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Biediger v. Quinnipiac University

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University¹ athletic departments across the country are often faced with difficult budgetary decisions affecting the number and types of sports teams they support. Universities are sometimes forced to defund certain programs to resolve budgetary issues, but the decision to cut a team involves not only financial considerations, but legal considerations as well. Football and men’s basketball are the only two National Collegiate Athletic Association (NCAA) sports that have been reported profitable by any university.² However, universities cannot simply choose to maintain only profit-generating programs because Title IX of the Education Amendments of 1972 requires universities to create and maintain equal athletic opportunities for men and women.³

In determining whether a university complies with the Title IX equal opportunity requirement, courts apply one of three tests.⁴ The most commonly used test is the “substantial proportionality test,”⁵ which asks “whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially

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1. “University” includes all postsecondary institutions in this context.
 2. See Christopher Lee, *College Athletics by the Numbers*, SPORTSOLOGIST (Sept. 29, 2010), <http://sportsologist.com/college-athletics-by-the-number/> (citing NCAA, REVENUES AND EXPENSES: NCAA DIVISION I INTERCOLLEGIATE ATHLETICS PROGRAMS REPORT 2004–2009, at 28 (Aug. 2010), available at http://www.ncaapublications.com/productdownloads/REV_EXP_2010.pdf (stating that about 57% of football and men’s basketball programs are profitable)).
 3. See 20 U.S.C. § 1681(a) (2012) (“No person in the United States shall, on the basis of sex, be excluded from participation in, denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”); 34 C.F.R. § 106.41(c) (2013) (“A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes.”); *Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62, 89 (D. Conn. 2010) (using the word “genuine” to refer to the 1996 letter from Norma V. Cantú, the former Assistant Secretary for Civil Rights at the Department of Education, which explained that for an athlete to be counted toward Title IX, he or she must be given opportunity that is “real, not illusory” (Norma Cantú, *Clarification of Intercollegiate Athletics Policy Guidance: A Three-Part Test*, U.S. DEP’T OF EDUC. (Jan. 16, 1996), available at <http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>)).
 4. See A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979) (“(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.”).
 5. See Ephraim Glatt, *Defining “Sport” Under Title IX: Cheerleading, Biediger v. Quinnipiac University, and the Proper Scope of Agency Deference*, 19 SPORTS LAW. J. 297, 303 (2012) (explaining that the substantial proportionality test provides a safe harbor for universities that do not want to engage in extensive compliance analysis because the university can maintain compliance by maintaining gender parity between its student body and its athletic population (citing *Horner v. Ky. High Sch. Athletic Ass’n*, 43 F.3d 265, 275 (1994)); *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 94 (2d Cir. 2012) (“OCR has not construed substantial proportionality to require exact proportionality. Rather, substantial proportionality is determined on a case-by-case basis in light of ‘the institution’s specific circumstances and the size of its athletic program.’” (quoting Cantú, *supra* note 3)); Ashlee A. Cassman, *Bring It On! Cheerleading vs. Title IX: Could Cheerleading Ever Be Considered an Athletic Opportunity?*, 17 SPORTS LAW. J. 245, 257 (2010) (“Athletic directors are often advised that satisfying [the substantial proportionality test] is the

proportionate to their respective enrollments.⁶ The substantial proportionality test consists of two prongs. Under the first prong, the Office of Civil Rights (OCR) or a court must determine the number of athletic opportunities the university provides. Under the second prong, the university must establish that the number of athletic opportunities provided is substantially proportionate to the number of students enrolled at the university for each respective sex.⁷ There are two ways to calculate the number of athletic opportunities under prong one. The first way, hereinafter “part A,” is whether an activity is a recognized sport.⁸ If an activity does not satisfy part A, it may be evaluated under “part B,” which determines whether the activity is a genuine athletic opportunity under the OCR definition.⁹

Under part A, an activity is entitled to a rebuttable presumption that it is a sport if it is recognized by an intercollegiate athletic organization, such as the NCAA or the National Association of Intercollegiate Athletics (NAIA).¹⁰ If it is not recognized by an intercollegiate athletic organization, the court will evaluate the activity under part B and determine if it is a “genuine athletic opportunity” for Title IX compliance purposes on a case-by-case basis by considering factors such as administration, structure, preparation, and competition.¹¹ Specifically, only genuine athletic opportunities taking place in the context of a sport can be counted toward compliance.¹² Once it has been established that a genuine athletic opportunity exists, the court will compare the number of opportunities provided to each sex with the university’s respective enrollment.¹³ Only those universities that provide a number of opportunities that is substantially proportionate to enrollment will be in compliance with Title IX.

Universities planning to cut funding for an unprofitable team must ensure that substantial proportionality is maintained either by replacing that team with another team for the same sex (which may be less expensive to operate) or by cutting a team

only definite way to guarantee Title IX compliance. This is because it is the only objective and clearly quantifiable test.”).

6. A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413.

7. See *Biediger*, 728 F. Supp. 2d at 87.

8. *Id.* at 89.

9. *Id.* at 90.

10. See *id.* at 89–90.

11. See *id.*

12. *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 93 (2d Cir. 2012) (citing Stephanie Monroe, *Dear Colleague Letter: Athletic Activities Counted for Title IX Compliance*, U.S. DEP’T OF EDUC. (Sept. 17, 2008), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20080917.html> (clarifying the 1996 OCR letter, Cantú, *supra* note 3, stating that an athlete must be given a real, not illusory participation opportunity)). While the OCR does not have a specific definition for the term “sport,” it will look at factors such as administration, structure, preparation, and competition to determine whether an activity is a sport for compliance purposes. See *id.* Real opportunities are those that provide “the same benefits as would be provided to *bona fide* athletes.” *Id.* See also Glatt, *supra* note 5 (explaining that a given activity that is not comparable to existing varsity sports will not be considered a sport for Title IX purposes (citing *Horner v. Ky. High Sch. Athletic Ass’n*, 43 F.3d 265, 275 (6th Cir. 1994))).

13. See *Biediger*, 728 F. Supp. 2d at 89.

of the opposite sex.¹⁴ The goal of promoting gender equality through the substantial proportionality test can sometimes lead schools to take steps that undermine the purpose of Title IX, rather than promote growth of athletic opportunity. For example, to remain in compliance, universities sometimes engage in deceitful practices,¹⁵ cut teams for one sex instead of add teams for the other sex,¹⁶ or fund teams in which there is a lack of genuine interest to compete at the varsity level because those teams are less expensive to fund than more popular sports.¹⁷

In *Biediger v. Quinnipiac University*, members of the varsity volleyball team sought an injunction to prevent the university's athletic department from cutting women's volleyball and replacing it with competitive cheerleading.¹⁸ The plaintiffs asserted that the university engaged in discriminatory conduct against its female athletes¹⁹ by replacing volleyball with an activity that is neither an NCAA varsity sport nor a genuine athletic opportunity.²⁰ Using the substantial proportionality test, the court determined that Quinnipiac's competitive cheerleading team was not presumed to be a sport because the NCAA did not recognize the activity as a sport.²¹ Therefore, the court evaluated the cheerleading team according to its structure, administration, team preparation, and competition, and determined that Quinnipiac's competitive cheerleading team did not constitute a genuine athletic opportunity for

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14. See *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1048–49 (8th Cir. 2002) (citing *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763 (9th Cir. 1999)) (“[E]very court, in construing the Policy Interpretation and the text of Title IX, has held that a university may bring itself into Title IX compliance by increasing athletic opportunities for the underrepresented gender (women in this case) *or* by decreasing athletic opportunities for the overrepresented gender (men in this case).”).
 15. See, e.g., *Biediger*, 728 F. Supp. 2d at 66 (finding that Quinnipiac manipulated rosters by adding female athletes just prior to the first competition and then removing them later in the season); see also 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, 1612 (2004) (discussing the negative implications of roster management practices).
 16. See, e.g., *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 611 (6th Cir. 2002) (addressing a case in which, due to a lack of funds to increase athletic opportunities for women, Miami University was forced to cut men's wrestling, tennis, and soccer in order to comply with Title IX's substantial proportionality requirement).
 17. See Cassman, *supra* note 5, at 258 (discussing a few of the options schools have in order to remain in Title IX compliance).
 18. See *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 91 (2d Cir. 2012); Cassman, *supra* note 5, at 254 (explaining that competitive cheerleading exists for the purpose of competition, in contrast to traditional cheerleading, in which cheerleaders are on the sidelines cheering for a team to win, and that competitive cheerleading teams perform high-risk stunts resembling gymnastics and compete against other teams at multiple competitions throughout a season).
 19. The plaintiffs also argued that Quinnipiac engaged in roster manipulation practices. This case comment does not address roster manipulation practices. For the court's discussion of this claim, see *Biediger*, 728 F. Supp. 2d at 65–66.
 20. See *Biediger*, 691 F.3d at 91.
 21. See *id.* at 103; see also *Cohen v. Brown Univ.*, 991 F.2d 888, 897 (1st Cir. 1993); Monroe, *supra* note 12; see generally 34 C.F.R. § 106.41 (2013).

Title IX purposes.²² The U.S. Court of Appeals for the Second Circuit affirmed, finding Quinnipiac in violation of Title IX.²³

This case comment contends that the substantial proportionality test used to determine whether an extracurricular activity constitutes a genuine athletic opportunity is flawed because it fails to promote athletic growth through new activities and can, in fact, hinder the progression of intercollegiate sports. Specifically, the criteria used to evaluate an activity²⁴ is flawed for two reasons.²⁵ First, the test does not evaluate the athleticism required by an activity in determining whether it is a genuine athletic opportunity—ignoring the nature of the opportunities that the statute was intended to promote, and potentially encompassing sedentary activities such as chess.²⁶ “OCR does not have a specific definition for the term ‘sport.’ Instead, OCR considers several factors related to an activity’s structure, administration, team preparation and competition”²⁷ Second, evaluating whether a newly developed activity has similar competitive opportunities to existing sports undermines the goal of creating equal opportunity because teams engaging in new activities cannot survive this rigorous standard.²⁸ Under a modified standard that includes consideration of the athletic component of an activity and allows for a developmental period, universities would need to cut fewer programs to maintain substantial proportionality. Thus, they would be better able to provide more athletic opportunities for both sexes—in support of the purpose of Title IX. Quinnipiac’s competitive cheerleading team would qualify as a genuine athletic opportunity under this modified standard.

Quinnipiac University, a participating NCAA Division I institution located in Hamden, Connecticut, sponsored seven varsity men’s athletic teams and twelve varsity women’s athletic teams before the 2009–10 academic year.²⁹ Academic enrollment at Quinnipiac totaled 5,686 students, 61.87% of whom were female and 38.13% of whom were male.³⁰ In March 2009, the university announced its plans to cut three varsity sports from its athletic program for the 2009–10 academic year—women’s volleyball, men’s track and field, and men’s golf.³¹ The eliminated sports

22. See *Biediger*, 691 F.3d at 93–94; Monroe, *supra* note 12 (describing the substantial proportionality test the OCR created to determine whether an activity is a sport and the factors considered in the evaluation of an activity); see also *Cohen v. Brown Univ.*, 991 F.2d at 896; *Equity in Athletics, Inc. v. Dep’t of Educ.*, 639 F.3d 91, 110 (1st Cir. 2011).

23. See *Biediger*, 691 F.3d at 104–05.

24. See Monroe, *supra* note 12.

25. This case comment focuses specifically on the OCR determination of a sport in the first prong of the substantial proportionality test. The court in *Biediger* focused primarily on this prong because competitive cheerleading is not an NCAA sport, and therefore, not entitled to the presumption that it is a sport.

26. See Glatt, *supra* note 5, at 321.

27. Monroe, *supra* note 12.

28. See *id.*

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

30. *Id.*

31. See *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 91 (2d Cir. 2012).

were replaced by a newly created women's varsity competitive cheerleading squad with thirty spots for female participants.³²

Competitive cheerleading and varsity sports at Quinnipiac have similar administrative structures. The competitive cheerleading team was directed by Quinnipiac's athletic department and received funding, a coaching staff, and other benefits akin to those of other varsity sports on campus.³³ For its inaugural year, the cheerleading team's operating budget began at \$50,000 and increased with the permission of the athletic department as the year progressed.³⁴ The coaching staff reported to the athletic director and was responsible for using this budget to travel, provide equipment, train players, and recruit athletes.³⁵ The team also received six full-time scholarships to award to team members.³⁶ Other benefits included team awards, university-wide awards, medical treatment, and study halls.³⁷

In addition to the administrative structure, the competitive cheerleading athletes practiced on campus a total of twenty hours during the regular season and eight hours during the off-season, which was consistent with NCAA practice requirements and other varsity sports at Quinnipiac.³⁸ The competitive cheerleading team's regular season was governed by the National Competitive Stunt and Tumbling Association (NCSTA), which establishes uniform rules for participating teams.³⁹ For example, the NCSTA provides that teams compete in a minimum of eight competitions during the regular season.⁴⁰ In 2009–10, Quinnipiac's team competed in ten competitions with other collegiate varsity programs, collegiate club programs, collegiate sideline cheer teams, all-star squads, and high school cheer squads.⁴¹ Postseason competitions were governed by the National Cheerleading Association (NCA), which has hosted an annual national championship for intercollegiate cheerleaders since 1990.⁴² While the NCA playoff system included several sideline cheer teams, the NCA placed teams in divisions according to their size and ability.⁴³ Quinnipiac's cheerleading team competed only against collegiate varsity teams in the

32. *See id.*

33. *See id.* at 103.

34. *See Biediger*, 728 F. Supp. 2d at 95.

35. *See id.* (explaining that recruiting took place solely on campus because the team was created not long before the season was scheduled to start).

36. *See id.*

37. *See id.*

38. *See id.* at 96.

39. *See id.* at 82.

40. *See id.*

41. *See id.* at 97.

42. *See id.* at 79, 97.

43. *See id.* at 79.

NCA championship, demonstrating the competitive nature of the team, and supporting the notion that the team should be treated like other varsity sports.⁴⁴

Not all of the university's female athletes were content with Quinnipiac's efforts to comply with Title IX and provide genuine athletic opportunities for women by creating a competitive cheerleading program.⁴⁵ Five members of the varsity volleyball team and their coach filed suit against the university, claiming that Quinnipiac discriminated against its female athletes because the athletic opportunities provided did not fully and effectively accommodate women's athletic interests and abilities.⁴⁶ Specifically, the plaintiffs claimed that cheerleading was not an acceptable replacement for the volleyball team because cheerleading is neither a varsity sport recognized by the NCAA, nor a genuine athletic opportunity for Title IX purposes.⁴⁷

The district court granted a permanent injunction enjoining Quinnipiac from cutting the volleyball program, finding that cheerleading "did not yet afford genuine athletic participation opportunities in a varsity sport."⁴⁸ Although the competitive cheerleading team was structured like other varsity sports at Quinnipiac with respect to administration, support services, and practice time, the court concluded that the cheerleading team's inability to recruit off-campus and the underdeveloped state of competition⁴⁹ rendered cheerleading ineligible for Title IX compliance.⁵⁰

On appeal, Quinnipiac argued that the thirty roster spots available to women on the competitive cheerleading team should count for Title IX purposes and that, even if these positions were excluded, the resulting 3.62% disparity between the percentage of all genuine athletic opportunities available at the university for female students (58.25%) and the percentage of the total student population that was female (61.87%) was insufficient to warrant a Title IX violation.⁵¹ Quinnipiac argued that it provided athletic opportunities that were "substantially proportionate" to the enrollment of male and female students.⁵² The Second Circuit rejected this argument and affirmed the trial court's decision to preclude the thirty roster spots on the competitive

44. *See id.* at 98.

45. *See id.* at 62.

46. *See id.* at 63–64.

47. *See id.* at 64 (describing the plaintiffs' additional claims that the athletic department would manipulate rosters by increasing or decreasing roster sizes for the first competition in order to comply with Title IX's substantial proportionality requirements, and then subsequently increasing or decreasing the number of roster spots).

48. *Id.* at 95 (granting a preliminary injunction based on the plaintiffs' roster manipulation claims).

49. The court described the competition as "underdeveloped" because there were few varsity teams to compete against and no uniform rules of competition. *See id.* at 97–100.

50. *See id.* at 99–100; *Cohen v. Brown Univ.*, 991 F.2d 888, 897 (1st Cir. 1993); *A Policy Interpretation: Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71,413 (Dec. 11, 1979); *Monroe*, *supra* note 12; *Equity in Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 96 (4th Cir. 2011).

51. *See Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 91 (2d Cir. 2012); *Equity in Athletics*, 639 F.3d at 110.

52. *Biediger*, 691 F.3d at 96.

cheerleading team from being included in the female athlete count.⁵³ The court reasoned that competitive cheerleading is not presumed to be a sport under prong one, part A of the substantial proportionality test because competitive cheerleading is not yet recognized as a varsity sport—or even as an emerging sport⁵⁴—by the NCAA.⁵⁵ Competitive cheerleading also did not satisfy the OCR’s definition of a sport under prong one, part B despite being structured and administered like other varsity sports at Quinnipiac because the program did not conduct off-campus recruitment and did not have a uniform set of rules to govern competition.⁵⁶

This case comment contends that the substantial proportionality test the court used in *Biediger* is flawed because it does not further the purpose of Title IX and hinders opportunities for growth in intercollegiate athletics.⁵⁷ Specifically, the OCR evaluation of an activity under prong one, part B—determining if the activity constitutes a genuine athletic opportunity based on its structure, administration, team preparation, and competition—is flawed for two reasons. First, it ignores the requisite skill, strength, and athleticism required of a sport, despite Title IX’s purpose of ensuring that activities of an *athletic* nature are available to both genders.⁵⁸ “Athleticism is an integral part of the definition of sport”;⁵⁹ however, if the standard remains unchanged, activities requiring little or no physical exertion will fulfill Title IX

53. *See id.* at 85.

54. Current emerging sports for women are rugby, sand volleyball, and equestrian. *Emerging Sports for Women*, NCAA (July 16, 2012), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Emerging+Sports+for+Women> (“An emerging sport is a sport recognized by the NCAA that is intended to provide additional athletics opportunities to female student-athletes.”).

Bylaws require that emerging sports must gain championship status (minimum 40 varsity NCAA programs or 28 [D]ivision III varsity programs for a [D]ivision III only championship) within 10 years or show steady progress toward that goal to remain on the list. Institutions are allowed to use emerging sports to help meet the membership minimum sports sponsorship requirements and, in Divisions I and II, minimum financial aid requirements. Sports do not have to be NCAA championship or emerging sports to be varsity, nor does such status mean the institution’s conduct of the sport meets Office for Civil Rights or Title IX standards for varsity sports.

Id.

55. *See id.*; *see also Biediger*, 691 F.3d at 94; Monroe, *supra* note 12; *see generally* A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413.

56. *See Biediger*, 691 F.3d at 99–100; Monroe, *supra* note 12.

57. *See* Cassman, *supra* note 5, at 257–58. The overall intent of Title IX is to preserve the integrity of intercollegiate athletics by maintaining both genders’ opportunities to participate. *See* 34 C.F.R. § 106.41(a) (2013) (“No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.”).

58. *See* 34 C.F.R. § 106.41(c).

59. Glatt, *supra* note 5, at 320 (defining sport as “an athletic activity requiring skill or physical prowess” and as “an activity involving physical exertion and skill”).

requirements,⁶⁰ while those activities that require just as much, if not more, physical exertion than current varsity sports (e.g., competitive cheerleading) will not fulfill Title IX requirements. Second, newly proposed activities cannot offer competition comparable to existing varsity sports without adequate time for other universities to invest resources and create their own teams. University athletic departments often face budgetary issues and are hesitant to invest in activities that cannot help the university comply with Title IX.⁶¹ Requiring newly developed activities to involve competition that is comparable in quantity and quality to established varsity sports discourages universities from committing their resources to new athletic proposals.

The evaluation process for activities under the substantial proportionality test should therefore be modified. First, the analysis of whether something is a genuine athletic opportunity should involve consideration of the athletic nature of the activity. Second, the test should allow a developmental period to provide for the expansion of competition to a level comparable to other sports. New activities that satisfy administrative and structural factors, such as competitive cheerleading, should be afforded a genuine chance to develop into a widely recognized varsity sport.

The U.S. Department of Education (DOE) interprets Title IX to require universities to provide equal athletic opportunity for members of both sexes.⁶² Whether a university is providing equal athletic opportunities is evaluated using one of three possible tests,⁶³ but the substantial proportionality test, determining whether intercollegiate athletic opportunities are provided for both male and female athletes in numbers substantially proportionate to their respective enrollments in the university,⁶⁴ is most commonly used.⁶⁵ The substantial proportionality test consists of two prongs. Under prong one, part A, an activity recognized by an intercollegiate athletic organization—like the NCAA—is entitled to a rebuttable presumption that the activity is a sport and therefore a genuine athletic opportunity to be counted toward Title IX compliance.⁶⁶ This presumption can be overcome by evidence that demonstrates that the activity does not satisfy the factors set forth by the OCR.⁶⁷ If the activity is not recognized by an intercollegiate athletic organization, this

60. *See id.* at 321 (using chess and card games as examples of activities that require almost no physical exertion, but may qualify as a “sports” or “athletic opportunities” under the current standard); *Championship Central*, NCAA, <http://www.ncaa.com/championships> (2013) (showing that rifle is an NCAA sport).

61. *See* Glatt, *supra* note 5, at 320.

62. Cantú, *supra* note 3.

63. The OCR has clarified that institutions need to comply with only one part of the three-part test—(1) substantial proportionality, (2) history, or (3) continuing practice or fully and effectively accommodating interests and abilities of the underrepresented sex. *See* A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,418 (Dec. 11, 1979); Cantú, *supra* note 3.

64. *See* A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,418; Cantú, *supra* note 3; Monroe, *supra* note 12.

65. *See* Glatt, *supra* note 5.

66. *See* Monroe, *supra* note 12.

67. *See id.* (discussing program structure, administration, team preparation, and competition).

presumption does not apply and the court will then evaluate the activity under the OCR definition of a sport in prong one, part B. The factors that a court considers relate to program structure, administration, team preparation, and competition—including, for example, scholarships, funding, recruiting, scheduling, practice schedule, and postseason play.⁶⁸ If the court determines that the new activity is similar to existing varsity sports at the university, then it may be counted as a genuine athletic opportunity for Title IX purposes.⁶⁹

Under the substantial proportionality test, analysis begins under prong one by determining the number of all male and female participants in the institution's genuine athletic opportunities.⁷⁰ Under part A, if an activity is recognized by an intercollegiate athletic association, it may be counted toward compliance.⁷¹ If the activity is not recognized, it is evaluated under part B to determine whether it can be considered a genuine athletic opportunity.⁷² Athletes who receive benefits and services afforded to members of an intercollegiate athletic team should be counted toward compliance.⁷³ These benefits include “training and practice time, coaching, tutoring services, locker room facilities, and equipment, as well as important non-tangible benefits derived from being a member of an intercollegiate athletic team.”⁷⁴ Athletes who practice but may not compete are also counted because there are no minimum criteria for playing time or athletic ability, so long as the participant is on the roster by the date of the first competition.⁷⁵ Once the number of genuine athletic opportunities is counted for both men and women, the analysis proceeds to prong two and the statistics must be compared with each gender's respective enrollment at the university to determine if the athletic opportunities offered are substantially proportionate to enrollment.⁷⁶ If the court finds that the numbers are substantially proportionate, the university is in compliance with Title IX.⁷⁷

The OCR has explained that a genuine athletic opportunity must take place in the context of a “sport.”⁷⁸ The dictionary defines “sport” as “an activity involving

68. *See id.*; Glatt, *supra* note 5, at 307.

69. *See* Monroe, *supra* note 12.

70. *See* Cantú, *supra* note 3.

71. *See* Biediger v. Quinnipiac Univ., 728 F. Supp. 2d 62, 93–94 (D. Conn. 2010).

72. *See id.*

73. *See id.* at 88–89.

74. *Id.* at 88.

75. *See id.*

76. *See id.* at 89; Carolyn Davis, Note, *Leave It on the Field*, 76 BROOK. L. REV. 265, 272 (2010) (“[S]chools are entitled to a presumption that they are in compliance with Title IX if they can show ‘substantial proportionality’ between their male and female athletic participation opportunities and overall enrollment.”).

77. *See* A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979); Cantú, *supra* note 3; Monroe, *supra* note 12.

78. Monroe, *supra* note 12; *see also* Chalenor v. Univ. of N.D., 291 F.3d 1042, 1046 (8th Cir. 2002) (“Assuming *Chevron* deference is not due, it is still true that interpretations contained in formats such as

physical exertion and skill in which an individual or team competes against another or others.”⁷⁹ But prong one (including parts A and B) of the substantial proportionality test under Title IX does not evaluate an activity’s physical exertion, skill, or any other athletic component. Failing to address whether a given activity requires any physical exertion or skill ignores the meaning of the phrase “genuine athletic opportunity.”⁸⁰

Although the OCR has not specifically defined “sport,”⁸¹ the organization strives to provide opportunities similar to those sports that have already received recognition by intercollegiate associations, such as the NCAA, yet disregards the athletic nature of these prospective activities in the evaluation process. All sports recognized by the NCAA should require some form of inherent athleticism.⁸² In fact, part of the NCAA’s function is to research the causes of injuries sustained during athletic competition and establish safety guidelines to prevent those injuries,⁸³ which suggests that physical exertion is an integral part of providing a genuine athletic opportunity.⁸⁴ The importance of physical exertion in qualifying an activity as a sport is also demonstrated by the benefits and services recognized sports receive.⁸⁵ NCAA Rule 16.4.1 provides that a school may offer medical insurance, surgical expenses, medication, rehabilitation, physical therapy expenses, and dental insurance to each participating NCAA athlete, which suggests that the sports pose a risk of physical injury due to the physical exertion involved.⁸⁶ Furthermore, the NCAA, the leading governing body for intercollegiate athletics, requires “physical exertion to be with the

opinion letters are entitled to respect . . . *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997)[] requires that we give deference to an agency’s interpretation of its own regulations, if the regulations are ambiguous. . . . If the regulation is ambiguous, then we defer to any reasonable construction by the Department of Education, even though its interpretation might not be the best or most natural one by grammatical or other standards.” (citations and internal quotation marks omitted).

79. *Sport Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/sport> (last visited Nov. 15, 2012).
80. See JOHN F. MANNING & JOHN C. STEPHENSON, *LEGISLATION AND REGULATION: CASES AND MATERIALS* 215–16 (West Academic Publ’g 2d ed. 2013) (explaining that a statute is to be interpreted using the ordinary meaning of its language unless it explicitly defines some of its terms differently).
81. See Cassman, *supra* note 5, at 247–48.
82. See *Emerging Sports for Women*, *supra* note 54 (“The NCAA bylaws require that emerging sports must gain championship status (minimum 40 varsity NCAA programs or 28 [D]ivision III varsity programs for a [D]ivision III only championship) within 10 years or show steady progress toward that goal to remain on the list.”).
83. See *NCAA Sport Science Institute*, NCAA, <http://www.ncaa.org/health-and-safety/ncaa-sport-science-institute> (last visited Jan. 2, 2014).
84. See NCAA ACADEMIC & MEMBERSHIP AFF. STAFF, 2012–13 NCAA DIVISION I MANUAL 1 (2012), available at <http://www.ncaapublications.com/productdownloads/D113.pdf>. Rule 1.2(a) states that the NCAA’s stated purpose is to “initiate, stimulate and improve intercollegiate athletics programs for student-athletes and to promote and develop . . . physical fitness, athletics excellence and athletics participation” *Id.*
85. See *id.* at 223.
86. See *id.* at 227.

purpose of competition.”⁸⁷ The current standard should be modified to address the physical exertion of a given activity, and the fact that it is an integral part of athletic competition, in order to fulfill the purpose of Title IX’s enactment.

The omission of an athletic factor in the assessment of activities for Title IX compliance also undermines the overall purpose of the statute. The purpose of Title IX is to provide equal *athletic* opportunities for members of both sexes.⁸⁸ Using the current standard, it is unclear that athletic skill is required to classify an activity as a sport because “any activity that meets the ‘structure and administration’ factors, as well as the ‘preparation and competition’ factors, is a sport, regardless of the athleticism involved in its performance.”⁸⁹ The standard for evaluating new athletic opportunities should therefore be modified to include an athletic component.

Competitive cheerleading demands tremendous amounts of energy from participants, similar to other Title IX qualifying sports. For example, stunts and tricks found in competitive cheerleading are similar to those of the Title IX-approved sport of gymnastics.⁹⁰ Even the court in *Biediger* conceded that competitive cheerleading “is a difficult, physical task that requires strength, agility, and grace.”⁹¹ Cheerleading accounts for the most serious injuries to female athletes in sports,⁹² which arguably reflects the high level of difficulty and athleticism required to execute stunts incorporated in the activity.⁹³ Furthermore, safety organizations were formed to develop rules to protect the welfare of competitive cheerleading participants and guide university programs in the

87. Glatt, *supra* note 5, at 321.

88. See 34 C.F.R. § 106.41(c) (2013) (“A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes.”).

89. See Glatt, *supra* note 5, at 321.

90. See *Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62, 78 (D. Conn. 2010) (“[C]ompetitive cheer teams strictly engage in sport . . . and emphasize the more gymnastic elements of sideline cheerleading, such as aerial maneuvers, floor tumbling, and balancing exercises [C]ompetitive cheer is an athletic endeavor that ‘could be easily described as group floor gymnastics.’” (quoting *Biediger v. Quinnipiac Univ.*, 616 F. Supp. 2d 277, 295 (D. Conn. 2009)); Cassman, *supra* note 5, at 254 (explaining that the high-risk stunts and routines performed in competitive cheerleading resemble gymnastics); 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, 558 (2003) (explaining that cheerleading has “strenuous tumbling runs, human pyramids, back flips, lifts, catches and tosses” making it “comparable to gymnastics”); Glatt, *supra* note 5, at 322 (“Similar to the Title IX recognized sport of gymnastics, competitive cheerleaders must practice for hours, following a regimen that hones specific skills and talents.”).

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

92. See Cassman, *supra* note 5, at 249 (“In 2004 there were an estimated 28,414 emergency room visits by cheerleaders.”).

93. The National Center for Catastrophic Sports Injury Research at the University of North Carolina at Chapel Hill conducted a study on catastrophic injuries in high school and college sports for men and women and found that cheerleading accounted for 65.2% of high school and 70.5% of college catastrophic injuries among all female sports. See FREDERICK O. MUELLER & ROBERT C. CANTU, NAT’L CTR. FOR CATASTROPHIC SPORTS INJURY RES., TWENTY-SIXTH ANNUAL REPORT FALL 1982–SPRING 2008, at 26 (2008), available at <http://www.unc.edu/depts/nccsi/AllSport.pdf>.

safe performance of cheerleading.⁹⁴ This suggests that if an athletic component were included in the standard for evaluating whether an activity constitutes a genuine athletic opportunity, competitive cheerleading would satisfy that factor.

Also, the substantial proportionality test should not expect a new activity to offer competitive opportunities comparable to existing sports. This undermines Title IX's goal of creating new athletic opportunities for both male and female athletes. Title IX allows universities to create new teams as a way of providing genuine athletic opportunities in which its students profess an interest;⁹⁵ however, for the new activity to comply with statutory requirements, it is expected to meet a level comparable to sports that have achieved intercollegiate association recognition after years of development.⁹⁶

No new athletic opportunities can survive such scrutiny.⁹⁷ This is troublesome because some universities may not want—or may not have the resources—to commit to an athletic opportunity that does not yet qualify as a sport because of the implications for the school's compliance with Title IX.⁹⁸ A reluctance to invest in such activities will hinder the development of new sports, or at least hinder the speed at which they develop.⁹⁹ For universities that do have an interest in the emerging activity, seeking sport or “genuine athletic opportunity” qualification will be difficult.¹⁰⁰ Allowing new activities that satisfy the administrative factors (i.e., activities that are administered and regulated by the athletic department or receive most of the same benefits as current varsity sports, among other things) to have a developmental “grace” period in which competition opportunities can grow—so that the athletes can still be counted for purposes of Title IX compliance—will give universities the chance to devote resources to the new activity and will help to expand competition to the level of already existing sports.

Quinnipiac's competitive cheerleading team competed at ten competitions in 2009–10, but faced five different scoring systems. The court found this to be

94. *See Cheerleading as a Sport*, AM. ASS'N OF CHEERLEADING COACHES & ADM'RS, <https://www.aacca.org/content.aspx?item=Resources/Test.xml> (last visited Jan. 2, 2014).

95. *See Monroe*, *supra* note 12 (stating that this approach “affords recipients [of federal funding] the flexibility to create athletics programs that are responsive to the specific interests and abilities of their particular student bodies”).

96. *See Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 104–05 (2d Cir. 2012).

97. *See Glatt*, *supra* note 5, at 320 (“Even if a university establishes a new women's team, the team will not count towards Title IX compliance unless adequate competition exists as well. Other universities may not yet have a similar team in place, rendering moot the first university's attempt at advancement because of a lack of intercollegiate competition.”).

98. *See Cassman*, *supra* note 5, at 258 (discussing how restrictive budgets tend to cause schools to cut teams rather than add them).

99. *See Glatt*, *supra* note 5, at 320 (“Even if a university establishes a new women's team, the team will not count towards Title IX compliance unless adequate competition exists as well. Other universities may not yet have a similar team in place, rendering moot the first university's attempt at advancement because of a lack of intercollegiate competition.”).

100. *See id.*

detrimental to its “genuine athletic opportunity” qualification.¹⁰¹ However, the NCSTA (the intercollegiate competitive cheer organization created in 2009 which established the early structure of competitions, scoring systems, and rules) had its first meeting in the same academic year that Quinnipiac planned to compete. This did not provide sufficient time for the organization to establish a competition structure, scoring system, or rules similar to that of the NCAA, which has been in existence since 1906.¹⁰² The NCSTA meeting was held in September 2009, and its eight members established a uniform set of rules to govern the activity for a season that was to commence immediately.¹⁰³ In contrast, the NCAA was conceived in 1905 and, by its second meeting, had sixty-two charter universities creating the structure and rules behind intercollegiate sports.¹⁰⁴ For the court to expect a new organization with only eight members to achieve a structure like that of the NCAA in such a small period of time is unrealistic.

The substantial proportionality test, as it currently stands, fails to promote the growth of athletic programs and hinders the development of new sports. Title IX was originally created to equalize the disparity between opportunities for women and men in sports, with men traditionally receiving a majority of the resources. In addition, the statute’s goal was to add teams to university athletic departments, not subtract them.¹⁰⁵ With the budgetary issues that universities are facing, including the costs to comply with the statute and maintain substantial proportionality, university athletic departments are cutting many men’s athletic teams rather than adding women’s teams, as was originally intended by Title IX.¹⁰⁶ Although cutting men’s programs has led to several lawsuits, the courts have accepted the termination of programs as an acceptable way for university athletic departments to comply with Title IX’s requirements.¹⁰⁷ Cutting men’s teams not only negatively impacts male athletes, it affects women as well because universities are not creating new opportunities in women’s sports.¹⁰⁸ Universities have also resorted to adding women’s

101. See *Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62, 97–100 (D. Conn. 2010).

102. See *National Collegiate Athletic Association*, WIKIPEDIA, http://en.wikipedia.org/wiki/National_Collegiate_Athletic_Association (last updated Dec. 31, 2013).

103. See *Biediger*, 728 F. Supp. 2d at 82–83 (noting that the rules defined the length of the season, the number of contests required, the rules for competition and scoring, the number of scholarships that can be offered, and the number of participants allowed on each roster, among other things).

104. See *National Collegiate Athletic Association*, *supra* note 102.

105. See *Title IX: Athletics and Sports*, FEMINIST MAJORITY FOUND., http://www.feminist.org/sports/titleix_sports.asp (last visited Jan. 2, 2014).

106. See *Larson*, *supra* note 15, at 1607, 1610. This is particularly true for schools that sponsor football programs because no women’s team carries a roster size equivalent to that of football, and the average NCAA Division I-A roster consists of 118 male athletes. See *Cassman*, *supra* note 5, at 258 (“Wrestling teams experienced the worst decline, losing 171 teams, a forty percent decrease. Of the schools that discontinued a men’s sports team during that time frame, thirty-one percent cited compliance with gender equity requirements as a strong influence behind the decision.”).

107. See *Cassman*, *supra* note 5, at 259–60.

108. See *Larson*, *supra* note 15, at 1621.

teams in sports that do not compete at the varsity level, such as crew, because the cost of operation is low and the roster sizes are large, offsetting men's football.¹⁰⁹ While these sports do create more genuine athletic opportunities for women, other sports—especially those that are more expensive to operate and in which there may be a stronger interest and the possibility of competing at the varsity level, like volleyball—will be sacrificed for the sake of compliance.¹¹⁰

Modifying prong one of the substantial proportionality test to include an athletic component and developmental period for new activities would preserve the integrity of Title IX, as well as provide more athletic opportunities for both men and women. Additionally, when an activity satisfies the OCR factors, the OCR should allow the activity a developmental period to attain a competitive level on par with other varsity sports.¹¹¹ This would encourage institutions to invest in new activities because they would have a greater chance of achieving Title IX compliance.¹¹² Under a modified standard, a sport such as competitive cheerleading (for which there is a genuine interest) would increase athletic opportunities for female athletes without sacrificing existing opportunities for male athletes, and preserve the integrity of intercollegiate athletics by encouraging universities to create and maintain equal athletic opportunities for men and women.

109. Another example of this is rowing. *See* Larson, *supra* note 15, at 1610–11; *see also* Kristen Rozum, Comment, *Staying Inbounds: Reforming Title IX in Collegiate Athletics*, 18 WIS. WOMEN'S L.J. 155, 170–71 (2003).

110. *See* Larson, *supra* note 15, at 1610–11; Rozum, *supra* note 109.

111. A similar approach can be taken for emerging NCAA sports. *See supra* note 54.

112. *See* Cassman, *supra* note 5, at 260.