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## Putting Down the Pom Poms: The National Collegiate Athletic Association Should Stop Ignoring Competitive Cheer and Grant These Athletic Teams NCAA Emerging Sport Status

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# Putting Down the Pom Poms: The National Collegiate Athletic Association Should Stop Ignoring Competitive Cheer and Grant These Athletic Teams NCAA Emerging Sport Status

Cover Page Footnote

Dylan Malagrino; Louis Richards; Lorenda Richards

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**PUTTING DOWN THE POM POMS:  
THE NATIONAL COLLEGIATE ATHLETIC  
ASSOCIATION SHOULD STOP IGNORING  
COMPETITIVE CHEER AND GRANT THESE  
ATHLETIC TEAMS NCAA EMERGING  
SPORT STATUS**

E. EMILY RICHARDS\*

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**TABLE OF CONTENTS**

Introduction .....	6
I. <i>Biediger v. Quinnipiac University</i> —Competitive Cheer: An “Athletic Endeavor,” but not a Sport .....	8
II. Title IX: Providing Genuine Athletic Opportunity for Women, Versus Mere Compliance .....	10
A. Equal Opportunity Regulation and Competitive Cheer .....	10
B. Title IX Compliance and the Three-Prong Test: More Than Substantial Proportionality .....	12
III. Defining Competitive Cheer as an Emerging Sport ...	21
A. What is Competitive Cheer? .....	21
B. What is NCAA Emerging Sport Status? .....	25
C. Competitive Cheer Should Receive NCAA Emerging Sport Status .....	28
D. Granting Emerging Sport Status to Acrobatics and Tumbling Will Further Title IX Policy Interests .....	35
IV. Conclusion .....	38

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## INTRODUCTION

Competitive cheer is a sport. Gone are the days of pom poms and short skirts. Something new has emerged and transformed what America traditionally has understood cheerleading to be. Female athletes have moved this evolving sport from the sidelines to the competition floor. It is time for the National Collegiate Athletic Association<sup>1</sup> (“NCAA”) to evolve also. Although a recent federal court case told competitive cheerleaders they did not count as a collegiate sport,<sup>2</sup> competitive cheer has taken substantial steps to prove they do.<sup>3</sup> As a result of the court’s decision, competitive cheerleading is seeking recognition as a sport on the collegiate level. USA Cheer, a governing body in sport cheering, is pursuing emerging sport status for competitive cheer to disprove what the Connecticut District Court determined.<sup>4</sup>

Title IX’s aim of gender equity in education, and specifically in collegiate athletic opportunity, requires competitive cheer receive NCAA emerging sport status. If a school chooses to sponsor a team under this status, the NCAA requires the school to follow the Department of Education’s Office for Civil Rights’ (“OCR”) guidelines for compliance under Title IX. With women’s sports such as rugby, equestrian, sand volleyball, and squash receiving emerging sport status, why not competitive

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<sup>1</sup> See RAY YASSER ET AL., *SPORTS LAW: CASES AND MATERIALS* 2–3 (6th ed. 2006). Composed of approximately 1,200 member institutions, the NCAA regulates intercollegiate athletics with respect to championships, rules of competition, enforcement of those rules, eligibility, and recruitment. The National Collegiate Athletic Association was formed in 1906 and is currently headquartered in Indianapolis, Indiana. See also NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa> (last visited Nov. 30, 2010).

<sup>2</sup> See *Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62 (D.Conn. 2010).

<sup>3</sup> See *USA Cheer to Pursue Stunt as NCAA Emerging Sport*, THE NCAA NEWS, Sept. 9, 2010, [http://www.ncaa.org/wps/portal/ncaahome?WCM\\_GLOBAL\\_CONTEXT=/ncaa/ncaa/ncaa+news/ncaa+news+online/2010/association-wide/usa+cheer+to+pursue+stunt+as+ncaa+emerging+sport\\_09\\_09\\_10\\_ncaa\\_news](http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/ncaa/ncaa+news/ncaa+news+online/2010/association-wide/usa+cheer+to+pursue+stunt+as+ncaa+emerging+sport_09_09_10_ncaa_news) (last visited Nov. 30, 2010).

<sup>4</sup> See *id.*; *Biediger*, 728 F. Supp. 2d 62.

cheer?<sup>5</sup> Despite growing interest in the sport, there is hesitation that competitive cheer will not provide the athletic opportunities mandated by Title IX.<sup>6</sup> There is general fear NCAA member institutions will use competitive cheer to comply with the federal regulation, while simultaneously eliminating “bona fide” women’s athletic programs such as volleyball or softball, which are deemed to provide more legitimate athletic opportunities.<sup>7</sup> This fear is unfounded, and it is time for a change.

Part I of this comment discusses the recent Connecticut District Court decision of *Biediger v. Quinnipiac University*, whose determinations have ignited the world of competitive cheer to push for emerging sport status and athletic recognition. The Court’s rationale failed to consider women’s growing interest in the sport of competitive cheer and, instead, relied on an outdated perception of competitive cheer when determining its validity in providing genuine athletic opportunities for women.<sup>8</sup> Part II provides an in-depth review of Title IX and the judicial history that has shaped its application to intercollegiate athletics today. Additionally, Part II addresses the potential Title IX im-

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<sup>5</sup> See THE NAT’L COLLEGIATE ATHLETIC ASS’N, 2009–10 NCAA DIVISION I MANUAL 297 (2009). Emerging team sports for 2010 are women’s rugby and sand volleyball. Emerging individual sports for 2010 are women’s equestrian and squash.

<sup>6</sup> See *Biediger*, 728 F. Supp 2d at 101. See also 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. 245, 262 (2010).

<sup>7</sup> “Competitive” *Cheerleading is a Sham and Violates Title IX*, OPPOSING VIEWS (Aug. 1, 2010), available at <http://www.opposingviews.com/i/competitive-cheerleading-is-a-sham-and-violates-title-ix>.

<sup>8</sup> *Biediger*, 728 F. Supp. 2d at 91 (discussing the importance of “genuine athletic opportunity,” the court argues that, although Quinnipiac sponsored a new team, it did not provide that caliber of opportunity to those that participated in competitive cheer) (“Still, permitting universities space to cultivate new athletic opportunities for women does not do away with the fundamental requirement that, for an athletic opportunity to count under Title IX, it must be genuine, meaning that it must take place in the course of playing an actual ‘sport’ and it must allow an athlete to receive the same benefits and experience that she would receive if she played on another established varsity squad.”).

plications arising from competitive cheer's imminent designation as an emerging sport. Part III distinguishes between traditional sideline cheerleading and competitive cheer, explores recent developments in the sport and discusses the criteria required by the NCAA for emerging sport designation. Finally, Part IV illustrates why the NCAA must grant competitive cheer emerging sport status where competitive cheer satisfies the NCAA's definition of "sport" and where granting emerging sport status to competitive cheer will further Title IX's aims by providing legitimate athletic opportunities for women.

**I. *BIEDIGER V. QUINNIPIAC UNIVERSITY*—COMPETITIVE CHEER: AN "ATHLETIC ENDEAVOR," BUT NOT A SPORT**

On July 21, 2010, the collegiate athletic community was forced to take a closer look at competitive cheer when the decision in the *Biediger* case came down.<sup>9</sup> The suit, initiated by members of the women's varsity volleyball team, alleged sex discrimination in Quinnipiac University's ("Quinnipiac") allocation of athletic opportunities as well as failure to comply with Title IX of the Education Amendments of 1972.<sup>10</sup> Quinnipiac discontinued its women's volleyball, men's golf, and men's outdoor track teams in the spring of 2009, while simultaneously promoting its competitive cheer team to varsity status.<sup>11</sup> Though the controversy before the Court was not to determine the status of competitive cheer, but to review Title IX compliance at Quinnipiac,<sup>12</sup> the court ruled that members of Quinnipiac's competitive cheer team were not to be considered athletes for the purpose of determining university compliance with Title IX.<sup>13</sup> District Judge Stefan Underhill sent waves through the sports world by concluding that competitive cheer "[was] still too underdeveloped and disorganized to be treated as offering genuine varsity ath-

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<sup>9</sup> *See id.* at 63.

<sup>10</sup> *See id.*

<sup>11</sup> *See id.*

<sup>12</sup> *See id.* at 64.

<sup>13</sup> *See id.* at 99.

letic participation opportunities for students.”<sup>14</sup> As part of the court’s decision, Judge Underhill stated, as a matter of law, that competitive cheer does not constitute a sport.<sup>15</sup>

Judge Underhill relied on the NCAA’s treatment of competitive cheer when making his determination and stated: “[d]espite its athletic elements . . . competitive cheer is not recognized as a sport by the NCAA. Nor does the NCAA recognize competitive cheer as an ‘emerging sport.’”<sup>16</sup> Judge Underhill found the program structure and administration of the sport underdeveloped.<sup>17</sup> Although Quinnipiac provided the members of its competitive cheer team with scholarships and benefits equitable to those of other varsity athletes, it did not meet the OCR criteria for recognition as a sport.<sup>18</sup> The OCR has consistently held that

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<sup>14</sup> *Id.* at 64.

<sup>15</sup> *See id.*

<sup>16</sup> *Id.* at 78. Underhill held “[c]ompetitive cheer may, sometime in the future, qualify as a sport under Title IX; today, however, the activity is still too underdeveloped and disorganized to be treated as offering genuine varsity athletic participation opportunities for students.” *Id.* at 64.

<sup>17</sup> *See id.* at 95-96. Although competitive cheer maintained an operating budget, received benefits and services, and administered its coaching staff consistent with the other teams at Quinnipiac, the court focused on a few factors which deviate from typical varsity program administration. While competitive cheer received benefits such as study halls, medical treatment, publicity, and equipment, the team did not receive locker space. Also, the competitive cheer team did not receive NCAA catastrophic insurance and was required to seek out insurance from another provider. The court found the difference in recruitment process most persuasive of underdeveloped program structure and administration. The entire 2009-10 Quinnipiac competitive cheer team was selected from the existing pool of students contrary to Division I’s “essential” practice of off-campus recruitment.

<sup>18</sup> *See id.* at 101. The Court relied on the OCR’s criteria for examining a team’s practices and competitions: 1) The quality of the team’s practice opportunities; 2) Whether the regular season differs quantitatively or qualitatively from the regular seasons of other varsity sports; 3) Whether the pre- and post-seasons are consistent with other varsity sports; 4) Whether the team is organized primarily for the purpose of engaging in athletic competition. *See also* U.S. DEPT. OF EDUC. OFFICE FOR CIVIL RIGHTS, <http://www2.ed.gov/about/offices/list/ocr/aboutocr.html> (last visited Nov. 30, 2010). The Office for Civil Rights (OCR), an office within the Department of Education, aims to ensure equal access to education by enforcing federal civil rights laws prohibiting discrimination in programs or activities receiving federal funding.

competitive cheer is not a sport under the auspices of Title IX, and Judge Underhill provided a judicial decision to reaffirm that view.<sup>19</sup>

## II. TITLE IX: PROVIDING GENUINE ATHLETIC OPPORTUNITY FOR WOMEN, VERSUS MERE COMPLIANCE

Title IX provides a framework within which athletic programs may address disparity in athletic opportunities between both male and female athletes. Collegiate institutions that chose to provide genuine athletic opportunities for women by accommodating growing interest in competitive cheer have failed to meet judicial interpretation of minimum threshold requirements under Title IX because competitive cheer is not recognized as a sport.<sup>20</sup> This section discusses Title IX compliance under the three-prong test, and how courts interpret and apply various policy interpretations through major court decisions.

### A. *Equal Opportunity Regulation and Competitive Cheer*

Congress enacted Title IX as part of the Educational Amendments of 1972.<sup>21</sup> Section 901(a) of Title IX provides that “[n]o 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 ac-

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<sup>19</sup> See NCAA, GENDER EQUITY IN INTERCOLLEGIATE ATHLETICS: A PRACTICAL GUIDE FOR COLLEGES AND UNIVERSITIES 19 (2008), available at <http://www.ncaapublications.com/p-4024-gender-equity-in-intercollegiate-athletics-a-practical-guide-for-colleges-and-universities.aspx> [hereinafter GENDER EQUITY IN ATHLETICS]. With regard to cheerleading, “[t]he OCR has taken the position that cheerleading squads . . . are supporting services and not varsity programs. . . . It should be noted that the OCR [has] not uniformly accepted competitive cheerleading as a sport under Title IX . . . .”

<sup>20</sup> See Biediger, 728 F. Supp. 2d at 64 (holding Quinnipiac failed to comply with Title IX’s provisions although new athletic opportunities were provided by competitive cheer). This section focuses on the three-prong test; specifically the frequency in which substantial proportionality under prong one is used and favored over the other two prongs.

<sup>21</sup> See 20 U.S.C. §§ 1681–1688 (2006).



tivity receiving Federal financial assistance.”<sup>22</sup> Although the general purpose of Title IX is primarily to prohibit sex-based discrimination in educational opportunities,<sup>23</sup> Title IX has become more popularly known for its impact on collegiate athletics.<sup>24</sup> While the statute does not explicitly mention athletics, the Department of Education determined that collegiate athletics fall under the umbrella of “any education program or activity.”<sup>25</sup> After several revisions, the OCR released its final “Policy Interpretation” in 1979, which clarifies how Title IX applies to athletic programs.<sup>26</sup> Athletic opportunities are an essential component of education, and Title IX extends to prohibit discrimination in athletic programs receiving federal funds.<sup>27</sup> The goal of Title IX regulation “requires institutions to accommodate effectively the interests and abilities of students to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes.”<sup>28</sup>

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<sup>22</sup> 20 U.S.C. § 1681.

<sup>23</sup> *See id.* *See also* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 106.1 (2000) (providing “[t]he purpose of this part is to effectuate title IX of the Education Amendments of 1972, as amended by Pub. L. 93-568, 88 Stat. 1855 . . . which is designed to eliminate . . . discrimination on the basis of sex in any education program or activity receiving Federal financial assistance . . .”).

<sup>24</sup> *See* Biediger, 728 F. Supp. 2d at 87 (stating that “[i]n 1975, what was then the Department of Health, Education, and Welfare (HEW) . . . promulgated regulations pursuant to Title IX that required universities to provide equal opportunity for men and women in their athletics programs.”). *See also* Cohen v. Brown, 991 F.2d 888, 895 (1st Cir. 1993).

<sup>25</sup> *See* Biediger, 728 F. Supp. 2d at 87.

<sup>26</sup> *See* Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71413 (Dec. 11, 1979) (codified at 45 C.F.R. pt. 86) (providing a policy interpretation of Title IX designed particularly for intercollegiate athletics, the interpretation “clarifies the meaning of ‘equal opportunity’ in intercollegiate athletics. It explains the factors and standards set out in the law and regulation which the Department will consider in determining whether an institution’s intercollegiate athletics program complies with the law and regulations.”).

<sup>27</sup> *See id.*

<sup>28</sup> *Id.*

***B. Title IX Compliance and the Three-Prong Test: More Than Substantial Proportionality***

The most litigated aspect of Title IX is institutional compliance and exactly how athletic program opportunities are to be evaluated.<sup>29</sup> The OCR Policy Interpretation establishes a three-prong test to help collegiate institutions gauge equity of opportunity for both sexes within their athletic programs.<sup>30</sup> The three-prong test provides institutions with flexibility to organize their athletic programs in compliance with any one of the three prongs:<sup>31</sup> substantial proportionality, history and continuing practice of program expansion, and full and effective accommodation of the interests and abilities of the underrepresented sex.<sup>32</sup> Although the majority of court analysis for Title IX claims focuses on satisfying substantial proportionality under prong one,<sup>33</sup> compliance under prongs two and three have been

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<sup>29</sup> See Catherine Pieronek, *Title IX and Intercollegiate Athletics in the Federal Appellate Courts: Myth vs. Reality*, 27 J.C. & U.L. 447 (2000) (stating “[t]hroughout the 1990’s, federal courts or appeals in particular have wrestled with the application of Title IX to the athletic programs of colleges and universities, attempting to bring equity to a playing field traditionally dominated by men in their roles as student-athletes, coaches and athletic department administrators.”).

<sup>30</sup> See Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71413. Section IV of the OCR’s Policy Interpretation provides the following three categories to measure institutional compliance with Title IX: 1) Compliance in Financial Assistance (Scholarships) Based on Athletic Ability; 2) Compliance in Other Program Areas (Benefits); or, 3) Compliance in Meeting the Interests and Abilities of Male and Female Students.

<sup>31</sup> See Norma V. Cantu, *1996 Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, in EQUAL PLAY: TITLE IX AND SOCIAL CHANGE 153 (Nancy Hogshead-Makar & Andrew Zimbalist eds., 2007).

<sup>32</sup> See *Secretary’s Commission on Opportunities in Athletics*, Meeting Transcript (Jan. 29, 2003), in SPORTING EQUALITY: TITLE IX THIRTY YEARS LATER 11 (Rita J. Simon ed., 2005). See also SEC. OF EDU. COMM’N ON OPPORTUNITY IN ATHLETICS, “OPEN TO ALL”: TITLE IX AT THIRTY (Feb. 23, 2003), <http://www2.ed.gov/about/bdscomm/list/athletics/title9report.pdf> (last visited Nov. 30, 2010).

<sup>33</sup> See Earl C. Dudley, Jr. & George Rutherglen, *Ironies, Inconsistencies, and Intercollegiate Athletics: Title IX, Title VII, and Statistical Evidence of Discrimination*, 1 VA. J. SPORTS & L. 177, 196-197.

litigated more frequently and have been more contested in the media.<sup>34</sup>

### 1. Substantial Proportionality

The first prong of the three-prong test, substantial proportionality, asks “[w]hether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments.”<sup>35</sup> Focusing on the underrepresented sex, an institution is compliant with this first prong when the number of female athletic opportunities provided is substantially proportionate to the number of female students enrolled.<sup>36</sup> Arguably, institutions use the substantial proportionality prong more frequently because it is considered the easiest prong to satisfy.<sup>37</sup> Substantial proportionality creates a “baseline” against which discrimination may be evaluated.<sup>38</sup> In several prominent Title IX cases, substantial proportionality under prong one has been given “pri-

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<sup>34</sup> See Donna de Varona & Julie Foudy, *Minority Views on the Report of the Commission on Opportunity in Athletics*, in *SPORTING EQUALITY: TITLE IX THIRTY YEARS LATER* 58 (Rita J. Simon ed., 2005) (arguing “the use of interest surveys to reduce the basic obligation of educational institutions to provide equal opportunity its invalid and has been unequivocally rejected by the courts”); Katherine B. Woliver, Note, *Title IX and the “E-mail Survey” Exception: Missing the Goal*, 18 S. CAL. INTERDISC. L.J. 462 (2009). *But see* Erin McErlain, *Obama Admin. Rolls Back Title IX reforms*, COLLEGE SPORTS COUNCIL-NEWS ROOM, April 20, 2010, available at [http://college.sportsCouncil.org/newsroom/display\\_releases.cfm?id=30](http://college.sportsCouncil.org/newsroom/display_releases.cfm?id=30) (last visited Oct. 9, 2010).

<sup>35</sup> *Cohen v. Brown*, 991 F.2d 888, 897 (1st Cir. 1993) (citing Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 418).

<sup>36</sup> See OFFICE OF CIVIL RIGHTS, CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST (Jan. 16, 1996), available at <http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html#two>.

<sup>37</sup> See *Cohen*, 991 F.2d at 897 (stating that “a university which does not wish to engage in extensive compliance analysis may stay on the sunny side of Title IX simply by maintaining gender parity between its student body and its athletic lineup.”).

<sup>38</sup> See Dudley, *supra* note 33, at 197. “On reflection, this development is not surprising, since only the first part of the test sets forth a baseline against which to measure discrimination—the proportionality of competitive opportunities to enrollment, what we have called parity with enrollment.”

ority” in court analysis, making it the standard by which many institutions structure their athletic programs.<sup>39</sup>

Although institutions have the opportunity to comply with Title IX by satisfying any one of the three prongs, substantial proportionality is considered a “safe harbor” for institutions seeking compliance.<sup>40</sup> The substantial proportionality prong, however, often does not address the actual interests of female athletes nor does it account for the supposed reverse discrimination experienced by male athletes, whose teams have been discontinued in an attempt at institutional compliance.<sup>41</sup> In *Biediger*, the court held that Quinnipiac “discriminated on the basis of sex during the 2009–2010 academic year by failing to provide equal athletic participation opportunities for women.”<sup>42</sup> Because Quinnipiac’s competitive cheer team did not qualify as a varsity sport, Quinnipiac could not include these athletic opportunities for compliance under prong one.<sup>43</sup> The interest in competitive cheer at Quinnipiac was not a factor the court considered.

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<sup>39</sup> See generally *Biediger*, 728 F. Supp. 2d 62; Cohen, 991 F.2d at 888; *Kelley v. Bd. of Trustees of the Univ. of Ill.*, 35 F.3d 265, 267 (7th Cir. 1994). Aware of the substantial proportionality “baseline” under prong one, many schools model athletic programs and make decisions to add, discontinue, or demote athletic teams with parity in mind. The goal is to stay within a specified ratio between student enrollment and athletic opportunities provided for each sex. Although it may not be the only factor, it is a prominent consideration for the administration of the majority of athletic programs. It is given “priority” in court analysis because it is the only prong which rests on objective data rather than the subjective analysis required under the second and third prongs of the three-prong test.

<sup>40</sup> See Kristin Rozum, Comment, *Staying Inbounds: Reforming Title IX in Collegiate Athletics*, 18 WIS. WOMEN’S L.J. 155, 168 (2003) (stating “[a]s courts have demonstrated, substantial proportionality is the only affordable option that brings an athletic program into compliance.”). Rozum is referring to *Cohen’s* discussion of the OCR’s 1996 Policy Interpretation which states “The substantial proportionality contained in Benchmark 1 merely establishes such a safe harbor.” See Cohen, 101 F.3d at 178.

<sup>41</sup> See Rozum, *supra* note 40, at 169.

<sup>42</sup> See *Biediger*, 728 F. Supp. 2d 62. The court determined non-compliance, under the substantial proportionality prong, based on its own reasoning and statistical data provided by Dr. Donna Lopiano, plaintiff’s expert witness.

<sup>43</sup> See *id.* at 113.

Many scholars criticize substantial proportionality as imposing a quota system that focuses on the number of athletic opportunities offered rather than the “legitimacy” of the opportunities provided.<sup>44</sup> The OCR’s Policy Interpretation, however, also evaluates the equality of benefits between men and women in athletic programs under this prong.<sup>45</sup> Despite criticism of the

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<sup>44</sup> See Danielle M. Ganzi, Note, *After the Commission: The Government’s Inadequate Responses to Title IX’s Negative Effect on Men’s Intercollegiate Athletics*, 84 B.U. L. Rev. 543 (2004) (discussing the OCR’s contradictory language regarding quota systems and substantial proportionality in the 1990 Title IX Athletics Investigator’s Manual) (“The Manual seemed to disapprove of quotas, stating that ‘[t]here is no set ratio that constitutes ‘substantially proportionate’ or that, when not met, results in a disparity or violation.’ At the same time, it provided an example of an ideal ratio: the percentage of male and female students participating in athletics should mirror the percentage of men and women enrolled at the institution.”). See *id.* at 548–549. See also 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, 561–562 (2003).

<sup>45</sup> See Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71413. See also Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 106.41(c) (2010). The following ten factors are evaluated when determining compliance: 1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; 2) The provision of equipment and supplies; 3) Scheduling of games and practice time; 4) Travel and per diem allowance; 5) Opportunity to receive coaching and academic 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.

substantial proportionality prong,<sup>46</sup> it remains the most implemented standard of review for Title IX compliance.<sup>47</sup>

Both the second and third prongs allow “something short of [substantial] proportionality [as] a satisfactory proxy for gender balance.”<sup>48</sup> Each provides additional flexibility by allowing schools to accommodate the interests of the underrepresented sex without having to achieve strict proportionality of athletic opportunities.<sup>49</sup> Although allowing greater flexibility for athletic programs and an alternative path to Title IX compliance, the OCR employs a more stringent review of factors under the second and third prongs.<sup>50</sup>

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<sup>46</sup> See Kelley, 35 F.3d at 271 (“Plaintiffs . . . argue that the substantial proportionality test contained in the agency’s policy interpretation of that regulation establishes a gender-based quota system, a scheme they allege is contrary to the mandates of Title IX.” *Id.*) See Rozum, *supra* note 40, at 168 (“[D]eference to ‘substantial proportionality’ has turned Title IX into a quota system, forcing schools to eliminate men’s sports . . . [and] ignores the actual interest levels and capabilities of both sexes. [T]he misapplication of Title IX may actually hinder the development of women’s sports.”). For further criticism of substantial proportionality and its effects on male student-athletes, see also David Klinker, Comment, *Why Conforming with Title IX Hurts Men’s Collegiate Sports*, 13 SETON HALL J. SPORT L. 73 (2003).

<sup>47</sup> See Darren Rosenblum, *Loving Gender Balance: Reframing Identity-Based Inequality Remedies*, 76 FORDHAM L. REV. 2873, 2882–2884 (2008) (stating, “critics allege that substantial proportionality remains the only possible compliance option for many institutions. Title IX’s proportionality requirement reflects an underlying redistributive response to gender inequality: the use of a quota system.”). See also Pieronek, *supra* note 29. *But see* Pederson v. Louisiana State Univ., 213 F.3d 858 (5th Cir. 2000) (evaluating Louisiana State University’s athletic program under both the substantial proportionality test, prong one, and the full and effective accommodation test, prong three. A great deal of analysis involved the university’s failure to accommodate women’s interests).

<sup>48</sup> See Cohen, 991 F.2d at 898.

<sup>49</sup> See *id.* See also Secretary’s Commission on Opportunities in Athletics, *supra* note 32 (explaining that only prong one is considered a “safe harbor” for Title IX compliance. Compliance through substantial proportionality requires no further evaluation. Analysis of athletic programs under prongs two and three occur when proportionality cannot be proven).

<sup>50</sup> See Secretary’s Commission on Opportunities in Athletics, *supra* note 32, at 11 (“If a school claims it is in compliance under one of the other tests, the Office will scrutinize that claim more carefully since compliance under these parts is not a safe harbor.”).

## 2. History and Continuing Practice of Program Expansion

The second prong of the three-prong test requires institutions to show a history and continuing practice of program expansion at the institution.<sup>51</sup> Regulating agencies, such as the OCR, will look to see if the institution positively responds to student interest in additional sports and whether the institution has a record of sponsoring new sports or promoting women's sports to varsity status.<sup>52</sup> Because this prong lacks the quantifiable measures of substantial proportionality, it is regarded as ambiguous as and less meaningful than the first prong.<sup>53</sup>

The OCR reviews the institution's history for program expansion and, more importantly, focuses on the institution's present and continuing efforts of program expansion based on the interests of the underrepresented sex.<sup>54</sup> The arbitrary reduction of opportunities for men without efforts to increase opportunities for women will not satisfy prong two.<sup>55</sup> The goal of Title IX is to create more opportunities by prohibiting sex-based discrimination in education.<sup>56</sup> By simply removing men's programs, no new opportunities are available to female athletes.

*Kelley v. Board of Trustees of the University of Illinois* addressed the concern of arbitrary reduction of male athletic opportunities.<sup>57</sup> In a class action suit, male athletes on

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<sup>51</sup> See 44 Fed. Reg. at 418.

<sup>52</sup> See Cantu, *supra* note 31, at 156 (“[P]art two considers an institution’s good faith remedial efforts through actual program expansion.”). Institutions may demonstrate compliance under the second prong by actively responding to student interest in additional sports; increasing athletic participants for the underrepresented sex (female); and/or provide record of adding sports or promoting club or intramural sports to varsity status. See *id.* at 156–157.

<sup>53</sup> See Secretary’s Commission on Opportunities in Athletics, *supra* note 32, at 11–12 (“Many have argued to the Commission that because the guidance concerning the second and third parts of the test is so ambiguous, the proportionality part is the only meaningful test. Moreover many witnesses argued that the Office for Civil Rights and private litigants have transformed *substantial* proportionality into *strict* proportionality.”).

<sup>54</sup> See Cantu, *supra* note 31, at 156.

<sup>55</sup> See *id.* at 157.

<sup>56</sup> See Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71418.

<sup>57</sup> See *Kelley*, 35 F.3d at 267.

discontinued sports teams claimed reverse discrimination when the University of Illinois discontinued the men's swimming, men's fencing, and men's and women's diving to comply with Title IX.<sup>58</sup> The University continued to sponsor its women's swimming team.<sup>59</sup> The court ruled in favor of the University's actions: "[a]llowing a school to consider gender when determining which athletic programs to terminate ensures that in instances where overall athletic opportunities decrease, the actual opportunities available to the underrepresented gender do not."<sup>60</sup> The University's decision to discontinue men's swimming was based on several factors other than sex<sup>61</sup> and was aimed at protecting the interests of the underrepresented sex.<sup>62</sup> The University was not found to have violated Title IX.<sup>63</sup> Compliance under prong two must provide additional athletic opportunities to the underrepresented sex; athletic opportunities on

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<sup>58</sup> See *id.* at 267-270 (plaintiff argued "If a university is required by Title IX to eliminate men from varsity athletic competition . . . then the same Title IX should require the university to eliminate women from the academic departments where they are over[-]represented and men from departments where they have been over[-]represented.").

<sup>59</sup> See *id.* at 267.

<sup>60</sup> *Id.* at 272.

<sup>61</sup> See *id.* at 269. The University of Illinois considered seven factors when determining which athletic teams to discontinue for Title IX compliance: 1) Whether or not the Big Ten Conference and the National Collegiate Athletic Association sponsored a championship in the sport; 2) The tradition of success of the sport at the University; 3) The level of interest and participation in the sport at the high school level; 4) The adequacy of the University's facilities for the sport; 5) The level of spectator interest in the sport; 6) Gender and ethnic issues; and 7) The cost of the sport.

<sup>62</sup> See *Kelley*, 35 F.3d at 269-270 (citing *Roberts v. Colorado State Bd. of Agriculture*, 998 F.2d 824, 828-832 (10th Cir. 1993)) ("The percentage of women involved in intercollegiate athletics at the University of Illinois is substantially lower than the percentage of women enrolled at the school. If the University had terminated the women's swimming program . . . [f]emale participation would have continued to be substantially disproportionate to female enrollment, and women with a demonstrated interest in an intercollegiate athletic activity and demonstrated ability to compete at the intercollegiate level would be left without an opportunity to participate in their sport.").

<sup>63</sup> See *Kelley*, 35 F.3d at 271.



emerging sport teams would provide those additional athletic opportunities for women.

### 3. Full and Effective Accommodation of Interests and Abilities of Underrepresented Sex

The final prong requires that an institution fully and effectively accommodate the interests and abilities of the underrepresented sex.<sup>64</sup> Under this prong of the test, an institution may fail to meet substantial proportionality under prong one and still comply with Title IX if the imbalance is not a result of sex discrimination.<sup>65</sup> “In making this determination, OCR will consider whether there is (a) unmet interest in a particular sport; (b) sufficient ability to sustain a team in the sport; and (c) a reasonable expectation of competition for the team.”<sup>66</sup> There are several ways in which the OCR determines full and effective accommodation of interest. Students may request that an institution add new sports of interest; they may request that existing club teams be elevated to school-sponsored varsity sports; or the institution may evaluate student responses to surveys and questionnaires.<sup>67</sup>

The OCR supported the Model Survey in 2005 “as the sole means of assessing student interest in additional athletic participation opportunities.”<sup>68</sup> The Model Survey received mixed reception from institutions, proponents of Title IX, and the courts.<sup>69</sup> Internet surveys put the power back into the hands of

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<sup>64</sup> See Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71418.

<sup>65</sup> See Cantu, *supra* note 31, at 159.

<sup>66</sup> *Id.* at 157.

<sup>67</sup> See *id.* at 160.

<sup>68</sup> DON SABO & CHRISTINE H.B. GRANT, CTR. FOR RES. ON PHYSICAL ACTIVITY, SPORT & HEALTH, LIMITATIONS OF THE DEPARTMENT OF EDUCATION’S ONLINE SURVEY METHOD FOR MEASURING ATHLETIC INTEREST AND ABILITY ON U.S.A. CAMPUSES (June 2005), available at [http://www.dyc.edu/crpash/limits\\_of\\_online\\_survey.pdf](http://www.dyc.edu/crpash/limits_of_online_survey.pdf).

<sup>69</sup> See U.S. COMM’N ON CIVIL RIGHTS, TITLE IX ATHLETICS: ACCOMMODATING INTERESTS AND ABILITIES: BRIEFING REPORT 55-56 (2010) available at <http://www.usccr.gov/pubs/TitleIX-2010-rev100610.pdf>. Jessica L. Gavora addresses the strengths and weaknesses of the 2005 Model Survey by stating,

those Title IX seeks to protect. By providing women with the means and opportunity to voice their interests in athletics through participation in the survey, the goal of full and effective accommodation can be met. These interest surveys may prove beneficial to institutions that face litigation similar to *Biediger, Cohen v. Brown University*,<sup>70</sup> or *Kelley*. If employed in *Biediger*, student interest in competitive cheer would have been another objective measure by which the court evaluated the sport. The use of internet surveys, provided that proper notification to its target audience (female students) is made, would create the opportunity to address real and legitimate interests for female student-athletes. However, as implemented, the surveys inaccurately counted non-responses as disinterest and the chosen remedy was complete removal of the surveys a drastic decision when the survey could have been reformed.

The NCAA relied on survey information when deciding to grant emerging sport status to women's sand volleyball.<sup>71</sup> Surveys also demonstrated a growing interest in competitive cheer and triathlon.<sup>72</sup> Although surveys provide a means to

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“[i]ts strength—perhaps its only strength—is that for the first time in a decade it reintroduces the notion that government should view women as thinking discerning individuals capable of expressing and acting on their interests when judging an institution under Title IX.” The U.S. Department of Education, guiding the use of the Model Survey in 2005, was met with resistance from women's organizations which claim, “surveys can't gauge men's and women's relative interest in sports because ‘culturally, men are simply more likely than women to profess an interest in sport.’ Women, on the other hand, ‘are less likely to profess an interest in sports, even if they are interested!’” The rationale provided by these women's organizations in efforts to discourage the Model Survey is circular and contradictory.

<sup>70</sup> See *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996). See also *Cohen v. Brown*, 991 F.2d 888 (1st Cir. 1993).

<sup>71</sup> See Gary Brown, *Sand Volleyball Survey Reveals Little Interest in DIII*, THE NCAA NEWS, Apr. 15, 2010, [http://ncaa.org/wps/portal/ncaahome?WCM\\_GLOBAL\\_CONTEXT=/ncaa/ncaa/ncaa+news/ncaa+news+online/2010/division+iii/sand+volleyball+survey+reveals+little+interest+in+diii\\_04\\_15\\_10\\_ncaa\\_news](http://ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/ncaa/ncaa+news/ncaa+news+online/2010/division+iii/sand+volleyball+survey+reveals+little+interest+in+diii_04_15_10_ncaa_news) (last visited Nov. 4, 2010).

<sup>72</sup> See *id.* The survey inquired about potential emerging sports. Results reflect a 34% interest in competitive cheer and a 24% interest in triathlon. Women's sand volleyball, which became an NCAA emerging sport in 2009, returned 37% of institutional interest.

measure student interests and provide another option for institutions to comply with Title IX, the OCR rescinded its support of internet surveys on April 20, 2010.<sup>73</sup> As such, the first prong continues to be the only true measure of compliance.<sup>74</sup>

### III. DEFINING COMPETITIVE CHEER AS AN EMERGING SPORT

Competitive cheer should receive NCAA emerging sport status. It has evolved from traditional sideline cheerleading, whose primary focus was to support other sports teams,<sup>75</sup> into an immensely physical new sport,<sup>76</sup> for which the purpose is to compete.<sup>77</sup> Competitive cheer successfully meets the NCAA criteria for emerging sport designation and thus, should receive NCAA emerging sport status because such designation would further the true aim of gender equity under Title IX—equal opportunity for woman in education and athletics.

#### A. *What is Competitive Cheer?*

Competitive cheer, unlike traditional sideline cheerleading, is a sport that has evolved tremendously and significantly in recent

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<sup>73</sup> See Michelle Brutlag Hosick, *OCR Rescinds 2005 Title IX Clarification*, THE NCAA NEWS, April 20, 2010, [http://www.ncaa.org/wps/portal/ncaahome?WCM\\_GLOBAL\\_CONTEXT=/ncaa/NCAA/NCAA+News/NCAA+News+Online/2010/Association-wide/OCR=rescinds+2005+Title+IX+clarification\\_04\\_20\\_10\\_NCAA\\_News](http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/NCAA+News/NCAA+News+Online/2010/Association-wide/OCR=rescinds+2005+Title+IX+clarification_04_20_10_NCAA_News) (last visited Nov. 26, 2010).

<sup>74</sup> See Cohen, 101 F.3d at 174 (“[R]elative interests approach ‘cannot withstand scrutiny on either legal or policy grounds,’ because it ‘disadvantages women and undermines the remedial purposes of Title IX by limiting required program expansion for the underrepresented sex to the status quo level of relative interests.’”).

<sup>75</sup> See Biediger, 728 F. Supp. 2d at 78.

<sup>76</sup> See NAT’L COLLEGIATE ACROBATIC & TUMBLING ASS’N, <http://www.thencata.org/faq.html> (last visited Nov. 30, 2010) (stating competitors in NCATA events will have to meet certain specific physical requirements, basket tosses, tumbling, and pyramids).

<sup>77</sup> See *id.* See also Biediger, 728 F. Supp. 2d at 78 (providing “[p]articipants do not perform for a crowd’s approval or involvement—they compete to win.”).

history. It is imperative to differentiate between the two when analyzing competitive cheer as a sport because doing so highlights the increased physical and competitive aspects of the new sport.<sup>78</sup> In *Biediger*, Judge Underhill distinguished competitive cheer from sideline cheer by stating that “sideline cheerleaders primarily work to entertain audiences or solicit crowd reaction at other teams’ games or school functions[.] [C]ompetitive cheer teams strictly engage in sport.”<sup>79</sup> Sideline cheerleading is a supportive activity whose primary aim is not in itself competitive.<sup>80</sup> In contrast, competitive cheer’s primary purpose is to compete against other teams.<sup>81</sup> At competitions, judges evaluate competitive cheerleaders’ stunts, tumbling, jumps, tosses, and pyramids.<sup>82</sup> The level of skill, athleticism, and synchronization required to compete are analogous to “traditional and legit-

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<sup>78</sup> There are many differences pointed out in *Biediger*: “In order to distinguish their activity from their sideline roots, cheer teams do not attempt to elicit crowd response; generally do not use pom-poms, megaphones, signs, or other props associated with traditional cheerleading teams; do not wear skirts and sleeveless or cropped tops, but wear uniforms consisting of shorts and jerseys, much like that women’s volleyball players don; and emphasize the more gymnastic elements of sideline cheerleading, such as aerial maneuvers, floor tumbling, and balanced exercises, to the exclusion of those activities intended to rally the watching audience.” *See id.*

<sup>79</sup> *See id.* *See also* NAT’L COLLEGIATE ACROBATIC & TUMBLING ASS’N, *supra* note 76. Competitive cheer, more recently known as acrobatics and tumbling, “has evolved out of gymnastics and the athletic aspects [of] competitive cheer. It is a unique varsity sport that fundamentally combines the skill sets from acrobatics and tumbling.”

<sup>80</sup> *See id.* Cheerleaders are “[a] group of individuals (team) whose purpose is to support a university or school. This group leads the crowd on the sidelines, serves as ambassadors for the institution at public appearances . . . . [T]he purpose of this team is to support.”

<sup>81</sup> *See Biediger*, 728 F. Supp. 2d at 78. *See also* Cassman, *supra* note 6, at 255; NAT’L COLLEGIATE ACROBATIC & TUMBLING ASS’N, *supra* note 76. Competitive cheer is “an evolution of cheerleading into a competitive sport. A competitive cheer team’s purpose is to compete. . . . [T]he purpose of the team is to compete on behalf of a school/university . . . .”

<sup>82</sup> *See* NAT’L CHEERLEADERS ASS’N, [http://www.nca.varsity.com/pdfs/vas\\_scoring\\_nca.pdf](http://www.nca.varsity.com/pdfs/vas_scoring_nca.pdf) (last visited Oct. 12, 2010). Competitive cheer teams are also judged based upon degree of difficulty, synchronization, skill completion, creativity, execution, ease of movement, and general athleticism. The criteria is easily comparable to nationally recognized sports such as gymnastics and synchronized swimming.

imate” sports such as gymnastics and synchronized swimming.<sup>83</sup> The NCAA acknowledged gymnastics as a varsity sport and conferred emerging sport status upon synchronized swimming.<sup>84</sup>

Despite its evolution, Judge Underhill concluded that competitive cheer was “underdeveloped and disorganized.”<sup>85</sup> Judge Underhill was mistaken. Contrary to the *Biediger* decision, competitive cheer is organized under several cheerleading organizations, many of which were formed several decades prior to Judge Underhill’s decision.<sup>86</sup> The National Cheerleaders Association (“NCA”), Universal Cheerleaders Association (“UCA”), and Varsity Brands have held competitions for club and all-star cheer and dance teams annually since 1980.<sup>87</sup> Competitive cheer has enjoyed thirty years of active competition,<sup>88</sup> and over 450,000 women and girls already participate in this sport at the high school and collegiate levels.<sup>89</sup> The University of Maryland was the first institution to sponsor a varsity women’s competitive cheer team in 2003.<sup>90</sup> After the *Biediger* decision, the University of Maryland, which has used its compet-

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<sup>83</sup> See *Biediger*, 728 F. Supp. 2d at 78 (stating competitive cheer emphasizes 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. As I noted in my preliminary injunction ruling, competitive cheer is an athletic endeavor that could be easily described as ‘group floor gymnastics.’”).

<sup>84</sup> See *NCAA Emerging Sports Timeline*, THE NAT’L COLLEGIATE ATHLETIC ASS’N, available at <http://www.ncaa.org/wps/wcm/connect/f192c7004e0d61e7bc2efc1ad6fc8b25/Emerging+Sports+History.doc?MOD=AJPERES&CACHEID=F192c7004e0d61e7bc2efc1ad6fc8b25> (last visited Nov. 4, 2010).

<sup>85</sup> See *Biediger*, 728 F. Supp. 2d at 64.

<sup>86</sup> See NATIONAL CHEERLEADERS ASSOCIATION (NCA), <http://nca.varsity.com/> (last visited Nov. 30, 2010) The NCA was founded in 1948. See also *History and Philosophy*, UNIVERSAL CHEERLEADERS ASSOCIATION (UCA), <http://uca.varsity.com/HistoryAndPhilosophy.aspx> (last visited Nov. 30, 2010). The UCA was founded in 1974.

<sup>87</sup> See *Biediger*, 728 F. Supp. 2d at 79.

<sup>88</sup> *Id.* Jeff Webb, through Varsity Brands, Inc., held the first cheerleading competition in 1980.

<sup>89</sup> NAT’L COLLEGIATE ACROBATIC & TUMBLING ASS’N, <http://www.then-cata.org/numbers.html> (last visited Nov. 10, 2010).

<sup>90</sup> Marisa Walker, *Great Dates in Cheer*, AMERICAN CHEERLEADER MAGAZINE, Feb. 1, 2005.

itive cheer to satisfy Title IX requirements, has made no plans to change the sport's status.<sup>91</sup>

The National Collegiate Acrobatics and Tumbling Association ("NCATA")<sup>92</sup> is leading the efforts for competitive cheer recognition at the collegiate level.<sup>93</sup> As an emerging governing body for the sport, the NCATA already has six member institutions,<sup>94</sup> whose schools currently sponsor competitive cheer as a varsity sport.<sup>95</sup> On September 2, 2010, USA Gymnastics,<sup>96</sup> the United States' Olympic Gymnastics team, announced that it would sanction NCATA events.<sup>97</sup> The fact that the US Olympic Gymnastics team is supporting NCATA only further reinforces the competitive nature of the new sport. NCATA, NCA, UCA, and Varsity Brands provide organization and opportunity for the sport of competitive cheer, and the NCAA, in granting emerging sport status, could provide that same organization and opportunity for female athletes at member institutions.<sup>98</sup>

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<sup>91</sup> See Steve Yanda, *No Immediate Changes for Maryland After Cheerleading Ruling*, WASH. POST, July 23, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/22/AR2010072205699.html>.

<sup>92</sup> See NAT'L COLLEGIATE ACROBATIC & TUMBLING ASS'N, *supra* note 76. The NCATA was formed in January 2010. It is currently the governing body for the collegiate sport of acrobatics and tumbling. Its primary focus is to advocate for acrobatics and tumbling before the NCAA in efforts to obtain emerging sport status.

<sup>93</sup> See *id.*

<sup>94</sup> See *id.* (listing Azusa Pacific University, Baylor University, Fairmont State University, University of Maryland, University of Oregon, and Quinnipiac University as NCATA members).

<sup>95</sup> See *id.* The NCATA has two levels of membership: Athletic Department Membership and Club Membership. "Athletic Department Membership is defined as a fully recognized, varsity status sport with the complete funding and recognition by the respective university consistent with US Department of Education Office for Civil Rights requirements for consideration as an intercollegiate sport." Current membership represents universities which adhere to the requirements of the NCAA, Title IX equity, and NCATA bylaws.

<sup>96</sup> USA GYMNASTICS, <http://www.usa-gymnastics.org/pages/index.html> (last visited Nov. 29, 2010).

<sup>97</sup> *USA Gymnastics agrees to sanction NCATA events*, USA GYMNASTICS, Sept. 2, 2010, <http://www.usa-gymnastics.org/pages/post.html?PostID=6157> (last visited Nov. 29, 2010).

<sup>98</sup> See *Competitive Cheer Summit Held at Maryland: Plans to Advance the Sport as an NCAA Emerging Sport Gain Momentum*, UNIVERSITY OF MARY-

### ***B. What is NCAA Emerging Sport Status?***

There are various definitions of what constitutes a “sport.” The OCR and NCAA interpretations of “sport” are most relevant because courts and institutions rely on their definitions to evaluate compliance.<sup>99</sup> Although the OCR, charged by the Department of Education with enforcing anti-discriminatory Federal Civil Rights laws such as Title IX, does not have a clear-cut definition of what constitutes a “sport,” it has set forth several guidelines for whether an activity is to be considered a “sport” for Title IX purposes.<sup>100</sup> The OCR considers factors such as objective selection of team participants based on athletic ability;<sup>101</sup> competition limited to a defined season;<sup>102</sup> uniformity of program structure, administration, preparation, and competition;<sup>103</sup>

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LAND ATHLETICS, Sept. 18, 2009, <http://www.umterps.com/sports/comp-cheer/spec-rel/091809aaa.html>. (last visited Nov. 27, 2010).

<sup>99</sup> See generally Biediger, 728 F. Supp. 2d at 78-79. Judge Underhill heavily relies on the NCAA’s treatment of competitive cheer in making his determination. He also supports his decision by stating: “Furthermore, the Department of Education has not recognized competitive cheerleading to be a sport.”

<sup>100</sup> See GENDER EQUITY IN ATHLETICS, *supra* note 19, at 22 (2008).

<sup>101</sup> See THE NAT’L COLLEGIATE ATHLETIC ASS’N, *supra* note 5, at 116. NCAA Bylaw 13.11 specifically prohibits the use of tryouts for recruiting purposes. “A member institution, on its campus or elsewhere, shall not conduct (or have conducted on its behalf ) any physical activity (e.g., practice session or test/tryout) at which one or more prospective student-athletes (as defined in Bylaws 13.11.1.1 and 13.11.1.2) reveal, demonstrate or display their athletics abilities in any sport except as provided in [men’s basketball and competition against recruit exceptions].” Recruits are to be evaluated based on prior performance at the high school, two-year college, or club levels.

<sup>102</sup> See *id.* at 266. NCAA Bylaw 17.22.1 provides that the playing season for Swimming and Diving, for example, is limited to 144 days. The season “may consist of two segments (each consisting of consecutive days) and exclude only required off days per Bylaw 17.1.6.4 and official vacation, holiday and final-examination periods during which no practice or competition shall occur.”

<sup>103</sup> See NAT’L COLLEGIATE ACROBATIC & TUMBLING ASS’N, *supra* note 76. An activity may be considered a sport if its primary purpose is competition rather than support of other athletic teams. This factor speaks directly to cheerleading. Sideline cheer is not a sport under the OCR guidelines because its primary purpose is not competition but support of other athletic

sponsorship by institution athletic departments; and whether the activity's primary purpose is that of competition rather than support of other athletic teams.<sup>104</sup> One overarching consideration, however, is the OCR's continued practice of case-by-case evaluation for sport determination under Title IX.<sup>105</sup> The door has been left open for the OCR to classify competitive cheer as a sport.

In contrast to the OCR's guidelines, the NCAA has provided its own clear definition of "sport" that must be satisfied prior to awarding emerging sport status.<sup>106</sup> A sport has been defined as "an institutional activity involving physical exertion with the purpose of competition versus other teams or individuals within a collegiate competition structure."<sup>107</sup> The definition further requires that sports participate in "regularly scheduled team and/or individual, head-to-head competition (at least five) within a defined competitive season(s)."<sup>108</sup> Although the OCR and NCAA evaluate similar criteria, an activity must meet the

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teams. In contrast, competitive cheer's primary purpose is that of competition. Competitive cheer satisfies this factor.

<sup>104</sup> See GENDER EQUITY IN ATHLETICS, *supra* note 19, at 22. See also Letter from Stephanie Monroe, Asst. Secretary for Civil Rights, to Colleagues at local educational institutions which participate in interscholastic athletics, (Sept. 17, 2008) available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20080917.html>.

<sup>105</sup> See GENDER EQUITY IN ATHLETICS, *supra* note 19, at 22.

<sup>106</sup> See *Emerging Sports for Women*, NAT'L COLLEGIATE ATHLETIC ASS'N, [http://www.ncaa.org/wps/portal/ncaahome?WCM\\_GLOBAL\\_CONTEXT=/wps/wcm/connect/ncaa/NCAA/About+The+NCAA/Diversity+and+Inclusion/Gender+Equity+and+Title+IX/New+Emerging+Sports=For+Women](http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/wps/wcm/connect/ncaa/NCAA/About+The+NCAA/Diversity+and+Inclusion/Gender+Equity+and+Title+IX/New+Emerging+Sports=For+Women) (last visited Oct. 15, 2010). The NCAA defines emerging sport as "a sport recognized by the NCAA that is intended to provide additional athletics opportunities to female student-athletes. Institutions are allowed to use emerging sports to help meet the NCAA minimum sports-sponsorship requirements and also to meet the NCAA's minimum financial aid awards."

<sup>107</sup> See *id.* Despite numerous definitions of the term, the NCAA employs this definition of sport when awarding emerging sport status.

<sup>108</sup> *Id.* This requirement can also be found in NCAA Bylaw 17.22.1. See THE NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 5, at 266.



NCAA definition of a sport to submit a proposal for emerging sport designation.<sup>109</sup>

The NCAA awards emerging sport status to “sports recognized [as] provid[ing] additional athletics opportunities to female student-athletes.”<sup>110</sup> In efforts to provide greater opportunity for women in collegiate athletics, the NCAA’s Gender-Equity Task Force recommended an emerging women’s sports list in 1994 and implemented standards and regulations.<sup>111</sup> In response, the NCAA implemented standards and regulations for emerging sport designation to achieve gender equity of opportunity in collegiate athletics. There were nine original emerging sports, four of which enjoyed substantial growth and currently have NCAA-sponsored championships.<sup>112</sup>

The NCAA Committee on Women’s Athletics (“CWA”) receives and reviews proposals from applicant activities seeking emerging sport status.<sup>113</sup> Procedurally, sports seeking emerging-sport designation must submit a proposal accompanied by commitment letters from ten member institutions.<sup>114</sup> The proposal must demonstrate adequate support for the sport, the participation of at least twenty collegiate teams in the sport, and suggestions to the NCAA for general competition rules and regulations.<sup>115</sup> Emerging sport status plays a vital role in accomplishing a central aim of Title IX—gender equity in athletics.

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<sup>109</sup> See *Emerging Sports for Women*, *supra* note 106 (“If an activity meets the definition of a sport, then a proposal and 10 commitment letters are submitted to the Committee on Women’s Athletics (CWA).”).

<sup>110</sup> *Id.*

<sup>111</sup> *See id.*

<sup>112</sup> *See id.* The original nine emerging sports were: archery, badminton, bowling, ice hockey, rowing, squash, synchronized swimming, team handball, and water polo. Bowling, ice hockey, rowing and water polo have all achieved sufficient growth needed for NCAA championship sponsorship.

<sup>113</sup> *See id.*

<sup>114</sup> *See id.* Application for emerging sport status requires that the proposed sport submit ten commitment letters from other member institutions expressly stating their current or anticipated sponsorship of the sport at issue. These letters must be signed by the president and director of athletics of each member institution.

<sup>115</sup> *See id.*

Sports receiving emerging sport designation are considered to provide legitimate athletic opportunity for women. The NCAA awards emerging sport status in response to institutional interest. By providing a mechanism for institutions to fully and effectively accommodate student interest, the NCAA is furthering Title IX goals of equality and equity of opportunity. Emerging sports provide additional athletic opportunities for female athletes by provisionally-approving sports activities that currently do not have an NCAA-sponsored championship.<sup>116</sup> Simply stated, emerging sports count.<sup>117</sup> They are considered in revenue distribution, Title IX compliance, and grants-in-aid.<sup>118</sup> Competitive cheer meets every definition of “sport” and satisfies all of the NCAA criteria while promoting increased opportunities for women to compete. Yet, as seen in *Biediger*, competitive cheer does not count.<sup>119</sup>

### ***C. Competitive Cheer Should Receive NCAA Emerging Sport Status***

The NCAA should grant competitive cheer emerging sport status for several reasons. First, competitive cheer meets the criteria for the NCAA’s definition of sport.<sup>120</sup> Both the NCA and the NCATA have established schedules for competition, and standardized rules, which provide for objective judging.<sup>121</sup> The

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<sup>116</sup> See THE NAT’L COLLEGIATE ATHLETIC ASS’N, *supra* note 5, at 297; GENDER EQUITY IN ATHLETICS, *supra* note 19, at 85.

<sup>117</sup> NCAA refers to emerging sports as “countable sports” in its 2009 Division I Manual. Emerging sports are included in revenue distribution and grants-in-aid. The Gender Equity Task Force suggested an emerging sport list to further Title IX aims of providing genuine athletic opportunities for women and additional sports of interest for institutions. See THE NAT’L COLLEGIATE ATHLETIC ASS’N, *supra* note 5, at 297; GENDER EQUITY IN ATHLETICS, *supra* note 19, at 85.

<sup>118</sup> See THE NAT’L COLLEGIATE ATHLETIC ASS’N, *supra* note 5, at 297.

<sup>119</sup> See *Biediger*, 728 F. Supp. 2d 62.

<sup>120</sup> See *Emerging Sports for Women*, *supra* note 106.

<sup>121</sup> See *Biediger*, 728 F. Supp. 2d at 82-83. See NAT’L CHEERLEADERS ASS’N, COLLEGE RULE BOOK 2010-11 (2010), available at [http://www.nca.varsity.com/pdfs/college\\_sgb.pdf](http://www.nca.varsity.com/pdfs/college_sgb.pdf). As a result of the Cheer Summit held at the University of Maryland in September 2009, the NCATA agreed to the following

proposal for emerging sport status undoubtedly will include commitment letters from current and pending NCATA member institutions pledging their present and future sponsorship of competitive cheer as a varsity sport.<sup>122</sup> USA Gymnastics' sanction of NCATA events is further evidence of support for competitive cheer.<sup>123</sup>

Second, many institutions already provide competitive cheer albeit only with some of the benefits provided to other athletic teams.<sup>124</sup> Gaining emerging sport status would require institutions to fully accommodate competitive cheer with all benefits enjoyed by other varsity sports to achieve the requisite equality.<sup>125</sup> As discussed in *Biediger*, Quinnipiac accorded its competitive cheer team with six full-time scholarships, costs for travel, lodging, equipment, operational expenses, and "benefits on par with those received by other varsity teams, such as equipment; access to facilities, trainers, and strength and conditioning coaches; the opportunities to participate in 'power hour' study

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rules: 1) The competitive cheer season would last 132 days, counting back from the final championship event; 2) Each competitive cheer team could have up to three paid coaches, and could have one additional volunteer coach; 3) Each team must compete in at least eight contests, including the championship, over the course of the season; 4) No team could have more than twelve scholarship spots; 5) Teams could have approximately thirty-five players, although the number was never decided definitely; 6) Competitions must be played on cushioned mats; and 7) A certified trainer must be present at all practices and competitions.

<sup>122</sup> *See id.* The mission of NCATA is to receive emerging sport status. The member institutions support this goal and are active in pursuing emerging sport designation for competitive cheer as part of NCATA. As institutions that already sponsor competitive cheer teams, their commitment letters are essential to NCATA's proposal.

<sup>123</sup> *USA Gymnastics agrees to sanction NCATA events, supra* note 97. USA Gymnastics, a respected governing body in athletics, agreed to sanction NCATA events. NCATA member schools will become members of USA Gymnastics. NCATA is viewed as an extension of USA Gymnastics. *See also USA Gymnastics and NCATA Form Alliance, OFFICIAL SITE OF BAYLOR BEARS ATHLETICS*, <http://www.baylorbears.com/sports/comp-cheer/spec-rel/090810aaa.html> (last visited Nov. 4, 2010).

<sup>124</sup> *See Biediger*, 728 F. Supp. 2d at 81-82.

<sup>125</sup> *See Title IX and Intercollegiate Athletics*, 44 Fed. Reg. at 71415, *supra* note 45. Title IX requires that all varsity sports receive equal benefits and treatment.

halls and the University's 'positive play' community service program; and publicity about the team's news and successes."<sup>126</sup> Despite providing such benefits, Quinnipiac failed to provide its competitive cheer team with locker room space.<sup>127</sup>

Although many institutions already provide equality in benefits to their competitive cheer teams, they are not sufficient to make the programs fully Title IX and NCAA compliant.<sup>128</sup> Emerging sport status would mandate that collegiate institutions adhere to the requirements that all sports teams enjoy equity in opportunity and benefits.<sup>129</sup> Competitive cheer would be subject to the NCAA bylaws regulating recruiting practices,<sup>130</sup> academic requirements,<sup>131</sup> and competition,<sup>132</sup> to say the least.<sup>133</sup>

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<sup>126</sup> Biediger, 728 F. Supp. 2d at 81.

<sup>127</sup> *See id.*

<sup>128</sup> *See id.* (stating "[a]lthough the NCAA does not recognize competitive cheer as a varsity sport, the Quinnipiac competitive cheer team still followed applicable NCAA rules, such as requiring all participants to be cleared by Quinnipiac's medical staff before competing and following practice time restrictions."). Quinnipiac's competitive cheer team received six full-time scholarships and "benefits on par with those received by other varsity teams."

<sup>129</sup> *See* THE NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 5, at 297. Bylaw 20.02.5 provides that emerging sports are to be countable sports. Emerging sports are acknowledged as varsity for Title IX purposes.

<sup>130</sup> *See id.* at 77. Bylaw Art. 13 provides pertinent requirements for recruitment at member institutions.

<sup>131</sup> *See id.* at 129. Bylaw 14.1 provides general academic eligibility requirements for student athlete participation.

<sup>132</sup> *See id.* at 213. Bylaw Art. 17 sets forth the competition regulations for each sport individually. Competitive cheer would be included among the list with specified competition season, rules, and requirements.

<sup>133</sup> *See Criteria for Emerging Sports*, NAT'L COLLEGIATE ATHLETIC ASS'N, available at <http://www.ncaa.org/wps/wcm/connect/067159804e0d61ecbc36fc1ad6fc8b25/Criteria+For+Emerging+Sports.pdf?MOD=AJPERES&CACHEID=067159804e0d61ecbc36fc1ad6fc8b25> (last visited Nov. 4, 2010). Competitive cheer would be subject to NCAA recruiting bylaws regulating telephone calls, official visits, seasonal evaluation periods, etc. NCAA bylaws also mandate academic requirements and accommodation of disabilities. Competitive cheer, if made an emerging sport, would be subject to all NCAA regulations. *See* THE NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 5, at 297.

Third, competitive cheer meets the guidelines proposed by the OCR.<sup>134</sup> The OCR should apply its case-by-case analysis to evaluate the merits of competitive cheer as a sport because competitive cheer teams at institutions such as Maryland and Quinnipiac engage in sport as defined by the OCR and NCAA. The main purpose of competitive cheer is to compete,<sup>135</sup> and the season will last “132 days counting back from the championship event, which, in 2009–2010, would be the April 2010 NCA Daytona Beach national championship.”<sup>136</sup> In *Biediger*, Quinnipiac afforded its competitive cheer team with the same benefits, coaching,<sup>137</sup> practice schedule and facilities, and equipment as other varsity sports.<sup>138</sup> Similarly, the University of Maryland, recognizing competitive cheer as a varsity sport, provides the same scholarship opportunities and benefits as other varsity sports at the institution.<sup>139</sup> By consciously refusing to acknowledge competitive cheer as a sport, the OCR has denied many women a vital opportunity to participate in meaningful athletic competition in a sport of interest.

Fourth, the NCAA should grant competitive cheer emerging sport status because other collegiate sport regulatory organiza-

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<sup>134</sup> See GENDER EQUITY IN ATHLETICS, *supra* note 19, at 22. Although the OCR used cheerleading as a blatant example of what a sport is not, it is time for the OCR to re-evaluate the evolved competitive cheer under its “sport criteria.” Competitive cheer selects participants based on athletic ability. NCATA defined its cheer season at the September 2009 Cheer Summit, and the primary purpose of competitive cheer is competition, not support of other athletic teams. If the OCR analyzed competitive cheer under these criteria, it would find that competitive cheer, unlike sideline cheer, is a bona fide sport.

<sup>135</sup> See NAT’L COLLEGIATE ACROBATIC & TUMBLING ASS’N, *supra* note 76.

<sup>136</sup> *Biediger*, 728 F. Supp. 2d at 82.

<sup>137</sup> See *id.* at 82-83. Quinnipiac University employs Mary Ann Powers as head coach of its competitive cheer team along with two paid assistant coaches and one unpaid volunteer coach. Mary Ann Powers was moved from sideline cheer coach to competitive cheer coach by administration. No national search was conducted.

<sup>138</sup> See *id.* at 81.

<sup>139</sup> See UNIV. OF MD. COMPETITIVE CHEER RECRUITMENT PACKET 2009, available at [http://www.umterps.com/auto\\_pdf/p\\_hotos/s\\_chools/md/sports/comp-cheer/auto\\_pdf/RecruitmentPacket2009](http://www.umterps.com/auto_pdf/p_hotos/s_chools/md/sports/comp-cheer/auto_pdf/RecruitmentPacket2009).

tions have already done so.<sup>140</sup> The National Association of Intercollegiate Athletics (“NAIA”) placed competitive cheer on its emerging sport list in 2009, along with bowling and men’s volleyball.<sup>141</sup> The NAIA, comprised of smaller collegiate institutions, acknowledges that competitive cheer meets its criteria as an emerging sport.<sup>142</sup> The NAIA and the NCAA have similar requirements for emerging sport status.<sup>143</sup> Both regulatory organizations require intent to sponsor a varsity team in the sport of interest by a minimum number of institutions.<sup>144</sup> The NCAA requires twenty institutions whereas the NAIA requires twenty-five.<sup>145</sup> Additionally, the NCAA requires that petitioners include general competition rules and format for their proposed emerging sport.<sup>146</sup> While the NAIA does not require petitioners to propose general competition rules and format for the sport, it requires that all institutions participating in the emerging sport create a mandatory coaches’ association to develop policies and procedures for the new sport.<sup>147</sup> Although the NAIA’s actions do not require the NCAA to take the same step, it demonstrates

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<sup>140</sup> See *Emerging Sports*, NAT’L ASS’N OF INTERCOLLEGIATE ATHLETICS, <http://naia.cstv.com/member-services/championships/EmergingSports/EmergingSports.htm> (last visited Nov. 27, 2010). “Competitive Cheer and Dance has reached an impressive number of varsity teams in the last several years. The NAIA is working toward being the first collegiate organization to offer Competitive Cheer and Dance as a Championship Sport.” In 2009, the NAIA added competitive cheer and dance to its list of emerging sports.

<sup>141</sup> See *id.*

<sup>142</sup> See *id.* The NAIA acknowledges competitive cheer as a recognized sport, which requires at least fifteen current NAIA institutions sponsor a varsity team for competition. “Competitive cheer and dance, under the NAIA governance structure, reached championship sport status when more than 50 member colleges and universities declared to participate during the 2010-11 academic year.”

<sup>143</sup> See *Emerging Sports for Women*, *supra* note 106 (the NCAA requires twenty or more existing teams and ten letters of commitment submitted with the proposal for emerging sport status). See also, *Emerging Sports*, *supra* note 140 (the NAIA requires twenty-five institutions to sponsor a varsity team in the sport of interest).

<sup>144</sup> See *id.*

<sup>145</sup> See *id.*

<sup>146</sup> See *Emerging Sports for Women*, *supra* note 106.

<sup>147</sup> See *Emerging Sports*, *supra* note 140.

a dedication to Title IX's basic purpose of prohibiting sex-based discrimination, while simultaneously providing athletic opportunity to the underrepresented sex. The NCAA should grant emerging sport status to competitive cheer for the same reasons—increased athletic opportunity and to further Title IX's basic purpose of gender equity in sports.

The last reason competitive cheer should receive emerging sport status is that this sport clearly has not received the respect it is due. Discrimination surrounding the perception of cheerleading has hindered honest evaluation of the competition and athleticism involved.<sup>148</sup> The scrutiny and stigma that accompanies the image of traditional sideline cheerleaders as athletes has prompted many competitive cheer teams to change their team name.<sup>149</sup> Felecia Mulkey, University of Oregon Head Coach, renamed Oregon's competitive cheer team to "Team Stunts and Gymnastics" immediately after her hire.<sup>150</sup> The NCATA officially renamed the sport "Acrobatics and Tumbling."<sup>151</sup> To fur-

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<sup>148</sup> See POINT OF THE GAME: CONVERSATIONS ON SPORTS, ETHICS AND CULTURE, <http://pointofthegame.blogspot.com/2010/08/competitive-cheerleading-violates-title.html> (Aug. 1, 2010, 7:40 AM) (arguing that "pretending" cheerleading qualifies as a competitive sport would violate the very intent to Title IX; J. Patrick Dobel further asserts that using cheerleading to comply with Title IX would provide an easy route for institutions to save money and avoid expansion of opportunity for women's sports).

<sup>149</sup> See NAT'L COLLEGIATE ACROBATIC & TUMBLING ASS'N, *supra* note 76. While the University of Maryland, Baylor University, and Fairmont State University still maintain "competitive cheer" teams, other NCATA member schools have renamed their teams to avoid scrutiny and better describe the sport itself. Azusa Pacific University and Quinnipiac University sponsor Acrobatics and Tumbling teams. University of Oregon has dubbed its team stunts and gymnastics.

<sup>150</sup> See Katie Thomas, *Competitive Cheer Fans See Acceptance In Future*, N.Y. TIMES, July 22, 2010, available at [http://www.nytimes.com/2010/07/23/sports/23cheerleading.html?\\_r=2&ref=sports](http://www.nytimes.com/2010/07/23/sports/23cheerleading.html?_r=2&ref=sports) (Defending her decision to change the team's name, Felecia Mulkey stated, "[t]he name conjured outdated images of pompoms and miniskirts. Calling it the team stunts and gymnastics program better described her squad of talented athletes. The message was clear: Mulkey's team would be cheering for itself alone. And the activity deserved to be considered a sport."). Mulkey has since changed the team's name to "Acrobatics and Tumbling."

<sup>151</sup> See NAT'L COLLEGIATE ACROBATIC & TUMBLING ASS'N, *supra* note 76. The sport has also been referred to as "Stunts and Tumbling."

ther avoid being confused with traditional sideline cheerleading and to promote awareness of this evolved sport,

The NCATA has taken the necessary step of removing the word ‘cheer’ from its name to help the public focus on the competitive and athletic aspects of the sport and move past the stereotypes of traditional cheerleading. Unlike many institutions that have excellent spirit squads/sideline teams which lead cheers at games but rarely, if at all, compete, competitive stunt and tumbling teams reflect the evolution of cheerleading’s most athletic elements into a true intercollegiate sport.<sup>152</sup>

Additionally, the OCR explicitly stated in its 1996 Clarification Letter that an athlete counts if and only if provided with an opportunity that is “real not illusory.”<sup>153</sup>

Whether named “competitive cheer” or “acrobatics and tumbling,” the athletic opportunities are real for many women.<sup>154</sup> If the NCAA were to grant emerging sport status to “acrobatics

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<sup>152</sup> UNIVERSITY OF MARYLAND COMPETITIVE CHEER RECRUITMENT PACKET 2009, available at [http://www.umterps.com/auto\\_pdf/p\\_hotos/s\\_schools/md/sports/comp-cheer/auto\\_pdf/RecruitmentPacket2009](http://www.umterps.com/auto_pdf/p_hotos/s_schools/md/sports/comp-cheer/auto_pdf/RecruitmentPacket2009). See also *Mulkey Named Ducks’ First Team Stunts and Gymnastics Coach*, GODUCKS.COM, May 15, 2008, available at [http://www.goducks.com/ViewArticle.dbml?DB\\_OEM\\_ID=500&ATCLID=1470800](http://www.goducks.com/ViewArticle.dbml?DB_OEM_ID=500&ATCLID=1470800) (last visited Nov. 5, 2010) (“‘There is a stereotype because competitive cheer started with cheerleading and people do not want to let that go,’ Mulkey said. ‘It conjures up images of cheerleaders on the sidelines, which is not what we are. There is no cheerleading going on in competitive cheer, which is why we changed the name. I’m hoping people can drop the stereotype. When they see what we’re doing with team stunts and gymnastics they will see that it’s something completely different than what the people on the sidelines are doing. And hopefully that will change the thought process that I think is really holding the sport back.’”).

<sup>153</sup> See U.S. COMM’N ON CIVIL RIGHTS, TITLE IX ATHLETICS: ACCOMMODATING INTERESTS AND ABILITIES 116 (Briefing Report, 2010) available at <http://www.usccr.gov/pubs/TitleIX-2010-rev100610.pdf>.

<sup>154</sup> The term “real” is meant to address the legitimacy of benefits and opportunities provided by acrobatics and tumbling. If the NCAA were to grant emerging sport status to acrobatics and tumbling, it would provide scholarships, future opportunities in education and sport, and genuine recognition of the achievements these women accomplish. Since these acrobatics and tum-



and tumbling,” the opportunities in education and athletic competition for acrobatics and tumbling would equal those opportunities of established varsity sports such as volleyball or softball. Collegiate institutions would be required by the OCR to fully comply with Title IX regulations as they pertain to this emerging sport—equality of benefits provided and protection from sex-based discrimination in athletics.<sup>155</sup>

In NCAA’s history of emerging sports, activities such as bowling, badminton, and archery received credence within the sports community.<sup>156</sup> Bowling, badminton and archery require precision, skill, and an arguably negligible amount of physical strength. Acrobatics and tumbling, with firm roots in gymnastics, requires an immense amount of skill, precision, and strength.<sup>157</sup> Acrobatics and tumbling “is an athletic endeavor that could be easily described as *group floor gymnastics*.”<sup>158</sup> This sport requires an inordinate amount of strength and skill to be competitive at the collegiate level. Acrobatics and tumbling opportunities are far from illusory. Due to the court’s reliance on their determinations, and until the OCR and other regulatory entities acknowledge the genuine interest in acrobatics and tumbling, the women Title IX purports to protect from discrimination will continue to be denied legitimate opportunities in collegiate athletics.

#### ***D. Granting Emerging Sport Status to Acrobatics and Tumbling Will Further Title IX Policy Interests***

Title IX seeks to create and maintain equality of opportunity in education and athletics.<sup>159</sup> The NCAA, along with the CWA,

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bling teams clearly meet the OCR and NCAA criteria for sport, the opportunities cannot be considered illusory.

<sup>155</sup> See Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71413.

<sup>156</sup> See *Emerging Sports for Women*, *supra* note 106.

<sup>157</sup> See Biediger, 728 F. Supp. 2d at 78.

<sup>158</sup> *Id.* (quoting language from *Biediger v. Quinnipiac Univ.*, 616 F. Supp. 2d at 295).

<sup>159</sup> See 20 U.S.C. § 1681 (2006).

evaluates potential new sports for emerging sport status.<sup>160</sup> The CWA requires that proposals from institutions include data demonstrating support for the sport.<sup>161</sup> High school sponsorship, a tangible measure of female student interest in sport, is considered along with professional and Olympic sport sponsorship when awarding emerging sport status.<sup>162</sup> The data available for acrobatics and tumbling at the high school level is compelling,<sup>163</sup> and collegiate sponsorship of this sport is necessary to provide increased opportunities for these young women.

The National Federation of State High School Associations (“NFHS”)<sup>164</sup> conducts annual high school athletics participation surveys.<sup>165</sup> During the 2008–09 school year, competitive cheer ranked ninth in popularity among high school girls’ sports.<sup>166</sup> The NFHS 2009–10 High School Athletics Participation Survey illustrates that there are 123,644 female participants in the sport of competitive cheer, what the survey calls competitive spirit squads.<sup>167</sup> This number reflects greater female high school athletic participation in competitive cheer than in other NCAA emerging sports. High school female athletic participation in

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<sup>160</sup> See *Criteria for Emerging Sports*, *supra* note 135.

<sup>161</sup> See *id.* The CWA evaluates collegiate recreation and intramural sponsorship, non-scholastic competitive programs, Olympic sponsorship of the sport, professional sport opportunities, and high school sport sponsorship.

<sup>162</sup> See *id.*

<sup>163</sup> See THE NAT’L FED’N OF STATE HIGH SCHOOL ASSOCIATIONS, <http://www.nfhs.org/content.aspx?id=3282&linkidentifier=id&itemid=3282> (last visited Nov. 30, 2010).

<sup>164</sup> See *id.* The National Federation of State High School Associations is a high school sports and interscholastic regulatory organization which oversees the fifty member state high school associations.

<sup>165</sup> See *id.*

<sup>166</sup> *Competitive Cheer Summit Held at Maryland: Plans to Advance the Sport as an NCAA Emerging Sport Gain Momentum*, UNIVERSITY OF MARYLAND ATHLETICS, Sept. 18, 2009, available at <http://www.umterps.com/sports/comp-cheer/spec-rel/091809aaa.html>. (last visited Nov. 27, 2010). Competitive cheer had 117,793 participants during the 2008–09 school year surpassing current and former emerging sports such as equestrian (1,039 participants), bowling (23,847 participants), and crew (2,455 participants).

<sup>167</sup> NAT’L FED’N OF STATE HIGH SCHOOL ASSOCIATIONS, *supra* note 163. The data shows the number of female participants in various sports. The data is collected from the fifty member state high school associations.

bowling, equestrian, and ice hockey were lower than competitive cheer—with bowling having 24,942 female participants; equestrian having 1,395 female participants; and ice hockey having 8,254 female participants.<sup>168</sup> To ignore the immense interest of female high school athletes is to undermine the policy reasons supporting Title IX's enforcement.

The NCAA must also grant emerging sport status to acrobatics and tumbling because, as we have seen in *Biediger*, courts defer to the NCAA's treatment of sports when making its determinations in Title IX cases.<sup>169</sup> Although Judge Underhill determined competitive cheer “could easily be described as ‘group floor gymnastics[,]’” and “strictly engage[s] in sport,” he determined, as a matter of law, that competitive cheer is not a sport because of the NCAA's refusal to declare it as such.<sup>170</sup> By granting emerging sport status, the NCAA will send a message to the sports and legal communities that competitive cheer is a legitimate sport. The designation will provide new and legitimate opportunities in education and athletics to the 123,644 high school athletes seeking them.<sup>171</sup> It will also provide legitimacy and equality of opportunity and benefits for the over 450,000 high school and collegiate acrobatics and tumbling athletes.<sup>172</sup> The NCAA must grant emerging sport status to competitive cheer to promote and uphold Title IX's objectives: prohibition of sex-based discrimination and equal opportunity for woman in education and athletics.

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<sup>168</sup> 2009–10 High School Athletics Participation Survey, THE NAT'L FED'N OF STATE HIGH SCHOOL ASSOCIATIONS, <http://www.nfhs.org/content.aspx?id=3282&linkidentifier=id&itemid=3282> (last visited Nov. 27, 2010).

<sup>169</sup> See *Biediger*, 728 F. Supp. 2d at 78-79. Judge Underhill begins his legal analysis by stating, “Despite its athletic elements, however, competitive cheer is not recognized as a sport by the NCAA. Nor does the NCAA recognize competitive cheer as an ‘emerging sport,’ a provisional designation that allows a university to count the activity toward NCAA revenue distribution and minimum sports sponsorship requirements.”

<sup>170</sup> See *id.* at 78.

<sup>171</sup> THE NAT'L FED'N OF STATE HIGH SCHOOL ASSOCIATIONS, *supra* note 163.

<sup>172</sup> See NAT'L COLLEGIATE ACROBATIC & TUMBLING ASS'N, *supra* note 76. NCATA estimates over 450,000 all-star competitors.

#### IV. CONCLUSION

Competitive cheer, whether called acrobatics and tumbling, or team stunts and gymnastics—is a sport and should be designated as one by the NCAA. Perhaps a name change is necessary to call attention to the legitimacy of the endeavor and away from stereotypes and misconceptions. The NCAA should grant emerging sport status to acrobatics and tumbling, because acrobatics and tumbling provides new opportunities for women to receive scholarships, gain access to education, and enjoy meaningful participation in collegiate athletics. Furthermore, the purpose of emerging sport status is to create opportunities for institutions to take responsibility in ensuring equity between both sexes in sport. With such strong involvement in competitive cheer already in place, granting it emerging sport status would only expand college and university options for Title IX compliance. Fear that institutions will promote sideline cheer teams to varsity status for the sole purpose of Title IX compliance is unfounded. The NCATA estimates over 450,000 acrobatics and tumbling athletes at the high school and collegiate level.<sup>173</sup> Sponsoring or promoting these teams to varsity status, while simultaneously aiding in Title IX compliance, undoubtedly provides immense growth and opportunity. The women involved have proactively changed a sideline supportive activity into an emerging sport with its roots firmly in gymnastics. The 450,000 estimated acrobatics and tumbling athletes deserve the protection of Title IX—equity of opportunity, equality of benefits, and freedom from sex-based discrimination.

Title IX is about more than quotas and proportionality; it also seeks to provide women with more athletic opportunities based on their true interests. Nearly half a million women are interested in acrobatics and tumbling and they are waiting for a genuine opportunity to participate in a meaningful way. When the NCATA submits its proposal for emerging sport status on behalf

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<sup>173</sup> See *id.*

of acrobatics and tumbling, the NCAA must respond in the affirmative. The NCAA must grant emerging sport status to acrobatics and tumbling.

