



4-1-2014

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Recommended Citation

Jacqueline R. Liguori, *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 (2014).

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STICKING THE LANDING: HOW THE SECOND CIRCUIT'S
DECISION IN *BIEDIGER V. QUINNIPIAC UNIV.* CAN HELP
COMPETITIVE CHEERLEADING ACHIEVE "SPORT" STATUS
UNDER TITLE IX

*"Cheerleading is no longer the stuff of Sandra Dee –
it has become an athletic event."*¹

I. INTRODUCTION

Laura Jackson was fourteen years old when, in an attempt to do a back handspring for varsity cheerleading tryouts, she broke two vertebrae in her back leaving her paralyzed from the neck down.² Eileen Bangoali tore her anterior cruciate ligament, a season-ending injury for professional athletes, but continued to compete on her cheerleading team for more than a year.³ Krista Parks suffered severe brain trauma after being dropped twenty feet onto her head during a cheerleading practice.⁴ Despite the clear risk of injury and the athletic ability required for membership on a competitive cheerleading team, to some, including the Second Circuit, what these girls do is not yet a sport under Title IX of the Educational Amendments of 1972.⁵

1. Katie Dowd, *Beyond Beauty: Cheerleading's Terrifying Danger*, THE POST GAME (Dec. 19, 2011, 7:17 AM), <http://www.thepostgame.com/features/201112/beyond-beauty-cheerleading-terrifying-danger> (revealing that Laura Jackson suffered paralyzing spinal injury attempting to do back handspring in preparation for trying out for varsity cheerleading squad). "Jackson's head cracked so violently against the floor that a piece of her scalp ripped off, and she lay there, gasping for breath that didn't come." *Id.*

2. *See id.* (providing example of risk of injury).

3. *See* Wayne Drehs, *Athletes Are Cheerleaders, Too*, ESPN (Mar. 15, 2004), <http://sports.espn.go.com/espn/page2/story?page=drehs/040316> (noting that ACL injury has ended seasons for professional athletes like Jason White, Willis McGahee, and Aaron Boone).

4. *See* Dowd, *supra* note 1 (providing second example of risk of injury).

5. *See* Biediger v. Quinnipiac Univ., 691 F.3d 85, 105 (2d Cir. 2012) [hereinafter *Biediger III*] (holding competitive cheerleading was not sport under Title IX); Ashlee A. Cassman, Comment, *Bring It On! Cheerleading vs. Title IX: Could Cheerleading Ever Be Considered an Athletic Opportunity Under Title IX, and If So, What Implications Would That Have on University Compliance?*, 17 SPORTS LAW. J. 246 (2010) ("Those against recognizing cheerleading as a sport point to the lack of competition, lack of objective scoring to determine a winner, lack of physical contact, and the fact that cheerleading's overriding purpose is to support other athletes." (citing Howard Wasserman, *The Significance of Defining Sport*, SPORTS LAW BLOG, (Dec. 28, 2008, 11:05 PM), http://sports-law.blogspot.com/2008_12_01_archive.html; *Cheerleading, Drill Team, Danceline and Band as Varsity Sports: The Foundation Position*,

The issue of whether cheerleading is a sport is one that is severely polarizing among sports authorities, athletes, and academic institutions.⁶ Cheerleading has evolved from a sideline sideshow to a competitive event that arguably exhibits levels of athleticism comparable to any other sport.⁷ Specifically, one of the major missing links for competitive cheerleading is the lack of recognition that it is a sport under Title IX.⁸ In *Biediger v. Quinnipiac University*, the Second Circuit held that for the purposes of Title IX, competitive cheerleading could not count as a varsity sport.⁹ Despite the holding in *Biediger*, the ruling helps competitive cheerleading in its fight to be considered a sport under Title IX.¹⁰ The court in *Biediger* provided specific reasons why cheerleading should not yet be considered a sport for the purposes of Title IX, and that specificity has shed some light on how cheerleading can obtain the “sport” designation.¹¹

This Casenote evaluates the Second Circuit’s decision in *Biediger* and how the decision should not be considered a setback in the fight to have competitive cheerleading considered a sport for the purposes of Title IX.¹² Part II narrates the events leading up to the suit against Quinnipiac University (hereinafter “Quinnipiac” or

WOMEN’S SPORTS FOUNDATION, http://www.womenssportsfoundation.org/en/home/advocate/title-ix-and-issues/title-ix-positions/cheerleading_drill_team_danceline_and_band_as_varsity_sports (last visited Dec. 24, 2013)). For a detailed discussion of the function and purpose of Title IX, see *infra* notes 31-34 and accompanying text.

6. See generally Cassman, *supra* note 5 (setting forth arguments for and against whether cheerleading should be considered sport).

7. See Katie Thomas, *Gender Games – Born on Sideline, Cheering Clamors to Be Sport*, N.Y. TIMES, May 22, 2011, at A1, available at http://www.nytimes.com/2011/05/23/sports/gender-games-born-on-sideline-cheering-clamors-to-be-sport.html?pagewanted=all&_r=1& (“While cheerleading evokes images of pompoms and pleated skirts, it has relied on increasingly athletic feats of grace and strength in recent years.”).

8. For a detailed discussion on the Department of Education’s position on cheerleading, see *infra* notes 73-79 and accompanying text. For a discussion on how the “Sport” designation under Title IX avails an athletic activity of additional benefits such as scholarships for participants and better training equipment, see *infra* note 174 and accompanying text.

9. See *Biediger III*, 691 F.3d at 105 (summarizing holding with respect to competitive cheerleading).

10. For a discussion of how the ruling in *Biediger III* may actually bring competitive cheerleading closer to being considered a sport for the purposes of Title IX, see *infra* notes 185-190 and accompanying text.

11. See *Biediger III*, 691 F.3d at 103-05 (detailing characteristics that distinguish competitive cheerleading from other varsity sports).

12. For a more detailed discussion of the Second Circuit’s decision, see *infra* notes 106-183 and accompanying text.

the “University”).¹³ Part III details the history of Title IX, the publications that followed Title IX, and the Department of Education’s current position on what constitutes a “sport” under Title IX.¹⁴ Part IV examines the Second Circuit’s decision in *Biediger*, focusing on the determination of whether competitive cheerleading should be counted as a sport under Title IX.¹⁵ Finally, Part V considers the impact of *Biediger* on collegiate competitive cheerleading, as well as recent developments in the fight to have competitive cheerleading considered a sport.¹⁶

II. FACTS

Quinnipiac University is a private university located in Connecticut.¹⁷ For purposes of athletic competition, the University is a member of the National Collegiate Athletic Association (“NCAA”), and competes in NCAA Division I varsity athletics.¹⁸ In 2009, Quinnipiac University announced plans to eliminate the women’s volleyball team along with several smaller men’s sports teams and, concurrently, announced plans to create a varsity women’s competitive cheerleading team.¹⁹ In May 2009, several women’s volleyball players along with their coach filed suit against Quinnipiac in the United States District Court for the District of Connecticut.²⁰ The plaintiffs’ primary claim was that as a result of its plans to cut the women’s volleyball team, Quinnipiac had violated Title IX.²¹ The plaintiffs sought an injunction to prevent Quinnipiac from elimi-

13. For a more detailed discussion of the parties to the suit and the procedural history of the case, see *infra* notes 17-30 and accompanying text.

14. For a more detailed discussion of Title IX, see *infra* notes 31-105 and accompanying text.

15. For a detailed narrative of the Second Circuit’s analysis in *Biediger III*, see *infra* notes 106-161 and accompanying text.

16. For a detailed discussion of critical remarks and the potential impact of *Biediger III*, see *infra* notes 162-207 and accompanying text.

17. See *About Us*, QUINNIPIAC UNIVERSITY, <http://www.quinnipiac.edu/about/> (last visited Jan. 14, 2014) (detailing basic facts about academic institution).

18. See *Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62, 64 (D. Conn. 2010), *aff’d*, 691 F.3d 85 (2d Cir. 2012) [hereinafter *Biediger II*] (detailing state of athletics program).

19. See *Biediger v. Quinnipiac Univ.*, 616 F. Supp. 2d 277, 278 (D. Conn. 2009) [hereinafter *Biediger I*] (explaining course of events leading to suit).

20. See *id.* (stating parties to suit); see also Dan Fitzgerald, *Quinnipiac Faces Title IX Lawsuit over Elimination of Women’s Volleyball*, CONNECTICUT SPORTS LAW (Apr. 21, 2009), <http://ctsportslaw.com/2009/04/21/quinnipiac-faces-title-ix-lawsuit-over-elimination-of-womens-volleyball/> (reporting filing of suit).

21. See *Biediger I*, 616 F. Supp. 2d at 279 (describing plaintiff’s claim); see also Pat Eaton-Robb, *Attorneys End Arguments in Quinnipiac Equity Case*, USA TODAY (May 14, 2009), http://usatoday30.usatoday.com/sports/college/volleyball/2009-05-14-1508058890_x.htm (detailing litigation strategy of plaintiffs).

nating the women's volleyball team.²² In a pre-trial hearing, the district court found that the plaintiffs showed the irreparable harm and likelihood of success on the merits necessary to meet their burden of proof.²³ The district court granted the plaintiffs a preliminary injunction.²⁴

At the close of a bench trial several months later, the district court granted permanent injunctive relief and found that the University had disproportionately allocated athletic participation opportunities.²⁵ The district court explained that for the purposes of Title IX, the University was prohibited from counting some track positions multiple times, as cross-country athletes were compelled to participate in both indoor and outdoor track.²⁶ The district court also declined to count thirty women's competitive cheerleading roster positions, noting that women's competitive cheerleading did not yet count as a varsity sport for the purposes of Title IX.²⁷ Once the women's competitive cheerleading positions and select track positions were excluded from the total number of available athletic opportunities, the court found that the disparity between the positions afforded to men and those afforded to women was not substantially proportional and, as a result, the University was in violation of Title IX.²⁸

The University filed an appeal with the United States Court of Appeals for the Second Circuit shortly after the decision, challenging the determination that the University had violated Title IX.²⁹ The Second Circuit affirmed the district court's issuance of an injunction, holding that the district court was correct in the methods used to count athletic opportunities for the purpose of Title IX and that the 3.62% disparity between female enrollment and female

22. See *Biediger I*, 616 F. Supp. 2d at 279 (discussing plaintiffs' requested relief).

23. See *id.* at 298 (summarizing rationale).

24. See *id.* (indicating district court decision).

25. See *Biediger v. Quinnipiac Univ. (Biediger II)*, 728 F. Supp. 2d 62, 114 (D. Conn. 2010), *aff'd*, 691 F.3d 85 (2d Cir. 2012) (stating disposition of district court).

26. See *id.* at 64 (detailing analysis undertaken to determine number of participation opportunities truly available on cross-country, indoor track, and outdoor track teams).

27. See *id.* at 101 (rejecting argument that competitive cheerleading met requirements to be considered sport under Title IX).

28. See *id.* at 112-13 ("Application of OCR's 1996 Clarification shows that the 3.62 percent disparity is enough to prove that Quinnipiac has not achieved substantial proportionality and does not fall within the 1979 Policy Interpretation's first safe harbor for Title IX compliance.").

29. See *Biediger v. Quinnipiac Univ. (Biediger III)*, 691 F.3d 85, 96 (2d Cir. 2012) (describing circumstances of appeal).

athletic opportunities “demonstrated a failure to provide substantially proportionate athletic participation opportunities as required by Title IX.”³⁰

III. BACKGROUND

A. Statutory and Regulatory Framework

On June 23, 1972, Title IX of the Educational Amendments of 1972 was signed into law.³¹ Title IX’s goal is to prevent sex-based discrimination within those educational institutions receiving federal funding.³² Section 901(a) of Title IX provides in relevant part: “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.”³³ Originally applicable to only “educational activities,” in 1974, Title IX’s scope was expanded to apply to collegiate athletic programs.³⁴

Through its implementing regulations, Title IX further protects students from discrimination by requiring recipients of federal financial assistance that are operating or sponsoring “interscholastic, intercollegiate, club or intramural athletics” to “provide equal athletic opportunity for members of both sexes.”³⁵ To determine whether a school is satisfying the equal athletic opportunity mandate, the Department of Education has set forth a list of factors to assist in the analysis.³⁶ The list of factors is as follows:

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of

30. *Id.* at 108 (summarizing holding). For further discussion of the district court’s methods used to count athletic opportunities for the purpose of Title IX, see *infra* notes 118-151 and accompanying text.

31. See 20 U.S.C. §§ 1681-88 (2006) (providing United States statutory provisions for discrimination based on sex or blindness).

32. See *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979) (explaining goal of Title IX was to “avoid the use of federal resources to support discriminatory practices” and “provide individual citizens effective protection against those practices”).

33. 20 U.S.C. § 1681(a) (2006) (providing general prohibition against discrimination, with certain specified exceptions).

34. See J. Brad Reich, *All the (Athletes) Are Equal, but Some Are More Equal Than Others: An Objective Evaluation of Title IX’s Past, Present, and Recommendations for Its Future*, 108 PENN ST. L. REV. 525, 530-31 (2003) (discussing applicability of Title IX to intercollegiate sports through Javits Amendment).

35. 34 C.F.R. § 106.41(c) (2013) (promulgating mandate for equal athletic opportunity).

36. See 34 C.F.R. § 106.41(c) (setting forth factors relevant in making determination of whether there are equal athletic opportunities for men and women).

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 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.³⁷

These factors force equal athletic opportunity claims into one of two categories: effective accommodation claims or equal treatment claims.³⁸ An effective accommodation claim occurs where there is a dispute as to “[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes”³⁹ An equal treatment claim is present where there is a dispute as to the allocation of resources such as equipment, practices, and facilities.⁴⁰ In the years after Title IX’s passage, there was significant confusion with respect to its application to collegiate athletics, as well as how to maintain compliance.⁴¹ As a result, Congress ordered action to clarify the statute and its requirements.⁴²

1. 1979 Policy Interpretation

In 1979, the Department of Health, Education, and Welfare, now the Department of Education (“DOE”), issued a policy interpretation that primarily dealt with the meaning of “equal opportu-

37. 34 C.F.R. § 106.41 (providing list of factors set forth by Department of Education in its implementing regulations).

38. See *Biediger v. Quinnipiac Univ. (Biediger III)*, 691 F.3d 85, 92 (2d Cir. 2012) (explaining function of 34 C.F.R. §106.41). Section 106.41(c)(1) governs effective accommodation claims, while Sections 106.41(c)(2)-(10) govern equal treatment claims. See *id.* (relying on *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 291 (2d. Cir. 2004)).

39. 34 C.F.R. § 106.41(c)(1) (providing first factor considered in determining whether equal athletic opportunities are available to both sexes).

40. See 34 C.F.R. § 106.41(c)(1)-(10) (listing factors considered in determining equal treatment).

41. See Brenda L. Ambrosius, Note, *Title IX: Creating Unequal Equality Through Application of the Proportionality Standard in Collegiate Athletics*, 46 VAL. U. L. REV. 557, 561-62 (2012) (discussing interpretation and application issues).

42. See *id.* at 561 (describing course of events leading to issuance of 1979 Policy Interpretation).

nity” as it applied to intercollegiate athletics.⁴³ Specifically, the 1979 Policy Interpretation articulated three pathways to compliance with the effective accommodation requirement of Section 106.41(c).⁴⁴ The three pathways to compliance examine:

- (1) Whether intercollegiate level participation opportunities for 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.⁴⁵

This test, known as “the three-part test,” is used to determine whether there are non-discriminatory athletic opportunities available for both sexes.⁴⁶ An academic institution can comply with Title IX by ensuring they meet any one of the three prongs of the test.⁴⁷

2. 1996 Clarification

The Department of Education’s Office of Civil Rights (“OCR”), the department responsible for enforcement of Title IX, made several efforts to clarify the requirements and limitations of these

43. See 1979 Policy Interpretation, 44 Fed. Reg. 71,413, 71,414 (Dec. 11, 1979) [hereinafter 1979 Policy Interpretation] (articulating purpose of Policy Interpretation).

44. See *id.* (detailing methods of compliance with Title IX).

45. *Id.* at 71,418 (articulating three-part test).

46. See *id.* (“In 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 . . .”).

47. See Paul M. Anderson, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments That Shaped Gender Equity Law*, 22 MARQ. SPORTS L. REV. 325, 340 (2012) (explaining how three-part test ensures compliance with Title IX).

three options for compliance.⁴⁸ In 1996, OCR issued a clarification of the three-part test.⁴⁹ The 1996 Clarification set forth the following three ways for academic institutions to ensure compliance with Title IX's regulations.⁵⁰

Under Prong I of the three-part test, male and female intercollegiate level athletic participation opportunities must be "substantially proportionate."⁵¹ To determine whether opportunities are substantially proportionate, the OCR analysis begins with a determination of the number of participation opportunities available to both males and females.⁵² After ascertaining the number of participation opportunities, the OCR then compares the numbers on a case-by-case basis to ensure they are substantially proportionate.⁵³ Factors influencing the determination that participation opportunities are substantially proportionate include the school's particular circumstances and the size of the athletic program.⁵⁴ Satisfying Prong I virtually assures compliance with Title IX if adhered to properly, and has been the method of choice for institutions aiming to maintain compliance.⁵⁵

Prong II of the three-part test "looks at an institution's past and continuing remedial efforts to provide nondiscriminatory participa-

48. See *Biediger v. Quinnipiac Univ. (Biediger III)*, 691 F.3d 85, 96 n.4 (2d Cir. 2012) (summarizing OCR enforcement powers).

49. See Letter from Norma V. Cantú, Assistant Sec'y for Civil Rights, Office for Civil Rights, Dep't of Educ., *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (Jan. 16, 1996), available at <http://www2.ed.gov/print/about/offices/list/ocr/docs/clarific.html> [hereinafter 1996 Clarification] (recounting issuance of 1996 Clarification). The stated purpose of the 1996 Clarification was to "provide specific factors that guide an analysis of each part of the three-part test." *Id.*

50. See *id.* ("If an institution has many any part of the three-part test, OCR will determine that the institution is meeting this requirement.")

51. 1979 Policy Interpretation, 44 Fed. Reg. at 71,418 (reiterating first prong of test).

52. See 1996 Clarification, *supra* note 49 (setting forth first step in substantial proportionality analysis). OCR also includes non-scholarship athletes and athletes who practice but may not compete in determining the number of participation opportunities. See *id.* (noting specific position on counting certain athletes).

53. See *id.* (discussing substantial proportionality guidelines and examples); see also Andrew J. Weissler, Article, *Unasked Questions: Applying Title IX's Effective Accommodation Mandate to Interscholastic Athletics*, 19 SPORTS LAW. J. 71, 86 (2012) ("[I]t is clear that a deviation of more than a few percentage points is likely to be fatal to compliance with Benchmark 1.").

54. See 1996 Clarification, *supra* note 49 (listing factors that aid in substantial proportionality determination).

55. See Jay Larson, Note, *All Sports Are Not Created Equal: College Football and a Proposal to Amend the Title IX Proportionality Prong*, 88 MINN. L. REV. 1598, 1606 (2004) (discussing preference of athletic directors to advise compliance through Prong I).

tion opportunities through program expansion.”⁵⁶ To satisfy this prong, the past actions of the institution must show that it has a history of being responsive to the “developing interests and abilities of the underrepresented sex.”⁵⁷ In addition, the institution must demonstrate a continuing practice of responding to those developing interests and abilities.⁵⁸ Any elimination of sports teams (comprised of underrepresented athletes) should occur in the context of program expansion as a result of changing interests and abilities.⁵⁹

Prong III of the three-part test asks if the school is “fully and effectively accommodating the interests and abilities of its students who are members of the underrepresented sex.”⁶⁰ Prong III is comprised of three subparts to address whether a school is fully and effectively accommodating the underrepresented sex: “(a) whether there is unmet interest in a particular sport; (b) sufficient ability to sustain a team in the sport; and (c) reasonable expectation of competition for the team.”⁶¹ Interest by the underrepresented sex can

56. 1996 Clarification, *supra* note 49 (setting forth language of second prong).

57. *Id.* (describing actions required by academic institution). In addition to past responsive action, the school must be able to show that they are currently taking necessary responsive actions. *See id.* (detailing requirements to which institution is required to adhere to maintain compliance). Factors considered to decide if an institution has a history of program expansion include:

[A]n institution’s record of adding intercollegiate teams, or upgrading teams to intercollegiate status, for the under represented sex; [A]n institution’s record of increasing the numbers of participants in intercollegiate athletics who are members of the underrepresented sex; and an institution’s affirmative responses to requests by students or others for addition or elevation of sports.

Id. (listing factors considered in finding history of program expansion).

58. *See id.* (detailing requirement of continuing practice of program expansion). Factors considered to decide if an institution has a continuing practice of program expansion include:

[A]n institution’s current implementation of a nondiscriminatory policy or procedure for requesting the addition of sports (including the elevation of club or intramural teams) and the effective communication of the policy or procedure to the students; and an institution’s current implementation of a plan of program expansion that is responsive to developing interest and abilities.

Id. (listing factors considered in finding continuing practice of program expansion).

59. *See id.* (describing procedure for eliminating teams while remaining in compliance).

60. *Id.* (setting forth language of Prong III). Under this prong, students that are admitted to the institution but have not enrolled are included in the analysis. *See id.* (describing which students’ interest and abilities are counted when asking if school is fully and effectively accommodating interests and abilities of underrepresented sex).

61. *Id.* (describing sub-parts used to determine if school is in compliance with Prong III).

take several forms, including: requests to participate in a particular sport not currently offered, participation in specific club or intramural sports, and “requests that an existing club or intramural sport be elevated to intercollegiate team status.”⁶² Sufficient ability to sustain a team can come from, among other things, the ability of the students to compete and the opinions of coaches as to the sustainability of a team.⁶³ The reasonable expectation of competition can be inferred from opportunities to compete against current competitor schools, as well as other competitive opportunities in the geographic area surrounding the institution.⁶⁴

3. 2008 Clarification

With an eye toward ensuring that schools are only counting genuine athletic opportunities toward participation opportunities, OCR issued another clarification in 2008, the purpose of which was to “help institutions determine which intercollegiate or interscholastic athletic activities can be counted for the purpose Title IX compliance.”⁶⁵ Specifically, OCR explained that it does not have a strict definition for “sport.”⁶⁶ Instead, OCR presumes that an academic institution’s “established sports” can be counted for the purposes of Title IX, so long as the “university is a member of an intercollegiate athletic organization, such as the National Collegiate Athletic Association.”⁶⁷ If an academic institution is not a member of an intercollegiate organization, OCR takes up a case-by-case evaluation and weighs two sets of factors: 1) the activity’s structure and administration, and 2) team preparation and competition.⁶⁸

62. 1996 Clarification, *supra* note 49 (providing examples of how interest can manifest).

63. *See id.* (describing methods by which ability to sustain team can be found).

64. *See id.* (iterating examples of evidence to support reasonable expectation of competition).

65. Letter from Stephanie Monroe, Assistant Sec’y for Civil Rights, Office for Civil Rights, Dep’t of Educ., *Athletic Activities Counted for Title IX Compliance* (Sept. 17, 2008), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20080917.html> [hereinafter 2008 Clarification] (stating purpose of 2008 Clarification).

66. *See id.* (noting OCR position on “sport” definition).

67. *Id.* (explaining situation where established sports will be presumed eligible to be counted under Title IX); *see also* Ephraim Glatt, Article, *Defining “Sport” Under Title IX: Cheerleading, Biediger v. Quinnipiac University, and the Proper Scope of Agency Deference*, 19 SPORTS LAW. J. 297, 305 (2012) (detailing contents of 2008 Compliance Letter); *see generally About the NCAA*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/membership+new> (last visited Dec. 23, 2013) (detailing operation and purpose of NCAA).

68. *See* 2008 Clarification Letter, *supra* note 65 (explaining OCR’s analysis where school does not belong to intercollegiate athletic organization).

With respect to structure and administration, the following factors weigh in favor of finding that an activity qualifies as a sport: whether the budget and staff are under the control of the athletics department, whether the participants are eligible for athletic scholarships, and whether the recruitment methods are the same as other varsity sports.⁶⁹ Similarly, regarding team preparation and competition, OCR considers, among other things, whether the practice and competition opportunities are similar in quality and quantity to other varsity sports.⁷⁰ Notably, OCR also considers whether the “primary purpose of the activity is to provide athletic competition at the intercollegiate or interscholastic varsity levels[.]”⁷¹ In short, if the activity qualifies as a “sport” per the 2008 Clarification Letter of Title IX’s implementing regulation, the “participants” defined in the 1996 Clarification count towards participation opportunities for the purposes of Prong I.⁷²

4. OCR’s Position on Cheerleading

As early as 1975, OCR took the position that cheerleading was presumptively not a sport.⁷³ OCR did not take up the issue again

69. *See id.* (providing Factor I, which details sub-factors relevant to program structure and administration).

70. *See id.* (providing Factor II, which details sub-factors relevant to team preparation and competition factor). In addition to regular season competition opportunities, OCR also inquires into the existence of pre-season and post-season competition, and compares the existence of such competition to the pre-season and post-season competition that exists in other varsity sports. *See id.*

71. *Id.* (noting primary purpose of activity as factor of importance to OCR under Factor II).

72. *See id.* (setting forth analysis undertaken by OCR to determine whether activity can qualify as “sport” under Title IX); *see also* 1996 Clarification, *supra* note 49 (defining which athletes may count as “participant” under Title IX). Athletes are defined in the 1996 Clarification 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.

Id. (citing 44 Fed. Reg. 71,413, 71,415).

73. *See* Letter from Peter E. Holmes, Director, Office for Civil Rights, Dep’t of Educ., *Letter to Chief State School Officers, Title IX Obligations in Athletics* (Nov. 11, 1975), available at <http://www2.ed.gov/about/offices/list/ocr/docs/holmes.html> [hereinafter 1975 OCR Letter] (“[D]rill teams, cheerleaders, and the like, which are covered more generally as extracurricular activities under section 86.31 . . . are not part of the institution’s “athletic program” within the meaning of the regula-

until 2000, when it sent two letters to the Executive Director of the Minnesota State High School League in order to respond to inquiries about what could be classified as a “sport.”⁷⁴ OCR sent the first letter in April 2000, in which it specifically cited the 1975 OCR letter and reaffirmed that OCR maintains the presumption that cheerleading is not a sport within the meaning of Title IX.⁷⁵

Only one month later, OCR sent a second letter to the Minnesota State High School League in order to clarify its restatement that cheerleading was presumptively not a sport.⁷⁶ Specifically, OCR clarified that its definition of cheerleading included both competitive and sideline cheer, and that both types of cheerleading were presumptively not sports for the purposes of Title IX.⁷⁷ In the first letter, OCR indicated a willingness to evaluate whether an activity is a sport on a case-by-case basis.⁷⁸ In the second letter, however, OCR cautioned that in any past instance where cheerleading or a similar activity was evaluated, it was not found to be a sport for the purposes of Title IX.⁷⁹

5. Legal History

One of the first cases in the line of Title IX jurisprudence is *Cannon v. University of Chicago*.⁸⁰ In *Cannon*, a woman alleged that she was denied admission to the University of Chicago’s medical school because of her sex.⁸¹ The woman brought a claim under

tion.”). OCR did not originally distinguish between competitive cheerleading and the more traditional sideline cheerleading. See *id.* (noting OCR definition’s lack of distinction). Traditional sideline cheerleading primarily involves supporting athletes and entertaining crowds. See Thomas, *supra* note 7 (describing sideline cheerleading); see also Sean Gregory, *Cheer Factor*, TIME, Apr. 23, 2012, available at <http://www.time.com/time/magazine/article/0,9171,2111810,00.html> (distinguishing competitive cheerleading event from traditional sideline cheerleading). Competitive cheerleading is more akin to gymnastics, and usually includes “strenuous tumbling runs, human pyramids, back flips, lifts, catches, and tosses.” Reich, *supra* note 34, at 558 (discussing athletic maneuvers competitive cheerleaders perform).

74. See Paul M. Anderson, Symposium, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments That Shaped Gender Equity Law*, 22 MARQ. SPORTS L. REV. 325, 363 (2012) (discussing purpose of first letter that was sent on April 11, 2000).

75. See *id.* at 364 (reiterating principle articulated in 1975 OCR Letter).

76. See *id.* (explaining purpose of second letter).

77. See *id.* (detailing OCR definition of cheerleading).

78. See *id.* at 363 (explaining OCR policy of evaluation of athletic activities).

79. See *id.* at 364 (cautioning that after evaluation, cheerleading had never been deemed sport).

80. See *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979) (finding private right of action under Title IX). For further discussion of *Cannon*, see Anderson, *supra* note 74, at 335-36 (discussing practical implications of *Cannon* under Title IX).

81. See *Cannon*, 441 U.S. at 680 (discussing facts of case).

Title IX, but the lower courts dismissed her claim, as they failed to find a private right of action in the Title IX statute.⁸² On appeal, the Supreme Court disagreed and held that there was a private right of action under Title IX.⁸³ It explained that the failure of Congress to specifically create a private right of action under Title IX did not necessarily mean that Congress did not intend for there to be such a right.⁸⁴ Following *Cannon*, not only could wronged plaintiffs file a complaint with OCR, they could also file a federal lawsuit.⁸⁵

After articulating a broad view of Title IX's applicability in *Cannon*, the Supreme Court narrowed the applicability of Title IX in *Grove City College v. Bell*.⁸⁶ In *Grove City*, the court held that Title IX applied only to those programs receiving financial aid from the federal government.⁸⁷ The court held that because Grove City College's financial aid program received federal financial assistance, the College's financial aid program was subject to Title IX.⁸⁸ This meant that athletic programs that did not directly receive federal funds were not subject to Title IX.⁸⁹ As a result of the decision in *Grove City*, many athletic programs were no longer subject to Title IX regulation.⁹⁰

In response to the *Grove City* decision, Congress passed the Civil Rights Restoration Act, and in doing so, broadened the term "program or activity" to ensure that receipt of both direct and indirect funds subjected an academic institution to Title IX.⁹¹ Prior to the Civil Rights Restoration Act, "the threshold issue was whether the actual athletic program received federal funds necessary for Ti-

82. See *id.* at 683-86 (detailing procedural history).

83. See *id.* at 709 ("There can be no question but that this . . . analysis supports the implication of a private federal remedy.")

84. See *Cannon*, 441 U.S. at 717 (summarizing rationale for holding).

85. See Jill K. Johnson, Note, *Title IX and Intercollegiate Athletics: Current Judicial Interpretation of the Standards for Compliance*, 74 B.U. L. REV. 553, 560 (1994) (discussing implications of *Cannon*).

86. See *Grove City College v. Bell*, 465 U.S. 555 (1984) (holding that only specific programs may fall within purview of Title IX). For further analysis of *Grove City*, see Preussel, *infra* note 96, at 91-92 (discussing effect of *Grove City* on Title IX enforcement).

87. See *Grove City*, 465 U.S. at 570-71 (discussing program-specific view of statute).

88. See *id.* at 573-74 (discussing holding).

89. See Reich, *supra* note 34, at 534 (discussing impact of *Grove City*).

90. See Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 32 (1992) (detailing *Grove City*'s effect on athletic programs).

91. See 20 U.S.C.A. § 1687 (West 2002) (exhibiting Civil Rights Restoration Act).

tle IX to apply, or whether receipt by an educational institution or its students rendered the school as a whole, and all of its programs, subject to Title IX scrutiny.”⁹² Following the Civil Rights Restoration Act, if one department within an academic institution received federal funds, the entire academic institution fell within the purview of Title IX.⁹³

Several years later, the Supreme Court decided *Franklin v. Gwinnet County Public Schools*, and provided some guidance on the remedies that courts could award.⁹⁴ The Supreme Court in *Franklin* held that “absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute.”⁹⁵ This expanded the relief available under Title IX from mere equitable relief to any relief the court deems appropriate, including but not limited to damages and attorney’s fees.⁹⁶

The landmark case in the progression of Title IX has been *Cohen v. Brown University*.⁹⁷ In *Cohen*, a class action suit was brought against Brown University for its decision to demote the women’s volleyball and gymnastics teams from varsity teams to intercollegiate club sports.⁹⁸ The district court found that Brown University had failed all three prongs of the test.⁹⁹ The First Circuit affirmed the

92. Heckman, *supra* note 90, at 29 (discussing question academic institutions struggled with after passage of Title IX).

93. *See id.* at 33 (explaining corrective nature of Civil Rights Restoration Act).

94. *See Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 70-71 (1992) (discussing practical repercussions of holding).

95. *Id.*

96. *See* Robin M. Preussel, Article, *Successful Challenge, Ruling Reversed: Why the Office of Civil Rights’ Survey Proposal May Be Well-Intentioned but Misguided*, 13 SPORTS LAW. J. 79, 92 (2006) (reporting effect of *Franklin* holding).

97. *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996) (clarifying methods of compliance). For further discussion of *Cohen*, see Preussel, *supra* note 96, at 92-95 (discussing implications of *Cohen*).

98. *See Cohen*, 101 F.3d at 161 (describing facts of case).

99. *See Cohen v. Brown Univ.*, 809 F. Supp. 978, 991-93 (D.R.I. 1992), *aff’d*, 991 F.2d 888 (1st Cir. 1993) (discussing University’s failure to satisfy all three prongs). The court found the University did not meet Prong I because the athletic participation opportunities offered by the University were not substantially proportionate. *See id.* at 991 (finding failure to meet Prong I). With respect to the first prong, the court found that the makeup of the undergraduate student population (51.8% male and 48.2% female) was not substantially proportionate to the number of athletic participation opportunities (63.4% male and 36.6% female). *See id.* (explaining significance of disparity). The court found that the University failed Prong II of the test because it had demonstrated past practice of program expansion, but could not demonstrate a continuing practice of program expansion. *See id.* (finding failure to meet Prong II). Finally, the court found that the denial of full varsity status to women’s volleyball and gymnastics meant that the University was not accommodating the interests and abilities of its women athletes. *See id.* at

district court opinion, noting specifically that failing to meet Prong I of the three-part test does not necessarily mean the institution is violating the effective accommodation provision of Section 106.41(c)(1); for a violation to occur, the institution must fail all three parts of the test.¹⁰⁰ Following logically from this assertion, the court recognized that the University could comply with Title IX if any one of the three prongs was satisfied.¹⁰¹ Finally, the court explained that the three-part test should be treated as a rebuttable presumption.¹⁰² One author explains, "If a school could demonstrate substantial proportionality, it complied with Title IX. If not, it could attempt to comply under either of the remaining two prongs."¹⁰³

Courts have repeatedly tracked the same analysis as *Cohen* and have affirmed its holding repeatedly since it was decided.¹⁰⁴ Though the 1996 Clarification seems to reaffirm *Cohen's* holding that a school need only satisfy one of the three prongs of the three-part test to maintain compliance, the majority of academic institutions continue to use the substantial proportionality test as the benchmark for compliance.¹⁰⁵

IV. NARRATIVE ANALYSIS

A. Standard of Review

The Second Circuit first took up the issue of the standard of review for the district court's decision.¹⁰⁶ On appeal, Quinnipiac University challenged the district court's declaratory judgment that it was engaging in sex discrimination under Title IX and argued for the reversal of the district court's grant of permanent injunctive relief.¹⁰⁷ The circuit court held that although it did not normally

991-92. The court held that the failure to accommodate violated Prong III. *See id.* (noting failure to meet Prong III).

100. *See Johnson, supra* note 85, at 574 (describing operation of three-part test).

101. *See Reich, supra* note 34, at 535 (discussing court's analysis of compliance under three-part test).

102. *Cohen v. Brown Univ.*, 101 F.3d 155, 171 (1st Cir. 1996) (discussing court's opinion on function of three-part test).

103. *Reich, supra* note 34, at 536 (examining methods of compliance).

104. *See Preussel, supra* note 96, at 95 (discussing line of cases that followed *Cohen*).

105. *See Tshaka C. Randall, Comment, A (Not So) Safe Harbor: Substantial Proportionality as a Measure of Effective Accommodation*, 5 TEX. REV. ENT. & SPORTS L. 79, 92 (2003) (explaining that most schools use first prong as safe harbor).

106. *See Biediger v. Quinnipiac Univ. (Biediger III)*, 691 F.3d 85, 96 (2d Cir. 2012) (presenting threshold issue of standard of review).

107. *See id.* at 96 (setting forth University's argument).

have the discretion to review declaratory judgments, because the declaratory judgment was “inextricably intertwined” with the grant of permanent injunctive relief, the circuit court had jurisdiction in this case.¹⁰⁸ Further, the court explained that because the University only challenged the legal and factual basis of the injunction, rather than the scope of the relief, the court was only allowed to review the factual findings for clear error, but conclusions of law could be reviewed de novo.¹⁰⁹

B. Deference to the Department of Education

The circuit court then turned to the high level of deference afforded to the policy interpretations and implementing regulations of Title IX.¹¹⁰ The court relied on *McCormick ex rel. McCormick v. School District of Mamaroneck* to demonstrate that Congress delegated the policy-making duties underlying Title IX to the DOE.¹¹¹ The court next cited *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* to show that as a result of the delegation, the high degree of judicial deference to OCR was warranted.¹¹² The court also relied on *Auer v. Robbins* and found that the 1979 Policy Interpretation, 1996 Clarification, and the 2000 and 2008 OCR Letters were all entitled to “substantial deference.”¹¹³

The court then moved on to discuss the content of the OCR policy interpretations in the context of the University’s litigation strategy.¹¹⁴ It observed first that OCR has explained that having separate teams based on sex is permitted, so long as both sexes are given equal opportunity.¹¹⁵ The court noted that the plaintiffs’ argument was, in short, that the participation opportunities afforded

108. See *id.* (explaining standard under which jurisdiction is proper).

109. See *id.* (discussing proper standards of review for review of lower court decision).

110. See *id.* at 96-97 (summarizing issue of deference to Department of Education).

111. See *id.* at 96 (citing *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 288 (2d Cir. 2004)).

112. See *id.* at 96-97 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)).

113. *Id.* (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (affording deference to Department Secretary’s interpretation of Department of Labor regulation)).

114. See *id.* at 98-99 (discussing University’s choice to defend only one of two claims on appeal).

115. See *id.* at 98 (referencing 34 C.F.R. § 106.41(b)). Section 106.41(b) permits institution to maintain separate teams for members of each sex “where selection for such teams is based upon competitive skill or the activity involved is a contact sport.” 34 C.F.R. § 106.41(b). Section 106.41(c) mandates that equal opportunity be provided for both sexes in sports. See 34 C.F.R. § 106.41(c) (“A recipi-

to women were not equal under both Prong I and Prong III of the three-part test.¹¹⁶ The court then explained that although the plaintiffs had put forth claims under Prong I and III of the three-part test, the University chose to defend the Prong I claim, the substantial proportionality of its athletics program.¹¹⁷

C. Review of District Court's Analysis of Athletic Participation Opportunities Afforded to Women

The court next addressed the question of the number of athletic participation opportunities afforded to women.¹¹⁸ First, the Second Circuit noted that the Plaintiffs' claim was an effective accommodation claim under Section 106.41(c)(1).¹¹⁹ As such, the court explained that the proper analysis under Section 106.41(c)(1) was to apply the three-part test articulated in the 1979 Policy Interpretation and the 1996 Clarification.¹²⁰ Per the 1996 Clarification, the court explained that the first step in the analysis is to accurately determine the number of participation opportunities afforded to male and female athletes.¹²¹ The plaintiffs argued that the women's cross-country, indoor track, and outdoor track roster positions should not count as fifty-four participation opportunities as the eighteen team members each held a place on all three teams.¹²² The court noted that per the 1996 Clarification, if an athlete participates in more than one sport, he or she is counted as a participant in each sport.¹²³ The issue for the court, however, was

ent which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes.”).

116. See *Biediger III*, 691 F.3d at 98 (explaining Plaintiffs' arguments that athletic opportunities available to women were neither substantially proportionate to enrollment, nor fully and effectively accommodating female student population's interests and abilities).

117. See *id.* (discussing litigation strategy of University).

118. See *id.* at 99-102 (detailing calculation of participation opportunities afforded to women).

119. See *id.* at 92 (explaining category of Plaintiffs' claim). For a more detailed explanation of the distinction between an effective accommodation claim and an equal treatment claim under Section 106.41(c), see *supra* notes 38-40 and accompanying text.

120. See *Biediger III*, 691 F.3d at 93 (explaining first step in analysis). For a more detailed discussion of the 1979 Policy Interpretation, 1996 Clarification, and three-part test generally, see *supra* notes 43-64 and accompanying text.

121. See *Biediger III*, 691 F.3d at 93 (citation omitted) (internal quotation marks omitted) (describing analysis needed to make determination with respect to number of opportunities available).

122. See *id.* at 99 (detailing argument of Plaintiffs with respect to participation opportunities on cross-country team, indoor track team, and outdoor track team).

123. See *id.* (discussing policy weighing in favor or finding that fifty-four athletic participation opportunities should be counted as genuine).

that the women cross-country runners were being forced to participate in all three sports.¹²⁴

The court affirmed the district court's finding that the sixty positions available on the University's indoor and outdoor track teams "were not reflective of genuine participation opportunities in these sports, but were inflated to afford mandated year-round training for eighteen members of the women's cross-country team."¹²⁵ The court found persuasive the district court's reasoning that the five indoor track team positions and the six outdoor track team positions that were being filled by injured or otherwise ineligible athletes were in fact illusory.¹²⁶ As a result of this finding, the circuit court held that the total athletic participation opportunities among women's cross-country, indoor track, and outdoor track was sixty-seven participants, as opposed to the University's proffered seventy-eight.¹²⁷

D. Competitive Cheerleading as a Sport Under Title IX

In order to complete the calculation of the available athletic opportunities, the circuit court then dealt with the issue of whether women's competitive cheerleading constituted a "sport" for the purposes of Title IX.¹²⁸ For the positions on the competitive cheerleading team to be counted as participation opportunities, the activity must be considered a sport under Title IX.¹²⁹ The district court

124. *See id.* (highlighting fact that runners were being compelled to participate as signal to court of potential problem). Notably, the men's cross-country team members were not required to do the same. *See id.* (recognizing distinction between men's and women's cross country team requirements).

125. *Id.* at 100 (finding participation opportunities were not genuine).

126. *See id.* at 100-01 (observing that injured and red-shirted athletes could not be counted multiple times as participation opportunities).

127. *See id.* at 100 (noting reduction in number of genuine participation opportunities). The University came to a number of seventy-eight based on the thirty positions available on both indoor and outdoor track, combined with the eighteen positions on the women's cross country team. *See id.* at 98-101 (discussing generally number of participation opportunities). The University attempted to challenge this ruling by claiming it was denied due process "by lack of notice that the question of whether injured and red-shirted cross-country runners were afforded genuine athletic participation opportunities in indoor and outdoor track was at issue." *Id.* at 101 (setting forth additional argument by University). The court rejected the University's argument, as well as the argument that the University lacked notice that mandating cross-country runners to participate in indoor and outdoor track would be looked upon negatively. *See id.* (describing arguments court found unpersuasive).

128. *See id.* at 102-05 (describing analysis of whether competitive cheerleading is sport under Title IX).

129. *See* 2008 Clarification, *supra* note 65 ("OCR evaluates the opportunities provided by the institution's intercollegiate or interscholastic 'sports.'). For a more detailed discussion of how OCR determines if an activity is a sport and an

concluded that competitive cheerleading was not a sport for the purposes of Title IX, and the circuit court reaffirmed.¹³⁰

First, as a threshold matter, the court distinguished between sideline cheerleading and competitive cheerleading and noted that the University's team is a competitive cheerleading team.¹³¹ The court next pointed out that neither the Department of Education nor the NCAA has ever recognized competitive cheerleading as a sport.¹³² The court then reviewed the lower court's application of the 2008 Compliance Letter to the facts of the case.¹³³ The district court found that although the competitive cheerleading team's structure, administration, team preparation, and competition was similar to other varsity teams, it was distinguishable enough that it could not be considered a varsity sport for the purposes of Title IX.¹³⁴

Specifically, the court explained, "competitive cheerleading was generally structured and administered by Quinnipiac's athletics department in a manner consistent with the school's other varsity teams."¹³⁵ The court also agreed with the district court finding that the team's preparation—including "practice time, regimen, and venue"—was similar to that of other varsity sports.¹³⁶ The court took note of the district court's finding that the competitive opportunities—including the number of competitions, the length of the season, and the presence of a governing body that dictated the competitive schedule—were similar to other varsity sports.¹³⁷ Finally, the court noted the district court's finding that the purpose

examination of the 2008 Clarification, see *supra* notes 65-72 and accompanying text.

130. See *Biediger III*, 691 F.3d at 105 (citing *Biediger II*, 728 F. Supp. 2d at 101, *aff'd*, 691 F.3d 85 (2d Cir. 2012) (summarizing holding of district court)).

131. See *id.* at 102-03 (discussing distinction between sideline and competitive cheerleading).

132. See *id.* at 103 (pointing out competitive cheerleading's lack of recognition by NCAA and DOE as sport). The NCAA has yet to declare competitive cheerleading as even an "emerging sport," the precursor to "sport" designation under NCAA standards. *Id.* (noting lack of NCAA "emerging sport" definition). For a more detailed discussion of the recent effort to add competitive cheerleading to the list of emerging sports, see *infra* notes 194-202 and accompanying text.

133. See *Biediger III*, 691 F.3d at 103 (examining district court analysis).

134. See *id.* at 104-05 (summarizing findings of district court).

135. *Id.* at 103 (internal citation omitted) (discussing 2008 OCR Letter's application to structure and administration of competitive cheerleading program).

136. See *id.* at 103-04 (internal citation omitted) (discussing competitive cheerleading team's preparation).

137. *Id.* at 104 (observing recent creation of NCATA). For a more detailed discussion of the NCATA and NCATA's role in Emerging Sport Proposal, see *infra* notes 194-202 and accompanying text.

of competitive cheerleading was competition, also like many other varsity sports.¹³⁸

Despite the evidence weighing in favor of classifying competitive cheerleading as a sport for the purposes of Title IX, the court identified characteristics that set competitive cheerleading apart from other sports: the lack of recruitment efforts, the lack of a uniform set of rules that led to competition between varsity and non-varsity competitors, and irregularities in season and post-season competition.¹³⁹ The court noted that, unlike other varsity sports, the University did not recruit competitive cheerleaders off-campus during the 2009-2010 season.¹⁴⁰ Additionally, the Second Circuit found it important that “no uniform set of rules applied to the cheerleading competition throughout the 2009-2010 season.”¹⁴¹ Moreover, the court gave weight to the fact that the University’s competitive cheerleading team competed against both varsity and non-varsity competitors.¹⁴² The Second Circuit supported the district court’s reasoning that uniform rules and solely varsity opponents are “touchstones of a varsity sports program” that ensure fair play and allow teams to be “distinguished in terms of quality.”¹⁴³ Finally, the court found that the post-season play the team engaged in was too different from other varsity sports.¹⁴⁴ Specifically, the court found that lack of a “progressive playoff system leading to a championship game. . . did not conform to expectations for a varsity sport.”¹⁴⁵ As those facets of competitive cheerleading’s competition structure were distinguishable from other varsity sports, the circuit

138. *Biediger III*, 691 F.3d at 104 (concluding purpose to be intercollegiate varsity level competition).

139. *See id.* at 104-05 (listing characteristics that differentiate competitive cheerleading from other varsity sports).

140. *See id.* at 104 (“Quinnipiac did not – and, in 2009-10, could not – conduct any off-campus recruitment for its competitive cheerleading team, in marked contrast to not only the school’s other varsity sports teams but also to a typical NCAA Division I sports program.”).

141. *Id.* (“[I]n the ten competitions in which the Quinnipiac team participated during the regular season, it was judged according to five different scoring systems.”).

142. *See id.* (describing types of teams against whom team competed as club teams, sideline cheerleading teams, and all-star teams).

143. *Id.* (analyzing benefits of competition against exclusively varsity competitors using uniform rules).

144. *See Biediger III*, 691 F.3d at 104-05 (discussing type of championship wherein team competed).

145. *Id.* (explaining that instead, competitive cheerleading team participated in “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”).

court agreed with the district court's finding that cheerleading was not yet a sport for the purposes of Title IX.¹⁴⁶

The University challenged the weight to which the district court assigned the factors that influenced the finding that competitive cheerleading was not a varsity sport.¹⁴⁷ The Second Circuit rejected the University's challenge and noted that significant discretion is given to the lower court to decide the weight a particular factor should be given.¹⁴⁸ Deference to the lower court aside, the circuit court noted that it agreed with the analysis of the district court, and that:

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 . . . the balance tips decidedly against finding competitive cheerleading to presently be a 'sport' whose participation opportunities should be counted for purposes of Title IX.¹⁴⁹

The court did note that in the future, competitive cheerleading may meet the requirements to be considered a varsity sport, but "that time has not yet arrived."¹⁵⁰ As a result of the determination that competitive cheerleading was not yet a sport under Title IX, the University's athletic participation opportunities were reduced by a total of forty-one.¹⁵¹

E. Substantial Proportionality

After finding that the University had forty-one fewer athletic participation opportunities for women than the University thought it had, the court affirmed the district court's finding that 233 of the University's 400 varsity athletic participation opportunities, or

146. *See id.* (presenting possibility of varsity sport designation if activity is better organized and begins to play by defined, uniformly applied rules).

147. *See id.* at 105 (describing University's argument).

148. *See id.* ("We generally accord considerable discretion to a factfinder in deciding what weight to assign competing evidence pointing toward different conclusions.").

149. *Id.* (rejecting University's argument that circuit court should decide how much weight to give factors weighing for and against finding competitive cheerleading to be sport under Title IX).

150. *Biediger III*, 691 F.3d at 105 (citing *Biediger II*, 728 F. Supp. 2d at 101, *aff'd*, 691 F.3d 85 (2d Cir. 2012)).

151. *See id.* at 105-06 (noting total athletic participation opportunities eliminated among cross-country and competitive cheerleading participants).

58.25%, belonged to women.¹⁵² Given that females then made up 61.87% of the undergraduate population, the court noted that a 3.62% disparity existed between the athletic opportunities available to men versus those available to women.¹⁵³ The Second Circuit found that the 3.62% disparity “demonstrated that Quinnipiac was not affording substantially proportionate varsity athletic participation opportunities to its female students.”¹⁵⁴

The University challenged the determination that the 3.62% disparity in athletic opportunities was not substantially proportional on two grounds.¹⁵⁵ First, the University argued that 3.62% was “too small to support such a finding.”¹⁵⁶ Second, the University argued that the increase in female undergraduate enrollment that partially accounted for the disparity was out of its control.¹⁵⁷ The circuit court did not find the University’s challenge persuasive for two main reasons.¹⁵⁸ First, the court explained that the University’s reliance on the exact percentage of the disparity was unnecessary because, per the 1996 Clarification, “substantial proportionality is not determined by any bright-line statistical test.”¹⁵⁹ Second, the circuit court pointed out that, as the district court discovered, the disparity was primarily the result of the University’s intentional roster manipulation.¹⁶⁰ Having determined that the 3.62% disparity was sufficient to find a lack of substantial proportionality, the court affirmed the district court’s determination that the University had violated Title IX.¹⁶¹

152. *See id.* at 106 (calculating percentage of female enrollment and female athletic participation opportunities).

153. *See id.* (analyzing percentage disparity between female enrollment and female athletic participation opportunities).

154. *Id.* at 108 (summarizing holding of circuit court with respect to substantial proportionality).

155. *See id.* at 106-07 (presenting crux of University’s argument).

156. *Biediger III*, 691 F.3d at 106 (arguing percent difference between female enrollment and female varsity athletic participation opportunities to be too slight).

157. *See id.* at 107 (“[The University] submits that the district court erred in holding Quinnipiac responsible for the disparity in light of fluctuations in enrollment . . .”).

158. *See id.* at 106-07 (describing two reasons University’s argument was unpersuasive).

159. *Id.* at 106 (“[W]e do not, in any event, understand the 1996 Clarification to create a statistical safe harbor at [2%] or any other percentage.”).

160. *See id.* at 106-07 (“[T]he 3.62% identified disparity was almost entirely attributable to Quinnipiac’s own careful control of its athletic rosters.”).

161. *See id.* at 108 (“Accordingly, we reject Quinnipiac’s challenge to the district court’s finding that the school engaged in sex discrimination in violation of Title IX, and we affirm the order enjoining Quinnipiac from continuing such discrimination.”).

V. CRITICAL ANALYSIS

The Second Circuit's conclusion with respect to whether competitive cheerleading should be considered a sport under Title IX was warranted based not only on the state of the University's program, but on the state of the sport generally.¹⁶² The court identified three main characteristics that set competitive cheerleading apart from other sports: the lack of recruitment efforts, the lack of a uniform set of rules and competitors, and irregularities in season and post-season competition.¹⁶³

Turning to the first characteristic, the court correctly found it relevant that the University's cheerleading team did not conduct the same type of recruitment as typical NCAA Division I programs.¹⁶⁴ Most large schools with Division I programs conduct large-scale recruitments for many sports.¹⁶⁵ For example, NCAA Division I Men's Basketball recruits each get to visit five college campuses, with the academic institution footing the bill for the recruit and one of his or her parents.¹⁶⁶ Competitive cheerleading is not recognized as a sport by the NCAA, so even those academic institutions that are members of the NCAA cannot recruit competitive cheerleaders in the same manner that they recruit athletes for other sports.¹⁶⁷ Moreover, because many schools designate competitive cheerleading as a club or intramural sport, the financial benefits available to recruits for other sports are simply unavailable to competitive cheerleaders.¹⁶⁸

162. For a more detailed discussion of the differences in competitive opportunities, scoring systems, varsity designations, and a general discussion of how competitive cheerleading differs from other varsity sports, see *infra* notes 164-183 and accompanying text.

163. See *Biediger III*, 691 F.3d at 104-05 (listing characteristics that differentiate competitive cheerleading from other varsity sports).

164. See *id.* at 104 (discussing inability to recruit new competitive cheerleaders).

165. See Allie Grasgreen, *Hands-Off Approach to NCAA Rules*, INSIDEHIGHERED.COM (Jan. 21, 2013), <http://www.insidehighered.com/news/2013/01/21/division-i-trims-rulebook-deregulates-recruiting> (providing examples of recruiting rules).

166. See Michelle Brutlag Hosick, *Basketball Recruiting Rule Change Effective Friday*, NCAA (Jun. 11, 2012), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2012/June/Basketball+recruiting+rule+change+effective+Friday> [hereinafter Brutlag Hosick 1] (describing recruiting efforts allowed under NCAA rules).

167. See Liam Migdail-Smith, *Competitive Cheerleading Fans Push NCAA for Official Recognition as a Sport*, PENNLIVE.COM (Jan. 29, 2011), http://www.pennlive.com/midstate/index.ssf/2011/01/competitive-cheerleading_fans.html (discussing current lack of designation as sport under NCAA and petition asking NCAA to grant cheerleading emerging sport designation).

168. See Drehs, *supra* note 3 ("There are no scholarships. No free books. No on-site trainer. Not even early registration to schedule classes around practices.

With respect to the second characteristic, the court also correctly found that neither the rules governing cheerleading competition and the competitors against whom the University was competing were not all uniform.¹⁶⁹ Though the University participated in all-varsity competitions through the National Competitive Acrobatics and Tumbling Association (“NCATA”) during the 2009-2010 season, they also participated in other competitions wherein the competitors were not all varsity teams.¹⁷⁰ Notably, Quinnipiac University’s team was not the only NCATA member-team competing against non-varsity competitors during the 2009 and 2010 seasons.¹⁷¹

Even if the Second Circuit had conducted its own review of the issue, it would likely have made similar findings based on the state of competitive cheerleading during the 2009 and 2010 seasons.¹⁷² Only a small number of colleges and universities maintain varsity competitive cheerleading programs, although many have coined them “acrobatics and tumbling” teams.¹⁷³ Many other schools maintain their teams as club or intramural sports, rendering the team members ineligible to receive any of the benefits other NCAA-sanctioned sports teams would receive.¹⁷⁴ Despite the variation in

Most cheerleaders need jobs to support themselves, a rules violation for athletes of NCAA-sanctioned sports.”).

169. See *Biediger III*, 691 F.3d at 104 (explaining that Quinnipiac “was challenged by a motley assortment of competitors.” (citation omitted) (internal quotation marks omitted)).

170. See *Biediger II*, 728 F. Supp. 2d at 82-83, *aff’d*, 691 F.3d 85 (2d Cir. 2012) (discussing types of opponents team faced). The University’s competitive cheerleading team competed in both NCATA meets and outside competitions, such as the NCA Cheerleading Championship. See *id.* (providing evidence that team competed against all types of competitors).

171. See, e.g., 2010 Schedule/Results Azusa Pacific Acrobatics & Tumbling, AZUSA PACIFIC ATHLETICS, <http://www.apu.edu/athletics/acrobatics/schedule/2010/> (last visited Dec. 21, 2013) [hereinafter 2010 Azusa Schedule] (detailing competition schedule for 2009-2010 season); *University of Oregon Acrobatics & Tumbling – 2009-10 Schedule*, GODUCKS.COM, http://www.goducks.com/SportSelect.dbml?SP-SID=105365&SPID=11402&DB_OEM_ID=500&Q_SEASON=2009 (last visited Dec. 23, 2013) [hereinafter 2009-2010 Oregon Schedule] (exhibiting competition schedule for 2009-2010 season).

172. See *Biediger III*, 691 F.3d at 105 (explaining Quinnipiac’s argument for de novo review and court’s rejection of same).

173. See Liz Clarke, *Title IX Anniversary: Maryland Cuts Cheerleading, but Was It Ever a Sport?*, WASH. POST, Apr. 13, 2012, http://articles.washingtonpost.com/2012-04-13/sports/35453053_1_neena-chaudhry-female-athletes-title-ix (noting name change from competitive cheerleading to acrobatics and tumbling); see also *Baylor Bears Acrobatics & Tumbling*, BAYLORBears.COM, <http://www.baylorbears.com/sports/w-acro/bay-w-acro-body.html> (last visited Dec. 21, 2013) (exhibiting team name).

174. See Drehs, *supra* note 3 (explaining choice of many academic institutions to designate competitive cheerleading with club or intramural status and effect on

designations, some competitions, including the National Cheerleaders Association (“NCA”) Cheerleading Championship, allow all types of competitive cheerleading teams, including both varsity and clubs teams, to compete.¹⁷⁵ The varied organizations that host the competitions that Quinnipiac, as well as other schools competed in, all used their own distinct set of rules for competition and scoring.¹⁷⁶ Given the state of varsity competitive cheerleading during the 2009-2010 competition season, the circuit court was correct in finding a lack of a uniform rule system and, in turn, all-varsity competition.¹⁷⁷

Finally, turning to the third characteristic, the court was correct in determining that during the 2009-2010 season, there was no uniformity with respect to a post-season and that the lack of uniformity in the post-season was quite different from other varsity sports.¹⁷⁸ The lack of a post-season undoubtedly separates competitive cheerleading from other varsity sports.¹⁷⁹ For example, men’s basketball teams from NCAA member schools compete in a progressive, single elimination playoff system during March and April every year (popularly known as “March Madness” or the “Final Four”).¹⁸⁰ Additionally, college football holds the Bowl Championship Series every year and starting in 2015, NCAA college football will adopt a four-team college football playoff format in lieu of the current national championship game.¹⁸¹ For the few varsity com-

athletes who participate); *see also* VIRGINIA TECH COMPETITIVE CHEERLEADING, http://www.vtcompetitivecheerleading.com/Home_Page.html (last visited Dec. 21, 2013) (exhibiting club sport status).

175. *See NCA & NDA Competition Rule Book for College Teams*, NCA & NDA COLLEGIATE CHEER AND DANCE CHAMPIONSHIP, at 12 (2013), *available at* http://nca.varsity.com/pdfs/college_rule_book.pdf (providing that both varsity and club cheerleading teams may be eligible for NCA competition).

176. *See Biediger II*, 728 F. Supp. 2d at 84, *aff’d*, 691 F.3d 85 (2d Cir. 2012) (providing chart showing different rule systems are used during competition season).

177. *See Biediger III*, 691 F.3d at 104 (restating finding of both varsity and non-varsity competitors).

178. *See id.* at 104-05 (finding team competed in open invitational rather than more traditional progressive playoff system).

179. For examples of college sports that conduct post-season tournaments, *see infra* notes 180-181 and accompanying text.

180. *See 2013 NCAA Men’s Basketball Championship Bracket*, NCAA, <http://www.ncaa.com/interactive-bracket/basketball-men/d1> (last visited Dec. 23, 2013) (exhibiting results from progressive playoff system for used during 2013 NCAA basketball post-season).

181. *See* David L. Ricci, Article, *The Worst Form of Championship, Except for All of the Others That Have Been Tried: Analyzing the Potential Anti-Trust Vulnerability of the Bowl Championship Series*, 19 VILL. SPORTS & ENT. L.J. 541, 541-42 (2012) (discussing merits and popular criticisms of previous format of Bowl Championship Series); Brett McMurphy, *Sites of 2016, 2017 Title Games Set*, ESPN (Dec. 16, 2013, 8:11 PM),

petitive cheerleading teams in existence during the 2009-2010 season, the “post-season” was limited to participation in the NCA Cheerleading Championship, which does not rank teams by merit.¹⁸² It seems clear the Second Circuit was correct in determining that for the 2009-2010 season, Quinnipiac’s competitive cheerleading team did not participate in a meaningful post-season, thus distinguishing it from other varsity sports.¹⁸³

VI. IMPACT

The Second Circuit’s decision in *Biediger* reaffirmed that competitive cheerleading was not a sport under Title IX at the time, but in doing so, articulated with specificity what exactly distinguished it from varsity sports.¹⁸⁴ Perhaps *Biediger* should not be seen as a setback, but as more of a blueprint for how to bring competitive cheerleading within the purview of Title IX.¹⁸⁵

NCATA and its member teams seem to have a similar view, as many of the issues that led the lower court to find that competitive cheerleading was not yet ready to be considered a sport under Title IX have since been resolved.¹⁸⁶ For example, one of the key issues for the court was that competitors against which the University’s team was competing were not all varsity.¹⁸⁷ As for the 2012-2013 season, all five of the varsity teams currently in existence were com-

http://espn.go.com/college-football/story/_/id/10147406/arizona-tampa-florida-land-2016-2017-college-football-national-championship-games (“AT&T Stadium in Arlington, Texas, was announced in April [2013] as the site of the title game in 2015, the first year the NCAA moves to the four-team College Football Playoff.”).

182. See, e.g., *Biediger II*, 728 F. Supp. 2d at 82-83, *aff’d*, 691 F.3d 85 (2d Cir. 2012) (providing schedule that shows team competed at NCA Cheerleading Championship); 2009-2010 Azusa Schedule, *supra* note 171 (providing second example of varsity team participation in NCA Cheerleading Championship as sole post-season activity); 2009-2010 Oregon Schedule, *supra* note 171 (providing third example of varsity team participation in NCA Cheerleading Championship as sole of post-season activity).

183. See *Biediger III*, 691 F.3d at 104-05 (summarizing finding of lack of traditional playoff-style post-season activities).

184. See *id.* (listing characteristics that distinguished competitive cheerleading from other sports).

185. See *id.* (“[W]e do not foreclose the possibility, that the activity, with better organization and defined rules, might some day warrant recognition as a varsity sport.”).

186. For a further discussion of the recent changes made to competitive cheerleading structure following the district court decision, see *infra* notes 187-190 and accompanying text.

187. See *Biediger III*, 691 F.3d at 104 (reiterating concern of Second Circuit that lack of all-varsity competition distinguished competitive cheerleading from other varsity sports).

peting through NCATA exclusively against varsity competitors.¹⁸⁸ The result of the exclusive participation in NCATA competitions is that all the varsity teams are competing according to the same scoring system, eliminating the second of three problems on which the *Biediger* court focused.¹⁸⁹ Finally, with respect to the lack of a post-season, NCATA has responded by creating its own championship series with a single-elimination system.¹⁹⁰

As recently as March of 2013, the district court reaffirmed that despite the above developments, the Quinnipiac program is still not similar enough to the University's other sports to be considered a varsity sport for the purposes of Title IX.¹⁹¹ The court explained that the fact that the NCAA still does not recognize the activity as an Emerging Sport "tip[s] the balance against treating an athletic endeavor as an authentic varsity 'sport' for purposes of prong one."¹⁹² It would seem then, that following this most recent ruling, that NCAA Emerging Sport designation is essential to finding that com-

188. See *2012 Schedule/Results Azusa Pacific Acrobatics & Tumbling*, AZUSA PACIFIC ATHLETICS, <http://www.apu.edu/athletics/acrobatics/schedule/2012/> (last visited Dec. 23, 2013) (detailing competition schedule for 2012-2013 season); *University of Oregon Acrobatics & Tumbling – 2012-13 Schedule*, GODUCKS.COM, http://www.goducks.com/SportSelect.dbml?SPSID=105365&SPID=11402&DB_OEM_ID=500&Q_SEASON=2012 (providing 2012-2013 competition schedule); *Quinnipiac University Acrobatics & Tumbling 2012-13 Schedule*, WWW.QUINNIPIACBOBCATS.COM, <http://www.quinnipiacbobcats.com/sports/gymnastics/2012-13/schedule> (last visited Dec. 23, 2013) (providing 2012-2013 competition schedule); *Baylor Bears Acrobatics & Tumbling 2013 Schedule*, BAYLORBears.COM, <http://www.baylorbears.com/sports/w-acro/sched/bay-w-acro-sched.html> (last visited Dec. 21, 2013) (providing 2012-2013 competition schedule); see also *Fairmont State University Acrobatics & Tumbling 2013-2014 Schedule*, FIGHTINGFALCONS.COM, <http://www.fightingfalcons.com/acrobatic/schedule/> (last visited Dec. 23, 2013) (providing 2013-2014 competition schedule).

189. See *Scoring*, NCATA, <http://thencata.org/competition/scoring/> (last visited Dec. 23, 2013) (discussing basic format of scoring system). The court was concerned with the lack of fairness and the inability to compare teams that accompanied the use of several different scoring systems. See *Biediger III*, 691 F.3d at 104 (taking issue with lack of uniform application of one set of rules).

190. See *Championship Format*, NCATA, <http://thencata.org/competition/qualification/championship-format/> (last visited Dec. 23, 2013) (providing basic information about competition).

191. See *Biediger v. Quinnipiac Univ.*, No. 3:09-CV-621 (SRU), 2013 WL 789612, at *3-7 (D. Conn. Mar. 4, 2013) (discussing changes to University's team).

192. *Id.* at *33 (D. Conn. Mar. 4, 2013) ("So long as acknowledged authorities in intercollegiate athletics decline to recognize acro as an authentic varsity sport, courts should hesitate before doing otherwise. For this reason alone, I conclude that Quinnipiac has failed to overcome the presumption against treating acro as a varsity "sport" for purposes of Title IX."). For a further discussion of what constitutes an "Emerging Sport," see *infra* notes 196-197 and accompanying text.

petitive cheerleading is a sport for the purposes of Title IX, at least within the District of Connecticut.¹⁹³

The fact that competitive cheerleading is still not considered a sport cannot be attributed to lack of effort.¹⁹⁴ In 2010, the NCAA was asked by two competing organizations, USA Cheerleading and USA Gymnastics, to consider adding competitive cheerleading to the list of Emerging Sports for Women.¹⁹⁵ USA Cheerleading and USA Gymnastics submitted distinct proposals for STUNT and Acrobatics and Tumbling, respectively, to be added to the list of Emerging Sports for Women.¹⁹⁶ To be considered an Emerging Sport, at least twenty varsity teams must be in existence at colleges and universities around the country and the NCAA must receive ten letters of commitment from academic institutions that already maintain the sport or plan to create the sport.¹⁹⁷

As of this writing, the NCAA has requested additional information relating to several different elements of the function of the sport, but has not yet made a determination on whether to add competitive cheer to the list of Emerging Sports for Women.¹⁹⁸

193. See Biediger, 2013 WL 789612, at *33 (announcing lack of NCAA recognition of competitive cheer as sport as sole purpose for holding competitive cheerleading, or “acro” to not yet be sport under Title IX).

194. For a further discussion of the efforts to have competitive cheerleading considered a sport, see *infra* notes 195-202 and accompanying text.

195. See Erin Skarda, *Will Competitive Cheerleading Become the Next NCAA-Sanctioned Sport?*, TIME, May 24, 2011, available at <http://newsfeed.time.com/2011/05/24/will-competitive-cheerleading-become-the-next-ncaa-sanctioned-sport/> (discussing both proposals and organizations that submitted them); see also Michelle Brutlag Hosick, *NCAA Committee Asks for Collaboration in New Sport*, NCAA.ORG (Aug. 16, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/August/NCAA+committee+asks+for+collaboration+in+new+sport> [hereinafter Brutlag Hosick 2] (discussing petition to make acrobatics and tumbling emerging sport). In response to the dual submissions, the NCAA Committee on Women’s Athletics asked the two groups to collaborate and “submit a single proposal for consideration by the NCAA membership.” *Id.*

196. See Brutlag Hosick 2, *supra* note 195 (noting submission of two proposals). STUNT and Acrobatics and Tumbling are both sports that blend competitive cheerleading and gymnastics. See *id.*

197. See *id.* (“In order for a sport to be considered for the NCAA Emerging Sports for Women list, 20 or more varsity teams and/or competitive club teams must currently exist on college campuses and . . . 10 letters of commitment must be submitted from member institutions that sponsor or intend to sponsor the sport.”). A detailed proposal that includes among other things, rules for the sport, financial considerations, and proposed recruiting practices, must also be submitted to the NCAA for consideration. See *id.* (providing list of additional information required by Committee).

198. See *id.* (detailing information requested by NCAA Committee before decision is made). The NCAA Committee on Women’s Athletics has expressed interest “in seeing how the sport establishes itself.” *Id.* (setting forth justification for lack of decision on whether to add competitive cheer to list of Emerging Sports).

One reason the NCAA has not considered adding competitive cheer to the list of Emerging Sports for Women is simply that not enough teams exist.¹⁹⁹ Additionally, USA Cheerleading and USA Gymnastics cannot come to a consensus on the proper set of rules to govern the activity.²⁰⁰ Specifically, STUNT and Acrobatics and Tumbling primarily differ in the way their competitions are structured and their manner of scoring.²⁰¹ The NCAA has requested that the two groups submit a joint proposal, but as of this writing, no proposal has been submitted.²⁰²

In order for competitive cheerleading to become an emerging sport under NCAA rules, two courses of action are required. First, USA Cheerleading and USA Gymnastics must create a joint proposal for submission to the NCAA Committee on Women's Athletics.²⁰³ Second, there must be a cohesive effort among USA Cheerleading, USA Gymnastics, NCATA, and academic institutions to create varsity competitive cheerleading teams, or elevate club or intramural teams to varsity status.²⁰⁴ The student-athletes needed to form these teams are present in overwhelming numbers, competing as members of collegiate and private teams all across the country.²⁰⁵ More young adults may be inclined to join teams or stay on teams longer if they knew with some certainty that once they reach college, there may be academic scholarships available as a result of

199. See *Biediger v. Quinnipiac Univ.*, No. 3:09-CV-621 SRU, 2013 WL 789612, at *6 (D. Conn. Mar. 4, 2013) ("But due, in part, to competition from STUNT, there are currently too few teams operating under the NCATA's format to support acro as emerging sport.").

200. See Gregory, *supra* note 73, at 1 (discussing tension between USA Cheerleading and USA Gymnastics).

201. See Michelle Brutlag Hosick, *Taking Flight*, NCAA.ORG (May 17, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/May/Taking+flight> [hereinafter Brutlag Hosick 3] (discussing differing characteristics of two proposals).

202. See Gregory, *supra* note 73, at 2 (discussing failure to submit joint proposal).

203. See Brutlag Hosick 2, *supra* note 195 (noting lack of joint proposal). The two proposals originally submitted differ in key areas such as number of scholarships offered in association with participation in sport, roster size, minimum number of competitions, and format of competition. See Brutlag Hosick 3, *supra* note 201 (describing differences in proposals).

204. For a more detailed discussion of the small number of varsity teams that exist, see *supra* notes 173-174 and accompanying text.

205. See Alissa Figueroa, *Cheerleading May Not Be a Sport, but It Is an Industry*, THE CHRISTIAN SCIENCE MONITOR (Jul. 22, 2010), <http://www.csmonitor.com/Business/new-economy/2010/0722/Cheerleading-may-not-be-a-sport-but-it-is-an-industry> (noting that upwards of three million adolescents participate in cheerleading nationwide).

their competitive cheerleading skills.²⁰⁶ Without an effort from all parties involved, growth of competitive cheerleading at the collegiate level may stagnate or stop altogether.²⁰⁷

VII. CONCLUSION

The Second Circuit's decision in *Biediger*, even taking the district court's most recent ruling into account, leaves the door open for competitive cheerleading to be considered a sport under Title IX, and leaders in the field of competitive cheerleading are generally optimistic.²⁰⁸ The effort to have competitive cheerleading be counted as an Emerging Sport is ongoing.²⁰⁹ If there is enough growth of competitive cheerleading to satisfy the requirements for designation as an NCAA Emerging Sport and eventually an NCAA-sanctioned sport, a successful case could be made in the future that competitive cheerleading is a sport for purposes of Title IX.²¹⁰ While some, including the executive director of the Universal Cheerleaders Association, call the *Biediger* decision a minor setback, this author respectfully disagrees.²¹¹ Competitive cheerleading is a popular and well-established activity throughout the country and the athletes are talented, ready, and willing to compete.²¹² As one author aptly surmised, in the case of competitive cheerleading, the

206. See Drehs, *supra* note 3 (noting lack of NCAA benefits such as athletic scholarships); see also Deidre Silva, *Infighting Complicates Cheerleading's Future Status*, SPORTSPRESSNW.COM (Jun. 3, 2011), <http://sportspressnw.com/2011/06/silva-infighting-complicates-cheerleadings-future-status-2/> ("A situation now exists that a starting high school quarterback has access to a college scholarship to play football while the equally athletic head cheerleader sitting next to him in Spanish class is offered few avenues to explore her chosen athletic activity after graduation.").

207. See Thomas, *supra* note 7 (noting growth of competitive cheerleading over past thirty years).

208. See *Judge: Cheerleading Not a Title IX Sport*, ESPN.COM (Jul. 29, 2010), <http://sports.espn.go.com/ncaa/news/story?id=5398814> (detailing statement by executive director of USA Cheer that *Biediger* decision is "only a minor setback for the efforts to make cheer an intercollegiate sport").

209. See Brutlag Hosick 2, *supra* note 195 (discussing areas of competitive cheer that Committee on Women's Athletics will be examining over coming years).

210. See *Biediger v. Quinnipiac Univ. (Biediger III)*, 691 F.3d 85, 105 (2d Cir. 2012) (suggesting that if changes to system were made that competitive cheerleading may be eligible for "sport" designation under Title IX).

211. See *Judge: Cheerleading Not a Title IX Sport*, *supra* note 208 ("Bill Seely, the executive director of USA Cheer . . . said he believes the ruling represents only a minor setback for the efforts to make cheer an intercollegiate sport.").

212. See Figueroa, *supra* note 205 (noting high levels of participation of youth); see also Drehs *supra* note 3 ("Today, competitive cheerleading is one of the fastest-growing activities in the country.").

mantra should not be, “If you build it, they will come,” rather, “They are already here, build it.”²¹³

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213. See Reich, *supra* note 34, at 560 (indicating typical willingness of OCR to recognize sports in order to foster interest in sport).

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