

## Varsity Cheer: Proceed with Caution

By Barbara Osborne, Of Counsel, Ice Miller Collegiate Sports Practice

In March 2009, Quinnipiac University, a private institution that competes at the NCAA Division I level, announced plans to drop women's volleyball, men's golf, and men's outdoor track. They also indicated that they would be adding competitive cheerleading as a varsity sport. Student-athletes on the women's volleyball team sued under Title IX claiming that Quinnipiac deprived female athletes of equal athletic participation opportunities. In order to determine whether the university provided equal athletics opportunities in compliance with Title IX, the court had to determine if cheerleading was a genuine varsity sport participation opportunity. The court determined that cheerleading, as conducted at Quinnipiac, was not a legitimate varsity sport participation opportunity that should be counted for Title IX compliance purposes (*Biedinger v. Quinnipiac University*, 2010).

Following the decision, there has been public debate on NPR and articles in the *New York Times* and a multitude of other newspapers whether cheerleading is a sport. Two national organizations, USA Cheer and USA Gymnastics have carefully rebranded and packaged cheerleading into two competitive formats and are currently seeking NCAA emerging sport status. Some athletics administrators appear enthusiastic about elevating cheer teams to varsity status as a quick and relatively inexpensive way to increase female participation numbers and assist in meeting Title IX compliance.

Title IX of the Education Amendments of 1972 was enacted to eliminate gender discrimination in educational programs and activities. In 1975, the U.S. Department of Education (then the Department of Health, Education, and Welfare) issued Regulations (34 C.F.R. Part 106.41). The Regulations required that educational institutions which sponsored intercollegiate athletics programs

to provide equal opportunities for both sexes in selection of sports, levels of competition, and a list of program components including equipment, scheduling, travel, coaching, facilities, and medical services [34 C.F.R. Part 106.41(c)(1-10)]. Confusion regarding the requirement to "effectively accommodate the interests and abilities of members of both sexes" [34 C.F.R. Part 106.41(c)(1)] led to the 1979 Policy Interpretation on Title IX and Intercollegiate Athletics (45 C.F.R. Part 26).

The Policy Interpretation was presented in three sections: scholarships, program areas, and interests and ability. The scholarships requirement is a straightforward math-

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ematical formula for providing athletics-related grant-in-aid based on the percentage of male and female athletes participating in the program. The second section added two program factors, recruitment and support services, and provided a framework for determining whether disparities existed. The third section introduced a new three-part test to determine whether institutions were effectively accommodating the athletics interests and abilities of male and female athletes (45 C.F.R. Part 26).

Significant focus for Title IX compliance has been on participation opportunities and the three-part test. An institution can show that they are meeting the interests and abilities of male and female athletes by meeting one of the following three options: 1) proportionality of participation that is reflective of the student body at large; 2)

a continuing history of expanding opportunities for the underrepresented sex; or 3) that the current offerings already satisfy the interests and abilities of the student body. Elevating a competitive cheer team may help institutions satisfy either the first or second parts of the test.

However, determining whether an athletics program is in Title IX compliance does not stop with satisfying one of the parts of the Three-part Test. The 1975 Regulations, a 2008 "Dear Colleague" letter issued by the Office for Civil Rights (OCR), and the Quinnipiac decision provide guidance regarding the necessary steps to insure that competitive cheer is operating as a varsity sport. Additionally, the institution will need to acquire OCR approval before competitive cheerleaders will be countable participants on the annual Equity in Athletics Disclosure Act (EADA) forms.

Currently, most collegiate competitive cheer teams are organized at the club sport level, although some report to the marketing unit of the athletics department. If a school chooses to elevate cheer to the varsity level, it is assumed that the institution would adopt one of the two proposed emerging sport formats. USA Gymnastics has created the National Collegiate Acrobatics and Tumbling Association (NCATA). Teams compete in six different events (compulsories, stunt, pyramid, basket toss, tumbling, and team routine) which are scored by judges according to the degree of difficulty of the maneuver. The competition is structured similar to gymnastics meets, with typically 2-4 teams competing in a set rotation of events. The College STUNT Association was created by USA Cheer and Varsity Brands. This format offers four "quarters" of play including partner stunts, group jumps and tumbling, pyramids and tosses, and team performance. Teams compete head to head in the first two quarters and then perform consecutively for the final two

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## Court Sides with Hofstra in Sexual Harassment Case

**A** federal judge from the Eastern District of New York has granted summary judgment to Hofstra University, dismissing the sexual harassment and retaliation claims of a woman who served former student manager of the football team

In the summer of 2006, plaintiff Lauren Summa began dating a member of the Hofstra football team. She ultimately applied for, and was selected to be, team manager. That fall, players on the team began making lewd comments to her, initially when she traveled on bus rides with the team to away games. Essentially, lewd comments were made to her by players on the team. The comments, allegedly, escalated, leading the plaintiff to speak with defendants Melissa Connolly, the vice president of the Office of University Relations at Hofstra, David Cohen, the head coach for the Hofstra football team. Cohen ultimately cut one of the players, whose comment led the plaintiff to file an official complaint.

The controversy might have ended there, had the university not bypassed Summa in its search for a manager for spring football. This, alleged the plaintiff, was a retaliatory act. She initially filed her complaint with the New York State Division of Human Rights. But within a year, the complaint was escalated to the federal courts.

Her claims included discrimination, harassment and retaliation under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e et seq. ("Title VII"), Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681 et seq. ("Title IX"), and

New York State Human Rights Law, N.Y. Exec. Law §§290 et seq. ("NYSHRL"), and aiding and abetting violations of NYSHRL.

The defendants moved for summary judgment.

Among the key findings of the court was that the purported sexual harassment was more likely "gender neutral" harassment, meaning it was not motivated by her gender and thus did not qualify as sexual harassment. The court also found that the incidents, "when viewed objectively, (do not) rise to the level of severity or pervasiveness necessary to support an actionable claim of sexual harassment."

In addition, the court found that Hofstra responded promptly and appropriately to the incidents. "The law requires that the employer take remedial action upon learning of harassment, and that it is unquestionably what (the defendant) did," wrote the court.

Meanwhile, the retaliation claim fell short because Summa failed to demonstrate that the person in charge of hiring student managers had knowledge of her complaints, which is a required element for any retaliation claim. ■

*Lauren E. Summa v. Hofstra University, David Cohen, and Melissa Connolly in their individual and official capacities; E.D.N.Y.; CV 08-0361, 2011 U.S. Dist. LEXIS 37975; 4/7/11*

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quarters. Judges determine the winner based on technical execution and synchronization.

An analysis of the legal requirements under Title IX identifies some weaknesses in the USA Cheer and USA Gymnastics proposals. Although large squad size is a primary attraction for many athletics programs, inflated rosters are a Title IX compliance hazard. Team rosters should reflect actual performers plus a number of subs that are reflective of the typical squads for other varsity sports within the program. The scholarship limitations in the proposals also appear to be artificially low, especially for the large squad size, and need to be adjusted to fall within the ranges/percentage of participants for other varsity sports. Coaches, currently volunteers or part-time

at many institutions, would need to be elevated to full-time status, and a number of assistant coaches would need to be hired as well, so that the full-time equivalencies (FTE's) of the coaching staff are reflective of coach/athlete ratios for other varsity teams. The number of competitions in a season appear to be low compared to other sports and it is not yet clearly defined how contests will be counted (each competition or by days). Cheerleading has been identified as one of the most dangerous activities, with the potential for catastrophic injury rivaling football – athletics training staff will need to be assigned to cover both practices and competitions. Finally, policies will need to be created relative to student-athletes who participate both as sideline cheerleaders and on the varsity team.

Athletics departments should proceed with caution in making the decision to elevate competitive cheer to the varsity level. If Title IX compliance is a motivating factor, a comprehensive Title IX compliance review should be conducted, as well as a cost-benefit analysis. Athletics departments should have a written policy explaining the process for becoming a varsity sport. The Collegiate Sports Practice Group at Ice Miller LLP is able to assist athletics departments in this process. If you have any questions, please contact Barbara Osborne, at [barbara.osborne@icemiller.com](mailto:barbara.osborne@icemiller.com) or (317) 236-2465. ■

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