

From Cheer to Fear: Why Cheerleaders Need More than Just Their Pom Poms to Protect Them from Sex-Based Discrimination

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For years, cheerleaders could not break out of a vicious cycle of sexualization, abuse, and paternalism. Cheerleaders seemingly reinforced a subordinate role for young women in sports. Recently, cheerleaders have begun to unravel the sexualized stereotype they have endured by demonstrating to the public the athleticism that cheerleading requires. However, cheerleaders still face a roadblock on their way to athletic legitimacy: competitive cheer does not qualify as a sport under Title IX. Moreover, the lack of recognition under Title IX combined with the pervasive sexualized stereotype associated with cheerleaders leaves cheerleaders vulnerable to harassment with no practical remedies available. This paper examines the history behind the sexualization of cheerleaders, the history and purpose of Title IX, and efforts to reclassify cheer as a sport under Title IX. It will argue that Title IX's rigid criteria for what is considered a sport perpetuates the harassment and discrimination cheerleaders face and ultimately undermines the objective of Title IX. Finally, the paper provides recommendations outside of recognizing cheer as a sport to further prevent future harassment and discrimination from occurring.

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I. INTRODUCTION¹

For years, cheerleaders represented the “embodiment of idealized, irresistible, and flirty sexuality combined with ... an underlying innocence and vulnerability.”² Cheerleaders seemingly reinforced a subordinate role for young women in sports.³ However, in recent years, cheerleaders have begun to unravel the sexualized stereotype by demonstrating to the public the athleticism that cheerleading requires. With cheerleaders’ athleticism more visible in the media through hit shows like *Cheer*, cheerleaders are redefining the stereotypes they have faced for over fifty years and the role they play in sports.

Yet, cheerleaders face a roadblock on their way to athletic legitimacy: a federal court ruled that competitive cheer does not qualify as a sport under Title IX.⁴ Title IX sought to end gender discrimination in higher education and has already made great strides in promoting equal educational opportunities, preventing sexual discrimination and harassment, and involving more women in college sports.⁵ However, in the shadow of Title IX’s success is Title IX’s inability to fully protect cheerleaders from sexual harassment, gender

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1. This note is dedicated to the hundreds of women who have served as Song Girls at the University of Southern California since 1967. From 2015-2019, I served as a member and captain of the Song Girls and witnessed the consequences of not being considered Title IX athletes. My experience inspired me to fight for the athletic recognition that all collegiate cheerleaders around the country deserve.

2. DEBORAH L. BLAKE, GETTING IN THE GAME: TITLE IX AND THE WOMEN’S SPORT REVOLUTION 98 (2010).

3. *Id.*

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

5. UNITED STATES DEPARTMENT OF JUSTICE, EQUAL ACCESS TO EDUCATION: FORTY YEARS OF TITLE IX (2012).

discrimination, and sex based stereotypes.

Cheerleaders are in a unique position compared to designated Title IX athletes. Cheerleaders train similarly to athletes, cheer year-round at many types of events, and provide tangible economic and social benefits to universities.⁶ However, Title IX does not afford cheerleaders recognition as a varsity sport because of Title IX's criteria of what constitutes a "sport."⁷

This creates a problem. The lack of recognition combined with the pervasive sexualized stereotype associated with cheerleaders leaves cheerleaders vulnerable to harassment. For example, in *Richardson v. Northwestern University*, 2021 WL 306448 (N.D.Ill.), Hayden Richardson, a former cheerleader and Truman scholar, filed a lawsuit against Northwestern after she faced and witnessed pervasive sexual harassment, gender discrimination, race-based discrimination, and unequal educational opportunities as a member of the Northwestern cheer squad. Specifically, Richardson cited that the athletic department failed to take her Title IX claim seriously because the university viewed cheerleaders as commodities whose purpose was to solicit donations and placate the male spectators.⁸

This paper examines the history behind the sexualization of cheerleaders, the history and purpose of Title IX, and efforts to reclassify cheer as a sport under Title IX. It will argue that Title IX's rigid criteria for what is considered a sport perpetuates the harassment and discrimination cheerleaders face and ultimately undermines the objective of Title IX. Finally, the paper provides recommendations outside of recognizing cheer as a sport to further prevent future harassment and discrimination from occurring.

II. THE HISTORY BETWEEN CHEERLEADING AND TITLE IX

This section will examine the history behind the sexualization of cheerleaders, the history and purpose of Title IX, and the efforts to reclassify cheer as a sport under Title IX.

A. *The Evolution of Cheerleading: From Excluding Women to Sexualizing Them*

While it may be a surprise to most, cheerleading began as a "male-dominated endeavor about athleticism and civic leadership."⁹ Women did not participate in cheerleading until World War II.¹⁰ In the late 1940s, cheerleading began to take its well-known shape. Unlike other sports which women began

6. Wayne Drehs, *Athletes are Cheerleaders, too*, ESPN, <http://www.espn.com/espn/page2/story?page=drehs/040316>

7. See *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 103-6.

8. *Hayden Richardson, Plaintiff, v. Northwestern Univ., Amanda Dasilva, Heather Van Hoegarden Obering, Michael Polisky, and Pamela Bonnevier, Defendants.*, 2021 WL 306448 (N.D.Ill.).

9. Blake, *supra* note 1, at 96.

10. *Id.*

playing during the war, such as baseball, cheerleading quickly became feminized because the activity did not have deep ties to nationalism and masculinity.¹¹ As cheerleading became women-dominated, the nature of the activity changed from displaying athletic ability to “projecting enthusiasm and unconditional support.”¹² In 1948, the father of modern cheerleading, Lawrence Herkimer, created the National Cheerleaders Association (“NCA”), held national cheer camps, pioneered some of the most widely known cheer moves, including the “herky,” and introduced the most recognizable feature of modern cheerleading: the pom poms.¹³ By the 1960’s, nearly every high school and college in America had cheerleaders.¹⁴ Additionally, professional sports teams, most notably the Dallas Cowboys, created cheer teams and marketed the cheerleaders at games, events, and the most watched television event in America, the Super Bowl.¹⁵

Cheerleading became increasingly feminized and sexualized in terms of dress and performance as televised professional sports teams flaunted cheer squads.¹⁶ Minor leagues and local high schools largely followed suit, adopting teams that mirrored those at the professional level.¹⁷ The smaller uniforms and emphasis on popularity molded cheerleading into the “quintessentially feminine activity” it is known to be today.¹⁸ This feminization was exacerbated by the sexually charged performances to “cheer on” the male athletes.¹⁹ The “cultural understanding” of the mid-century was that cheerleading was a traditional feminine activity where cheerleaders embodied “idealized, irresistible, and flirty sexuality.”²⁰

During the feminist movement in the 1970’s, cheerleaders were notably absent. A *New York Times* article from 1972 reported that, at a Madison Square Garden cheerleading event, “it didn’t take long to see the rah-rah world of cheerleading had no room on the squad for Gloria Steinem, Germaine Greer, and other Women’s Lib killjoys.”²¹ One “all-American” cheerleader in the article went so far as to say “what in the world are they talking about?” when sexual

11. *Id.*

12. Blake, *supra* note 1, at 96-7.

13. *Cheerleading History*, Epic Sports (last visited April 1, 2020), <https://cheer.epicsports.com/cheerleading-history.html#:~:text=Cheerleading%20dates%20to%20the%201860s,up%20with%20a%20catchy%20cheer>

14. *Id.*

15. *Id.*

16. *Id.*

17. Blake, *supra* note 1, at 96-7.

18. *Id.*

19. *Id.*

20. *Id.* at 97-8.

21. Karen Yuan & Caroline Kitchener, *How Cheerleading Went from Raucous and Male to Restrictive and Female*, THE ATLANTIC (April 27, 2018), <https://www.theatlantic.com/membership/archive/2018/04/how-cheerleading-went-from-raucous-and-male-to-restrictive-and-female/559172/> (quoting Steve Cady, Garden Echos with 18 Rah, Rah, Rahs for Tradition, The New York Times (February 18, 1972)).

exploitation was suggested.²² Cheerleaders quoted in the article expressed the common sentiment that cheerleading was based on tradition and spirit, not sexual exploitation.²³ Despite the sentiment among cheerleaders in America in the 1970's, cheerleading was changing.

After Title IX passed in 1972, the first debate over cheerleading's status as a sport emerged. School administrators hoped to count cheerleaders as athletes to comply with Title IX more easily.²⁴ By 2000, OCR issued guidance stating that cheerleading was presumably not a sport under Title IX.²⁵ With this presumption, the spirit industry changed the nature of cheer to what most Americans know cheer as today—acrobatic stunts and tumbling.²⁶

By 2000, competitive cheerleading began gaining national recognition. No longer were cheerleaders “over-caffeinated dancers in itty-bitty skirts,” but rather “real athletes.”²⁷ Cheerleading began hitting the mainstream media in hits like *Bring It On* and through national competitions where cheering was about winning and not entertaining. However, cheerleading hit another major roadblock in 2010 when a federal court ruled that cheerleading could not be considered a varsity sport under an official athletic program for Title IX purposes.²⁸ While the court was receptive to the idea of cheer becoming a sport in the future, it emphasized the need for “better organization and defined rules” to be considered a sport under Title IX.²⁹

Despite the court's ruling in 2010, cases related to cheerleading continued to come before the federal courts. Since 2013, there has been a sleuth of litigation between cheerleaders and NFL organizations, which concerns gender discrimination under Title VII and wage theft under the Fair Labor Standards Act.³⁰ For example, in 2018, six former Houston Texans' cheerleaders filed a lawsuit that alleged “brutal working conditions that included harassment and unpaid hours.”³¹ In 2013, the Oakland Raiderettes filed a class action against the Raiders organization alleging they were not paid minimum wage, not

22. *Id.*

23. *Id.*

24. Blake, *supra* note 1, at 100.

25. Letter from Mary Frances O'Shea, Nat'l Coordinator for Title IX Athletics, OCR, U.S. DOE, to David V. Stead, Exec. Dir., Minn. State High Sch. League, at 1–3 (Apr. 11, 2000); Letter from Mary Frances O'Shea, Nat'l Coordinator for Title IX Athletics, OCR, U.S. DOE, to David V. Stead, Exec. Dir., Minn. State High Sch. League, at 1 (May 24, 2000).

26. Yuan & Kitchener, *supra* note 22.

27. Linda Villarosa, *Cheerleading Changes, Injuries Increase*, N.Y. TIMES (Oct. 3, 2000), <https://www.nytimes.com/2000/10/03/health/cheerleading-changes-and-injuries-increase.html>.

28. *Quinnipiac*, 691 F.3d 85.

29. *Id.* at 105.

30. Todd Hatcher, *Cheerleaders Face Down with the League with Wage Discrimination*, EXPERT INSTITUTE (Feb. 17, 2021), <https://www.expertinstitute.com/resources/insights/nfl-cheerleaders-face-down-league-with-wage-discrimination-litigation/#:~:text=This%20trend%20of%20wage%2Dbased,rehearsals%20and%20obligatory%20event%20appearances>.

31. Francine Eichhorn, *How the NFL “Protects” Cheerleaders with Discriminatory Policies*, 34 ABA J. LAB. & EMP. L. 289, 294 (2020).

compensated for overtime, and not reimbursed for expenses associated with the job.³² These suits sparked litigation across the country as cheerleaders sued the Tampa Bay Buccaneers, New York Jets, Cincinnati Bengals, Buffalo Bills, Washington Redskins, and Dallas Cowboys.³³

Since 21st century cheerleading has evolved from a sexualized extracurricular into a highly athletic activity, “the sexualized body of the female cheerleader has become a moral and ideological battleground.”³⁴ In light of the NFL lawsuits, we must examine why civil rights law did not fully protect cheerleaders from abuse committed by professional sports organizations. Professional cheerleaders always had the ability to sue their employers, the NFL franchises, under Title VII and the Fair Labor Standards Act. It was not until the beginning of the #MeToo movement, however, that cheerleaders acted against the abuse they endured.

Professional cheerleaders have always been viewed as sex symbols to the general public. Cheerleaders support all male athletes but are not considered professional athletes themselves. Despite popular television shows like *Dallas Cowboys Cheerleaders Making the Team* that demonstrate how making a world-famous cheer team is physically challenging and competitive, professional cheerleaders are consistently viewed as commodities, not athletes. Thus, the enduring stereotype of superficial, sexualized cheerleaders overshadowed the severity of the abuse, prevented the abuse from being taken seriously, and suggested that the abuse was self-inflicted or deserved.

Similarly, collegiate cheerleaders now reckon with a comparable situation where the pervasive sexualized stereotype associated with cheerleaders leaves them vulnerable to gender-based discrimination and harassment. In *Richardson v. Northwestern University*, the plaintiff endured sexual harassment and gender discrimination while serving as a member of the Northwestern cheer team. Northwestern’s cheer coach forced Richardson to present herself as a “new, young sex kitten” to solicit donations for the university.³⁵ The cheer coach went so far as to block exits to events so cheerleaders could not physically walk away from the sexual harassment they endured.³⁶ The coach normalized this inappropriate behavior as “simply part of the sport of cheerleading,” and told the girls to “take it.”³⁷

When Richardson decided to bring her claims to the athletic department, the associate athletic director forced Richardson to investigate the matter herself,

32. *Id.*

33. *Id.*

34. Pamela Avila, *Exploring the NFL Cheerleader’s Wage Problem*, LOS ANGELES MAGAZINE (Feb. 1, 2019), <https://www.lamag.com/culturefiles/nfl-cheerleader-pay/> (quoting *A Women’s Work* documentarian Yu Gu).

35. Complaint & Demand for Jury Trial at 54, *Richardson v. Northwestern Univ.*, No. 1:21-cv-00522 (N.D.Ill. Jan. 29, 2021).

36. Interview with Hayden Richardson, Pl. in *Richardson v. Northwestern Univ.*, (Mar. 5, 2021) (notes on file).

37. *Id.* at 4.

in direct violation of Title IX, and accused her of falsifying the evidence.³⁸ Moreover, the athletic department questioned why the behavior was problematic as they encouraged her to “suppress her intellect and instead flaunt her body” for wealthy donors.³⁹ Richardson then tried to engage the Title IX office, which failed to properly investigate her claims and purposely subverted her to “witness status” to cut her off from the investigation.⁴⁰

Richardson’s case suggests, much like the years of abuse NFL cheerleaders endured because of the sexual stereotype associated with cheer, that the outdated notions surrounding cheerleaders remain deeply rooted in the cultures of universities and directly lead to gender-based discrimination and harassment. Richardson’s use of the proper channels, including the Title IX office, to report this gender-based discrimination and sexual harassment was to little avail as her claims were not taken seriously due to her role as a cheerleader and the archaic notion that cheerleaders should just “take it.”⁴¹ Thus, this paper examines the need for educational institutions to recognize cheerleaders as athletes under Title IX in order to end the sexualized narrative surrounding cheerleaders that undermines the ultimate purpose of Title IX—to end gender-based discrimination in educational institutions.

B. History and Purpose of Title IX and Equal Opportunity in Athletics

Congress passed Title IX of the Education Amendments in 1972 to prohibit sex and gender-based discrimination in any educational program or activity receiving federal financial assistance.⁴² The rationale behind Title IX is to ensure that students will not be denied educational opportunities based on their sex. The classes of educational institutions subject to this prohibition are any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education.⁴³ Title IX also applies to a wide range of educational opportunities, including admissions to, and financial aid for, post-secondary institutions, student services and counseling, and athletics and physical education.⁴⁴

Under its implementing regulations, Title IX prohibits gender-based discrimination in interscholastic, intercollegiate, club or intramural athletics and provides that recipients of federal funding must grant equal athletic opportunity for members of both sexes.⁴⁵ The Code lists ten factors that help courts determine whether equal opportunities exist at universities:

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

38. *Id.* at 85.

39. *Id.* at 3.

40. *Id.* at 13.

41. *Id.* at 4.

42. U.S.C.A. § 1681 (WEST).

43. §1681(c).

44. EQUAL ACCESS TO EDUCATION: FORTY YEARS OF TITLE IX, *supra* note 4, at 1.

45. 34 C.F.R. § 106.41.

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; [and] (10) Publicity.⁴⁶

The regulations, however, do not give criteria as to what constitutes a sport under Title IX.⁴⁷ In 1979, the Department of Education issued a policy interpretation that clarified the meaning of “equal opportunity” as it applied to intercollegiate athletes.⁴⁸ The policy interpretation provided institutions three ways to comply with Title IX. These three ways to achieve compliance are now typically referred to as the “three-prong test,” which determines whether equal athletic opportunities are available for both sexes.⁴⁹ The first path to compliance is to examine whether athletic participation for males and females is substantially proportionate to their respective enrollments.⁵⁰ The second path is to examine whether the “institution can show a history and continuing practice of program expansion” related to the underrepresented sex.⁵¹ The third path is for an institution to show that “the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.”⁵²

The first path, or the substantial proportionality test, is most often used by plaintiffs and courts to determine whether an educational institution is compliant with Title IX.⁵³ It is the easiest prong to satisfy as it is based on enrollment numbers. For example, if the student body is 50% women, then 50% of the athletic participation opportunities must be dedicated to women. However, the substantial proportionality test does not require strict adherence to exact enrollment numbers.⁵⁴ This paper will only detail the requirements for the first prong because it is most cited to demonstrate Title IX compliance.

46. *Id.*

47. *Id.*

48. See 1979 Policy Interpretation, 44 Fed. Reg. 71,413, 71,414 (Dec. 11, 1979); Jacqueline R. Liguori, *Sticking the Landing: How the Second Circuit’s Decision in Biediger v. Quinnipiac Univ. Can Help Competitive Cheerleading Achieve “Sport” Status Under Title IX*, 21 JEFFREY S. MOORAD SPORTS L.J. 153 (2014).

49. 1979 Policy Interpretation, 44 Fed. Reg. at 71,418; See Alexandra Zdunek, *Who Knows the Difference Between Competitive Cheerleading, Sideline Cheerleading, Acrobatics and Tumbling? Why this Distinction is so Important for Title IX*, 31 MARQ. SPORTS L. REV. 175 (2020).

50. 1979 Policy Interpretation, 44 Fed. Reg. at 71,418.

51. *Id.*

52. *Id.*

53. William H. Glover Jr., *Title IX And Other Women’s Issues* (Excerpt from Sports Law Handbook) LEXISNEXIS LEGAL NEWSROOM (March 24, 2010), <https://www.lexisnexis.com/legalnewsroom/litigation/b/litigation-blog/posts/title-ix-and-other-women-s-issues>

54. *Title IX And Other Women’s Issues*, US LEGAL, <https://sportslaw.uslegal.com/title-ix-and-other-womens-issues/> (last visited April 1, 2021)

In 1996 and 2008, the Department of Education's Office of Civil Rights ("OCR"), which is responsible for Title IX enforcement, issued guidance clarifying the requirements and limitations of the three-prong test. In its 1996 clarification, OCR notably defined who is considered a "participant" in athletic opportunities under the first prong.⁵⁵ Athletic participants are defined as those who are receiving the institutionally sponsored support normally provided to athletes competing at the institution involved (e.g. equipment, gear, facilities, etc.); those who are participating in organized practice sessions, team meetings, and activities on a regular basis during a sport's season; those who are listed on the eligibility or squad lists maintained for each sport; or those injured athletic participants who cannot participate in regular athletic programming but continue to receive financial aid based on athletic ability.⁵⁶

In its 2008 clarification, OCR provided more guidance on the first prong of the test to "help institutions determine which intercollegiate or interscholastic athletic activities can be counted for the purpose of Title IX compliance."⁵⁷ While OCR did not define a "sport," OCR suggested that any "established sports" could be counted towards Title IX compliance if the institution belongs to an athletic organization like the National Collegiate Athletic Association ("NCAA").⁵⁸ If an institution was not part of an organization, the OCR would review the sports on a case by case basis.⁵⁹

When reviewing whether an activity is considered a sport for Title IX compliance, OCR weighs two factors: (1) the activity's structure and administration and (2) team preparation and competition.⁶⁰ In weighing the activity's structure and administration, OCR considers the following factors weighing in favor of qualifying the activity as a sport under Title IX: whether the athletic department controls the budget and staff, whether the athletes are eligible for scholarships, and whether recruiting for that activity is similar to that of other varsity sports.⁶¹ In evaluating team preparation and competition, OCR considers whether practices and competition opportunities are similar in quantity and quality to other varsity sports, and whether the "primary purpose of the activity is to provide athletic competition at the intercollegiate or interscholastic varsity levels[.]"⁶²

At first glance, it would seem cheerleading meets OCR's 1996 and 2008

55. Department of Education, Office for Civil Rights, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (Jan 16, 1996) <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>

56. *Id.*

57. Department of Education, Office for Civil Rights, *Dear Colleague Letter: Athletic Activities Counted for Title IX Compliance* (Sept. 17, 2008), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20080917.html>

58. *Id.*

59. *Id.*

60. See Liguori, *supra* note 44, at 153.

61. *Id.*

62. *Id.*

guidance regarding what activities could be considered a sport for Title IX purposes under the two factors: “Cheerleading has some of the most gruesome injuries, [] long hours, [] agonizing training and [] ultra-intense competitions.”⁶³ However, in *Biediger v. Quinnipiac University*, 691 F.3d 85 (2d Cir. 2012), a federal court ruled that competitive cheerleading does not satisfy the first prong of the OCR test and therefore cannot gain recognition as a sport under Title IX.⁶⁴

C. Why Cheerleading is not Considered a Sport: Biediger v. Quinnipiac University

In *Quinnipiac*, the Second Circuit analyzed whether women’s competitive cheerleading could be considered a sport under Title IX for the purpose of satisfying the substantial proportionality test.⁶⁵ OCR had previously addressed the issue of whether competitive cheerleading could be considered a sport under Title IX in its 2008 clarification letter. In that letter, OCR was concerned that educational institutions would use activities like cheer, a predominantly female sport with large teams, as a “genuine athletic opportunity that would count towards participation” and, as a result, decrease other athletic opportunities in already established female sports, like rowing or softball.⁶⁶ Thus, the court had to determine whether positions on the cheerleading team could be considered participation opportunities under Title IX.

The district court held that competitive cheerleading was not a sport for purposes of Title IX.⁶⁷ The lawsuit arose out of Quinnipiac University’s decision to eliminate women’s volleyball, men’s golf, and men’s outdoor track and field to create a new varsity sports team for women’s competitive cheerleading.⁶⁸ After women’s volleyball was cut, five players and their former coach sued Quinnipiac alleging that the university violated Title IX by denying women equal varsity athletic participation opportunities.⁶⁹ The district court preliminarily enjoined Quinnipiac from eliminating its volleyball team.⁷⁰

The Second Circuit affirmed the district court’s holding that cheerleading could not be considered a sport under Title IX and its roster positions could not count towards “genuine varsity athletic participation opportunities Quinnipiac afforded female students.”⁷¹ The court first distinguished competitive cheerleading, which seeks to “pit its skills against other teams for purposes of winning” from sideline cheerleading, which strives to “entertain audiences or solicit crowd reaction[s].”⁷² The court then applied OCR’s 2008 factors to

63. Drehs, *supra* note 6.

64. *Quinnipiac*, 691 F.3d 85.

65. *Id.*

66. *See* Liguori, *supra* note 44, at 153.

67. *Quinnipiac*, 691 F.3d 85, 105.

68. *Id.* at 91.

69. *Id.*

70. *Id.*

71. *Id.* at 105.

72. *Id.* at 103. Since 2000, OCR has presumptively found sideline cheerleading, which does

determine whether cheerleading met the criteria to be considered a sport. Regarding the first factor, the activity's structure and administration, the court agreed that, "competitive cheerleading was generally structured and administered by Quinnipiac's athletics department consistent with the school's other varsity teams."⁷³ Regarding the second factor, team preparation and competition, the court agreed that the "practice time, regimen, and venue" was similar to other varsity sports.⁷⁴ Finally, the court concluded that the purpose of competitive cheerleading was competition, which was one of the most important factors OCR noted in its 2008 report.⁷⁵

Despite cheerleading satisfying OCR's 2008 factors, the court determined that the differences between cheerleading and other varsity sports were too distinct.⁷⁶ First, cheerleading lacked a uniform set of rules which led to varsity and non-varsity teams competing against each other, competitions using different scoring systems, and a lack of fair play.⁷⁷ Second, the post-season play did not mirror other varsity sports because cheerleading did not have a "progressive playoff system."⁷⁸ Third, the competitive cheer program did not have the same recruitment ability as other varsity sports.⁷⁹ While the court declined to rule that cheerleading was a sport for Title IX athletic participation purposes, the court did not foreclose on the possibility that cheerleading could become a varsity sport in the future if it met the OCR factors more strictly.

III. THE IMPRACTICABILITY OF THE OCR FACTORS AND THE CONSEQUENCES OF CHEERLEADING'S NON-RECOGNITION UNDER TITLE IX

This paper will argue that the OCR factors that determine whether an activity is considered a sport under Title IX are impractical, and the non-recognition of cheer as a sport under Title IX perpetuates the harassment and discrimination cheerleaders face and ultimately undermines the objective of Title IX.

not involve competing, to not be a sport. Some universities organize sideline cheerleaders who also compete under their respective athletic departments, but universities have not challenged the presumption that sideline cheerleaders do not count as a sport for Title IX purposes. However, as discussed *infra*, sideline cheerleaders whose main focus is competition, like the LSU Tiger Girls, may challenge this presumption in the future in light of their 2022 UDA National Championship.

73. *Id.* at 103-4; *See* Liguori, *supra* note 44, at 19-20.

74. *Quinnipiac*, 691 F.3d 85, 105; *See* Liguori, *supra* note 44, at 19-20.

75. Department of Education, *Office for Civil Rights, Dear Colleague Letter: Athletic Activities Counted for Title IX Compliance; Quinnipiac*, 728 F. Supp. 2d 85, 103-4.

76. *Quinnipiac*, 691 F.3d 85, 105.

77. *Quinnipiac*, 691 F.3d 85, 105. The competitions the varsity cheer team entered allowed for "collegiate club opponents who did not receive varsity benefits, collegiate sideline cheerleading teams, and all-star opponents unaffiliated with a particular academic institution, some of whom may still have been high-school age" to compete against each other.

78. *Quinnipiac*, 691 F.3d 85, 104-5; *See* Liguori, *supra* note 44, at 20.

79. *Quinnipiac*, 691 F.3d 85, 104-5.

A. The OCR Factors that Determine What Constitutes a Sport are Impractical in Application

The OCR factors that determine what constitutes a sport are impractical in application and undermine the purpose of Title IX's mission to accommodate female athletic interests and eliminate gender-based discrimination.

Title IX arose out of the women's movement in the 1970's, which attempted to dismantle historical stereotypes associated with women. Title IX attempted to provide women equivalent educational opportunities in terms of academics and athletics. Regarding athletics, Title IX sought to provide women equal opportunities to participate in sports that historically prohibited female participation. Title IX did not define equality in athletics in terms of offering identical sports to men and women, rather, Title IX sought to ascertain a woman's athletic interest and offer sports accordingly.⁸⁰ Through gauging a woman's athletic interest rather than offering predetermined sports, Title IX sought to accommodate gender differences and value a woman's distinctive "voice and experience."⁸¹ OCR then seeks to promulgate equal opportunities for women in sports by ensuring women have an interest in the sports that Title IX recognizes. For example, women have historically not shown interest in participating in American football compared to men.⁸² Title IX does not force universities to maintain women's football teams but rather mandates universities to spend equal amounts of money on women's athletics as it does on men's athletics.

Despite Title IX's commitment to equality in athletics, OCR and the factors it uses to weigh what is considered a sport under Title IX undermines this approach. At the high school level, which prepares women to compete at the collegiate level, there has been a massive uptick in the popularity of cheerleading.⁸³ By 2010, 15 states had recognized competitive cheer as a sport and sponsored state championships, with more states contemplating the same move.⁸⁴ Between 2018 and 2019,⁸⁵ The National Federation of State High School Associations reported that "Competitive Spirit," or competitive cheer, was ranked in the top ten most popular girl sports programs in terms of both number of participants and number of schools offering cheer as a sport.⁸⁶ Competitive

80. Blake, *supra* note 1, at 95-6.

81. *Id.*

82. Timothy Wahl, *Women's interest and participation in football is growing sharply*, AMERICAN FOOTBALL INTERNATIONAL (April 2, 2021), <https://www.americanfootballinternational.com/womens-interest-and-participation-in-football-growing-sharply/> (contrasting the "unthinkable" idea of women wanting to participate in football decades ago to nearly 2,401 women joining high school male varsity football teams in 2017.).

83. 2018-19 High School Athletics Participation Survey, THE NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS (last visited April 5, 2020), https://www.nfhs.org/media/1020412/2018-19_participation_survey.pdf.

84. *Id.*

85. *Id.* Data for 2019-2020 is not available due to COVID-19's disruption of high school sports.

86. *Id.* Competitive spirit was ranked #9 in terms of participants and #10 in terms of school

Spirit was the only sport in the top ten that was also not recognized by the NCAA or OCR as a varsity sport.⁸⁷ Thus, if OCR seeks to gauge and accommodate a woman's genuine athletic interest, then cheerleading would be a recognized sport for Title IX purposes.

This contradiction in application brings us to the controversial issue of why cheerleading has not been deemed a sport for purposes of Title IX. Historically, cheerleading is not an "inherently gendered activity," but women have dominated the activity and have never been discriminated against in terms of ability to participate in the activity.⁸⁸ Critics of counting cheer as a sport argue that cheerleading is too easy and cheap of a way for schools to boost female participation at the cost of other women's sports which have historically suppressed female participation.⁸⁹ Critics also argue that, despite the "rigorous training" and "high level of athletic [] ability. . .and the opportunity for high-level competition," cheerleading poses the risk of "reinforcing a women's subordinate place in sports" due to the historical sexualization and association with supporting male athletics.⁹⁰ Ultimately, many critics of adopting cheer as a sport believe that allowing Title IX to recognize cheer as a sport funnels important resources away from other sports with a "greater potential in empowering women."⁹¹

This outdated critique against recognizing cheerleading as a sport under Title IX has biased the application of the OCR factors and rendered the OCR factors impractical in application. OCR weighs two factors in determining whether a sport can be counted for Title IX substantial proportionality purposes: (1) the activity's structure and administration, and (2) team preparation and competition.⁹² While OCR weighs other considerations like scholarship eligibility, recruiting ability, and competition opportunities, the primary inquiry is whether the activity's primary purpose is to compete at the varsity level.⁹³

If we compare cheerleading to bowling and rifle, both activities recognized by the NCAA and OCR as Title IX sports, we see the disparity in the OCR factors' application. First, bowling meets the OCR factors to be considered a sport: the activity is structured and administered like other varsity sports with a national governing body and NCAA-sponsored national progressive playoff. Additionally, varsity bowling teams' primary purpose is to compete at the varsity level and win a national championship. However, bowling is one of the smallest and cheapest NCAA-recognized sports with only about 4,000 potential recruits,

offerings.

87. *Id.* The other most popular sports listed, in no particular order, were Track and Field – Outdoor, Volleyball, Basketball, Softball, Soccer, Cross Country, Tennis, Swimming & Diving, and Lacrosse.

88. Blake, *supra* note 1, at 96.

89. *Id.* at 100.

90. *Id.*

91. *Id.*

92. See Liguori, *supra* note 44, at 153.

93. *Id.*

limited viewership, five allocated scholarships, and offsite facilities.⁹⁴ Similarly, rifle, the sport of shooting guns, meets the OCR requirements because its primary purpose is competing, it has a national governing body, the well-funded NRA and USA Shooting, an NCAA-sponsored national championship, and around 4.6 scholarships per team.⁹⁵ Both sports are favored around the country because the smaller sports boost female participation but allow more scholarships to go to popular female sports, like basketball, that were historically closed off to female participation.⁹⁶

If we compare these NCAA and OCR recognized sports to cheerleading, we see the inequities in factors' application. First, as the *Quinnipiac* court states, competitive cheerleading met the first and second factor of the OCR inquiry and met the all-important factor of whether the purpose of the activity is competition. Additionally, since *Quinnipiac*, competitive cheerleading has established a national governing body, USA Cheer, and it provides "cheer combines" to all junior and seniors in high school as an opportunity to get scouted by various collegiate level cheer teams, despite the NCAA refusing to designate traditional competitive cheer as an emerging sport.⁹⁷ Further, competitive cheerleading has about 4.2 million participants, who generate an estimated \$2 billion dollars annually for the cheer industry, compared to bowling and rifle's limited athletic participation and viewership.⁹⁸ The only outstanding *Quinnipiac* factor competitive cheerleading has yet to satisfy is the progressive playoff system. However, the National Cheerleader Association ("NCA") competitions and the Universal Cheerleader Association ("UCA") competitions arguably satisfy this requirement because both are multiday elimination style competitions. The only major difference between competitive cheerleading, bowling, and rifle is that cheer does not get the perks associated with official NCAA recognition: scholarship opportunities, supported admissions, and NCAA sponsored competitions. Thus, when we examine why bowling and rifle are considered sports under the OCR factors and competitive cheerleading is not, the logical conclusion is that competitive cheerleading is disfavored because of its historical inclination towards performance, aesthetics, and sexualized body display. Excluding cheerleading from NCAA recognition based on this history adopts a

94. Lindsay Gibbs, *Women's bowling is the NCAA's hidden gem*, POWER PLAYS (June 15, 2020), <https://www.powerplays.news/p/womens-bowling-is-the-ncaas-hidden>

95. *Robinson Rifle Team – A Parent's Guide*, <https://www.robinsonrifle.org/wp/wp-content/uploads/2018/12/A-Parents-Guide-to-Rifle-September-2018-ver-1dot5-FINAL.pdf>.

96. Gibbs, *supra* note 80.

97. *Cheer Combines*, USA CHEER (last visited April 4, 2021), <https://www.usacheer.org/usa-cheer-college-combines-2020>

98. Jeanette Settembre, *Netflix Cheerleading Docuseries Sheds Light on \$2B Industry*, FOX BUSINESS (Jan. 17, 2020), <https://www.foxbusiness.com/lifestyle/netflix-cheer-docuseries-billion-dollar-competitive-cheerleading>; James Pasley, *How Cheerleading Evolved From One man Yelling in Minnesota to 4.5 Million leaping Cheerleaders*, BUSINESS INSIDER (Jan. 31, 2020), <https://www.businessinsider.com/evolution-of-cheerleading-in-photos-2020-1#in-1978-other-nfl-teams-tried-to-beat-the-cowboys-cheerleaders-by-being-more-provocative-sports-illustrated-called-it-the-great-cheerleading-war-of-1978-21>.

“male baseline for what qualifies as a sport and patronizes the women who prefer cheerleading over other athletic activities” and undermines the purpose of Title IX because Title IX seeks to accommodate women’s preferences in sports and end historical gender discrimination.⁹⁹

USA Cheer has recognized the NCAA’s bias against cheerleading’s cultural history by forming the National Collegiate Acrobatics & Tumbling Association (“NCATA”) and its STUNT program, which is a modified version of competitive cheerleading that eliminates the “performance” aspect.¹⁰⁰ STUNT removes the performance aspect of competitive cheer, the dancing, crowd engagement, and aesthetic portion of cheerleading, which is the most feminine aspect of cheerleading and what many people believe compromises cheerleading’s legitimacy as a sport.¹⁰¹ STUNT athletes wear jerseys and spandex similar to volleyball athletes, do not do the classic high ponytail and bow, and only perform tumbling and acrobatic stunts, similar to NCAA-recognized gymnastics.¹⁰²

The NCAA’s near immediate recognition of STUNT as an emerging sport further demonstrates that the OCR’s factors are applied inequitably to competitive cheer because of its historical role as a subordinate, feminized sport. If another competitive cheer case came through a federal court today, it is possible a court may deem cheerleading a sport for Title IX purposes because cheerleading has improved its national structure, administration, and competitions. Yet the NCAA refuses to even recognize competitive cheer as an emerging sport and instead supports the STUNT program. In application, this new iteration of cheer further perpetuates the notion that cheerleaders are second class athletes because it implies that “normal” competitive cheerleaders, even those at top ranked programs like Oregon, are more “superficial[] and [open to] sexual objectification”¹⁰³ in comparison to Oregon’s nationally ranked STUNT team simply because of the difference in aesthetic performance elements.

Competitive cheer should pass the OCR factor test. By comparing OCR and NCAA recognized sports, like bowling and rifle, to the current state of competitive cheer, we see how the OCR factors are applied inequitably and rendered impractical in the determination of what constitutes a sport under Title IX. Further, the OCR factors and Title IX supposedly chart “a middle path” that rejects the “highly feminized” sideline style version of cheerleading as a “sport,” but leave “open the possibility that a more competition oriented version of the activity might count as a sport” as the court held in *Quinnipiac*.¹⁰⁴ Yet, the

99. Blake, *supra* note 1, 100.

100. Zdunek, *supra* note 49, at 96.

101. Laura Grindstaff, *Cheerleading and the Gendered Politics of Sport*, 53 SOCIAL PROBLEMS 500, 505 (2006).

102. STUNT 2020 Rules Appendix B: Uniform Specifications, USA Cheer (January 7, 2020), available at <https://www.stunthesport.org/wp-content/uploads/2020/01/2019-20-STUNT-Rule-Book-1-7-2020.pdf>.

103. Blake, *supra* note 1, at 101.

104. *Id.*

creation of NCATA and STUNT contradicts this possibility because the NCATA does not simply change competitive cheerleading to be more competition oriented in STUNT. STUNT strips competitive cheerleading of the typical feminine performance elements that, allegedly, delegitimize the activity. The NCAA then immediately recognizing STUNT as an emerging sport supports the unsubstantiated notion that counting competitive cheerleading as a sport under Title IX would ultimately “subordinate, sexualize, and feminize”¹⁰⁵ women in sports. Thus, the OCR factors’ impractical application undermines Title IX’s purpose in ending gender-based discrimination in education opportunities like athletics.

B. The Non-Recognition of Cheerleading as a Sport Subjects Female Cheerleaders to Gender Discrimination, Reinforces Sex Stereotypes, and Undermines the Purpose of Title IX.

As argued above, competitive cheer can and should be legally recognized by OCR as a sport for Title IX purposes. Non-recognition will continue to subject college cheerleaders to gender-based discrimination and sexual harassment and reinforce sex stereotypes associated with cheerleading. This non-recognition under Title IX ultimately undermines the legislative intent of Title IX—to dismantle gender-based stereotypes.

In *How the NFL “Protects” Cheerleaders with Discriminatory Policies*, Fracine Eichorn discusses how a former Saints cheerleader was dismissed after violating the anti-fraternization policy¹⁰⁶ in her contract.¹⁰⁷ Eichorn argued that not only is the anti-fraternization policy in the Saint’s cheerleader’s contract discriminatory on its face and actionable under Title VII because it only applied to the female cheerleaders, but the policy also reinforces the sex stereotypes associated with cheerleaders.¹⁰⁸ In the Saints’ response to a former cheerleader’s Title VII discrimination claim, they claimed the policy was there to protect the cheerleaders from possible sexual harassment perpetrated by the players.¹⁰⁹ However, this policy, and the Saints response, reinforces the notion that cheerleaders need paternalistic protection and play an inferior role to their male counterparts on the field. Moreover, the policy burdens the cheerleaders with avoiding all contact, rather than burdening the men with refraining from sexual harassment.¹¹⁰ The policy then reinforces the assumption that cheerleaders are second rate athletes who can be subject to gender-based discrimination and sexual harassment because of the outdated stereotype that the cheerleaders are

105. *Id.*

106. An anti-fraternization policy is a typical contractual provision for professional cheerleaders and sometimes collegiate cheerleaders. The provision requires cheerleaders to avoid all contact with players and physically remove themselves from any space a player is present at regardless of who was there first.

107. Eichhorn, *supra* note 42.

108. *Id.*

109. *Id.* at 291.

110. *Id.* at 307.

sexual objects, not true athletes that enhance a game day experience.

Like the implications of the anti-fraternization policy, the policy implications of not recognizing competitive cheerleaders under Title IX as athletes also subjects cheerleaders to gender-based discrimination, sexual harassment, and reinforces the sex stereotypes associated with cheerleading. As stated in *Richardson v. Northwestern University*, Northwestern's athletic department and Title IX office refused to take the plaintiff's claims of sexual harassment and gender-based discrimination seriously because of the sex stereotype that cheerleaders should "just take it."¹¹¹

Similar to the Saint's organization employing its cheerleaders and subjecting them to harassment, Northwestern administered the cheer program under its athletic department and commodified its cheerleaders for the purpose of soliciting donations and placating wealthy fans, all while refusing to recognize its cheerleaders as true athletes. The systematic exploitation of cheerleaders because of the associated gender stereotypes makes college cheerleaders vulnerable to harassment. With a "just take it" attitude, educational institutions reinforce the traditional sex stereotypes that cheerleaders can be subject to gender discrimination because of the feminine, sexual nature of cheer.

Richardson's case exemplifies why cheer needs to be considered a sport under Title IX to end the discrimination, harassment, and outdated stereotypes cheerleaders face. Like how Title VII was available to remedy the gender discrimination the Saint's cheerleader faced, Title IX was also available to Richardson to remedy the discrimination and sexual harassment she faced. However, in both cases, the NFL and university defended the gender-based discrimination claims by using outdated stereotypes about cheerleaders to justify the discrimination experienced by each cheerleader. Like the Saint's organization's paternalistic response to the cheerleaders objection to the discriminatory anti-fraternization policy, Northwestern's response to Richardson's Title IX claims demonstrates that Northwestern, its athletic department, and Title IX office did not take her claims seriously because her discrimination and harassment occurred while Richardson acted as a cheerleader in a toxic culture that cheerleaders are "forced to tolerate."¹¹²

Thus, to effectuate the true purpose of Title IX, cheerleading must be considered a sport under Title IX. Title IX seeks to dismantle historical stereotypes associated with women by compelling universities to provide women equal treatment in sports and legal remedies for women who are subjected to gender-based discrimination and harassment. Both protections built into Title IX equally contribute to Title IX's purpose of eliminating gender-based stereotypes. However, these overt prohibitions against sexual discrimination and harassment are not enough to effectively protect cheerleaders. As demonstrated by

111. "It" is in reference the sexual harassment the plaintiff endured during fan events sponsored by Northwestern and supervised by her coach.

112. Complaint & Demand for Jury Trial at 2, *Richardson v. Northwestern Univ.*, No. 1:21-cv-00522 (N.D.Ill. Jan. 29, 2021).

Northwestern's response to Richardson's claims, cheerleaders may have the same legal remedies available to them as any other student, but the cheerleaders' claims are taken less seriously because of the stereotypes associated with their activity. Thus, because Title IX is not just about anti-discrimination but also pro-equality, we should seek to counter the oversexualization of cheerleading by promoting a positive, athletic image of cheerleading.

Moreover, the implications of not recognizing competitive cheer as a sport under Title IX are clear in the recent national championship win by the Louisiana State University ("LSU") Tiger Girls.¹¹³ In January 2022, the LSU Tiger Girls, a sideline style cheer team whose main focus is competition, made headlines after winning a national championship at 2022 National Dance Team Competition after LSU's athletic department refused to allow the cheer team to compete in 2021.¹¹⁴ The Tiger Girls are organized under LSU's athletic department and are held to the same NCAA student-athlete standards that other Title IX recognized athletes must abide by.¹¹⁵ However, in 2021, LSU's athletic department prohibited the Tiger Girls from competing nationally.¹¹⁶ The LSU athletic department allegedly told head coach, Kandance Hale, that no athletic trainers could be spared for the cheer team's season and the NCAA-recognized sports "came first."¹¹⁷ While the team was not allowed to compete nationally, the LSU athletic department still demanded the Tiger Girls cheer at other Title IX recognized sporting events. Unlike the Tiger Girls, the Title IX recognized sports were still allowed to compete in their respective national championship competitions.¹¹⁸

The Tiger Girls' disparate treatment demonstrates how the non-recognition of cheerleading as a sport under Title IX continually subjects *all* cheerleaders, regardless of the style of cheer, to gender-discrimination, reinforces sex-based stereotypes, and undermines Title IX. The Tiger Girls, an all-female team, were stripped of their right to compete nationally simply because they were not recognized by NCAA or Title IX. This decision demonstrates gender-discrimination at a nationally recognized institution and undermines Title IX's ability to protect female athletes. LSU ultimately used the non-recognition to justify diverting athletic resources to what the institution believed were more deserving teams. LSU then forced the team, arguably one of the best collegiate cheer teams in the country, to continue to support other NCAA recognized sports regardless of the Tiger Girl's high probability of winning a national title for LSU. LSU's actions further reinforce sex-based stereotypes and the false assumption that cheerleaders are not worthy of the same athletic recognition as other teams.

113. Zoe Christen Jones, *From heartbreak to TikTok stardom: The amazing journey of the LSU Tiger Girls*, CBS NEWS (February 2, 2022), <https://www.cbsnews.com/news/lsu-tiger-girls-like-a-boy-uda-national-champions/>.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

Thus, the non-recognition of all types of cheerleaders under Title IX around the country demonstrates how athletic departments are continually subjecting cheerleaders to gender-based discrimination and false stereotypes.

If Title IX were to recognize cheerleading as a sport, there would be progress towards ending the sexual stigma society associates cheerleading with. Aside from receiving benefits, such as free tuition, food, clothing, housing, and stipends, sports and athletes with Title IX and NCAA recognition receive the validation that comes with playing a sport. The term sport signifies a “high status” associated with athletic ability; cheerleaders know that playing NCAA-recognized sports is more prestigious than cheerleading, and they consistently complain about being disrespected by other college athletes.¹¹⁹ The underlying reason for cheerleaders wanting cheer to be seen as a legitimate sport is not for the perks of being an athlete or to demonstrate their athletic ability, but rather so “people can’t trash [it].”¹²⁰ If the purpose of Title IX remains to end gender-stereotypes and promote equality, then recognizing cheerleading as a sport is the first step to eliminating the gender discrimination that female collegiate cheerleaders face in order to legitimize the sport.

The critics of adopting cheerleading as a sport under Title IX will argue that cheerleading is an easy, cheap way for schools to boost female participation at the cost of other women’s sports, which historically suppressed female participation.¹²¹ However, these critics are “subordinating” cheerleading by arguably “adopt[ing] a male baseline for what qualifies as a sport and patroniz[ing] the women who prefer cheerleading to other athletic activities.”¹²² The critics’ argument actually undermines Title IX’s true purpose of eliminating female stereotypes and promoting equality by adopting a perspective that denies more feminine athletic opportunities the same recognition as traditionally masculine athletic activities. By eliminating cheer from sport consideration, the critics are further perpetuating the narrative that women cheerleaders are less valuable than other female athletes. While this rationale may expand access to historically male dominated sports in the short term, it contradicts Title IX’s purpose of eliminating gender-based stereotypes. Thus, to end the discrimination and harassment cheerleaders face, cheer must be considered a sport under Title IX to promote a positive, athletic image of the activity and counteract its perpetual sexualization.

IV. RECOMMENDATIONS

In addition to classifying competitive cheer as a sport for purposes of Title IX, OCR should redefine the factors that it uses to evaluate if an activity constitutes a sport, the cheer industry should unite to create a national regulatory

119. Laura Grindstaff, *Cheerleading and the Gendered Politics of Sport*, SOCIAL PROBLEMS Vol. 53, No. 4, 505 (November 2006).

120. *Id.*

121. Blake, *supra* note 1, at 100.

122. *Id.*

body for all types of cheerleaders, and universities should restructure the organization of cheer programs to be uniformly administered under athletic departments.

A. Changing the OCR Factors Test to a Totality of Circumstances Test

The current OCR factors that weigh whether an activity is a sport or not are outdated and impractical in application. Instead of the current factors OCR weighs, OCR should implement a more flexible test, like the totality of circumstances test in §106.41,¹²³ which suggests ten factors OCR or institutions could use to determine whether equal opportunities are available to both men and women under Title IX.¹²⁴

For example, factors that are more flexible could include (1) popularity, (2) profitability, and (3) athleticism and skill set. Regarding popularity, Title IX seeks to accommodate women's athletic interest rather than offer a "set menu" of identical men and women's sport.¹²⁵ To satisfy this mission, OCR should add popularity of sport to the factors it considers. This would allow competitive cheerleading to likely qualify as a sport because there are currently 4.2 million active cheerleaders in the country, and competitive spirit ranks in the top 10 of most popular female sports among the National Federation of State High School Associations.

Additionally, the profitability of the sport could be taken into account. *Bloomberg Businessweek* estimated that professional cheerleaders appear for an average of seven seconds during a NFL broadcast, and that is equivalent to about \$8.25 million per season, or more than \$317,000 per year for each of the 26 teams with squads last year.¹²⁶ In college football broadcasts, cheerleaders appear more frequently due to the increased amount of school spirit associated with college football. In 2012, the PAC-12 negotiated a \$3 billion television deal with ESPN and Fox. This suggests that college cheerleaders' features on TV arguably equate to, or exceed, the economic value of the NFL Cheerleaders appearances on television.¹²⁷ Additionally, cheerleading's popularity is similar to the popularity of traditional sports, like basketball and football. Basketball and football's popularity has been translated into billions of dollars of revenue for universities

123. The totality of circumstances test was originally proposed by Rachel Schwarz. This paper concurs with her proposal but deviates from it in the possible factors OCR should consider. Rachel Schwarz, *Timeout! Getting Back to What Title IX Intended and Encouraging Courts and the Office of Civil Rights to Re-evaluate the Three-Prong Compliance Test*, 20 WASH. & LEE J. CIV. RTS. & SOC. JUST. 633, 669 (2014), available at <https://scholarlycommons.law.wlu.edu/crsj/vol20/iss2/12>

124. *Id.*

125. Blake, *supra* note 1, at 95.

126. David Berri, *Why Sports Cheerleaders and Dancers Are Worth More Than Minimum Wage*, VICE (June 8, 2016), <https://www.vice.com/en/article/z4a4v4/why-sports-cheerleaders-and-dancers-are-worth-more-than-minimum-wage>

127. Max Rogers, *USC Trojans Football: Pac-12 Commissioner Says College Football is Undervalued*, BLEACHER REPORT (April 2, 2012), <https://bleacherreport.com/articles/1127720-usc-trojans-football-pac-12-commissioner-says-college-football-is-undervalued>

and the NCAA.¹²⁸ Similarly, the cheerleading industry is currently valued at nearly \$2 billion dollars. If the cheer industry could translate this business into a varsity sport, competitive cheer could be on track to become one of the only other profitable sports, like basketball or football. Moreover, universities and the NCAA stand to profit if cheerleading is deemed a sport under Title IX as it is a low-cost athletic activity that boosts female participation, like bowling, but has much more potential viewership and revenue.

Lastly, competitive cheer requires extreme athleticism and agility. Arguably, cheer requires as much athleticism, if not more, than Title IX recognized sports like rifle or bowling. It seems obvious that competitive cheer's athleticism would qualify the activity to be a sport. However, the OCR factors do not weigh the skill set or athleticism required to participate in a sport. Thus, the OCR should adopt factors that weigh the training, athleticism, and skill set required for participation.

B. Creating a National Cheerleading Regulatory Body that Oversees All Levels and Types of Cheerleaders

In *Quinnipiac*, the court noted that the team was governed by the NCATA.¹²⁹ Despite being governed by this association, there were no uniform rules applied to the cheer team and the competitions it participated in. The court ultimately found that the irregularities created from the lack of uniform rules prevented competitive cheerleading from qualifying as a sport under Title IX.¹³⁰ Since *Quinnipiac*, USA Cheer has strengthened the uniformity of competition.¹³¹ While the USA Cheer's efforts to increase the uniformity of competitive cheer may strengthen a future case before a court, competitive cheerleading, both sideline style and stunting, remain fragmented because of the lack of one regulatory body who owns and runs all cheer and sideline cheer competitions.

In Georgetown Law's Workers' Rights Institute Event, *A Woman's Work: The NFL's Cheerleader Problem*, former NFL cheerleaders suggested that the only way to eliminate gender discrimination and gain respect as a sport would be to create an organization that regulates all types of cheering at all levels.¹³² Currently, the cheer industry is extremely fragmented—as displayed by the differences between the types of cheer, competitions, and professional opportunities. If cheerleaders, both sideline and competitive, could form a regulatory body that advocated for cheerleaders across the nation, then cheerleading could become a more legitimate, standardized, and professional

128. Alan Blinder, *Hammered by Pandemic, N.C.A.A. Revenue Falls by \$600 Million*, N.Y. TIMES (Feb. 26, 2021), <https://www.nytimes.com/2021/01/25/sports/ncaabasketball/ncaa-revenue-falls.html#:~:text=In%20its%20fiscal%20year%20before,net%20assets%20of%20%24450%20million>

129. *Quinnipiac*, 691 F.3d 85, 104-5.

130. *Id.*

131. Zdunek at 181-2.

132. Audio Tape: *A Woman's Work: The NFL's Cheerleader Problem*, held by the Georgetown Law Workers' Rights Institute (Feb. 26, 2021).

sport. This legitimization would then help mitigate the negative stereotypes associated with cheerleading.

C. Reorganizing All Cheer Programs to be Administered Under Athletic Departments

In her interview, Richardson discussed how when she initially auditioned for the Northwestern cheer team, she believed she would be considered an athlete because the program was administered by Northwestern athletics. However, the athletic department was just the parent organization to the cheer program; the cheer program was not directly administered by athletics.¹³³ Other programs, like UCLA and USC's spirit teams, operate under student affairs with no guidance from their respective athletic departments, despite the cheerleaders nearly exclusively cheering at events sponsored by the athletic department.

If all schools with spirit squads and competitive cheer teams were to organize their cheer programs under athletics, there would be more standardization and legitimacy among collegiate cheer. D1 athletic departments spend nearly three to six times more on athletes than institutions spend to educate the average student¹³⁴; athletic departments have the financial means and physical resources—like athletic trainers and gyms—to adequately serve collegiate cheerleading teams. Additionally, marketing associates, who typically organize and run the events and games cheerleaders perform at, work in the athletic department. When cheer programs are organized under the university's student affairs division, there is a disconnect in communication between cheer programs and marketing, resulting in cheerleaders not getting adequate support. For example, cheerleaders may not have the same access to water, scheduled half time breaks, trainers, and nutritionists that the athletic department regularly supplies to its own athletes. As a first step, if athletic programs across the country administered their competitive cheer and spirit programs, this could bring more legitimization to cheerleading as cheerleaders could still be considered athletes under their respective athletic departments. The athletic departments could grant cheerleaders access to facilities, priority registration, trainers, and free meals without the implications of being a Title IX sport.

V. CONCLUSION

Title IX's non-recognition of cheer as a sport is not practical in application and undermines Title IX's objective, which is preventing gender discrimination in educational institutions and dismantling gender-based stereotypes. Cheerleaders are in a unique position compared to the students and designated

133. Zoom Interview with Hayden Richardson (March 5, 2021).

134. *The athletic finance data was created from reports submitted to the NCAA and then was compiled by journalists at USA Today. Academic Spending Versus Athletic Spending: Who Wins?, Delta Cost Project at American Institute for Research, available at <https://www.air.org/sites/default/files/downloads/report/Academic-Spending-vs-Athletic-Spending.pdf>*

athletes of a university; cheerleaders train similarly to athletes, cheer year-round at many different types of events, and provide economic and social benefits to universities. However, Title IX does not afford cheerleaders recognition as a varsity sport because of the OCR factors that determine what activity constitutes a sport under Title IX. The lack of recognition combined with the sexualized stereotype associated with cheerleaders leaves cheerleaders vulnerable to harassment and reinforces outdated sex stereotypes.¹³⁵ The non-recognition of cheer as a sport thus undermines the mission of Title IX. To remedy the pervasive discrimination female cheerleaders face, cheerleading should be recognized as a sport, OCR should redefine its factors that determine what constitutes a sport under Title IX, cheerleading should institute a regulatory body, and athletic departments should oversee current collegiate cheer programs.

135. Hayden Richardson, Plaintiff, v. Northwestern Univ., Amanda Dasilva, Heather Van Hoegarden Obering, Michael Polisky, and Pamela Bonnevier., Defendants., 2021 WL 306448 (N.D.Ill.)