

TITLE IX: Forty years and still litigating

Colleges and universities facing financial concerns continue to litigate issues involving compliance with Title IX more than forty years after the federal law was enacted. This recent case involved the question whether female-only competitive cheerleading should count as a sport providing athletic opportunities for purposes of Title IX. Collegiate women's volleyball players brought suit against Quinnipiac University, alleging that university's plan to eliminate women's volleyball as varsity sport violated Title IX. The trial court found a violation and issued an injunction against the University. The University appealed.

BIEDIGER v. QUINNIPIAC UNIVERSITY

691 F.3d 85 (2 Cir. 2012)

REENA RAGGI, Circuit Judge:

Quinnipiac University appeals . . . from a permanent injunction ordered on July 22, 2010 . . . Quinnipiac was found to have violated Title IX of the Education Amendments of 1972 by failing to afford equal participation opportunities in varsity sports to female students. Quinnipiac argues that the injunction, which prohibits any such future discrimination, should be vacated because it is based on a Title IX ruling infected by errors in counting the varsity athletic participation opportunities afforded Quinnipiac's female students in the 2009-10 school year. Specifically, Quinnipiac faults the district court for excluding from its count of the total athletic participation opportunities afforded female students: (1) 11 roster positions on the women's indoor and outdoor track and field teams, held by members of Quinnipiac's women's cross-country team who were required to join the track teams even though they were unable to compete in 2009-10 because they were injured or “red-shirted”; and (2) all 30 roster positions on Quinnipiac's nascent women's competitive cheerleading team, based on a finding that the team did not afford the athletic participation opportunities of a varsity sport. Quinnipiac further contends that, even if these 41 roster positions should not count as varsity athletic participation opportunities for women, the district court erred in concluding that (3) the resulting 3.62% disparity between the percentage of all participation opportunities in varsity sports afforded female students (58.25%) and the percentage of enrolled female undergraduates (61.87%) established a Title IX violation warranting the challenged injunctive relief. We identify no merit in these arguments, and we affirm the challenged injunction substantially for the reasons stated by the district court in its comprehensive and well-reasoned opinion.

I. Background

A. Quinnipiac's Decision To Eliminate Women's Volleyball Prompts This Title IX Action

This lawsuit has its origins in Quinnipiac's March 2009 announcement that in the 2009-10 academic year, it would eliminate its varsity sports teams for women's volleyball, men's golf, and men's outdoor track and field, while simultaneously creating a new varsity sports team for

women's competitive cheerleading. Plaintiffs, five Quinnipiac women's volleyball players and their coach, Robin Sparks, filed this action in April 2009, charging the university with violating Title IX by denying women equal varsity athletic participation opportunities, and seeking an injunction. [The district court ultimately granted permanent injunctive relief.] . . .

In sum, as a matter of Quinnipiac's litigation strategy, resolution of this case effectively turned on whether Quinnipiac's sex based treatment of varsity athletes provided its female students with genuine athletic participation opportunities substantially proportionate to their enrollment. . . .

D. Athletic Participation Opportunities for Women in Competitive Cheerleading: The Determination That the Activity Does Not Yet Qualify as a "Sport"

Competitive cheerleading, which Quinnipiac decided to create as a new women's varsity sport team for 2009-10, is a late twentieth-century outgrowth of traditional sideline cheerleading. Whereas sideline cheerleaders generally strive to entertain audiences or solicit crowd reaction at sport or school functions, a competitive cheerleading team seeks to pit its skills against other teams for the purpose of winning. Thus, to distinguish the two activities, competitive cheerleaders

do not attempt to elicit crowd response; generally do not use pom-poms, megaphones, signs, or other props associated with [sideline] cheerleading teams; ... wear uniforms consisting of shorts and jerseys, much like what women's volleyball players don; and emphasize 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.

(observing that competitive cheerleading is an "athletic endeavor" that might be described as "group floor gymnastics").

The district court nevertheless concluded that the 30 roster positions that Quinnipiac assigned competitive cheerleading for 2009—10 could not be counted under Title IX because the activity did not yet afford the participation opportunities of a varsity "sport."

Preliminary to reaching this conclusion, the district court observed that competitive cheerleading is not yet recognized as a "sport," or even an "emerging sport," by the NCAA, action that would have triggered a presumption in favor of counting its participants under Title IX. Nor has DOE recognized competitive cheerleading as a sport; to the contrary, in two letters in 2000, OCR indicated competitive cheerleading is presumptively not a sport, while leaving open the possibility for a different conclusion with respect to a particular cheerleading program. There is, however, no record evidence of any competitive cheerleading program being recognized by DOE as a sport.

Mindful of these circumstances, the district court proceeded carefully to review the structure, administration, team preparation, and competition of Quinnipiac's competitive cheerleading

program to determine whether it nevertheless qualified as a sport whose athletic participation opportunities should be counted for purposes of Title IX. Again, we only briefly summarize the district court's detailed findings, which find ample support in the record evidence. The district court found that in terms of the team's operating budget, benefits, services, and coaching staff, competitive cheerleading was generally structured and administered by Quinnipiac's athletics department in a manner consistent with the school's other varsity teams. The district court noted two “minor” exceptions to this conclusion: Quinnipiac did not afford its competitive cheerleading team locker space; and because the NCAA did not recognize competitive cheerleading as a sport, the team did not receive NCAA catastrophic injury insurance and had to obtain it from a separate provider. With respect to factors relating to the team's preparation and competition, the district court found that the competitive cheerleading team's practice time, regimen, and venue were consistent with other varsity sports. Further, as with other varsity sports, the length of the competitive cheerleading season and the minimum number of competitions in which a team would participate were pre-determined by a governing athletic organization, the recently formed National Competitive Stunt and Tumbling Association, of which Quinnipiac was a founding member. Finally, the purpose of the team—to compete athletically at the intercollegiate varsity level—was akin to that of other varsity sports.

At the same time, however, the district court identified a number of circumstances that sufficiently distinguished Quinnipiac's competitive cheerleading program from traditional varsity sports as to “compel[] the decision that, for the 2009-10 season,” the program could not “be counted as a varsity sport for purposes of Title IX.” First, Quinnipiac did not—and, in 2009-10, could not—conduct any off-campus recruitment for its competitive cheerleading team, in marked contrast not only to the school's other varsity sports teams but also to a typical NCAA Division I sports program. The district court explained the significance of this circumstance: “Although the women on the Quinnipiac competitive cheer team were athletically able, they would have been all the more talented had [Coach] Powers been able to seek out the best competitive cheerleaders around the country, as any other varsity coach would have been able to do.”

More important, no uniform set of rules applied to competitive cheerleading competition throughout the 2009-10 season. Indeed, in the ten competitions in which the Quinnipiac team participated during the regular season, it was judged according to five different scoring systems. Further, in these competitions, Quinnipiac did not face only varsity intercollegiate competitive cheerleading teams. Rather, it was challenged by “a motley assortment of competitors,” including collegiate club opponents who did not receive varsity benefits, collegiate sideline cheerleading teams, and all-star opponents unaffiliated with a particular academic institution, some of whom may still have been high-school age. As the district court observed, “application of a uniform set of rules for competition and the restriction of competition to contests against other varsity opponents” are the “touchstones” of a varsity sports program. “Those features ensure that play is fair in each game, that teams' performances can be compared across a season, and that teams can be distinguished in terms of quality.”

The concerns raised by these irregularities in season competition were only aggravated by aspects of post-season play. Notably, competitive cheerleading offered no progressive playoff system leading to a championship game. Rather, it provided an open invitational, which neither

excluded any team on the basis of its regular season performance nor ranked or seeded participating teams on that basis. Instead, all entrants competed in a single championship round in which the team with the highest score won. That round, moreover, was subject to a new rule of competition that had not applied to Quinnipiac in any of its regular season competitions: a mandatory 45–60 second “spirit” segment in which a team was judged by the intensity of the response it elicited from the crowd and the number of the sponsoring brand's props that it employed, features that Quinnipiac's coach confirmed were more characteristic of sideline rather than competitive cheerleading. Viewing the totality of these circumstances, the district court concluded that the competitive cheerleading team's post-season competition did not conform to expectations for a varsity sport.

Most other varsity sports would have used some system to separate teams and competitors in terms of quality, and would have ranked, seeded, or excluded teams on the basis of their performances during the regular season. Moreover, any other varsity sport would not have imposed new rules of competition in the post-season that teams did not follow during the regular season.

Based on these findings, as well as those pertaining to regular season play, the district court concluded that Quinnipiac's competitive cheerleading team did not compete in circumstances indicative of varsity sports. Thus, it ruled that Quinnipiac's 30 roster positions for competitive cheerleading could not be counted for Title IX purposes because the activity did not yet afford women genuine participation opportunities in a varsity sport.

In challenging this conclusion, Quinnipiac questions the weight the district court assigned the various factors it identified as supporting or undermining recognition of competitive cheerleading as a genuine varsity sport. Quinnipiac argues that this court should decide the question *de novo*. We generally accord considerable discretion to a factfinder in deciding what weight to assign competing evidence pointing toward different conclusions. But the point merits little discussion here because, even 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. Like the district court, we acknowledge record evidence showing that competitive cheerleading can be physically challenging, requiring competitors to possess “strength, agility, and grace.” Similarly, we do not foreclose the possibility that the activity, with better organization and defined rules, might someday warrant recognition as a varsity sport. But, like the district court, we conclude that the record evidence shows that “that time has not yet arrived.”

Accordingly, we conclude 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.