²²⁷

The task before the federal courts in the *Biediger* litigation was to determine whether the activity of competitive cheerleading as described above constituted a sport for purposes of Title IX, so that its participants could be counted among the genuine athletic participation opportunities provided to women under the substantial proportionality prong of the three-part test. This section details the factual background and legal analysis underpinning these groundbreaking decisions.

A. *The 2010 District Court Decision*

In 2006, Quinnipiac University (Quinnipiac) transitioned its athletics program from NCAA Division II to NCAA Division I.²²⁸ The debt created by new facilities built in connection with the transition contributed to budgetary difficulties in the ensuing years.²²⁹ In March 2009, Quinnipiac announced plans to cut its men's golf team, men's outdoor track team, and women's volleyball team, while adding a new women's competitive cheerleading team for the 2009–2010 season.²³⁰ Faced with the prospect of having their team eliminated, five members of the volleyball team along with their coach, filed an action in federal court alleging that Quinnipiac's decision to eliminate the

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. Nancy Hogshead-Makar, *Hurricane Warning Flag for Olympic Sports: Compliance Practices in Biediger v. Quinnipiac University Signal a Risk to Women's and Men's Olympic Sports*, 52 B.C. L. REV. 465, 481 (2011).

229. *See id.* at 481–82.

230. *Biediger*, 728 F. Supp. 2d at 63. Apparently, Quinnipiac was faced with a space crunch and wanted to eliminate the volleyball program to free up the facility being used by the team for other activities. *Biediger*, 928 F. Supp. 2d at 471 n.64; Carolyn Davis, Note, *Leave It on the Field: Too Expansive an Approach to Evaluating Title IX Compliance in Biediger v. Quinnipiac University?*, 76 BROOK. L. REV. 265, 276 (2010).

volleyball team violated Title IX and its associated regulations.²³¹ The parties severed and the district court held a one-week bench trial on the plaintiffs' claim "that Quinnipiac discriminate[d] on the basis of sex in its allocation of athletic participation opportunities."²³²

Quinnipiac defended itself against the plaintiffs' claims of sex discrimination by relying on the first prong of the three-prong test set forth in the Policy Interpretation.²³³ Quinnipiac contended that it was in compliance with Title IX "because it provides athletic participation opportunities for women in numbers substantially proportionate to its undergraduate female enrollment."²³⁴ The first prong was the only prong of the three-prong test raised by Quinnipiac as a defense; it did not argue that it satisfied either the second or third prong of the test.²³⁵

The court used a two-step analysis to determine whether Quinnipiac provided substantially proportionate athletic participation opportunities for its female students.²³⁶ Under the first step, the court would "determin[e] which of the University's putative varsity athletic participation opportunities should be counted for Title IX purposes."²³⁷ Only those athletic participation opportunities that "afford[ed] an athlete a *genuine* opportunity to participate in a varsity sport" would be counted.²³⁸ Moreover, "[t]o be a genuine

231. *Biediger*, 728 F. Supp. 2d at 63. Private actions to enforce Title IX are permitted, because the statute expressly allows "'any person aggrieved' by an agency's termination of funding based on a finding of non-compliance with the statute to seek judicial review of such agency action." *Nat'l Wrestling Coaches Ass'n v. U.S. Dep't of Educ.*, 263 F. Supp. 2d 82, 88 (D.D.C. 2003) (quoting Title IX of the Education Amendments of 1972, 20 U.S.C. § 1683 (2016)); *see also* *Mansourian v. Regents of the Univ. of Cal.*, 602 F.3d 957, 964 n.6 (9th Cir. 2010).

232. *Biediger*, 728 F. Supp. 2d at 64.

233. *Id.* at 88.

234. *Id.*

235. *Id.* Courts have recognized that "relying exclusively on prong one—and forgoing proof [on the second and third prongs]—has certain advantages." *Biediger*, 728 F. Supp. 2d at 438. Establishing compliance under the second and third prongs usually requires extensive evidentiary production "concerning a school's past gender-equity practices, history of program expansion for women, and assessment of athletic interests over time." *Id.* On the other hand, the first prong permits a school to establish gender equity via a mathematical formula, based solely on its current athletic program. *Id.* Accordingly, "a university which does not wish to engage in extensive compliance analysis may stay on the sunny side of Title IX simply by maintaining gender parity between its student body and its athletic lineup." *Id.* (quoting *Cohen v. Brown Univ.*, 991 F.2d 888, 897–98 (1st Cir. 1993)). Therefore, "as a matter of litigation strategy, singular reliance on prong one allows a defendant-university concerned about its prior gender-equity record to avoid intrusive discovery on—and public testimony about—the school's history of sex discrimination in athletics." *Id.* For this reason, among others, the first prong is the prong most used by defendants in Title IX actions. *See* Glatt, *supra* note 12, at 303.

236. *Biediger*, 728 F. Supp. 2d at 93–94.

237. *Id.* at 93.

238. *Id.*

participation opportunity, an athlete must participate in a legitimate ‘sport,’ which is assessed by considering the set of factors set forth in the 2008 OCR Letter.”²³⁹ Once the number of genuine athletic participation opportunities was determined, the court proceeded to the second step of the analysis. This step consisted of “compar[ing] the percentage of athletic participation opportunities provided to women to the percentage of women enrolled as undergraduates,” to determine substantial proportionality.²⁴⁰

1. Deference

The court began with an analysis of the level of deference accorded to the various relevant administrative pronouncements it would be interpreting. The court found the 1975 Regulations were a reasonable interpretation of Title IX promulgated by HEW according to specific congressional delegation and were therefore entitled to a high level of deference under *Chevron*.²⁴¹ Likewise, the Policy Interpretation was previously deemed “both persuasive and not unreasonable,” according it deference under either *Chevron* or *Skidmore*.²⁴² Other courts similarly found the 1996 Clarification deserving of deference.²⁴³

However, no federal court had previously determined the level of deference to accord the 2000 and 2008 OCR Letters.²⁴⁴ Be that as it may, the court noted that “there seems to be little question that [it] should defer to [the Letters] as [a reasonable] interpretation of [OCR’s] own regulations” under *Martin*.²⁴⁵ The court found that the Letters “create[d] a reasonable and persuasive method—best captured by the 2008 OCR Letter, which builds upon the list of factors first proposed in the April 2000 OCR Letter—for determining which activities count as sports for Title IX purposes.”²⁴⁶ The court continued:

The 2008 OCR Letter correctly recognizes that an

239. *Id.*

240. *Id.* at 94. The court indicated that substantial proportionality would not be determined purely from the statistical figure but would also take account of the particular facts and circumstances, “such as whether any shortage in female athletes is large enough to sustain an independent women’s varsity team that the University is not presently sponsoring.” *Id.*

241. *Id.* at 92.

242. *Id.* (quoting *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 290 (2d Cir. 2004)).

243. *Id.* (citing, for example, *Mansourian v. Regents of the Univ. of Cal.*, 602 F.3d 957, 965 n.9 (9th Cir. 2010)).

244. *Id.* at 92–93; *see also* Glatt, *supra* note 12, at 311.

245. *Biediger*, 728 F. Supp. 2d at 93.

246. *Id.*

intercollegiate sport is defined not only by the activity's athletic elements, but also by its structure, administration, and the competition it fosters. Put differently, the OCR factors appropriately weigh not only the physical nature of the activity itself, but also how the experience of participating in that activity compares to the experience of participating on other varsity sports teams. That inquiry is reasonable, persuasive, and entirely consistent with OCR's goal of ensuring not only that female students are offered equal athletic participation opportunities, but that those participation opportunities are real, and not illusory. For those reasons, I will defer to the 2000 and 2008 OCR Letters interpreting OCR's regulations and will use the method they prescribe for determining whether an activity may be treated as a sport under Title IX.²⁴⁷

2. Whether Competitive Cheerleading Is a "Sport"

Having determined that all of the relevant agency pronouncements were entitled to at least some level of deference, the court proceeded to consider whether competitive cheerleading constituted a sport pursuant to the analytical framework laid out in the 2008 OCR Letter. The first consideration under the 2008 OCR Letter is whether the university is a member of a recognized intercollegiate athletic association, such as the NCAA, and whether the activity is governed by that association's rules.²⁴⁸ If so, there is a presumption that the activity can be counted as a sport for purposes of Title IX compliance.²⁴⁹

Quinnipiac is a member of NCAA Division I. However, competitive cheerleading is not a sport recognized by the NCAA.²⁵⁰ Nor have any schools sponsoring competitive cheerleading teams even applied to the NCAA for designation of competitive cheerleading as an "emerging sport."²⁵¹ Likewise,

247. *Id.*

248. *Id.* at 93–94.

249. *Id.* at 94.

250. *Id.*

251. *Id.* at 78, 94. "In 1994, the NCAA adopted the Emerging Sports initiative as part of an overall effort to promote the growth of women's sports. . . . The list of emerging sports for women helps member institutions overcome the challenges of adding new women's sports." Buzuvis, *supra* note 13, at 454–55. According to the NCAA, "[a]n emerging sport is a sport recognized by the NCAA that is intended to provide additional athletics opportunities to female student-athletes." CRITERIA FOR EMERGING SPORTS, *supra* note 133. Member institutions may count emerging sports toward "NCAA minimum sports-sponsorship and . . . minimum financial aid requirements." *Id.*; see also Biediger, 728 F. Supp. 2d at 78–79; 2015–16 NCAA DIVISION I MANUAL art. 20.02.4 (2015) [hereinafter NCAA MANUAL]; Buzuvis, *supra* note 13, at 455. An "[e]merging sport[] may become [an official] NCAA

DOE does not consider competitive cheerleading a sport for purposes of reporting athletic participation data under the Equity in Athletics Disclosure Act (EADA).²⁵² Therefore, the court determined that “competitive cheer is not entitled to any presumption in favor of it being considered a sport under Title IX.”²⁵³ Indeed, in the May 24, 2000 Letter, OCR indicated “cheerleading is presumptively not a Title IX sport.”²⁵⁴ Therefore, pursuant to the guidelines set forth in the 2008 OCR Letter, the court proceeded to inquire as to whether competitive cheerleading should be considered part of Quinnipiac’s intercollegiate athletic program based on its program structure and administration, as well as its team preparation and competition.

a. Program Structure and Administration

The first set of factors considered in determining whether an activity constitutes a sport under Title IX coalesces around program structure and administration.²⁵⁵ The court found that, in many respects, the competitive cheer team was structured and administered in the same way as other, recognized sports.²⁵⁶ For instance, the “team’s operating budget, benefits and services, and coaching staff are administered by the athletics department in a manner consistent with the administration of Quinnipiac’s other varsity teams.”²⁵⁷ Team members also received benefits and services on par with other varsity teams in areas such as equipment, medical treatment, strength and conditioning coaching, study halls, community service opportunities, publicity, and eligibility to receive awards and recognition for their participation.²⁵⁸ “[T]he . . . coaching staff was administered like the coaching

championship sport[] if at least forty member institutions add the emerging sport within a ten-year period,” although exceptions are sometimes granted if the sport is making “‘steady progress’ toward that goal.” Buzuvis, *supra* note 13, at 455; *see also* CRITERIA FOR EMERGING SPORTS, *supra* note 133. Current championship sports that originated on the list of emerging sports include rowing, ice hockey, water polo, and bowling. Buzuvis, *supra* note 13, at 455. For the 2015–2016 academic year, the NCAA lists only rugby, equestrian, and triathlon as emerging sports. NCAA MANUAL, *supra* note 251, art. 20.02.4(a)–(b).

252. *Biediger*, 728 F. Supp. 2d at 79. “The EADA is a law separate from Title IX that requires an educational institution receiving federal funding and participating in intercollegiate athletics to report its athletic participation data for men and women to the Department of Education.” *Id.* at 79 n.18 (citing 20 U.S.C. § 1092(g) (2016)); *see also Biediger*, 928 F. Supp. 2d at 422 n.8 (citing 20 U.S.C. § 1092(g)).

253. *Biediger*, 728 F. Supp. 2d at 94.

254. *Id.*

255. *Id.* at 95.

256. *Id.*

257. *Id.*

258. *Id.*

staff of other Quinnipiac varsity [teams].”²⁵⁹ Finally, while not recognized by the NCAA as a varsity sport, “the Quinnipiac competitive cheer team still followed applicable NCAA rules, such as . . . practice time restrictions” and medical clearance requirements, just like Quinnipiac’s established varsity sports.²⁶⁰

However, the court also found several areas in which the competitive cheer team diverged from the typical varsity program at Quinnipiac. For instance, the team did not receive locker room space like other varsity teams.²⁶¹ Moreover, unlike other varsity sports at the school, as a non-recognized sport, competitive cheer was not covered by the NCAA’s insurance program, and had to buy its own catastrophic insurance coverage from a separate provider.²⁶² Most importantly, in contrast to every other varsity sport at Quinnipiac, not a single member of the competitive cheer team was recruited off campus, because the team’s coach had not passed the NCAA recruitment examination.²⁶³

b. Team Preparation and Competition.

The court then turned to an examination of the relevant factors relating to team preparation and competition. Pursuant to the criteria established by the 2008 OCR Letter, the court examined

(1) the quality of the team’s practice opportunities; (2) whether the regular season differs quantitatively or qualitatively from the regular seasons of other varsity sports; (3) whether the pre- and post-seasons are consistent with other varsity sports; and (4) whether the team is organized primarily for the purpose of engaging in athletic competition.²⁶⁴

The court found no question that two of the factors favored treating

259. *Id.*

260. *Id.* at 81.

261. *Id.* at 81–82.

262. *Id.* at 82, 95.

263. *Id.* at 80, 95. The head coach of Quinnipiac’s competitive cheer team, Mary Ann Powers, was formerly the coach of Quinnipiac’s sideline cheer team. *Id.* at 80. At the time she accepted the position in 2009, Powers was not familiar with the applicable NCAA and conference recruiting rules and was not cleared to recruit any athletes off campus until she passed the NCAA recruitment examination for coaches in the spring of 2010. *Id.* Notwithstanding her inability to recruit off campus, Powers believed that her on-campus recruiting was sufficient to field a competitive team for the 2009–2010 season. *Id.* at 81.

264. *Id.* at 96.

competitive cheerleading as a sport.²⁶⁵ First, “the team’s practices [were] similar to the practice regimen for other varsity squads.”²⁶⁶ Quinnipiac also satisfied the fourth factor, as the primary purpose of the competitive cheerleading team was “to compete athletically at the intercollegiate varsity level.”²⁶⁷ However, there were major distinctions between the competitive cheerleading team and Quinnipiac’s other varsity sports as to the remaining two factors, differences the court ultimately found dispositive.²⁶⁸

First, the court compared the regular season of Quinnipiac’s competitive cheer team to the regular seasons of the school’s other varsity sports.²⁶⁹ According to the 2008 OCR Letter, in analyzing this factor, the following considerations were relevant: “whether the number of competitions and length of play are predetermined by a governing athletics organization, conference, or consortium of institutions; whether the competitive schedule reflects the team’s abilities; and whether the activity’s season is defined by a governing athletics organization, conference, or consortium.”²⁷⁰

Quinnipiac partially satisfied these criteria: along with seven other schools, it had “joined and helped establish [an] intercollegiate competitive cheer organization [known as] the National Competitive Stunt and Tumbling Association (NCSTA).”²⁷¹ For the 2009–2010 season, the NCSTA determined that the competitive cheer season would last 132 days and that each team would compete in at least eight contests, including the championship, which would be the National Cheerleading Association (NCA) national championship event in Daytona Beach, Florida, in April 2010.²⁷² “[T]he NCSTA developed an initial set of rules for its competitions during the 2009–10 season.”²⁷³ However, despite their agreement on these measures, as well as their common belief that competitive cheer teams should only engage in competition and not support other varsity teams in a sideline capacity, the organization remained “a loosely defined, unincorporated association with no board of directors, subcommittees,

265. *Id.*

266. *Id.*

267. *Id.* at 99.

268. *Id.* at 96–97.

269. *Id.* at 97.

270. *Id.*

271. *Id.* at 82.

272. *Id.* at 82–83.

273. *Id.* at 83. The rules established a scoring system for competitions similar to gymnastics and figure skating. *Id.* Teams would select a routine with a predetermined score value to perform at each event, and “whether the team[] [met] that score [would] depend[] on the quality and accuracy of [its] execution.” *Id.* “Scores [would be] determined by [a] panel[] of five judges.” *Id.*

voting or petition systems for its members, or other hallmarks of a governing national athletics organization.”²⁷⁴ Moreover, the NCSTA “did not establish a maximum number of competitive cheer competitions; rules for what kind of teams its member schools could play against; or what kinds of scoring systems would be permissible at non-NCSTA competitive cheer competitions.”²⁷⁵ Nor did it appear that the rules that the NCSTA established were even enforceable; the court found no evidence that the NCSTA could penalize its member schools for violating the organization’s agreement.²⁷⁶

As a result of these deficiencies, “the 2009–10 Quinnipiac competitive cheer season was marked by inconsistency in terms of whom the University competed against and what scoring system was applied.”²⁷⁷ The team participated in ten competitions during the 2009–2010 regular season, but only two of them were conducted under the auspices of the NCSTA.²⁷⁸ Because the competitive cheer season was not governed by a single overseeing body, such as the NCAA, the rules varied from competition to competition.²⁷⁹ Indeed, those ten contests were conducted according to at least five different scoring rules.²⁸⁰ The court found that “[n]o other varsity sport was subject to multiple sets of governing bodies, and every other Quinnipiac varsity team could prepare for games knowing that the rules of competition would remain constant.”²⁸¹

Moreover, Quinnipiac’s competitive cheer team did not play a schedule that reflected its participants’ abilities.²⁸² In its ten regular season contests, the team competed against a variety of different opponents, “including other collegiate varsity competitive cheer squads, collegiate club competitive cheer squads, collegiate sideline cheer teams, all-star squads, and even high school cheerleaders.”²⁸³ No other varsity team at Quinnipiac played against

274. *Id.* at 82.

275. *Id.* at 97.

276. *Id.* “Indeed, the NCSTA could not even threaten . . . violators . . . [with a] postseason [ban]—a stick that the NCAA uses to deter and punish its member schools for violating its rules—because the 2009–10 post-season was administered by NCA—a third party . . . over which the NCSTA had no authority.” *Id.*

277. *Id.* at 83.

278. *See id.* at 84, 97.

279. *Id.* at 97.

280. *Id.* at 84, 97.

281. *Id.* at 97.

282. *Id.*

283. *Id.*; *see also id.* at 84.

non-varsity—indeed, in certain cases, non-collegiate—competition.²⁸⁴ Because “[n]o other Quinnipiac varsity team is forced to play such a motley assortment of competitors . . . it cannot be doubted that the quality of competition is more variant across the competitive cheer season than across the seasons of the University’s other varsity teams.”²⁸⁵

Not only was the competitive cheer team’s regular season different from the school’s other varsity sports, but its postseason differed significantly from established varsity sports as well.²⁸⁶ As mentioned above, for the 2009–2010 season, the competitive cheerleading postseason consisted of competing in the NCA national championship event.²⁸⁷ This event “was open to all schools’ cheerleading teams; there was no progressive playoff system or entrance qualification, such as a ranking system or minimum win tally over the course of the season.”²⁸⁸ Indeed, “being a competitive cheerleading team was not a prerequisite to participating in the NCA event.”²⁸⁹ Although Quinnipiac competed only against other competitive cheer teams at the NCA championship, the teams “were not ranked, seeded, or winnowed in any way.”²⁹⁰ The teams were simply “pitted against each other in a single championship round in which the team with the highest score won. How those schools fared in their regular season was irrelevant to their success.”²⁹¹

A further issue related to the NCA event was its “fail[ure] to provide a form of competition in keeping with Quinnipiac’s season.”²⁹² The rules for the NCA event required teams to participate in a “spirit” segment in which their success would be judged by the intensity of the crowd response they elicited and the number of sponsor props they used.²⁹³ At no point in the regular season had the team’s score ever been determined by its ability to elicit a crowd reaction, which is a hallmark of sideline, not competitive cheer.²⁹⁴ Needless to say, “[n]o other varsity sport at Quinnipiac introduces a new scoring system or element of competition in its championship that was not

284. *Id.* at 97–98.

285. *Id.* at 98.

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.* at 98–99.

present during the regular season.”²⁹⁵ Thus, the differences between the competitive cheer team and Quinnipiac’s other varsity sports as to both regular season and postseason competition counseled against a determination that competitive cheerleading constituted a sport for Title IX purposes.²⁹⁶

In sum, while certain aspects of Quinnipiac’s competitive cheer program compared favorably to other varsity sports, “other factors relating to the structure, administration, team preparation, and competition” supported a finding that, “at this point in time, the University’s competitive cheer team cannot count as a sport under Title IX.”²⁹⁷ The court then balanced the various factors, with an eye towards whether the members of the competitive cheer team “are receiving genuine athletic participation opportunities equivalent to the opportunities provided to athletes in other established varsity sports.”²⁹⁸ The court believed that the three deciding factors in the analysis were the competitive cheer team’s inability to recruit off campus; its inconsistent regular season, in terms of both the rules governing team competitions, as well as the type and quality of opponents; and its “aberrant” postseason, involving a new form of competition and no entrance qualification or progressive playoff system.²⁹⁹ These factors led the court “to conclude that the women’s competitive cheer team was not a varsity sport under Title IX.”³⁰⁰

Notwithstanding the court’s conclusion that Quinnipiac’s competitive cheer team, as currently constituted, would not be counted as a sport for Title IX purposes, it is important to note that the court did not close the door entirely on the issue. While “the activity is still too underdeveloped and disorganized to be treated as offering genuine varsity athletic participation opportunities for students,” competitive cheerleading “may, some time in the future, qualify as a sport for the purposes of Title IX.”³⁰¹ Indeed, the court expressed

little doubt that at some point in the near future—once competitive cheer is better organized and defined, and surely in the event that the NCAA recognizes the activity as an emerging sport—competitive cheer will be acknowledged as a bona fide

295. *Id.* at 99.

296. *Id.*

297. *Id.*

298. *Id.* at 100.

299. *Id.* at 99–100.

300. *Id.* at 100.

301. *Id.* at 64.

sporting activity by academic institutions, the public, and the law.³⁰²

However, “that time has not yet arrived,” and, accordingly, Quinnipiac could not yet count the members of its competitive cheer team as genuine athletic participation opportunities for purposes of compliance with the substantial proportionality prong of the three-part test for Title IX compliance.³⁰³

3. Substantial Proportionality

Having determined which athletic participation opportunities would be counted, the court then proceeded to compare the percentage of athletic participation opportunities provided to women to the percentage of women enrolled as undergraduates, to determine substantial proportionality. For the 2009–2010 school year, of the 5,686 students enrolled at Quinnipiac, 2,168 students, or 38.13%, were male, while 3,518 students, or 61.87%, were female.³⁰⁴ Quinnipiac argued that even after eliminating the women’s volleyball team, it still offered athletic participation opportunities for women substantially proportional to the university’s female undergraduate

302. *Id.* at 101. Quinnipiac provided evidence of various changes instituted by the NCSTA for the 2010–2011 season in an effort to convince the court that competitive cheerleading constituted a sport. *See id.* at 84–85. For instance, in 2010–2011, the NCSTA held its championship independent of the NCA, required its schools to compete in six competitions, at least half of which had to follow NCSTA rules and format and be against at least one other collegiate team, and determined that NCSTA membership would be available to all competitive cheer teams sponsored as varsity teams, as well as to club teams at schools committed to sponsoring them as varsity programs eventually. *Id.* The NCSTA also agreed to “apply to the NCAA for competitive cheer to be recognized as an emerging sport.” *Id.* at 85. However, every NCSTA team would still qualify to compete at the new championship event, regardless of record. *See id.* at 84. Moreover, the NCSTA still “has not[] created a permanent set of bylaws to govern competitive cheer,” with its “rules remain[ing] somewhat in flux.” *Id.* at 85. Nor did Quinnipiac seek a letter from OCR determining that its competitive cheer team counted as athletic participants for purposes of Title IX. *Id.* Finally, as Quinnipiac conceded, competitive cheer could not be approved as an emerging sport because there were not yet sufficient teams to meet the NCAA’s requirements. *Id.* The most recent edition of the NCAA Division I Manual still does not list competitive cheer as an emerging sport. *See NCAA MANUAL*, *supra* note 251, art. 20.02.4(a)–(b). Thus, the court remained unconvinced that the changes would be adequate to support a conclusion that competitive cheerleading could count as a sport under Title IX for the 2010–2011 season. *Biediger*, 728 F. Supp. 2d at 113.

303. *Biediger*, 728 F. Supp. 2d at 101.

304. *Id.* at 64. This ratio presented a significant hurdle to Quinnipiac’s attempt to demonstrate substantial proportionality, especially since NCAA Division I schools must offer at least fourteen sports, no fewer than six of which are for men. *Hogshead-Makar*, *supra* note 228, at 482.

enrollment.³⁰⁵ According to Quinnipiac's numbers, it had 282 female athletes out of 450 athletes overall for the 2009–2010 school year.³⁰⁶ These figures would “result[] in 62.67 percent of the school's athletic participation opportunities being assigned to women,” which would satisfy the substantial proportionality prong.³⁰⁷ However, based on its conclusion that competitive cheerleading did not constitute a sport providing genuine athletic participation opportunities for purposes of Title IX, the court removed all thirty members of the competitive cheer team from Quinnipiac's count of female participation opportunities, along with eleven additional athletes.³⁰⁸ After making these reductions, the court found that females comprised 61.87% of Quinnipiac's undergraduate enrollment, but received only 58.25% of the school's athletic participation opportunities—a disparity of 3.62%.³⁰⁹

The court then determined whether the 3.62% disparity in the percentage of athletic participation opportunities offered to females was nevertheless sufficient to be considered substantial proportionality for purposes of satisfying the first prong and acknowledged that the difference represented, “in strictly numeric terms, a borderline case of disproportionate athletic opportunities for women.”³¹⁰ However, based upon the guidance of the 1996 Clarification, “raw numbers are only part of the analysis for whether the participation of women in a school's varsity program is proportional to enrollment.”³¹¹ OCR also established “other factors designed to give context and meaning to a school's shortfall of athletic opportunities for students of a specific sex.”³¹² Specifically, the court needed to focus on “whether natural fluctuations in enrollment contributed to the lack of proportionality, and whether the absolute number of athletic participation opportunities that need to be created to achieve exact proportionality would be sufficient to sustain a viable athletic team.”³¹³

As to the first of these factors, “there is no indication that the disparity is

305. *Biediger*, 728 F. Supp. 2d at 86.

306. *Id.* at 87.

307. *Id.* at 65, 87.

308. *Id.* at 111. The additional eleven athletes removed by the court from the tally of female athletic participation opportunities were cross-country runners who the court refused to “double count” as indoor and outdoor track participants, where those individuals were injured or red-shirted during the indoor and outdoor track seasons. *See id.* at 73–78, 111.

309. *Id.* at 111.

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

attributable to a surge of women enrolling at Quinnipiac,”³¹⁴ nor could the disparity “be attributed to any unanticipated drop in female athletic participation or spike in male athletic participation.”³¹⁵ Quinnipiac imposed carefully selected roster targets for all of its teams and “took meticulous steps to ensure that its roster targets were met over the course of the year.”³¹⁶ Thus, there were “no natural fluctuations in Quinnipiac’s enrollment or [athletic participation] that would explain the disparity.”³¹⁷

As to the second additional factor, the court found that “the 3.62 percent disparity represent[ed] a shortfall of approximately 38 female athletes.”³¹⁸ This would be more than enough to sustain an additional female varsity team.³¹⁹ Indeed, such a team already existed—the women’s volleyball team the school was trying to eliminate. Accordingly, “[a]lthough a [sic] 3.62 percent is not an overwhelming disparity, it is sufficient to show an absence of substantial proportionality on the facts of this case.”³²⁰

Based on all of the above, the 3.62% disparity in female athletic participation opportunities established that “Quinnipiac did not offer athletic participation opportunities for women that were substantially proportional to the University’s female enrollment,” and, therefore, “does not fall within the 1979 Policy Interpretation’s first safe harbor for Title IX compliance.”³²¹ The court held, as a matter of law, that Quinnipiac violated Title IX and “discriminated on the basis of sex during the 2009–2010 academic year by failing to provide equal athletic participation opportunities for women.”³²²

As a remedy, the court “enjoined [Quinnipiac] from continuing to discriminate against its female students on the basis of sex by failing to provide equal athletic participation opportunities.”³²³ It also ordered Quinnipiac to “submit a compliance plan describing how it will bring itself into Title IX compliance for 2010–2011 and thereafter.”³²⁴ The compliance plan had to commit to sponsoring a women’s volleyball team for at least the 2010–2011

314. *Id.* at 111–12.

315. *Id.* at 112.

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.* at 113.

321. *Id.* at 112–13.

322. *Id.* at 64; *see also id.* at 113.

323. *Id.* at 114.

324. *Id.* at 113.

school year.³²⁵

B. *The Second Circuit Decision*

Quinnipiac appealed the district court's injunction to the Second Circuit.³²⁶ The school argued that the district court erred by excluding all thirty roster positions on the competitive cheer team from its tally of female athletic participation opportunities, on the basis that it was not a varsity sport for Title IX purposes.³²⁷ Even if those athletes were not counted, Quinnipiac further contended that the district court erred in finding the resulting 3.62% disparity between the percentage of participation opportunities afforded female athletes and the percentage of female undergraduate enrollment to constitute a Title IX violation.³²⁸

Where an appellant challenges the "basis [of injunctive relief] in law and fact, [an appellate court] review[s] the district court's factual findings only for clear error and its conclusions of law de novo."³²⁹ Like the district court, the Second Circuit began its analysis of the substantial proportionality prong, the only prong on which Quinnipiac elected to defend itself,³³⁰ by determining the number of participation opportunities afforded by the school's intercollegiate athletic program to male and female athletes.³³¹ Also like the district court, the Second Circuit

conclude[d] that the 1996 Clarification . . . and the 2000 and 2008 OCR Letters [were] likewise entitled to substantial deference under *Auer v. Robbins*³³² . . . because they reflect reasonable agency interpretations of ambiguities in its own regulation, and there is no reason to think that the agency's interpretations do not reflect its "fair and considered judgment

325. *Id.* at 114.

326. *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 90 (2d Cir. 2012).

327. *Id.* at 91, 96.

328. *Id.*

329. *Id.* at 96. While the district court's "finding of sex discrimination [was] incorporated in a declaratory judgment that [was] not yet final and . . . appealable," the Second Circuit determined that it "nevertheless ha[d] jurisdiction to review the finding because it [was] 'inextricably intertwined' with the challenged injunctive relief over which [the court did possess] interlocutory appellate jurisdiction pursuant to 28 U.S.C. § 1292(a)(1)." *Id.* (citing *Lamar Advert. of Penn, LLC v. Town of Orchard Park*, 356 F.3d 365, 371-72 (2d Cir. 2004)).

330. *Id.* at 98.

331. *Id.* at 93.

332. *See generally* 519 U.S. 452 (1997).

on the matter in question.”³³³

Moreover, “even if . . . the 1996 Clarification and [2000 and 2008 OCR L]etters were not entitled to *Auer* deference, they would be entitled to substantial deference under *United States v. Mead Corp.*³³⁴ because their logical consistency with the agency’s earlier 1979 Policy Interpretation amplifies their ‘power to persuade.’”³³⁵

1. Whether Competitive Cheerleading Constitutes a “Sport”

After establishing the legal framework, the Second Circuit provided a detailed description of the district court’s application and analysis of the various factors set forth in the 2008 OCR Letter that went into its conclusion that the members of the competitive cheer team could not be counted under Title IX, because the activity did not afford the participation opportunities of a varsity sport.³³⁶ “Quinnipiac question[ed] the weight the district court assigned the various factors it identified as supporting or undermining recognition of competitive cheer[] as a genuine varsity sport” for Title IX purposes and also asserted that the court should review the issue *de novo*.³³⁷ While the Second Circuit “generally accord[s] considerable discretion to a factfinder in deciding what weight to assign competing evidence pointing toward different conclusions,” the issue was irrelevant.³³⁸ This was because

333. *Biediger*, 691 F.3d at 96–97 (footnote added) (citation omitted) (quoting *Mullins v. City of New York*, 653 F.3d 104, 113–14 (2d Cir. 2011)). In *Auer v. Robbins*, where Congress had not directly spoken on the issue, the Supreme Court determined that it “must sustain the Secretary [of Labor’s interpretation of an overtime wage exemption] so long as it is ‘based on a permissible construction of the statute.’” *Auer*, 519 U.S. at 457 (quoting *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)). Because the test used by the Secretary was “a creature of the Secretary’s own regulations, his interpretation of it,” which “simply cannot be said to be unreasonable,” was “controlling unless ‘plainly erroneous or inconsistent with the regulation.’” *Id.* at 458, 461 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

334. *See generally* 533 U.S. 218 (2001).

335. *Biediger*, 691 F.3d at 97 (footnote added) (citation omitted) (quoting *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2169 (2012)). *United States v. Mead Corp.* found “room at least to raise a *Skidmore* claim [of deference] here, where the regulatory scheme is highly detailed, and [the agency] can bring the benefit of specialized experience to bear on” the subtle questions at issue. *Mead*, 533 U.S. at 235. An agency ruling in such a “situation may therefore at least seek a respect proportional to its ‘power to persuade.’” *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). “Such a ruling may surely claim the merit of its writer’s thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight.” *Id.*

336. *See Biediger*, 691 F.3d at 102–05.

337. *Id.* at 105.

338. *Id.*

[E]ven assuming that *de novo* review were warranted, we conclude for the same reasons stated in detail by the district court and summarized in this opinion that, although there are facts on both sides of the argument, in the end, the balance tips decidedly against finding competitive cheerleading presently to be a “sport” whose participation opportunities should be counted for purposes of Title IX.³³⁹

Like the district court, the Second Circuit acknowledged “that competitive cheer[] can be physically challenging, requiring competitors to possess ‘strength, agility, and grace.’”³⁴⁰ Similarly, the Second Circuit did not “foreclose the possibility that [competitive cheer], with better organization and defined rules, might some day warrant recognition as a varsity sport.”³⁴¹ However, the Second Circuit echoed the district court in concluding that “that time has not yet arrived.”³⁴² Thus, the Second Circuit held “that the district court was correct not to count the 30 roster positions assigned to competitive cheerleading in determining the number of genuine varsity athletic participation opportunities that Quinnipiac afforded female students.”³⁴³

2. Substantial Proportionality

The Second Circuit next addressed Quinnipiac’s argument that, even if the members of the competitive cheerleading team were properly excluded from the tally of athletic participation opportunities, the resulting 3.62% disparity between female athletic participation opportunities and female undergraduate enrollment did not support the finding of a Title IX violation.³⁴⁴ Quinnipiac asserted that this disparity was too small to support a finding that the school failed to provide athletic participation opportunities to its female students in substantial proportion to their enrollment.³⁴⁵ Quinnipiac further argued that it could not be held “responsible for the disparity in light of fluctuations in

339. *Id.*

340. *Id.* (quoting *Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62, 101 (D. Conn. 2010)).

341. *Id.*

342. *Id.* (quoting *Biediger*, 728 F. Supp. 2d at 101).

343. *Id.*

344. *Id.* at 105–06.

345. *Id.* at 106.

enrollment.”³⁴⁶ Finally, “Quinnipiac contend[ed] that the district court erroneously accorded dispositive weight to the fact that the number of additional female roster spots needed to achieve exact proportionality—[thirty-eight]—would have been sufficient for Quinnipiac to field an additional varsity team.”³⁴⁷

The Second Circuit rejected all of Quinnipiac’s contentions.³⁴⁸ First, the court found the relatively small percentage of the disparity unimportant.³⁴⁹ While the district court conceded that the disparity represented “in strictly numerical terms . . . a borderline case of disproportionate athletic opportunities,” the 1996 Clarification made clear that “substantial proportionality is not determined by any bright-line statistical test.”³⁵⁰ Although no other reported decision found such a small disparity to constitute a lack of substantial proportionality, “the 1996 Clarification . . . [did not] create a statistical safe harbor at [any] . . . percentage,” but “instruct[ed] that substantial proportionality is properly determined on a ‘case-by-case basis’ after a careful assessment of the school’s ‘specific circumstances,’ including the causes of the disparity and the reasonableness of requiring the school to add additional athletic opportunities to eliminate the disparity.”³⁵¹ Analyzing precisely these factors, “the district court pointed to record evidence showing that the 3.62% identified disparity was almost entirely attributable to Quinnipiac’s own careful control of its athletic rosters,” and its conclusion should be upheld.³⁵²

Finally, the Second Circuit did not interpret the district court’s decision to categorically hold that “no matter how small a disparity, if it can be closed by the creation of a new sports team, a school will be found not to have afforded substantially proportionate athletic opportunities.”³⁵³ Rather, the district court “discussed the possible creation of a new sports team only to explain why it was reasonable to expect Quinnipiac to add additional athletic opportunities for women to close the identified 3.62% disparity.”³⁵⁴ Because the gap reflected thirty-eight positions, and all of Quinnipiac’s currently existing women’s sports teams had rosters of less than thirty participants, it was “certain that [a new] sports team could be created from the shortfall.”³⁵⁵

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.* (quoting *Biediger*, 728 F. Supp. 2d at 111).

351. *Id.*

352. *Id.* at 107.

353. *Id.*

354. *Id.*

355. *Id.* (quoting *Biediger*, 728 F. Supp. 2d at 112).

Indeed, it would take “little effort . . . to afford the additional participation opportunities of an independent sports team,” because such a team already existed in the form of the women’s volleyball team the school was trying to eliminate.³⁵⁶

Based on all of the above reasons, the Second Circuit rejected Quinnipiac’s contentions on appeal and affirmed the injunction “substantially for the reasons stated by the district court in its comprehensive and well reasoned [sic] opinion.”³⁵⁷

C. The 2013 District Court Opinion

Following the Second Circuit’s affirmance, Quinnipiac subsequently moved to lift the district court’s injunction, claiming that changes to its athletics program over the past two years brought it into compliance with Title IX.³⁵⁸ Specifically, Quinnipiac emphasized the following changes:

(1) [T]he addition of a varsity women’s golf team; (2) the further cultivation of competitive cheer as a developing sport, having renamed the activity “acrobatics and tumbling”; (3) the addition of a varsity women’s rugby team; and (4) the adoption of a written policy that no student athlete would be required to join additional teams in order to participate in her sport of choice—or more specifically, that women’s cross-country athletes would no longer be required to participate in women’s indoor and outdoor track.³⁵⁹

Quinnipiac asserted that women’s golf, competitive cheer, rugby, and track “provide[d] female athletes with genuine varsity participation opportunities,” and, when these participation opportunities were combined with the school’s other participation opportunities, as to which there was no dispute, the school allocated female athletic participation opportunities in numbers substantially proportionate to its female undergraduate enrollment, in compliance with the first prong of the three-prong test.³⁶⁰

The court quickly determined that as a full-fledged NCAA championship

356. *Id.*

357. *Id.* at 91.

358. *Biediger v. Quinnipiac Univ.*, 928 F. Supp. 2d 414, 419 (D. Conn. 2013).

359. *Id.* at 420.

360. *Id.* at 453.

sport, women's golf provided genuine athletic participation opportunities and counted the golf team's eleven athletes in its tally.³⁶¹ The court also decided to count all but three multisport cross-country athletes who regularly participated in practice sessions and other team activities, even if they were injured and did not actually compete in meets.³⁶² Therefore, the bulk of the court's lengthy opinion consisted of discussion and analysis related to whether competitive cheer and rugby athletes could be counted as genuine participation opportunities for purposes of Title IX compliance.

After retracing the development of the relevant Title IX regulations and guidelines, the court reaffirmed the analytical framework it used in its earlier opinion. Because Quinnipiac again proceeded solely under the substantial proportionality prong of the three-part test, the court's analysis proceeded in two steps. First, the court determined the number of genuine varsity athletic participation opportunities afforded to members of each sex.³⁶³ Then, it calculated "whether the number of participation opportunities is substantially proportionate to the gender demographics of the university."³⁶⁴

1. Whether an Activity Constitutes a "Sport"

As to the first step of the analysis, the court determined which participation opportunities should be counted by focusing on the factors delineated in the 2008 OCR Letter,³⁶⁵ just as it had in its previous decision:

Under prong one [of the Three-Part Test], the term "participation opportunities" means the total number of "participants"—as defined in the 1996 Clarification—engaged in genuine intercollegiate-level varsity "sports." Whether a particular athletic activity qualifies as a "sport" (so that "participants" in that activity may count for purposes of prong one) depends on both intrinsic and extrinsic factors, as outlined in the 2008 OCR Letter. Intrinsic factors concern the inherent sport-like qualities of the activity, such as (1) whether the purpose of the activity is athletic competition; (2) whether

361. *Id.*

362. *Id.* at 465. The three athletes the court decided not to count quit the indoor track team less than halfway through the season, without competing in a single event, and so could not be found to have participated in the activity on a regular basis. *Id.* at 466.

363. *Id.* at 440.

364. *Id.*

365. Consistent with its earlier decision, the court continued to accord the 1996 Clarification and 2000 and 2008 OCR Letters substantial deference. *See id.* at 445–46.

competition is judged by a set of rules and objective criteria; (3) whether participants are selected on the basis of athletic ability; (4) whether the number of competitions and length of play are determined by a governing athletics organization; (5) whether the activity has a defined season; and (6) whether post-season competition, if available, is dependent on regular season results. Extrinsic factors, in contrast, concern how the putative sport is administered by the university, including (1) whether the budget, support services, and coaching are provided in a manner consistent with established varsity sports; (2) whether participants are eligible for scholarships and awards; (3) whether participants are recruited in a manner consistent with other varsity sports; (4) whether practice opportunities are consistent with other varsity sports; (5) whether competitive opportunities differ quantitatively or qualitatively from established varsity sports, including competition against other varsity opponents; (6) whether the competitive schedule reflects the abilities of the team; (7) whether the team participates in pre-season or post-season competition in a manner consistent with other varsity sports; and (8) whether resources for the activity are based on the competitive needs of the team. Intrinsic factors bear on whether an activity is *capable* of providing athletes a genuine varsity participation opportunity, while extrinsic factors bear on whether a particular school's program is organized and administered in a way that *actually* provides athletes a genuine varsity participation opportunity. Accordingly, even if an athletic activity possesses, in the abstract, all of the intrinsic attributes of an authentic "sport," it may nonetheless be offered in such a manner that its participants do not receive a genuine varsity experience on par with other bona fide varsity athletes; that is, the activity, as administered, lacks the extrinsic attributes of an intercollegiate varsity sport.³⁶⁶

a. *Competitive Cheer.*

Turning first to competitive cheer, or "acro," as Quinnipiac now calls it,³⁶⁷

366. *Id.* at 444.

367. "Acro" is short for "acrobatics and tumbling." *Id.* at 420.

the court assumed that the activity continued to satisfy all of the factors it found satisfied in its previous opinion.³⁶⁸ The team's "budget, benefits and services, coaching staff, scholarships and awards, and practice opportunities were all provided in a manner consistent with established varsity sports."³⁶⁹ Moreover, the team's purpose was "to compete athletically at the intercollegiate level, and . . . its members were selected for—and remain dedicated to—that purpose."³⁷⁰ The issue facing the court was whether the further development and changes implemented in the program subsequent to its 2010 decision were sufficient to justify a finding that the acro team now constituted a sport whose team members could be counted as participants for purposes of Title IX.³⁷¹

i. Lack of NCAA Recognition.

An initial problem for Quinnipiac was the fact that neither competitive cheer nor acro was recognized as a championship sport by the NCAA, or even as an emerging sport.³⁷² Indeed, the recent efforts by the National Collegiate Acrobatics and Tumbling Association (NCATA), the new name of the former NCSTA,³⁷³ to obtain NCAA recognition for acro as an emerging sport proved fruitless.³⁷⁴ The initial emerging-sport proposal put forward by the NCATA in 2010 ignited a schism within the competitive cheer community, based on diverging visions for the activity.³⁷⁵ While the NCATA's proposed format emphasized the gymnastic elements of cheer, another faction, led by USA Cheer, the national governing body for cheerleading, submitted an emerging sport proposal of its own, based on a "rival format called 'STUNT,' which place[d] greater emphasis on the performance-based aspects of traditional cheerleading competitions."³⁷⁶ Faced with competing proposals, the NCAA Committee for Women's Athletics (CWA), the organization responsible for

368. *Id.* at 454.

369. *Id.*; *see also id.* at 422 n.9.

370. *Id.* at 455.

371. *Id.*

372. *Id.* at 421, 423. As discussed, an emerging sport is "a provisional designation that allows a university to count the activity toward NCAA revenue distribution and minimum sports sponsorship requirements." *Id.* at 421; *see also supra* note 251. This designation "encourage[s] schools to increase sports opportunities and create NCAA championships in these new sports." Hogshead-Makar, *supra* note 228, at 469. As of the 2015–2016 season, acro is still not listed as an emerging sport. *See NCAA MANUAL, supra* note 251, art. 20.02.4(a)–(b).

373. *Biediger*, 928 F. Supp. 2d at 423.

374. *Id.* at 424.

375. *Id.*

376. *Id.*; *see also* Buzuvis, *supra* note 13, at 457. For a detailed discussion of the differences between the two proposals, *see* Buzuvis, *supra* note 13, at 456–58.

determining whether an activity receives provisional recognition as an emerging sport, held both proposals in abeyance and instructed the two rival organizations to resolve their differences.³⁷⁷ Unfortunately, the NCATA and USA Cheer were unable to reach agreement and once again submitted competing proposals to the CWA in 2011.³⁷⁸

Due to this discord, the court believed that “acro’s prospects of qualifying as an NCAA emerging sport in the foreseeable future have dimmed considerably since 2010.”³⁷⁹ The rivalry between NCATA and USA Cheer “means that the structure of this nascent sport will remain in flux, as some schools adopt one format while others adopt the competing format.”³⁸⁰ This was particularly problematic because at least twenty schools must offer varsity or competitive club teams in the activity before it can be recognized as an emerging sport.³⁸¹ Due to competition from USA Cheer, only six universities sponsored acro teams during the 2011–2012 season, too few to support acro as an emerging sport.³⁸² For 2012–2013, one of those six schools decided to cancel its acro team, while two others planned to sponsor acro teams.³⁸³ Even for the 2013–2014 season, only three additional schools provided letters of commitment, bringing the total to, at most, ten participating schools.³⁸⁴

Not only had the NCAA failed to classify competitive cheer or acro as either a championship or emerging sport, but DOE did not recognize it as a sport either, meaning schools reporting their athletic participation data under the EADA could not report their rosters “unless they have received a letter from the [OCR] determining that their cheer squads are legitimately engaged in sport.”³⁸⁵ And, of course, “[t]o date, the agency has never issued a letter counting cheerleading or acro as a varsity sport.”³⁸⁶

377. *Biediger*, 928 F. Supp. 2d at 424.

378. *Id.*

379. *Id.*

380. *Id.*

381. *Id.*; see Buzuvis, *supra* note 13, at 456. There must also “be other evidence of potential interest in a college-level competition.” Buzuvis, *supra* note 13, at 456 (citing CRITERIA FOR EMERGING SPORTS, *supra* note 133). Such evidence may take the form of “high participation rates in college intramurals, high school teams, or non-scholastic competitive teams, and support from governing bodies, conferences, the U.S. Olympic Committee, and professional organizations.” *Id.* (citing CRITERIA FOR EMERGING SPORTS, *supra* note 133).

382. *Biediger*, 928 F. Supp. 2d at 424–25. By contrast, fifteen collegiate club teams agreed to compete under the auspices of the USA Cheer format. Buzuvis, *supra* note 13, at 457.

383. *Biediger*, 928 F. Supp. 2d at 425.

384. *Id.*

385. *Id.* at 421–22.

386. *Id.* at 422. Quinnipiac decided not to seek such a letter following an earlier letter from OCR

In sum, acro was still not entitled to a presumption that it should be considered a sport because it was still not recognized by the NCAA as a championship sport or an emerging sport.³⁸⁷ Thus, Quinnipiac had the burden of proving that acro satisfied the factors listed in the 2008 OCR Letter.³⁸⁸ Not only did it have this burden, but Quinnipiac also had to overcome OCR's presumption *against* treating cheer-based activities as a sport under Title IX, as established by the 2000 OCR Letters.³⁸⁹ The school's failure to overcome this presumption constituted a significant hurdle to its claim that acro should be considered a sport.

Before even turning to the other factors, the court found the lack of recognition as a sport by the NCAA and OCR alone was "sufficient to tip the balance against treating an athletic endeavor as an authentic varsity 'sport' for purposes of prong one."³⁹⁰ Without such recognition, "acro lacks what every other varsity men's team sponsored by Quinnipiac enjoys: the chance to participate in an NCAA-sponsored championship."³⁹¹ And where

a school chooses to sponsor an athletics program at the highest level of competition (NCAA Division I), and offers *all* of its male athletes the opportunity to participate in NCAA-championship sports, the lack of NCAA recognition for a single women's sport within that program raises a significant gender-equity issue if the school hopes to count that unrecognized sport toward compliance with Title IX. So long as Quinnipiac chooses to hold itself out as a Division I institution, providing a full slate of NCAA-recognized sports for men, equity demands that it do the same for women.³⁹²

This was due to the fact that, as the plaintiff's expert testified, "the experience NCAA championships provide is considered 'the top of the mountain' by student athletes, and championships sponsored 'by other

to the athletic director of the University of Maryland, expressing skepticism as to whether competitive cheer satisfied several factors necessary to be counted toward Title IX compliance. See Letter from Linda C. Barrett, Team Leader, Office for Civil Rights, to Deborah A. Yow, Dir. of Athletics, Univ. of Md. (May 8, 2003) (on file with Author).

387. *Biediger*, 928 F. Supp. 2d at 454.

388. *Id.*

389. *Id.*

390. *Id.* at 455.

391. *Id.* at 423–24.

392. *Id.* at 455.

organizations don't have the same financial resources, and the quality of experience is not the same.”³⁹³

Moreover, the CWA—“the undisputed authority on intercollegiate sports for women, and the source from which the OCR’s presumption in favor of recognized emerging sports arises”—specifically reviewed the competing emerging sport proposals and determined that the competing organizations must first settle their differences before recognition as an emerging sport could be given.³⁹⁴ Thus, the CWA effectively determined that acro was not yet ready “to be recognized on its own as an emerging sport, at least until the internal divisions within the former competitive-cheer community are resolved.”³⁹⁵ “So long as acknowledged authorities in intercollegiate athletics decline to recognize acro as an authentic varsity sport, courts should hesitate before doing otherwise.”³⁹⁶ “For this reason alone,” the court concluded that Quinnipiac had not overcome the presumption against treating acro as a sport for purposes of Title IX.³⁹⁷

ii. Intrinsic Factors.

Notwithstanding the lack of recognition as a sport by the NCAA and OCR, the court also held that Quinnipiac continued to run afoul of the same factors set forth in the 2008 OCR Letter that proved fatal to its argument back in 2010.³⁹⁸ Among the intrinsic factors identified by OCR as relevant to finding that an activity constitutes a sport, the court previously identified the shortcomings of the competitive cheer team related to areas

fundamental to intercollegiate varsity sports, such as: whether competition is judged by a consistent set of rules; whether the number of competitions and length of play are determined by a governing athletics organization; whether the activity has a defined season; and whether post-season competition is dependent on regular season results.³⁹⁹

Quinnipiac argued that as a result of the changes it made to correct the

393. *Id.* at 424.

394. *Id.* at 455.

395. *Id.* at 455–56.

396. *Id.* at 456.

397. *Id.*

398. *Id.*

399. *Id.*

deficiencies identified by the court, its competitive cheer or acro program should now be considered a sport.⁴⁰⁰

The court acknowledged that the team's regular season benefited "from more consistency in the rules of play and the quality of opponents."⁴⁰¹ After changing its name, the NCATA "developed into a more cohesive governing body with its own set of bylaws, rules, and policies."⁴⁰² It partnered with USA Gymnastics, which now sanctions all NCATA competitions.⁴⁰³ As a result, all of the acro team's meets during the 2010–2011 and 2011–2012 seasons were governed by a consistent set of rules and the team "competed solely against college-level varsity opponents."⁴⁰⁴

The opportunity for a genuine postseason championship also improved for the acro team. Beginning with the 2010–2011 season, the team participated in a progressive-style championship, sponsored by NCATA, under the same rules that governed its regular season play.⁴⁰⁵ Moreover, teams were seeded based on their regular season results.⁴⁰⁶

However, "despite these incremental improvements in structure, administration, and scheduling," the court found that "crucial elements of Quinnipiac's acro program remain unchanged and continue to distinguish the team from other Division I varsity sports."⁴⁰⁷ First, the ongoing rift between the

400. *Id.* at 422.

401. *Id.* at 423.

402. *Id.*

403. *Id.* In conjunction with this partnership, NCATA "solidified some key features of its sport including size of squads (no more than forty), number of regular season competitions (six to eight), meet format (six rounds—compulsory, stunt, pyramid, basket toss, tumbling, and a team routine), and scoring (pre-determined start difficulty values for each skill in each round)." Buzuvis, *supra* note 13, at 457 (citing *NCATA: NCSTA Will Sanction Events Through USA Gymnastics*, SPIRIT CO. (Sept. 2, 2010), <http://spiritcompany.com/2010/09/ncata-ncsta-will-sanction-events-through-usa-gymnastics/>). The result was "a new, competitive discipline that is separate from sideline cheerleading and focused on competition based on accuracy and synchronous execution of physical skills," with "a competitive structure that is far more extensive and more tailored to the competitive purpose of sport than" what previously existed. *Id.* at 458.

404. *Biediger*, 928 F. Supp. 2d at 423. In the 2010–2011 season, Quinnipiac's acro team competed in six competitions and a national championship. *Id.* at 423 n.12. In the 2011–2012 season, the team competed in ten competitions and a national championship. *Id.* The team thus participated in more competitions per season than had been the case at the time of the district court's 2010 decision. *See* Buzuvis, *supra* note 13, at 460.

405. *Biediger*, 928 F. Supp. 2d at 423; *see also* Buzuvis, *supra* note 13, at 456–57. These rules are "designed to compare each team's technical and synchronous execution of stunts and maneuvers along objective, predetermined criteria," rather than "'crowd response' and incorporation of spirit props." Buzuvis, *supra* note 13, at 460.

406. *Biediger*, 928 F. Supp. 2d at 423; Buzuvis, *supra* note 13, at 460.

407. *Biediger*, 928 F. Supp. 2d at 423.

NCATA and USA Cheer meant that “the rules, competitive format, and structure” of the activity remained in flux, “as some teams gravitate toward one iteration of the sport while others gravitate toward competing iterations.”⁴⁰⁸ Until consensus could be reached between the two formats, “acro’s format will be subject to modification,” and no other varsity sport at Quinnipiac “risks training under a competitive format that is subject to change as rival factions battle over how the sport ultimately will be defined.”⁴⁰⁹

Furthermore, while the NCATA national championship seeded teams based on their regular season results, “due to the extraordinarily small number of schools sponsoring acro, the NCATA’s national championship remains open to each and every acro team in the country.”⁴¹⁰ There was “no progressive playoff system or entrance qualification, such as a minimum win tally over the course of [a] season.”⁴¹¹ Nor did such a playoff system seem feasible in the foreseeable future.⁴¹² No other varsity sport at Quinnipiac received “an automatic bid to nationals; a free pass that dilutes the experience compared to legitimate post-season competition.”⁴¹³ Accordingly, despite certain improvements, the intrinsic factors counseling against a determination that competitive cheer or acro constituted a sport in 2010 continued to weigh against such a finding in 2012.

iii. Extrinsic Factors.

The extrinsic factors identified by the court in its original decision related to “whether an athletic activity is administered by the university in manner [sic] consistent with bona fide varsity sports” and included

whether participants are recruited in a manner consistent with other varsity sports; whether competitive opportunities differ quantitatively or qualitatively from established varsity sports; whether the competitive schedule reflects the abilities of the team; and whether the team participates in pre-season or post-season competition in a manner consistent with other

408. *Id.* at 456.

409. *Id.*

410. *Id.*

411. *Id.*

412. *Id.*

413. *Id.*

varsity sports.⁴¹⁴

The court conceded that the acro team “has seen discernible improvements with respect to each of these factors” and “Quinnipiac has come closer to meeting its burden of proof.”⁴¹⁵ The team’s head coach began off-campus recruiting in June 2010 and tailored her recruitment efforts to NCAA standards.⁴¹⁶ Further, the team competed exclusively against collegiate varsity opponents over the past two seasons.⁴¹⁷ Ultimately, however, despite these improvements, the acro program still fell short in certain particulars.⁴¹⁸

First, while the head coach of the acro program could now recruit off campus, her recruitment strategies differed from those of every other varsity team at Quinnipiac.⁴¹⁹ She “could not recruit athletes based on their mastery of acro’s specific competitive format, because no high school in the country currently sponsors an acro program of its own.”⁴²⁰ The coach, therefore, was forced to seek out athletes “with a patchwork of skill sets derived from diverse athletic backgrounds, including cheerleading, gymnastics, acrobatics and other sports,”⁴²¹ in the hopes that “skills honed in those sports would be transferable to acro.”⁴²² Because none of these athletes had ever competed in the sport of acro, unlike the coaches of every other varsity team at Quinnipiac, the acro coach “could only know by inference and guesswork what other coaches knew for sure: whether a particular athlete competes effectively in the sport for which she is being recruited.”⁴²³ Thus, “recruitment for acro differed both quantitatively and qualitatively from every other varsity sport in the University’s athletics program.”⁴²⁴

Furthermore, while the team competed exclusively against collegiate varsity competition, “there are still far too few acro programs in existence to provide genuine intercollegiate competition on the varsity level.”⁴²⁵ This

414. *Id.* at 457.

415. *Id.* at 456–57.

416. *Id.* at 422–23.

417. *Id.* at 425, 457.

418. *Id.* at 457.

419. *Id.* at 425, 457.

420. *Id.* at 457.

421. *Id.* at 425.

422. *Id.* at 457.

423. *Id.*

424. *Id.*

425. *Id.*

resulted in “significant variation in the declared division level among those opponents.”⁴²⁶ During the 2011–2012 season, for example, there were only six acro teams nationwide.⁴²⁷ No other varsity team at Quinnipiac played “such a tiny universe of opponents.”⁴²⁸ Of those five opponents, only three were members of NCAA Division I, while one belonged to NCAA Division II, and one belonged to the NAIA.⁴²⁹ Indeed, of the acro team’s ten regular season competitions during the 2011–2012 season, only six involved fellow NCAA Division I members, meaning that “forty percent of [its] regular season meets were against teams below [its] declared division level.”⁴³⁰ Not one of Quinnipiac’s men’s teams played a single regular-season contest against a below-division opponent that year.⁴³¹

In sum, the changes Quinnipiac implemented in connection with its competitive cheer or acro team were not enough to overcome the presumption against treating the activity as a sport.⁴³² Based on “the lack of recognition by the NCAA, the ongoing rivalry with [USA Cheer], the sport’s unconventional recruiting difficulties, and the team’s inadequate regular-season and post-season competition,” Quinnipiac’s acro team still could not be considered a varsity sport for purposes of Title IX.⁴³³

b. Women’s Rugby.

Having reaffirmed its earlier conclusion that competitive cheerleading or acro did not constitute a sport for purposes of Title IX, the court next turned its attention to Quinnipiac’s newly developed women’s rugby team, which, it believed, “present[ed] a closer question.”⁴³⁴ Although Quinnipiac only began

426. *Id.* at 425.

427. *Id.* at 457.

428. *Id.*

429. *Id.* at 425. The NAIA school Azusa Pacific University has since reclassified to NCAA Division II. Joe Reinsch, *Azusa Pacific Recommended for Full NCAA Division II Membership*, AZUSA PAC. ATHLETICS (July 11, 2014), <http://www.apu.edu/athletics/stories/22124>.

430. *Biediger*, 928 F. Supp. 2d at 425, 457.

431. *Id.*

432. *Id.* at 455.

433. *Id.* at 458. The court, however, was careful to note that, because Quinnipiac chose to rely exclusively on the substantial proportionality prong of the three-prong test, its decision that competitive cheerleading or acro did not count toward compliance with Title IX was confined to that prong—“the only prong in which an assessment of substantial proportionality in ‘intercollegiate level participation opportunities’ is required.” *Id.* at 458. The court refused to foreclose the possibility that, “under different circumstances, a university’s sponsorship of a varsity-level acro program could count toward compliance under prongs two or three.” *Id.*

434. *Id.*

sponsoring women's rugby for the 2011–2012 season, the sport of rugby itself has been played for at least 175 years.⁴³⁵ Indeed, rugby is recognized by the NCAA as an emerging sport, which means that it is subject to many of the same structural and administrative requirements as NCAA championship sports, may be counted by sponsoring schools “toward membership minimums and revenue distribution under NCAA regulations[,]” and is entitled to a presumption that it provides its athletes the opportunity to participate in an intercollegiate varsity sport for purposes of Title IX.⁴³⁶

At the same time, however, the court noted various considerations supporting a conclusion that the presumption afforded to rugby as an emerging sport should not be given much weight.⁴³⁷ Pursuant to NCAA rules, an emerging sport may lose its status “if, after a period of ten years, it fails to add enough varsity teams to make adequate progress toward promotion to NCAA-championship status.”⁴³⁸ At that time, rugby was on the list of emerging sports for ten years, and only five schools, including Quinnipiac, sponsored it as a varsity sport.⁴³⁹ Based on the low number of schools sponsoring varsity women's rugby—far fewer than the number of schools sponsoring other emerging sports, that had been stripped of their status in the past for lack of growth⁴⁴⁰—“rugby risks losing recognition as an emerging sport in the very near future.”⁴⁴¹ Due to its precarious position, the court believed that the presumption afforded under the 2008 OCR Letter by NCAA recognition “[wa]s weakened in this case; rugby may be recognized today, but not tomorrow.”⁴⁴² Accordingly, “under the unique circumstances of this case, the presumption in favor of counting Quinnipiac's rugby program for Title IX purposes [wa]s entitled to considerably less weight.”⁴⁴³ The court then turned its sights to whether this weak presumption was effectively rebutted, based on the intrinsic and extrinsic factors set forth in the 2008 OCR Letter.⁴⁴⁴

435. *Id.* at 425.

436. *Id.* at 426, 458–59.

437. *Id.* at 426–27.

438. *Id.* at 426–27.

439. *Id.* at 427. Moreover, of those five schools, Quinnipiac was the only one to add rugby since it was granted emerging sport status. *Id.*

440. Women's squash was stripped of emerging sport status when, after ten years, only forty-eight schools sponsored a varsity team, while synchronized swimming lost its status with eleven school-sponsored teams, badminton with fifteen teams, and archery with eight. *Id.* at 427 n.18.

441. *Id.* at 459. Despite the court's misgivings, rugby is still listed as an emerging sport as of the 2015–2016 academic year. See NCAA MANUAL, *supra* note 251, art. 20.02.4(a).

442. *Biediger*, 928 F. Supp. 2d at 459.

443. *Id.*

444. *Id.* at 458.

i. Intrinsic Factors.

The court believed that the various intrinsic factors favored a finding that women's rugby constituted a sport for Title IX purposes.⁴⁴⁵ Rugby had been played in its current form for over a century and “plainly possesses the intrinsic qualities of an authentic sport.”⁴⁴⁶ “Without a doubt, rugby's purpose is athletic competition, its contests are governed by a uniform set of rules, its players are selected for their ruthless athleticism, and its competitive season and length of play are all well settled.”⁴⁴⁷ A national governing body—USA Rugby—“sponsor[ed] an annual post-season tournament in which member teams compete[d] based on their regular-season results.”⁴⁴⁸ Even “plaintiffs concede[d] that rugby is unquestionably [a] ‘sport,’ and . . . capable of providing genuine athletic participation opportunities.”⁴⁴⁹ The issue, however, was not merely whether Quinnipiac's women's rugby team was “*capable* of providing . . . genuine [athletic] participation opportunit[ies]” in the context of a sport, but whether the school administered the program as an intercollegiate-level sport on par with its other varsity sports teams and conducted it in a manner that satisfied the various extrinsic factors set forth in the 2008 OCR Letter.⁴⁵⁰

ii. Extrinsic Factors.

Certain extrinsic factors also supported a finding that Quinnipiac's women's rugby team provided genuine intercollegiate-level athletic participation opportunities within the context of a sport for purposes of Title IX. The team received “many of the same benefits that established varsity teams receive, such as professional coaching, support services, practice opportunities, scholarships and awards, and an annual budget tailored to the needs of the team.”⁴⁵¹ Also, the head coach of the women's rugby team was qualified to recruit off campus from an early stage.⁴⁵² Notwithstanding these findings, however, the court concluded that the Quinnipiac women's rugby team “lacked [other] extrinsic qualities required to provide its . . . athletes with participation opportunities on par with other [NCAA] Division I . . . sports.”⁴⁵³

445. *Id.* at 457–58.

446. *Id.* at 459.

447. *Id.*

448. *Id.*

449. *Id.*

450. *Id.*

451. *Id.*

452. *Id.* at 426.

453. *Id.* at 459.

Of greatest concern to the court were various factors related to team competition, including

(1) whether competitive opportunities differ quantitatively or qualitatively from established varsity sports, including “whether the team competes against intercollegiate or interscholastic *varsity opponents* in a manner consistent with established varsity sports”; and (2) whether the activity provides an opportunity for athletes to participate in pre-season or post-season competition in a manner consistent with other varsity sports, including “whether state, national and/or conference championships exist for the activity.”⁴⁵⁴

The court determined that the Quinnipiac women’s rugby team fell short on both the listed factors.⁴⁵⁵

The court first found that “rugby’s competitive schedule differed both quantitatively and qualitatively from other varsity sports.”⁴⁵⁶ Every other varsity team at Quinnipiac—even the acro team—played a full schedule of varsity competition.⁴⁵⁷ However, only four other colleges in the country sponsored varsity women’s rugby teams.⁴⁵⁸ Therefore, of the ten regular season contests on Quinnipiac’s schedule for the 2011–2012 season, six were against non-varsity club teams and only four were against varsity opponents.⁴⁵⁹ Moreover, of the four other varsity programs Quinnipiac competed against, only one (Eastern Illinois University) was a member of NCAA Division I.⁴⁶⁰ Thus, even if Quinnipiac played a full varsity schedule, there was a single competitor in the entire country at its same division level.⁴⁶¹

454. *Id.* at 460 (quoting *Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62, 100–01 (D. Conn. 2010)); *Monroe*, *supra* note 14.

455. *Id.* at 461.

456. *Id.* at 460.

457. *Id.*

458. *Id.* at 426.

459. *Id.* at 426, 460. “[C]lub teams [generally] operate at a lower level of competition and receive less institutional support than do varsity teams.” *Id.* at 426. They “typically receive little or no funding from a school’s athletic program, and must seek out alternative sources of support from student government or recreation departments to supply coaching, equipment, and training.” *Id.*

460. *Id.* One other school (West Chester University) was a member of NCAA Division II, while the remaining two schools (Bowdoin College and Norwich University) were members of NCAA Division III. *Id.* at 426 n.16.

461. *Id.* at 460 n.51.

The court deemed “[s]uch diminished competitive opportunity . . . inconsistent with a varsity program at an NCAA Division I institution.”⁴⁶² Thus, for purposes of this factor, “Quinnipiac’s rugby team does not presently provide female athletes with genuine ‘*intercollegiate level* participation opportunities,’ equivalent to other Division I varsity teams,” and “[t]hat will not change until, at the very minimum, a majority of its competitions are scheduled against varsity-level opponents.”⁴⁶³ So long as Quinnipiac offers every other varsity team a full schedule of varsity competition, “it must do substantially the same for rugby—at least if it hopes to count its rugby program toward compliance with prong one.”⁴⁶⁴

The court also found that the rugby team lacked the opportunity to play in any postseason competition during the 2011–2012 season, “let alone participate “in a manner consistent with established varsity sports.”⁴⁶⁵ First, no other school in Quinnipiac’s conference⁴⁶⁶ sponsored a women’s rugby team, so it had to compete “in a separate regional league known as the Metropolitan New York Rugby Football Union (“Metro NY”), which operate[d] under the auspices of USA Rugby.”⁴⁶⁷ Every other team competing in Metro NY was a collegiate club program.⁴⁶⁸ Even within this regional league, Quinnipiac “could not avail itself of [any] post-season opportunities.”⁴⁶⁹ First, an ice storm forced cancellation of the Metro NY regional playoffs, which were not rescheduled.⁴⁷⁰ Second, notwithstanding the ice storm, Quinnipiac already decided to skip the regional playoffs, due to a scheduling conflict with two varsity opponents and safety concerns regarding the potential of having to play matches on three

462. *Id.* at 460.

463. *Id.* at 461.

464. *Id.*

465. *Id.* (quoting Monroe, *supra* note 14).

466. At the time of the court’s decision, all of Quinnipiac’s other varsity teams, with the exception of acro, competed in the Northeast Conference (“NEC”). *Id.* at 427. Beginning with the 2013–2014 academic year, Quinnipiac’s sports teams began competing in the Metro Atlantic Athletic Conference. *Quinnipiac University Joins the MAAC*, MAACSPORTS (Dec. 14, 2012), <http://www.maacsports.com/ViewArticle.dbml?ATCLID=205825230>.

467. *Biediger*, 928 F. Supp. 2d at 427; *see also id.* at 461. Beginning with the 2012–2013 season, the rugby team would compete in the Tri-State Conference, still under the auspices of USA Rugby. *Id.* at 427 n.19.

468. *Biediger*, 928 F. Supp. 2d at 427.

469. *Id.* at 461. “USA Rugby sponsor[ed] its own national collegiate championship.” *Id.* at 427. A team had to win its regional playoffs, and then its conference championship, to qualify for the national tournament. *Id.*

470. *Id.* at 427, 461. Metro NY simply sent its highest ranked team, which was not Quinnipiac, to the conference tournament. *Id.* at 427–28.

straight days.⁴⁷¹

Based on these findings, the court felt compelled to conclude that, “[i]f Quinnipiac is serious about sponsoring women’s rugby as a Division I varsity sport, it should not tolerate its team competing in a region in which post-season championships are, in the Coach’s estimation, too dangerous to win.”⁴⁷² On top of this, even if the team participated in the postseason tournaments, its competition would consist entirely of club teams.⁴⁷³ The only point at which it might encounter another varsity team would be in the national championship itself, assuming that one of the other four varsity programs also managed to qualify.⁴⁷⁴ Accordingly, “rugby is unlike any other established varsity team at Quinnipiac: all other teams—with the exception of acro—compete in NEC and NCAA-sponsored tournaments against a full slate of varsity competitors.”⁴⁷⁵

In sum, based on the totality of the circumstances surrounding the 2011–2012 season, the court concluded that “Quinnipiac should not be permitted to count its nascent rugby program among the University’s intercollegiate-level varsity sports for purposes of prong one.”⁴⁷⁶ While there was no question that rugby had all the intrinsic qualities of a sport, “the manner in which Quinnipiac’s rugby program was administered in its inaugural season ultimately deprived female participants of the competitive opportunities essential to a genuine varsity experience.”⁴⁷⁷ Specifically,

[T]he rugby team’s majority club competition in the regular season, the absence of any potential varsity competition in the regional and/or conference post-season, and the team’s inability to compete for a regional, conference, or national championship due to safety concerns with the regional tournament’s current format are sufficient, in the aggregate, to overcome the presumption in favor of counting rugby’s

471. *Id.* at 428, 461. While the team could conceivably avoid any scheduling conflicts in the future, the court found that the safety concerns “effectively foreclose[] any chance of the team competing for USA Rugby’s national championship, at least until Metro NY modifies the tournament’s format.” *Id.* at 461.

472. *Id.*

473. *Id.*

474. *Id.* at 461–62.

475. *Id.* at 462.

476. *Id.*

477. *Id.*

participants for Title IX purposes.⁴⁷⁸

2. Substantial Proportionality

Once all of the participation opportunities are counted, the next step is to determine whether athletic opportunities at the school are substantially proportionate to the percentages of male and female undergraduate enrollment at the school. For the 2011–2012 academic year, Quinnipiac “had an undergraduate enrollment of 5,988 students, of which 2,253 (or 37.6%) were male, and 3,735 (or 62.4%) were female.”⁴⁷⁹ Based on its own figures, Quinnipiac asserted that it had 489 total athletes, of which 168, or 34.4%, were male, and 321, or 65.6%, were female.⁴⁸⁰ If these numbers were accurate, not only would Quinnipiac’s athletic participation rates be substantially proportional, but they would be slightly over-weighted in favor of females.⁴⁸¹

However, the court’s determination that neither acro nor women’s rugby provided genuine athletic participation opportunities meant that none of the members of those teams could be included in the tally.⁴⁸² This resulted in the removal of sixty-seven female athletes from Quinnipiac’s count, leaving it with only 254 female athletes.⁴⁸³ Using these figures, only 60.2% of Quinnipiac’s athletes were female, while females comprised 62.4% of the school’s undergraduate enrollment, a disparity of 2.2%.⁴⁸⁴

The court then decided whether the 2.2% disparity was significant enough

478. *Id.* Again, however, the court was quick to limit the potential reach of its holding. *See id.* The court acknowledged that emerging sports, such as rugby, “by definition, require an incubation period in which to grow and develop, and that during that period first-generation varsity teams will inevitably spend a portion of their regular seasons competing against club teams to round out their schedules.” *Id.* However, even if participants in emerging sports under those circumstances could never be counted for purposes of prong one (a conclusion the court denied reaching) that does not mean emerging sports may never count for anything under Title IX. *Id.* The court deemed it “all but certain that sponsorship of emerging sports could count toward compliance under prongs two or three.” *Id.* Quinnipiac, again, defended itself only under the substantial proportionality prong (prong one) of the three-prong test. *Id.* at 463. Therefore, while the court “conclude[d] that participants in Quinnipiac’s rugby program may not be counted for purposes of prong one,” the court’s holding “by no means precludes the possibility that, under different procedural circumstances, a school’s sponsorship of women’s rugby would count for purposes of prongs two or three.” *Id.*

479. *Id.* at 431.

480. *Id.*

481. *Id.*

482. *See id.* at 466.

483. *Id.* Of the sixty-seven female athletes removed from the tally, thirty-six were members of the acro team, twenty-eight were members of the rugby team, and three were indoor track runners who quit the team less than half-way through the regular season. *Id.*

484. *Id.*

to take Quinnipiac out of compliance with the substantial proportionality prong. Some courts previously found “that a disparity below two percentage points is proof that an educational institution falls within the substantial proportionality safe harbor,” making a 2.2% disparity a very close case in numerical terms.⁴⁸⁵ However, according to the 1996 Clarification, “raw numbers are only part of the analysis for whether the participation of women in a school’s varsity program is proportional to enrollment.”⁴⁸⁶ The court also considered “whether natural fluctuations in enrollment contributed to the lack of proportionality, and whether the number of athletic participation opportunities needed to achieve exact proportionality would be sufficient to sustain a viable athletic team.”⁴⁸⁷

As to the first consideration, Quinnipiac “introduced no evidence . . . to suggest that natural fluctuations in enrollment—or unanticipated drops in female athletic participation—were to blame for [the] disparity in athletic opportunities.”⁴⁸⁸ Indeed, the school carefully selected its teams’ roster targets and “continued to take steps to ensure that [those] targets were met over the course of the year.”⁴⁸⁹ As to the second consideration, “the 2.2 percent disparity represent[ed] a shortfall of . . . twenty-five female athletes,” enough to sustain an additional varsity team.⁴⁹⁰ Indeed, the established women’s volleyball team the school was trying to eliminate had a roster of only fourteen athletes.⁴⁹¹ In sum, the 2.2% disparity demonstrated that Quinnipiac still “failed to allocate athletic participation opportunities in numbers substantially proportionate to its undergraduate female population,” and had “not yet brought itself into compliance with Title IX’s effective-accommodation mandate.”⁴⁹²

3. The Levels-of-Competition Test

While many of the issues resolved by the court in connection with its analysis of the substantial proportionality prong were novel in their own right, the court proceeded to place an additional gloss on its decision, one that few, if

485. *Id.* at 466–67 (citing *Equity in Athletics, Inc. v. Dep’t of Educ.*, 675 F. Supp. 2d 660, 682–83 (W.D. Va. 2009)).

486. *Id.* at 467.

487. *Id.*

488. *Id.*

489. *Id.*

490. *Id.*

491. *Id.*

492. *Id.*

any, prior decisions addressed.⁴⁹³ As discussed previously, effective accommodation of student interests and abilities under Title IX entails both equity in athletic opportunities and equity in levels of competition.⁴⁹⁴ The three-part test determines whether a school met its obligations to provide equitable athletic opportunities between genders, while a separate two-part test determines whether equity between genders in levels of competition exists.⁴⁹⁵ In its 2010 decision, the court concluded that Quinnipiac failed to satisfy the first prong of the three-prong test for determining equity in athletic opportunities, so it did not have to consider the issue of equity in levels of competition.⁴⁹⁶ Now, however, plaintiffs argued that, even if Quinnipiac was in compliance with the three-part test, it independently failed the two-part levels-of-competition test.⁴⁹⁷ Therefore, the court needed to interpret and apply this standard as well.⁴⁹⁸

To reiterate, the two prongs of the levels of competition test focus on the following:

- (1) Whether the competitive schedules for men's and women's teams, on a program-wide basis, afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities; or
- (2) Whether the institution can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex.⁴⁹⁹

In the present litigation, Quinnipiac submitted no evidence regarding its historical allocation of athletic opportunities under the second prong, meaning that its compliance with the levels-of-competition requirement centered solely on whether it met the first prong.⁵⁰⁰ Unfortunately, the court lamented, while “the OCR has published multiple letters clarifying the scope and effect of the

493. *See id.* at 435.

494. *See* discussion *supra* pp. 542–45.

495. *Id.* at 437.

496. *Id.*

497. *Id.*

498. *Id.*

499. POLICY INTERPRETATION, *supra* note 25; *see also* *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 829 (10th Cir. 1993); *Biediger*, 928 F. Supp. 2d at 439.

500. *Biediger*, 928 F. Supp. 2d at 439–40.

three-part test, and the ‘substantial-proportionality’ prong in particular. . . . [T]he same cannot be said of the levels-of-competition test.”⁵⁰¹ OCR provided “almost no additional direction” on the test.⁵⁰² Indeed, in three decades since the Policy Interpretation was promulgated, OCR never, to the court’s knowledge, “issued *any* official policy clarifying the significance of this test or how it should be applied.”⁵⁰³ That being said, OCR continued to reiterate that effective accommodation must be assessed under both the three-prong test and the levels-of-competition test, so the test remained relevant.⁵⁰⁴ The court would have to make do with what little guidance it could find.

In the absence of official sources providing guidance on the levels-of-competition test, the court turned to OCR’s Investigator’s Manual, “the only interpretive compass at [its] disposal.”⁵⁰⁵ The Investigator’s Manual is an internal OCR document designed to “assist OCR personnel in conducting investigations and compliance reviews in the field.”⁵⁰⁶ It “was not subject to public notice and comment . . . was never formally published. . . . [And] is not an official interpretation of either Title IX or the 1979 Policy Interpretation.”⁵⁰⁷ Therefore, the court held that it was “not entitled to the same level of deference accorded the [1975] [R]egulations . . . Policy Interpretation, or . . . OCR policy letters.”⁵⁰⁸ It was entitled to respect only to the extent of its power to persuade.⁵⁰⁹ If any inconsistencies existed between the Investigator’s Manual and the Policy Interpretation, the Policy Interpretation would control.⁵¹⁰

The Investigator’s Manual provided the following methodology for assessing compliance with the first prong of the levels-of-competition test:

501. *Id.* at 440.

502. *Id.* at 446.

503. *Id.* (emphasis added). The court suspected that the reason “the levels-of-competition test is seldom used today and rarely if ever litigated” had to do with “evolving NCAA standards on competitive scheduling among member schools.” *Id.* Currently, “the NCAA imposes strict procedures governing the competitive schedules of men’s and women’s NCAA-championship sports, permitting only limited competition below declared division levels.” *Id.* Thus, “modern NCAA rules have all but eliminated the problem that the levels-of-competition test was designed to address—at least among schools that offer both sexes the full panoply of NCAA-championship sports.” *Id.* at 446–47. However, “a sizable percentage” of Quinnipiac’s athletic program “include[d] non-NCAA-championship sports,” meaning that the levels-of-competition test was back in play. *Id.* at 447.

504. *Id.* at 446.

505. *Id.* at 447.

506. *Id.*

507. *Id.*

508. *Id.*

509. *Id.*

510. *Id.* at 448.

COMPARE the number of competitive *events* for each team at the institution's declared competitive level. USE the attached chart for this comparison. DETERMINE the overall percentage of men's and women's *events* below the declared division level or classification. If this analysis results in relative equivalence, then the second factor [prong two], as discussed below, need not be considered. If there is a *significant difference* in the number of competitive events for men and women at the institution's declared competitive level, ASK the appropriate institution for an explanation. If there is any concern that the explanation is not satisfactory, consider the second factor.⁵¹¹

The court found persuasive the Investigator's Manual's focus on the division level of opponents as a proxy for competitive prowess but remained unpersuaded by its approach to determine proportional similarity, which it found to conflict with the plain language of the Policy Interpretation.⁵¹² This was due to the Investigator's Manual's "proportional comparison of *events* to competition level," while the levels-of-competition test itself expressly calls for a "proportional comparison of *athletes* to competition level."⁵¹³ Because the Investigator's Manual's approach could not be squared with the express language of the Policy Interpretation, the court did not owe it deference.⁵¹⁴ The court modified the analysis to "compare the percentage of 'competitive opportunities' afforded to male and female athletes below their declared division level," rather than comparing the number of events.⁵¹⁵

The court's analysis proceeded in four steps. First, the court multiplied "the number of team 'events' against division-level opponents by the number of participants on each team involved," to "calculate the total number of 'competitive opportunities' afforded to the members of each team at their declared division level."⁵¹⁶ Second, the court multiplied "the number of team 'events' against non-division-level opponents by the number of participants on

511. *Id.* (quoting VALERIE BONNETTE & LAMAR DANIEL, TITLE IX ATHLETICS INVESTIGATOR'S MANUAL 26 (1990)).

512. *Id.*

513. *Id.*

514. *Id.* at 449.

515. *Id.*

516. *Id.*

each team involved,” to “calculate the number of ‘competitive opportunities’ below the declared division level.”⁵¹⁷ Third, the court “add[ed] up the total number of division-level and non-division-level competitive opportunities across all teams for each sex,” to “determine what percentage of overall competitive opportunities were played against opponents below the school’s declared division level” for each sex.⁵¹⁸ Finally, the court “compar[ed] the overall percentage of below-division-level competitive opportunities for male athletes [and] . . . female athletes on a program-wide basis.”⁵¹⁹

After applying this formula, the competitive opportunities for male and female athletes needed to be proportionally similar to satisfy the first prong of the levels-of-competition test.⁵²⁰ Unfortunately, “[n]either the 1979 Policy Interpretation nor the Investigator’s Manual specified a threshold percentage that [would] constitute a violation” of this prong.⁵²¹ The court decided to give the proportionally similar phrase “a construction roughly analogous to the phrase ‘substantial proportionality,’ as used in the first prong of the three-part test.”⁵²² Thus, exact proportionality was not required, and “whether a university’s program-wide competitive schedule violates the equivalent-competition prong of the levels-of-competition test should be determined on a case-by-case basis, taking into account the totality of the circumstances.”⁵²³

When it came to applying the test, Quinnipiac asserted “that the competitive schedules provided for female athletes are proportionally similar to those provided for male athletes, in compliance with the first prong of the levels-of-competition test.”⁵²⁴ However, “during the 2011–12 academic year, zero percent of the competitive opportunities Quinnipiac provided to male athletes were against non-Division I opponents.”⁵²⁵ No men’s team played a single game against a lower-division opponent.⁵²⁶ On the other hand, “6.3 percent of the competitive opportunities Quinnipiac provided to female athletes were against non-Division I or non-varsity opponents.”⁵²⁷ This 6.3%

517. *Id.* (emphasis omitted).

518. *Id.*

519. *Id.*

520. *Id.*

521. *Id.* at 450.

522. *Id.* at 450–51.

523. *Id.* at 451.

524. *Id.* at 453.

525. *Id.* at 469.

526. *Id.*

527. *Id.*

“disparity in equivalently-advanced competitive opportunities for female athletes . . . is a direct consequence of the irregular competitive schedule of the women’s acro and rugby teams.”⁵²⁸

While OCR did not specify a threshold percentage that would constitute a violation of the first prong of the levels-of-competition test, the court focused on two facts. First, the rugby “schedule not only contained discrepancies in division levels among opponents, but discrepancies in their varsity status as well.”⁵²⁹ The fact that the majority of a women’s team’s schedule consisted of club opponents, while all male athletes were offered a full varsity schedule at the highest division level seemed to the court “a particularly egregious disparity in opportunity.”⁵³⁰ Moreover, the only two teams competing against below-division opponents—acro and rugby—“represent[ed] two of the four largest rosters among all women’s teams sponsored” by Quinnipiac.⁵³¹ This meant that “an exceptionally large percentage of female athletes were affected by Quinnipiac’s inequitable allocation of competitive opportunities.”⁵³² Based on these considerations, the court concluded “that Quinnipiac’s athletic program, viewed program-wide, failed to provide proportionally-similar numbers of male and female athletes equivalently-advanced competitive opportunities in the 2011–2012 academic year.”⁵³³ This meant that, even if women’s acro and women’s rugby constituted sports providing their members genuine athletic participation opportunities, and even if Quinnipiac was in compliance with the substantial proportionality prong of the three-part test, Quinnipiac’s failure to comply with the first prong of the two-part levels-of-competition test meant that it still violated the effective accommodation mandate of Title IX.⁵³⁴

In sum, Quinnipiac’s efforts following the district court’s 2010 decision “failed to demonstrate a significant change in the quantity and/or quality of athletic participation opportunities provided to its female students.”⁵³⁵ The school’s continuing failure to satisfy either the substantial proportionality prong of the three-part test or the first prong of the levels-of-competition test required

528. *Id.*

529. *Id.*

530. *Id.*

531. *Id.*

532. *Id.* “[D]uring the 2011–12 academic year, 20 percent of all [of Quinnipiac’s] female athletes had team schedules in which 40 percent or more of their regular-season competitions were against non-Division I or non-varsity opponents.” *Id.*

533. *Id.* at 469–70.

534. *See id.* at 467–68, 470–71.

535. *Id.* at 473.

the district court's injunction to be kept in place for the foreseeable future.⁵³⁶

D. Settlement

Following the district court's 2013 decision, the parties reached a settlement in April 2013.⁵³⁷ As part of the settlement, Quinnipiac agreed to keep all of its existing women's teams, including the volleyball team.⁵³⁸ Quinnipiac also agreed to allocate more scholarships to its female athletes and improve the benefits provided to its women's teams.⁵³⁹

IV. IMPLICATIONS OF *BIEDIGER*

The *Biediger* decisions make a substantial contribution to Title IX jurisprudence in several novel respects. The cases provide detailed and thorough guidance on several aspects of Title IX that had not received significant prior attention from either courts or commentators. In issuing its 2010 decision, the district court became the first federal court to apply "OCR's test for whether a sponsored varsity activity can be treated as a sport for purposes of Title IX."⁵⁴⁰ The district court's 2013 decision also became the first federal court decision to address the seldom used and rarely litigated levels-of-competition test.⁵⁴¹ Faced with such novel issues, the court painstakingly traced the relevant legal background, set forth in detail the limited resources it could find that were directly on point, and made logical inferences where necessary to apply those resources to the specific facts before it, facts that no federal court in a Title IX case had previously encountered. As the Second Circuit found in affirming the district court's 2010 decision, the court's opinion was "comprehensive and well reasoned [sic]."⁵⁴²

536. *Id.* at 471–72. Of course, as part of the injunction, Quinnipiac had to continue sponsoring a women's volleyball team. *Id.* at 473.

537. *Settlement Reached in Quinnipiac Title IX Case*, NBC CONN., <http://www.nbcconnecticut.com/news/local/Settlement-Reached-in-Quinnipiac-Title-IX-Case-204866541.html> (last visited June 9, 2016).

538. *Id.*

539. *Id.*

540. *Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62, 94 (D. Conn. 2010); *see also Biediger*, 928 F. Supp. 2d at 452 ("[A]part from my previous decision—and the appeal before the Second Circuit—no other court has addressed the OCR's test for assessing genuine varsity participation opportunities, and precious few have interpreted Title IX's effective-accommodation requirement more generally.").

541. *See Biediger*, 928 F. Supp. 2d at 446, 452.

542. *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 91 (2d Cir. 2012); *see also Buzuvis*, *supra* note 13, at 452 ("As a Title IX analysis, Judge Underhill's decision was appropriate and correct.").

A. *Assurance that Athletic Participation Opportunities Remain Genuine in the Current Economic Climate*

The validity of the *Biediger* decisions is most readily observed in the context of the economic realities currently facing most intercollegiate athletic departments. A recent NCAA study determined that only twenty athletics programs at the Football Bowl Subdivision level (the highest level of competition within NCAA Division I) turned a profit in 2013.⁵⁴³ A separate study of NCAA Division II and III schools “found that revenues failed to exceed expenses [for] every [athletic department] on those levels.”⁵⁴⁴ These economic challenges impact Title IX compliance as well. Faced with growing budgetary concerns, schools are more likely to be inclined to cut sports, rather than add them. However, “cutting a viable women’s team necessarily violates the second and third prong[s]” of the three-part test under Title IX.⁵⁴⁵ Therefore, schools seeking to cut women’s teams would only be able to rely on the substantial proportionality prong as a defense to any Title IX claim.⁵⁴⁶ And “schools unable to add or preserve women’s athletic [participation] opportunities may be tempted to count women’s opportunities that are marginally athletic in order to provide the appearance of proportionality.”⁵⁴⁷

The *Biediger* court believed that Quinnipiac was attempting to take such a short cut in its attempts to count competitive cheer or acro and rugby team members as female participation opportunities for purposes of the substantial proportionality prong.⁵⁴⁸ The court noted that “Quinnipiac did nothing to survey the athletic interests among current or prospective students, but instead chose to sponsor acro and rugby for economic or strategic reasons, including the sizable rosters of female athletes that both teams could support.”⁵⁴⁹

543. Mike Herndon, *NCAA Study Finds All but 20 FBS Schools Lose Money on Athletics*, AL (Aug. 20, 2014), http://www.al.com/sports/index.ssf/2014/08/ncaa_study_finds_all_but_20_fb.html.

544. *Id.*

545. Buzuvis, *supra* note 13, at 442. A school can hardly be said to effectively accommodate the interests and abilities of its female athletes if it seeks to eliminate a healthy women’s varsity team. *See* Cohen v. Brown Univ., 991 F.2d 888, 904 (1st Cir. 1993).

546. Buzuvis, *supra* note 13, at 442.

547. *Id.*

548. *Biediger v. Quinnipiac Univ.*, 928 F. Supp. 2d 414, 470 (D. Conn. 2013).

549. *Biediger*, 928 F. Supp. 2d at 470 n.63; *see also* Buzuvis, *supra* note 13, at 460–61 (observing the justified criticism of “institutions that have prematurely applied the label ‘sport’ to an existing activity to demonstrate Title IX compliance while avoiding the more costly alternative of adding traditional sports”); Hogshead-Makar, *supra* note 228, at 488 (identifying the deceptive practice of “starting new, cheaper teams for women” as a method for attempting to satisfy Title IX requirements); Glenn M. Wong et al., *NCAA Division I Athletic Directors: An Analysis of the Responsibilities, Qualifications and Characteristics*, 22 JEFFREY S. MOORAD SPORTS L.J. 1, 45 (2015) (characterizing

Accordingly,

rather than simply recommit to women's volleyball or bring other NCAA-championship sports to campus, the University doubled down on its plan to eliminate volleyball, and staked its compliance with Title IX on an as-yet unrecognized sport as well as an emerging sport in imminent danger of losing that recognition.⁵⁵⁰

Indeed, had the court endorsed “the meager level of competition that Quinnipiac’s cheer team experienced in 2009–2010, it would have rendered the definition of varsity sport dangerously broad.”⁵⁵¹ Moreover, while women’s rugby unquestionably possessed the intrinsic attributes of a sport, issues regarding its administration and competitive structure still deprived its participants of a quality athletic experience on par with the experiences of other varsity athletes.⁵⁵² The risk in allowing universities to “offer women’s sports that have minimal competitive structures and call them the equivalent of highly organized men’s sports,” is that such “backsliding” would inevitably occur.⁵⁵³ Thus, the *Biediger* decisions provide an important bulwark against the temptation of universities to take financial shortcuts toward Title IX compliance that would not truly provide their female athletes with genuine intercollegiate athletic participation opportunities.

Of course, it must also be remembered that *Biediger* did not foreclose the possibility of competitive cheerleading or acro one day meeting the requirements of a sport for Title IX purposes. The district court itself had

little doubt that at some point in the near future—once competitive cheer is better organized and defined, and surely in the event that the NCAA recognizes the activity as an emerging sport—competitive cheer will be acknowledged as a bona fide sporting activity by academic institutions, the public, and the

Quinnipiac’s actions as “a clever attempt to enlarge the definition of female sports for Title IX purposes.”).

550. *Biediger*, 928 F. Supp. 2d at 471.

551. Buzuvis, *supra* note 13, at 452–53.

552. *See Biediger*, 928 F. Supp. 2d at 462.

553. Buzuvis, *supra* note 13, at 453. This is due to the fact that “[c]ollege and university athletic departments do not have a history of voluntarily striving for gender equity, partly because it is politically and financially difficult to achieve.” *Id.*

law.⁵⁵⁴

The Second Circuit echoed these sentiments, refusing to foreclose the possibility that competitive cheer, “with better organization and defined rules, might some day warrant recognition as a varsity sport.”⁵⁵⁵ Unfortunately, both courts agreed that that day had not yet arrived.⁵⁵⁶

Nor has that day likely arrived in the two years since the district court’s 2013 decision. To be sure, further improvements to competitive cheer or acro have been made. For one thing, the NCATA national championship tournament is no longer an open invitational, as only the top eight teams in the country are invited.⁵⁵⁷ However, the NCATA and USA Cheer still have not reconciled their differences and both continue to offer competing formats for competitive cheer. As a result, neither format has yet attained emerging sport recognition from the NCAA.⁵⁵⁸ Moreover, issues regarding the competitive quality of Quinnipiac’s schedules remain. While thirteen schools sponsored acro teams for the 2015–2016 season, only three were members of NCAA Division I, including Quinnipiac.⁵⁵⁹ The same issues plague women’s rugby.

554. *Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62, 101 (D. Conn. 2010).

555. *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 105 (2d Cir. 2012).

556. *Id.*; *Biediger*, 728 F. Supp. 2d at 101.

557. *See NCATA Announces 2015 Championship Field*, NAT’L COLLEGIATE ACROBATICS & TUMBLING ASS’N (Sept. 30, 2015), http://thencata.org/sports/acro/2014-15/releases/NCATA-Champ_TournamentField/. Similarly, the USA Cheer-sponsored STUNT held separate double-elimination tournaments for Division I and Division II programs, in which the four top ranking teams at each level qualified. *See 2015 College STUNT: April Update*, USA CHEER, <http://usacheer.net/2015collegestunt> (last visited June 9, 2016); *2015 STUNT Division I National Championship*, C. STUNT, <http://collegestunt.org/2015-season/2015-stunt-national-championship/2015-stunt-division-i-national-championship> (last visited June 9, 2016); *2015 STUNT Division II National Championship*, C. STUNT, <http://collegestunt.org/2015-season/2015-stunt-national-championship/2015-stunt-division-ii-national-championship> (last visited June 9, 2016).

558. *See About*, C. STUNT, <http://collegestunt.org/about-stunt/> (last visited June 9, 2016) (stating that “USA Cheer is working closely with legal and Title IX experts to ensure that STUNT . . . can develop into a sport that qualifies for Title IX purposes.”); *FREQUENTLY ASKED QUESTIONS*, NAT’L COLLEGIATE ACROBATICS & TUMBLING ASS’N (Oct. 5, 2015), http://thencata.org/this_is/FAQ (noting that the NCATA’s mission is to attain emerging sport status); *Mission & Vision*, NAT’L COLLEGIATE ACROBATICS & TUMBLING ASS’N (Oct. 5, 2015), http://thencata.org/this_is/missionvision (stating that “[t]he mission of the NCATA is to bring the sport . . . to NCAA emerging sport status and towards a fully sanctioned NCAA championship sport.”).

559. NAT’L COLLEGIATE ACROBATICS & TUMBLING ASS’N, <http://thencata.org/landing/index> (last visited June 9, 2016). Of the remaining schools, seven are members of Division II, two are members of Division III, and one is a member of the NAIA. *Id.* USA Cheer, on the other hand, claims that more than fifty colleges participated in STUNT over the last five years but did not indicate how many of these teams were varsity teams, rather than club teams. *See 2015 College STUNT: November College Article*, USA CHEER, <http://usacheer.net/2015collegestunt> (last visited June 9, 2016).

Twelve varsity women's rugby teams are participating in the 2015–2016 season, but only six, including Quinnipiac, are members of Division I.⁵⁶⁰

Thus, despite further improvements, it is unlikely that either competitive cheer or women's rugby would be found to constitute sports for Title IX purposes even today.⁵⁶¹ Ultimately, however, when the day does arrive that competitive cheer and women's rugby are considered sports under Title IX, the concerns underlying the *Biediger* decisions will provide stronger incentives for those in charge of those activities “to work diligently to organize, standardize, and increase the competitive opportunities,” resulting, in the long run, in improved Title IX compliance and benefits to women's sports.⁵⁶²

B. Criticisms

1. Definition of “Sport” Too “Narrow”

Surprisingly, considering the detail and care with which the *Biediger* courts made their rulings, the decisions have been subject to criticism from several commentators. It has been suggested that the courts' definition of sport and application of the OCR factors was too narrow. This criticism proceeds along two main prongs. First, critics suggest that the OCR factors, as applied in *Biediger*, fail to “evaluate the athleticism required by an activity in determining whether it is a genuine athletic opportunity.”⁵⁶³ They assert that while the OCR test focuses on structure, administration, team preparation, and competition, “it ignores the requisite skill, strength, and athleticism required of a sport.”⁵⁶⁴ Critics fear that the standard, as applied in *Biediger*, will result in “activities

560. *NCAA Women's Rugby*, USA RUGBY, <http://usarugby.org/ncaa> (last visited June 9, 2016). Two NAIA schools are also sponsoring women's rugby, with an additional eight schools across divisions sponsoring club teams. *Id.*

561. Perhaps, however, recognition will be achieved for competitive cheer in the near future. “[A]ccording to the National Federation of State High School Associations, approximately 123,000 [high school] students participated in competitive cheer in 2009.” MITTEN ET AL., *supra* note 1, at 814. Competitive cheer is “among the fastest growing sports in the country.” Buzuvis, *supra* note 13, at 445; *but see* MITTEN ET AL., *supra* note 1, at 25 (observing that “[p]articipation in competitive cheer declined” in 2010–11, “after having experienced significant increases in prior years”). Moreover, based on Quinnipiac's experiences, it seems that operating costs for competitive cheer and acro are on par with other women's sports, which might prevent universities from simply using it “as a quick fix to Title IX compliance on a budget.” Buzuvis, *supra* note 13, at 461.

562. Buzuvis, *supra* note 13, at 454, 464.

563. Kiersten McKoy, Comment, *Biediger v. Quinnipiac University*, 58 N.Y.L. Sch. L. Rev. 457, 461 (2014).

564. *Id.* at 464.

requiring little or no physical exertion” satisfying Title IX requirements, as long as they meet the structure, administration, team preparation, and competition factors, “while those activities that require just as much, if not more, physical exertion than current varsity sports (e.g., competitive cheerleading) will not fulfill Title IX requirements.”⁵⁶⁵ Specifically, the *Biediger* court is accused of “ignoring the athletic nature of the [sic] competitive cheer and the existence of competitive events in favor of traditional stereotypes about ‘pom-poms and looking pretty.’”⁵⁶⁶ The critics suggest modifying the OCR test to include an athletic component.⁵⁶⁷

Contrary to these assertions, no such modification of the test for determining which activities count as sports for purposes of Title IX is needed. Neither *Biediger* nor the OCR test ignores the athletic nature of the activity in question. The district court and the Second Circuit in *Biediger* both specifically acknowledged “that competitive cheerleading can be physically challenging, requiring competitors to possess ‘strength, agility, and grace.’”⁵⁶⁸ However, simply requiring physical exertion and athletic skill is not enough, standing alone, to support a finding that an activity constitutes a sport for purposes of Title IX—those athletic skills must be utilized in a context providing their possessors with genuine intercollegiate-level athletic participation opportunities. Furthermore, the OCR test does account for physical exertion and athletic skill, at least indirectly. If an activity is recognized as an emerging sport by the NCAA, it is entitled to a presumption that it constitutes a sport for purposes of Title IX.⁵⁶⁹ The NCAA’s Criteria for Emerging Sports defines a sport as “an institutional activity *involving physical exertion* with the purpose of competition versus other teams or individuals within a collegiate competition structure,” and which “includes regularly scheduled team and/or individual, head-to-head competition (at least five) within a defined competitive season(s); and standardized rules with rating/scoring systems ratified by official regulatory agencies and governing bodies.”⁵⁷⁰ Thus, if an activity is classified as an emerging sport, which

565. *Id.* at 464–65.

566. Buzuvis, *supra* note 13, at 453.

567. McKoy, *supra* note 563, at 467–68.

568. *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 105 (2d Cir. 2012) (quoting *Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62, 101 (D. Conn. 2010)); *see also* Sowder et al., *supra* note 181 (identifying fitness, endurance, strength, power, agility, and flexibility as physical elements embodied by cheerleading).

569. *See* Monroe, *supra* note 14, at 2.

570. CRITERIA FOR EMERGING SPORTS, *supra* note 133 (emphasis added); *see also* Buzuvis, *supra* note 13, at 456–57. Of course, the emerging sports framework itself is not above criticism. Some commentators have suggested that, in practice, the sports that were approved as emerging sports have

accounts for the physical exertion involved in the activity, it will be presumed to be a sport for purposes of the OCR test for determining what constitutes a sport under Title IX.

The other prong of the criticism concerns the comparative approach adopted by both OCR and the *Biediger* courts, which “only consider[s] an activity to be ‘athletic’ if it is similar to already-existing varsity sports.”⁵⁷¹ Critics believe that “evaluating whether a newly developed activity has similar competitive opportunities to existing sports undermines the goal of creating equal opportunity because teams engaging in new activities cannot survive this rigorous standard.”⁵⁷² According to this line of reasoning, upon their initiation, new activities cannot possibly offer competitive opportunities comparable to existing sports that had years to develop, so time to invest resources in these activities is needed before they can hope to satisfy the OCR test.⁵⁷³ Budgetary restraints, however, may make schools reluctant to invest in new activities that are not immediately compliant with Title IX.⁵⁷⁴ Therefore, new activities that meet the administrative factors of the OCR test should receive a grace period in which competitive opportunities may grow and athletes can still be counted toward Title IX compliance.⁵⁷⁵

No such grace period is needed. Again, this proposal ignores the implications of attaining emerging sport status, which would help to assuage concerns regarding recognition of new activities.⁵⁷⁶ Moreover, even if emerging sports cannot be counted for purposes of the substantial proportionality prong—a conclusion the district court assiduously avoided reaching⁵⁷⁷—that does not mean they are irrelevant for purposes of Title IX. The court itself recognized that new activities would “require an incubation

simply constituted the women’s version of an already established men’s sport, rather than a purely female-driven activity, and have appealed more to women of a higher socioeconomic status. *See* MITTEN ET AL., *supra* note 1, at 776, 801; Buzuvis, *supra* note 13, at 462–63.

571. *See* Glatt, *supra* note 12, at 307.

572. McKoy, *supra* note 563, at 461.

573. *Id.* at 465.

574. *Id.*

575. *Id.* at 469.

576. OCR itself has expressly stated that its test is designed “to encourage compliance with the Title IX athletics regulations in a flexible manner that expands, rather than limits, student athletic opportunities.” Monroe, *supra* note 14, at 4 (emphasis omitted). The factors are designed “to provide institutions with information to include new sports in their athletics programs, such as those athletic activities not yet recognized by governing athletics organizations and those featured at the Olympic games, if they so choose.” *Id.*

577. *Biediger v. Quinnipiac Univ.*, 928 F. Supp. 2d 414, 462 (D. Conn. 2013).

period in which to grow and develop.”⁵⁷⁸ The court, therefore, emphasized that “it seems all but certain that sponsorship of emerging sports could count toward compliance under prongs two or three.”⁵⁷⁹ Accordingly, the problem in *Biediger* was not the fact that new activities may never be considered in the Title IX analysis, but that “Quinnipiac has taken a prong-two approach to solving a prong-one problem.”⁵⁸⁰ Therefore, even if new activities might not always be taken into account under the first prong of the three-part test, this is only because they are more appropriately considered elsewhere in the Title IX analysis.

2. Deference

Another area of criticism has been the level of deference the *Biediger* courts accorded to the various OCR pronouncements. Critics charge that the district court erroneously “assumed without analysis that the 2008 Letter interpreted a regulation and thereby qualified for [heightened] *Martin* deference.”⁵⁸¹ Rather, low-level *Skidmore* deference should have been applied, and the 2008 OCR Letter should have been found unpersuasive.⁵⁸² Again, this criticism misses the mark.

The basis for the assertion that the 2008 OCR Letter is not entitled to *Martin* deference appears to be that the 2008 OCR Letter could not have been interpreting ambiguity in the language of any regulation, because the applicable regulation under 34 C.F.R. § 106.41(c) “gives no guidance on the word ‘athletic,’ merely calling on universities to provide ‘equal athletic opportunity.’”⁵⁸³ To the contrary, the regulation states that whether universities provide “equal athletic opportunity” will be determined based on “[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.”⁵⁸⁴ What is meant by “sports” remains unclear from the regulation, and it was this ambiguous language that OCR interpreted in the 2008 OCR Letter, thereby

578. *Id.*

579. *Id.* Of course, the district court did not need to make such a finding, as Quinnipiac defended itself solely on the basis of the substantial proportionality prong. *Id.* at 458.

580. *Id.* at 471.

581. Glatt, *supra* note 12, at 315.

582. *See id.* at 315–21.

583. *Id.* at 315–16.

584. 34 C.F.R. § 106.41(c)(1) (2016).

entitling the Letter to heightened *Martin* deference.⁵⁸⁵ The Second Circuit subsequently agreed that the OCR Letters were “entitled to substantial deference.”⁵⁸⁶ Moreover, the Second Circuit further held that even if the OCR Letters were not entitled to heightened deference, they would still be entitled to deference, “because their logical consistency with the . . . Policy Interpretation amplifies their ‘power to persuade.’”⁵⁸⁷ Therefore, the *Biediger* courts properly deferred to the OCR Letters in reaching their determination.

For all of the above reasons, the criticisms of *Biediger* fail to withstand scrutiny. The district court’s well-reasoned decision was correct as a matter of both law and policy, and its analysis of what constitutes a sport for purposes of Title IX, as well as the levels-of-competition test, should be the starting point for all subsequent decisions on these subjects.

V. CONCLUSION

With the recent victory of the United States Women’s National Team in the 2015 FIFA Women’s World Cup, the impact of Title IX has again been in the forefront of the news. The importance of providing equal athletic opportunities to female athletes cannot be understated. However, those athletic opportunities must be genuine and come within the context of a “sport.” The *Biediger* decisions mark the first time that federal courts had the occasion to consider what constitutes a sport for purposes of compliance with Title IX. *Biediger* also represents the first instance in which a federal court interpreted and applied Title IX’s levels-of-competition test. As illustrated in this Article, the thorough and complete analyses embodied by the *Biediger* decisions represent an appropriate balancing of the relevant factors set forth by OCR. Both the district court and the Second Circuit properly recognized that adopting too broad a definition of sport risked watering down women’s sports. The *Biediger* trilogy therefore provides an important bulwark against the temptation of universities to take shortcuts to achieve Title IX compliance when faced with budgetary constraints. Going forward, the *Biediger* decisions will help ensure that female athletes receive genuine intercollegiate-level athletic participation opportunities.

585. See *Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62, 92–93 (D. Conn. 2010); Monroe, *supra* note 14, at 1–2.

586. *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 96–97 (2d Cir. 2012). At least one other federal court has accorded a similar degree of deference to a Dear Colleague Letter, citing the Second Circuit’s decision in *Biediger*. See *T.E. v. Pine Bush Cent. Sch. Dist.*, 58 F. Supp. 3d 332, 355 (S.D.N.Y. 2014).

587. *Biediger*, 691 F.3d at 97 (quoting *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2169 (2012)).