

# Archived Information

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THE SECRETARY'S COMMISSION  
ON  
OPPORTUNITY IN ATHLETICS  
WASHINGTON, D.C., FULL BUSINESS MEETING  
HOTEL WASHINGTON  
515 15TH STREET, NW  
WASHINGTON, D.C. 20004

Thursday, January 30, 2003

9:00 o'clock a.m.

1		I N D E X
2	APPEARANCES:	
3	CHAIRS:	CYNTHIA COOPER
4		TED LELAND
5	COMMISSIONERS:	PERCY BATES
		BOB BOWLSBY
6		EUGENE DeFILIPPO, JR.
		DONNA de VARONA
7		JULIE FOU DY
		THOMAS GRIFFITH
8		CARY GROTH
		LISA GRAHAM KEEGAN
9		RITA J. SIMON
		MIKE SLIVE
10		GRAHAM SPANIER
		DEBORAH YOW
11	EX OFICIO MEMBERS:	BRIAN JONES
12		GERALD REYNOLDS
		SALLY STROUP
13	STAFF:	DEBORAH PRICE
14		MATTHEW BECKER
		WILLIAM DUNCAN
15		MARISSA ANN MUNOZ
		VIRGINIA DeMINT
16		SALLY RICHARDS
		CHERYL MOSS
17	CONSULTANT:	JAY DISKEY
18		
19		
20		
21		
22		

1                   MR. LELAND: Welcome, everybody, to  
2 this morning's meeting. By popular acclamation,  
3 Cynthia and I have decided not to give our normal  
4 introductory talks by request of the  
5 commissioners, but we do have a couple of  
6 announcements to make.

7                   First of all, we are -- this is a  
8 public open discussion. We need to make sure  
9 that we talk into the microphones clearly so we  
10 can transcribe the proceedings. At the same  
11 time, make sure -- we all made this mistake,  
12 especially myself yesterday -- that if you are  
13 reading from a written document, please read  
14 slowly so the transcriber has a chance to keep  
15 up.

16                   We have sign translation services  
17 available. We will ask the translators to work  
18 for a few minutes and then they'll step aside.  
19 If anyone requests those services, you could do  
20 so at the table at the side.

21                   I'm assuming that we'll take a break  
22 at 11:00 o'clock, but if we are fine with the

1 work and people choose to stay, we could go  
2 ahead and decide that at the time.

3 But otherwise, we have planned on an  
4 11:00 o'clock stop.

5 So I think we are on recommendation  
6 number 12, and also start out this one by  
7 reading it. Well, let me -- Cynthia and I have  
8 spent a little bit of time trying to talk about  
9 to organize this morning, so here was our idea.

10 We would take the recommendations in  
11 numerical order, until we hit the first one that  
12 dealt with possible changes in the  
13 proportionality computations under 1, and then  
14 we would adjust our agenda in a way that we  
15 would take all of those recommendations that we  
16 think deal with proportionality, take them in  
17 order and then ask the -- I say the alleged  
18 sponsor, because some of those found out  
19 yesterday what they were sponsors on, they  
20 weren't really sure they were sponsors on.

21 But if your name is attached to it,  
22 take four or five, a limit of five minutes to

1 explain the proposal. Then we'll move on to the  
2 next.

3 So here's my reading of the  
4 proposals and that's -- that deal with possible  
5 changes, potential changes in the  
6 proportionality formula. They are proposal --  
7 recommendation 13, recommendation 14,  
8 recommendation 15A and B, recommendation 16,  
9 recommendation 18, recommendation 19 and I think  
10 recommendation 22.

11 That's not a perfect list but I  
12 assume that those are the ones that deal the  
13 proportionality formula in one way or another.

14 I've been requested by some  
15 commissioners that we deal with those all at one  
16 time.

17 So what Cynthia and I have decided  
18 the best, fairest process would be to go to, for  
19 instance, the 13 and 14 and 15A and 15B, on  
20 through that list I just gave you and ask each  
21 sponsor to talk a limit of five minutes and give  
22 your little remarks and then questions.

1                   People want to make adjustments in  
2                   their proposal at that time, that's the time to  
3                   do it. And then so we could look at the  
4                   adjustments, the potential adjustments to  
5                   proportionality in total.

6                   And then we can come back and start  
7                   looking working our way through 13, 14, 15, 16,  
8                   again. I think there was a feeling among the  
9                   commissioners that I talked to that  
10                  procedurally, they'd like to sort of get a grasp  
11                  on what all of the different proposals that deal  
12                  with proportionality might be, so that they  
13                  could have a better context to vote on each  
14                  particular one.

15                  Again when we deal with  
16                  proportionality, I think -- and we've talked to  
17                  officials at the department of education with, I  
18                  think, not only perfectly fine but appreciated  
19                  if we pass on all the relevant, supportable  
20                  ideas that we have.

21                  I don't think we have to come up  
22                  with one way, that we're going to ask the state

1 to come up with one way to suggest to Secretary  
2 Page that he change proportionality, but I think  
3 we should -- if we suggest to change it at all,  
4 but I think we should offer him a series of  
5 proposals. I think that's what I'm hearing from  
6 the other commissioners that they're most  
7 comfortable with, anyway.

8 So these proposals that I just  
9 named, 13, 14, 15A, B, 16, 18, 19, 20 are not  
10 mutually exclusive. We don't just have to end  
11 up passing one of those and defeating the  
12 others. I think we can pass on more than one,  
13 but there's no obligation to pass them all on.

14 Is there any question about -- yes?

15 MS. SIMON: Ted, 19 and 20 are very  
16 closely related. Twenty spells out the interest  
17 surveys in a little more detail.

18 But since you are including 19, can  
19 we also include 20? Nineteen talks about it in  
20 survey; 20 spells it out a little bit more.

21 MR. LELAND: The reason I excluded it  
22 is -- first of all I put it in, but the reason I

1 excluded it is because I thought it really dealt  
2 with prong three.

3 MS. SIMON: I know, but I --

4 MR. LELAND: But we would rule -- if  
5 you are the assigned person for that, so we'll  
6 move that, if that's your desire --

7 MS. SIMON: Thank you.

8 MR. LELAND: -- at least have a  
9 chance to discuss it at that time.

10 MS. SIMON: Thank you.

11 MR. BATES: Ted.

12 MR. LELAND: Yes.

13 MR. BATES: Point of clarification.

14 Are you suggesting all of these will  
15 be passed along as recommendations with equal  
16 weight, or are we going to try and decide at  
17 least what we would recommend and then include  
18 all of the others as part of the discussion that  
19 we looked at, rather than simply saying, we  
20 recommend all of these? Is that clear or not?

21 MR. LELAND: I don't think that  
22 Cynthia or I have a preconceived notion on what



1 the final vote might look like.

2 I can only answer your question to  
3 say that, in discussing these proposals, the  
4 commissioners have asked that we put them  
5 together in a way that they can make way to  
6 tradeoffs, understand what the trade offs are.

7 So I don't think we have a  
8 preconceived notion on what the final vote is  
9 going to look like, I guess.

10 I could imagine us going down these  
11 one by one and voting them in or out. I could  
12 imagine someone saying, let's put them all  
13 together and pass them on without comment, or  
14 without support.

15 I think it is the will of the group.  
16 All's I'm doing is trying to be the -- sort of a  
17 traffic policeman here and say this is the way  
18 we ought to do our business from, in terms of  
19 what comes first, what comes second.

20 The outcome -- so you are further  
21 along than I think Cynthia and I are.

22 MR. BATES: No, no, I understand the

1 process. I guess I'm getting sort of ahead with  
2 some concern about the outcome, is what I was  
3 thinking. And I assumed that you were.

4 MR. LELAND: Okay. I understand.

5 Okay. Recommendation, then, 112.

6 This is not part of our package of potential  
7 changes to the proportionality formula.

8 Recommendation 12, the Department of  
9 Education to encourage the NCAA to review  
10 scholarship guidelines and determine if they  
11 adequately -- excuse me --

12 The Department of Education should  
13 -- do as I say, not as I do; it's one of those  
14 things -- who is that man behind the screen?

15 The Department of Education should  
16 encourage the NCAA to review its scholarship  
17 guidelines to determine if they adequately  
18 promote athletic participation opportunities.

19 Okay; discussion?

20 MS. GROTH: Ted, I would like to make  
21 just a few minor changes based on yesterday's  
22 discussion, if instead it would read.

1                   The Department of Education should  
2           encourage the NCAA to review its scholarships  
3           and other guidelines to determine if they  
4           adequately promote or hinder athletic  
5           participation opportunities.

6                   MR. LELAND: Anybody have a problem  
7           with editorial changes?

8                   MR. BATES: I would support that.

9                   MR. LELAND: Our authors have got  
10          that, I hope.

11                   Any discussion? Can we pass this by  
12          consensus?

13                   See no objections, we'll consider it  
14          passed.

15                   Now we'll switch to our procedure to  
16          take on one by one those issues that deal with  
17          proportionality formula. We'll put a limit of  
18          five minutes' discussion on each one.

19                   We'll also have time, when we come  
20          back to vote on it, to discuss it again. But  
21          our attempt here is to give the commissioners a  
22          full flavor of all the different proposals

1 before them today that look specifically at the  
2 proportionality formula.

3 So if we could begin with 15.

4 MS. YOW: Thanks, Dan.

5 I'm going to open by saying that the  
6 proposal that we are looking at, I think it's  
7 important that everyone understand that it  
8 doesn't provide a financial advantage to the  
9 University of Maryland.

10 We are commit to gender equity  
11 through proportionality, and we have a 51/49  
12 split in our male to female undergraduate  
13 enrollment, and we don't have any projection  
14 that that is going to change significantly any  
15 time soon.

16 So I just want to repeat, Maryland  
17 Athletics does not benefit from this proposal.  
18 I'm not going to be under less financial strain.  
19 So I just ask that ask we go into this and look  
20 at it, that would you -- if you've already made  
21 your mind up that you don't like this, I'm just  
22 going to ask if you could temporarily suspend

1       that opinion and just listen to what I have to  
2       say about it.

3                   Let me at least start with the  
4       intent of the recommendation. The intent is to  
5       go 50/50, which has no -- it's wholly paradigm,  
6       has nothing to do with the undergraduate  
7       enrollment at any institution.

8                   It's just looking at opportunities  
9       for men and opportunities for women, saying what  
10      would be fair, and what to me seems to be fair  
11      would be 50/50.

12                  If we had an apple and we were both  
13      hungry and wanted to share that apple and we cut  
14      it in half, most people would say that would be  
15      fair: You take half, I'll take half.

16                  The percentage of variance, I want  
17      to remind you that when we first brought this up  
18      in Philadelphia, it was a suggestion and Alison  
19      will remind you that we did not know as  
20      commissioners that we were going to be asked to  
21      go around the room that day specifically to make  
22      suggestions.

1                   So I did the best I could on that  
2                   day and made a suggestion of a variance of five  
3                   to 7 percent.

4                   Since then I've had a chance to go  
5                   home and run some numbers on what that would  
6                   mean in an athletic program with, say, 200  
7                   athletes for the men and 200 for the women and  
8                   the variance is too large. I'm very open to the  
9                   variance being much smaller, but the idea of the  
10                  variance is still relevant, I think.

11                  The intent of the recommendation is  
12                  to have available a method to meet Title 9 that  
13                  does the following: It would be -- I think what  
14                  Bob Bowsby called yesterday the final resting  
15                  point: Versus the constant moving target of  
16                  tying that to the undergraduate enrollment  
17                  ratio.

18                  It would also benefit those of us  
19                  who are interested in going through the process.  
20                  We would not need interest surveys; that's a  
21                  second benefit.

22                  The third benefit is readily

1        quantifiable, and I believe is equitable, if you  
2        go back to the half and half. I believe that  
3        rationale also is logical. I've always had a  
4        logic disconnect with the comparing what we do  
5        for women and men related to the undergraduate  
6        enrollment.

7                    In short, it provides equal  
8        opportunity: 50 percent for the men, 50 percent  
9        from the women.

10                   The assumptions would be that there  
11        is adequate interest by women and ability of  
12        women to participate in sports at this required  
13        level, for both purposes of participation numbers  
14        and scholarship opportunities.

15                   And that flies in the face of what  
16        some people believe, if you look at the Mount  
17        Holyoke situation as an example, the fatherhood  
18        wars, education situation, or you look at what  
19        current participation rates are for women in  
20        high schools.

21                   I'm just going to suggest that  
22        those, at least at the high school level are

1 that way because we haven't had a reasonable  
2 opportunity to continue to pursue those  
3 opportunities.

4 I do, in fact, think there is both  
5 the interest and the ability of women to meet  
6 this meet.

7 The purpose of the variance, whether  
8 it is 2 percent, 3 percent, it is there because  
9 it assumes that there could be from time to time  
10 non-discriminatory reasons that occur that  
11 prohibit institutions from meeting a 50/50  
12 ratio.

13 Let me give you a few of those  
14 examples that those of us as AD's around the  
15 table know exist.

16 Number one, people fail academically  
17 and they are not eligible to compete, and Muffet  
18 knows this as a coach as well.

19 There are transfers, people who  
20 leave for all kinds of reasons, whatever that  
21 might be: Want more playing time, want to be  
22 closer to home. People who quit teams for all



1 kinds of reasons. And occasionally even if  
2 Imelda gets pregnant and can't compete, she  
3 can't help that. She is going to take care of  
4 herself and her baby and she'll be back later.

5 But those types of things do come  
6 up, and I don't think an a institution should be  
7 penalized for them.

8 And I'm not going to pick on, well,  
9 why would you pick two percent? Why would you  
10 pick three percent?

11 MR. LELAND: One minute.

12 MS. YOW: I'm pretty sure that there  
13 is no empirical statistical data to support Bobby  
14 Ox's civil rights. Originally pegged this as one  
15 percent, plus or minus one percentage point.

16 The variance is not designed as a  
17 floor; it's a logical common-sense  
18 acknowledgement that there are occurrences  
19 beyond our control which will take place.

20 Ted, I have 30 seconds left?

21 MR. LELAND: Yes.

22 MS. YOW: I think the key to it is

1 finding an acceptable variance, whatever that  
2 would be, and I don't pretend be an expert on it,  
3 but it is an attempt to be fair and to be logical  
4 about what we're doing and to create a situation  
5 with no moving further.

6 MR. LELAND: Okay; we have about 15  
7 seconds.

8 MS. COOPER: I have a question for  
9 you, Debbie.

10 Within your recommendations, what  
11 would you change your variance to be? I mean,  
12 in much smaller; just put much smaller?

13 MS. YOW: I mean, you're asking me to  
14 pick something out of the air, but I know that  
15 1 percent is not enough. It just isn't. I knew  
16 that through experience, so I know that two  
17 percent might be a possibility, maybe 3 percent,  
18 but I know that -- I know seven --

19 Sometimes you know that you know  
20 that you know; you can't even explain exactly  
21 why you know, but there is need for greater than  
22 1 percentage point, for non-discriminatory

1 reasons. I just listed all the -- a number of  
2 possibilities.

3 MR. LELAND: In an effort to stay  
4 within our five-minute time limit, let's just say  
5 we are done talking about this one. Now we'll go  
6 on to 14, but if you are going to change the  
7 proportion, I'd certainly -- let's have a  
8 specific proposal next time we talk about it; not  
9 now, because we want to --

10 MS. YOW: I can do it now, if you  
11 want to.

12 MR. LELAND: No, I think we need to  
13 move on. I really do -- I want to stay within  
14 the five minutes if at all possible.

15 MS. COOPER: Recommendation 14, page  
16 38, line 12. The first part of the three-part  
17 test for demonstrating compliance with Title IX's  
18 participation standard should be amended to  
19 denote the current measure of proportionality as  
20 part 1A, and then creating a new test denoted as  
21 1B, which would allow colleges and universities  
22 to establish compliance if the male-female ratio

1 in their athletic participation is within  
2 3 percent of the male-female ratio of high school  
3 participation within the Office for Civil Rights  
4 region for that institution.

5 MR. BOWLSBY: I would like to remind  
6 the Commission first that I was 15th out of 15  
7 when we were presenting these things, and was  
8 scrambling hard on a morning when I was  
9 relatively unprepared, as Debbie mentioned, to  
10 put forth the proposal.

11 But I do think this is a  
12 thought-provoking proposal that I have no pride  
13 of ownership in. It was attempt to get us  
14 thinking in a little different way about what  
15 kind of comparison group we use.

16 I think many of us feel that the  
17 comparison to the undergraduate student  
18 population is a flawed entry assumption. I  
19 don't think we go there for our student  
20 athletes. I think we recruit from the  
21 population at large among our citizenry and  
22 really, the comparison to the undergraduate

1 student population, as Debbie said at a previous  
2 meeting, doesn't have any logic flow.

3 We would be just as well off  
4 capturing a comparison group from any other  
5 segment of the population. It seems to me that  
6 the feeder system might be a logical one that we  
7 would use.

8 The issue I've added as I've thought  
9 about it was, however, there needs to be some  
10 way to incentivize continued growth in the  
11 feeder system, and that's why the percentage was  
12 in there that you've got to be above the  
13 percentage of participation in your region.

14 I, like Debbie, am not particularly  
15 wed to three percent or any particular number.  
16 It was an attempt to incentivize growth in the  
17 feeder system and accommodate that growth over a  
18 changing schedule, timetable in the -- at the  
19 collegiate level.

20 As I say, I am not particularly wed  
21 to it. Actually, recommendation 18 that Graham  
22 put forward I think gets at some of the issues,

1 as well.

2 And so I'm not really prepared to  
3 debate this at all, except just to have us all  
4 think about it as an alternative for the  
5 comparison to the undergraduate student  
6 population.

7 MS. COOPER: Thank you, Don.

8 MR. LELAND: Discussion? We have  
9 some time. Any questions?

10 MR. SPANIER: Why the Office for  
11 Civil Rights region? Most of us wouldn't know  
12 exactly which states are in our region.

13 Wouldn't a more appropriate -- I  
14 mean, the concept is good, as you say. It  
15 overlaps somewhat with a later one that I think  
16 I introduced.

17 But wouldn't it be more appropriate  
18 to look at -- different institutions have  
19 different geographical areas from which they  
20 draw. Many public universities, 70, 80, 90.  
21 98 percent of their students are from a  
22 particular state. In some cases it might be a

1 three-state region and some universities are  
2 completely national and their student are -- and  
3 their athletes are drawn from that kind of pool,  
4 and the -- what a civil rights region is, is not  
5 relevant.

6                   Would it make sense to just, instead  
7 of saying from that civil rights region, just  
8 say from an appropriately defined geographical  
9 area for that institution?

10                   MR. BOWLSBY: Yeah, I would be fine  
11 with that. I actually started out with the state  
12 that the institution resides within, and all the  
13 states contiguous to that, but that's a different  
14 matter for, you know, some western universities  
15 than it is for people that are in more densely  
16 populated areas.

17                   So I just -- the Office of Civil  
18 Rights regions were pre-established, and that's  
19 why I chose that, but I certainly would accept  
20 your suggestion as appropriate, Graham.

21                   MS. de VARONA: I just wanted to ask  
22 Bob, you know, when we were talking about

1 institutionalizing some number when it comes to  
2 providing opportunities.

3 From my point of view, it's --

4 MR. LELAND: Thirty seconds.

5 MS. de VARONA: -- I only have 30  
6 seconds? Okay.

7 So what I want to know is, as we've  
8 heard from the wrestlers and the swimmers one of  
9 the problems is the dropping of men's sports.  
10 When we talk about the solution, are you ready  
11 as commissioners to guarantee that if these  
12 changes were made, you would readopt programs  
13 that have been dropped?

14 What is this solving, these numbers  
15 and these solutions? It seems you are just  
16 limiting, you're institutionalizing the system  
17 that will put a barrier between equality. I'm  
18 not so sure that these solutions will open a  
19 door and add men's minor sports.

20 MR. LELAND: That's all time we'll  
21 give you. I wanted to give an overview of these  
22 different proposals.



1                   Now we are onto 15A, what I'll refer  
2                   to as A. It's line 25 on page 38 and it says,  
3                   if substantial proportionality is retained as a  
4                   way of complying with Title IX, the Office of  
5                   Civil Rights shall clarify the meaning of  
6                   substantial proportionality as allowing for a  
7                   variance of seven percent in the relative ratio  
8                   of athletic participation of men and women.

9                   Tom?

10                  MR. GRIFFITH: Thank you.

11                  I want to point out that the first  
12                  clause of that recommendation says, if  
13                  substantial proportionality is obtained.

14                  We've heard a lot, and I think  
15                  rightly so, in the last day or so about the  
16                  spirit of the law of Title IX. I'm not too good  
17                  at discerning the spirit of things, and like I  
18                  said that means -- let me read to you what the  
19                  letter of the law of Title IX says:

20                  No person in the United States  
21                  shall, on the basis of sex, be excluded from  
22                  participation in, be denied the benefits of or

1 be subjected to discrimination under any  
2 education program or activity receiving federal  
3 financial assistance.

4           Nothing -- and this is a  
5 continuation, now, of the law of Title IX.  
6 Nothing in the law shall be interpreted to  
7 require any educational institution to grant  
8 preferential or disparate treatment to the  
9 members of one sex on account of an imbalance  
10 which may exist with respect to the total number  
11 or percentage of persons of that sex  
12 participating in or receiving the benefits of  
13 any federally-supported program or activity, in  
14 comparison with a total number or percentage of  
15 persons of that sex in any community, state,  
16 section or other area.

17           That is the letter of the law of the  
18 Title IX. I am unalterably opposed to any  
19 numeric formulas which attempt to capture the  
20 spirit of Title IX, because that's opposed to  
21 the letter of Title IX.

22           Numeric formulas violate the express

1 terms of the statute. They violate the equal  
2 protection clause of the Constitution. They are  
3 morally wrong and they are logically flawed.

4 There is no connection between  
5 gender ratios in the undergraduate enrollment  
6 and interest in athletics, any more than there  
7 is interest in any discipline.

8 The fundamental evil Title IX  
9 combats is treating individuals as members of a  
10 class defined by their gender. That is, quite  
11 simply, wrong. It should not be perpetuated in  
12 any way, shape or form.

13 So I want to withdraw my name from  
14 recommendation 15 because it fights a battle on  
15 the wrong terrain. The Department of Education  
16 never should have, nor should it now continue,  
17 any remedy that relies on numeric formulas. It  
18 is illegal, it is unfair and it is wrong.

19 MR. LELAND: Okay we have a couple  
20 more minutes to discuss recommendation 15.

21 We decided earlier that just because  
22 a commissioner's name got attached to a

1 recommendation, their desire to withdraw doesn't  
2 automatically withdraw the need to take a --  
3 have a motion and a vote, which we will do now.

4 So we have a couple more minutes to  
5 discuss this particular recommendation. We'll  
6 come back and address it formally later. Yes,  
7 Cary?

8 MS. GROTH: Can you explain to me how  
9 do the courts uphold these percentages or  
10 substantial proportionality? It goes directly  
11 against what you just told us, based on those  
12 eight court findings.

13 MR. GRIFFITH: Sure, I'd be glad to  
14 take a stab at that.

15 First of all, I think the courts got  
16 it wrong. Second of all, the logic on which the  
17 courts rely that was a doctrine in  
18 administrative law that's referred to as Chevron  
19 deference. It's the idea that courts will not  
20 look behind the decision of agency that's been  
21 giving authority to enforce the law if there's  
22 any reasonable argument that can support the

1 agencies' interpretation of that law.

2 So there is nothing in the courts'  
3 decision that will preclude this Department of  
4 Education or any subsequent Department of  
5 Education of reading the law differently.

6 MR. LELAND: One minute.

7 MR. GRIFFITH: Make it clear, I think  
8 the Department of Education's reading of the  
9 clear and express terms of the statute that  
10 forbids numeric formulas -- I think the  
11 Department of Education's reading of that statute  
12 to come up with the use of numeric formulas is  
13 wrong.

14 Reasonable people differ on that. I  
15 guess to be a nice person I'd say yeah, but I  
16 don't see how you could take the statute, the  
17 clear intent of congress and in the face of that  
18 come up with numeric formulas.

19 MR. LELAND: Time. Thank you.

20 MS. COOPER: 15B on page 38, line 32.

21 If substantial proportionality is  
22 retained as a way of complying with Title IX,

1 the Office for Civil Rights should clarify the  
2 meaning of substantial proportionality, to allow  
3 for a variance of five percent if a relative  
4 ratio of athletic participation of men and  
5 women.

6 MS. MCGRAW: I have also reconsidered  
7 this 5 percent. I think it is way too high. I  
8 would like to see a small, allowable variance,  
9 but I would prefer that that number be an  
10 expression of the OCR on a case-by-case basis.

11 I think the words substantial  
12 proportionality has been confused with strict  
13 proportionality, and I think that the way we  
14 have it right now is pretty good, but I don't  
15 think one percent is sort of understood.

16 I would like to see -- I don't want  
17 to put a number on it. I would like to leave  
18 that to the discussion of the OCR.

19 So I'm not sure if that means I  
20 withdraw or I've changed it, but definitely  
21 different.

22 MR. BOWLSBY: I would not -- I would

1        treat that as an amendment to, you know -- you  
2        propose this; now you are amending it.  Would  
3        anybody object to that?

4                    MS. GROTH:  When you say you wouldn't  
5        put a numerical value on that or a percentage,  
6        are you suggesting to leave it, you know, the  
7        examples in the '96 interp give us examples of  
8        one percent, two percent and five percent.

9                    Are you saying to leave it the way  
10       it is, or are you suggesting it could go higher?

11                   MS. MCGRAW:  Oh, I definitely don't  
12       think it could go higher.  I think leaving it the  
13       way it is, is what I'm suggesting.

14                   MR. SPANIER:  Just to remind us how  
15       this came about -- I mean, it is a little unfair  
16       to the people whose names are attached because  
17       the concepts were on the table, just the general  
18       concept of how do you operationalize  
19       proportionality?

20                   And in the course of our discussion  
21       we were all participating and came up with  
22       different numbers, and somebody said what about

1       seven and somebody said, well, that sounds too  
2       high; what about five? We ended up with both of  
3       them to talk about today.

4                   I think realistically there's a  
5       fundamental issue that has just been raised and  
6       that really -- that needs to be dealt with at  
7       some level.

8                   But what happens ultimately is that  
9       people have to operationalize this in some way,  
10      if there is going to be any measure of  
11      proportionality, then people want guidance as to  
12      what that means. That's how we got into the,  
13      what should the number be?

14                   The only thing I'd like to say about  
15      it is that one of my concerns has been that the  
16      Office of Civil Rights has been put in a  
17      position, and many universities have been in a  
18      position of having major arguments about how  
19      close they are and what the number is, and a lot  
20      of energy has been squandered in debating about  
21      a school that's one percent off versus a school  
22      that's two percent off or whether an institution



1       that's now three percent off needs to be at  
2       1 percent and whether sports have to be cut  
3       because of that, when there are dozens of  
4       schools out there that are 20 and 30 percent off  
5       that haven't been reviewed.

6                     One of the things -- and I think  
7       already survived some of our recommendations --  
8       is that the Office of Civil Rights needs to pay  
9       attention to the blatant violations of Title IX,  
10      whether it's the spirit or the letter of the  
11      law. There are instances out there where it is  
12      not happening.

13                    So I support several of these  
14      recommendations, including -- if there is going  
15      to be a test of proportionality -- some number  
16      that can guide people so that people can get off  
17      arguing about the nuances of schools that are  
18      maybe or maybe not within striking distance and  
19      deal with the hundreds of thousands of other  
20      potential athletes out there that are being  
21      denied opportunities because schools aren't even  
22      following the spirit of the law, whatever that

1       might be.

2                       I think if there is going to be some  
3       test, it would be helpful to give the Office of  
4       Civil Rights some guidance, if for no other  
5       reason than they could say, look, the world  
6       needs a little flexibility, but let's, then,  
7       devote our time not to schools that are a couple  
8       of tenths of a percent off, but let's really  
9       sink our teeth into the larger issue and step up  
10      enforcement.

11                      MR. LELAND:  Yes.

12                      MS. SIMON:  As I look at  
13      recommendations 13, 14, 15 and even going on to  
14      16, it seems to me that where we are is, one,  
15      should we stay with the notion of substantial  
16      proportionality.  Tom suggested we ought to drop  
17      that.

18                      The second consideration issue, we  
19      simply go to 50/50 percent.  And the third  
20      consideration is, should the variance in hours  
21      -- I hear it from the people who suggested  
22      different variances.

1                   It's really, I think, between two  
2                   and three percent. Those are, I think, the  
3                   essences of these various suggestions, and I  
4                   would suggest that after hearing about the  
5                   letter of the law in Title IX, I strongly agree  
6                   with Tom that we should do away with substantial  
7                   proportionality and maybe the 50/50 percentage  
8                   is a good one.

9                   MR. LELAND: I'm having difficulty  
10                  figuring out where we are in terms of the process  
11                  here, but I think we are still on 15B and Muffet,  
12                  we need to -- do you want to change yours?

13                  I mean, I think, if I understand,  
14                  you sort of argued to keep this alive at three  
15                  percent, in order to give schools more guidance  
16                  as one of the options.

17                  I don't think he was necessarily  
18                  saying that's his highest choice, but that you  
19                  want to change this to the status quo, and then  
20                  I'd question whether we even need it at all.

21                  Tell me what your thinking it is.

22                  MS. MCGRAW: I thought he made a good

1 point. My only suggestion, I think there needs  
2 to be a range, you know, two to three percent,  
3 because I think different schools have different  
4 enrollments. We are talking about a lot  
5 different numbers, and that percentage could be  
6 pretty different for each school. That's why I  
7 wanted it.

8 MR. LELAND: So you would change the  
9 substantial proportionality to allow for a  
10 variance in the range? Right? And that's --

11 MS. MCGRAW: Right.

12 MR. LELAND: Rewrite this -- we could  
13 do that by the time we vote on it. Not five  
14 percent; we drop the number.

15 MS. MCGRAW: Yes.

16 MR. LELAND: Okay? Does anybody want  
17 to object to that? Since we've had the first  
18 four people we've assigned sort of deny  
19 authorship. We'll try to -- for good reasons, I  
20 understand. But the -- I know the next one is  
21 mine; I'm going to try and deny it.

22 Any other questions? We are out of

1 time on 15B. So we'll get a chance to revisit  
2 it, but we will amend it per Muffet's  
3 suggestion.

4 The next one I'll read, since it is  
5 mine. This is recommendation 16, line 44 on  
6 page 38.

7 The Office of Civil Rights should  
8 consider a different way of measuring  
9 participation opportunities for purposes of  
10 allowing institutions to demonstrate that it's  
11 applied for the first part of the three-part  
12 test.

13 Rather than the current system in  
14 which the number of participation opportunities  
15 is calculated by determining the number of  
16 athletes on a team on the first day of the  
17 season, the number of slots to be counted for  
18 each type of team would be determined through a  
19 consultation process.

20 Then an institution could establish  
21 that it has complied with the first part of the  
22 test by showing that the available slots for men

1 and women as demonstrated by the pre-determined  
2 number of participants for each team offered by  
3 the institution is proportional to the male and  
4 female ratio in enrollment.

5 This would be true whether there  
6 were actually more or less than that number of  
7 athletes actually participating on a team.

8 That's a long recommendation. Let  
9 me explain to you how I got to here.

10 First of all, I look at what's fair  
11 and what's equal opportunities. In my own mind,  
12 I have this crazy characterization where there's  
13 one way to look at that. We want to provide  
14 fair and equal opportunity. One is if we can  
15 sort of make the Tom argument that it's a  
16 non-discrimination clause. We have to prove  
17 that we're not discriminating.

18 The second option, I think, is to  
19 provide equal opportunity. That means you  
20 actually provide the equal number of  
21 opportunities, and whether people take advantage  
22 of those or not is sort of up to them.

1                   And the third one is, you provide  
2                   equal outcome, in which you actually measure the  
3                   outcome, and that's, in my opinion, what we do  
4                   now. Proportional, we measure the outcome; we  
5                   don't prove we're non-discriminating.

6                   And the proportionality clause only.  
7                   We don't prove we are providing equal  
8                   opportunity. We have to provide that we're  
9                   providing equal or substantially proportionate  
10                  outcome.

11                  That system, in my opinion, causes  
12                  two inadvertent problems. One is that it causes  
13                  us, instigates, pushes us towards -- not the  
14                  sole cause, but it can push us towards capping  
15                  men's sports or roster management of women's  
16                  sports. But capping men's sport is one concern.

17                  The other concern, which is equally  
18                  big for me, big concern is it provides what I  
19                  call false opportunity. It instigates us  
20                  provide false opportunities for women.

21                  I see an opportunity for an athlete  
22                  as a chance to get coaching, a chance to access

1 the facilities, a chance to practice with a  
2 team, a reasonable access to competition, team  
3 travel, et cetera.

4 We could really go down the laundry  
5 list that's provided in supporting documents and  
6 say that's what an opportunity is.

7 I don't see how, when I look at EADA  
8 reports, how people can, say on a team like  
9 water polo for women, when you get six athletes  
10 or seven athletes in a pool at one time, you  
11 probably need 13 or 12 to participate, and you  
12 report that you have 55 athletes on your team  
13 and that's okay.

14 Or that you have 150 women rowers,  
15 who we all know at the end of the season, at the  
16 conference rowing championship you send 26, 28  
17 athletes.

18 I think those are what I would call  
19 false opportunities, and the law, the way it is  
20 presently done, allows people to play those  
21 games, both roster-manage the men out of  
22 opportunities and inflate the opportunities for



1 women, in sort of a dysfunctional way.

2 Now, I -- this has been portrayed by  
3 a lot of people as an attempt to cut back on  
4 women's sports. We have done, on our staff at  
5 Stanford, a number -- we've looked at the EADA  
6 reports and then we've taken side-by-side  
7 measures of how my proposal would work.

8 And in almost every case, the school  
9 would have to work harder to comply with any  
10 proportionality ratio that it now does.

11 In other word, at Stanford, if we  
12 compute it the way we compute the EADA report  
13 now, we have 46 percent women athletes. If we  
14 compute it the way I'm suggesting, we would have  
15 43 percent women's opportunities.

16 So we would in effect be required to  
17 add sports or continue to add sports or continue  
18 to add real opportunities, not participants.

19 And so we'd have to work harder to  
20 go with timeline and to comply with 4 Type R.

21 So this isn't an effort to exclude  
22 women from opportunities. This is an effort

1 really to provide more real, genuine  
2 opportunities for women.

3 But the last thing I would say is  
4 that this is -- I projected this is -- I would  
5 suggest to the secretary of education, it is  
6 only the option that schools could use to reach  
7 proportionality.

8 Because as I look at EADA forms and  
9 I look at my calculations, there are some  
10 schools that now come pretty close to being  
11 proportionality formulated, that they use the  
12 system I'm suggesting would be way out of  
13 compliance. It would have to add numerous  
14 women's teams in order to comply with Title IX.

15 I think there are schools that are  
16 prepared to do that. These are multi schools  
17 that have said, we have big-time football and  
18 we're going to limit the number of athletic  
19 teams we have, men and women.

20 We have a broad-based program, 35  
21 sports like we do. You're probably a little bit  
22 better off on some of these calculations.

1                   That's my proposal, and I apologize  
2                   for the wordiness of my explanation. This is  
3                   one of these things. I've tried to explain this  
4                   to six different constituents and I haven't  
5                   successfully done anybody, so if you are  
6                   confused you are not alone.

7                   So let me -- only 30 seconds left,  
8                   so I apologize. She put my reading into this  
9                   into the five minutes.

10                  Yes, Donna?

11                  MS. de VARONA: I just want to ask  
12                  the question that I asked to Bob: Is it, is any  
13                  one of these solutions, is it going to open the  
14                  door to bring back sports that are being dropped?  
15                  Is it going to change the playing field, or is it  
16                  just -- or are we just tinkering with civil  
17                  rights law in a way that really is -- the outcome  
18                  really isn't going to make it better?

19                  MR. LELAND: In the evaluation of --  
20                  my professional opinion is an evaluation of the  
21                  eight schools that our staff did at Stanford.

22                  We took two Division 3, two Division

1           2, two Division 1A and two Division 1, AA's.

2                       It would not bring back men's sports  
3           -- it would not add men's sports, but you  
4           wouldn't have to cap walk-ons. That would be  
5           the difference. Most schools would have to add  
6           a women's sport or two, to get back to where  
7           they are now, in terms of their ratios.

8                       MS. COOPER: Time. Just kidding.

9                       MR. LELAND: What?

10                      MS. COOPER: Eighteen, page 30  
11           through -- I'm sorry. Eighteen, page 39, line  
12           29.

13                      Any student who is not a recipient  
14           of a full or partial scholarship will be defined  
15           as a walk-on or a non-scholarship student  
16           athlete.

17                      For the purpose of calculating  
18           proportionality with the male-female ratio of  
19           enrollment, in both scholarships and  
20           participation, these ratios will exclude such  
21           individuals. Proportionality ratios will be  
22           calculated through a comparison of full or

1 partial scholarship recipients.

2 MR. SPANIER: Well, again, I think  
3 this was another one that I volunteered to write  
4 out following a lot of discussion, but I think I  
5 would go back to something Bob Bowsby said  
6 yesterday, very eloquently but succinctly, that  
7 capping walk-ons, capping the roster sizes of  
8 your team, of men's teams, does not create any  
9 new athletic opportunities for women. Isn't that  
10 pretty close to what he said?

11 And I think what most of our  
12 institutions have evolved to is this system we  
13 euphemistically call roster management. It is  
14 hard to imagine the overall scheme of things  
15 that roster management is in the interest of  
16 promoting opportunity for men and women in  
17 athletics.

18 It also of course relates to the  
19 whole proportionality issue, because one of the  
20 flip sides of that is creating false  
21 opportunities for women.

22 For men who want to have the

1 opportunity to participate with a team it seems  
2 to me we should allow them to do that and not  
3 deny them the opportunity.

4 Similarly, if women wish to have  
5 that kind of walk-on opportunity, of course it  
6 should be encouraged. I've never seen much  
7 merit in limiting the number of walk-ons.

8 One of the concerns -- I think Cary  
9 mentioned it early in the discussion at a prior  
10 meeting -- was that walk-ons are not entirely  
11 free. There is some incremental cost to having  
12 walk-ons. It would not be true to characterize  
13 a walk-on as costing the institution nothing but  
14 they show as having no benefit.

15 What that cost is, however, the  
16 ranges at some schools from very close to  
17 nothing, depending on the level of competition,  
18 to something perhaps more substantial, depending  
19 on how they are treated by the institution.

20 In many sports walk-ons do not  
21 travel to away contests and in some cases they  
22 don't even suit up for a home contest.

1                   There might be some additional  
2           laundry or uniform costs. Whether or not it's  
3           de minimis, it seems to me is not that critical.

4                   We ought to deal with the  
5           fundamentals of this issue rather than the cost  
6           side of it at this point.

7                   So I think it's -- this is not the  
8           one solution to the larger issue of  
9           proportionality. I just want to reiterate what  
10          I think several have said already.

11                   Several of these proposals might  
12          provide an opportunity that fits better with how  
13          a particular institution does business.

14                   So to the extent that we are looking  
15          for a little more flexibility in the system  
16          while following the letter of law and meeting  
17          the spirit of the law, this is one change that I  
18          think should be available to institutions as  
19          they are examined, as they internally look at  
20          whether they are in compliance with Title IX.

21                   It's a question for Graham and/or  
22          Bob: Do you see this as unlimited in terms of

1 numbers? Because I think that we talked it, we  
2 talked about a handful of people and allowing  
3 some flexibility. I guess that's one thing.

4 It is another, in some sports, where  
5 these numbers with pretty large. So would you  
6 see this, without having any kind of cap at all  
7 as to how far you go with it?

8 MR. SPANIER: Well, theoretically, it  
9 is unlimited but I can't see, given the state of  
10 intercollegiate athletics today, how it really  
11 would be or could be. At some point --

12 MR. LELAND: One minute.

13 MR. SPANIER: At some point it is  
14 just too burdensome for a university to do that.  
15 We have some coaches -- we have a couple of  
16 coaches of our women's team who will not create  
17 false opportunities and they simply will not have  
18 the numbers we would like to see them carry.

19 We have some coaches of men's teams  
20 who similarly say, you know, I don't really want  
21 any more than I need, but we do have coaches of  
22 some men's sports who wouldn't mind at all



1       having another five or ten people at their  
2       practices. That's what works for them in their  
3       sport. And so no; I don't think I'd set a limit.

4                   MR. LELAND: Okay, time; we'll have a  
5       chance to come back to this.

6                   MS. COOPER: Nineteen. It is mine so  
7       I'll read it.

8                   On page 39 line 42: the Office of  
9       Civil Rights should explore the possibility of  
10      allowing institutions to conduct  
11      scientifically-based surveys to determine the  
12      actual athletic interest of its student body on  
13      a continual basis.

14                   The number of interested students  
15      would then become the measure for determining  
16      whether an institution is in compliance with the  
17      proportionality requirement of the first part of  
18      the three-part test. I.e., if 50 percent of the  
19      interested students are female, 50 percent of  
20      athletic participation opportunities would need  
21      to be provided for females.

22                   And I wrote down some notes. As it

1 stands, the regulations require schools to  
2 effectively accommodate the interest and  
3 abilities of male and female students. And OCR  
4 has assumed that this interest is pegged to the  
5 enrollment, the undergraduate enrollment.

6 And maybe this assumption is  
7 accurate and maybe it isn't. And the only way  
8 to know that is to conduct a survey that will  
9 enable schools and OCR to know the interest  
10 level of women and men in that institution.

11 And I know there's a lot of  
12 discussion. They'll be a lot of discussion, so  
13 just want to it up to any questions or  
14 discussions.

15 MS. SIMON: Cynthia, I think that  
16 recommendation 19 and 20 really are the same.

17 MS. COOPER: Right.

18 MS. SIMON: May I say something about  
19 that?

20 MS. COOPER: Right.

21 MS. SIMON: I would say that  
22 continuous surveys on a regular basis could

1 accurately predict and reflect men's and women's  
2 interests in athletics over time.

3 In addition to that, a by-product of  
4 surveys is that it would also provide  
5 information and incentives for prospective  
6 students to think about applying for athletic  
7 scholarships.

8 The very fact that they're sent a  
9 questionnaire in which they're asked about their  
10 interest in athletics may in fact spur students  
11 who hadn't thought about it to say, you know, I  
12 am interested; I would like to apply.

13 So that I think the interest there  
14 basically would give you, one, an accurate -- on  
15 a continual basis -- an accurate reflection of  
16 interest, and it also would encourage students  
17 to think about participating in varsity sports.

18 MS. COOPER: My concern is very  
19 basic. Last night I asked myself this question:  
20 How could you be sure you are effectively  
21 accommodating the interests and abilities of any  
22 sex, male or female, if you don't know what their

1 interests are, if you don't ask them?

2 MS. GROTH: I think this is addressed  
3 in prong three. I thought we had decided that it  
4 doesn't belong with prong one.

5 I mean, we agree that interest and  
6 ability surveys are beneficial and it's listed  
7 as a prong three -- as a part of prong three.

8 So I would like to say that I don't  
9 think it belongs in proportionality, that a  
10 prong one -- it belongs in three.

11 But while it is in prong one in the  
12 sense that you are tying -- you are assuming  
13 that the interest that this statement, the  
14 enrollment is 56 to 44, you are assuming that  
15 56 percent won't have the interest and abilities  
16 to participate in athletics. You are assuming  
17 that, so it is effectively in prong one already.

18 And the only question is whether you  
19 have asked the student body whether they are  
20 actually interested or not, and the only way you  
21 could find that out is ask.

22 MR. BOWLSBY: In fairness to the

1 process, Cary, I don't remember us coming to a  
2 consensus on that issue in prong three. I've  
3 heard it suggested and then I think we moved on  
4 to other topics, but I don't remember voting or  
5 coming to any consensus on surveys only being  
6 viable in prong three.

7 MS. SIMON: Certainly I think that  
8 you need the survey as essential for fallback,  
9 say, from prongs one, two and three. Since I'm  
10 not particularly in favor of prong one in the  
11 first place, I think the surveys are the measure  
12 of interest and therefore should play a more  
13 important role in the distribution of athletic  
14 scholarships.

15 So to limit it to prong three would  
16 be meaningless.

17 MR. LELAND: One minute.

18 MS. COOPER: I just have one more.

19 Debby, after hearing your  
20 recommendation, I actually wouldn't mind. I  
21 would accept your recommendation over -- just  
22 for lack of a better word -- over my

1 recommendation, because I do believe that 50/50,  
2 with some small variances, would help with the  
3 first prong.

4 MR. LELAND: Other questions?

5 MS. YOW: I have a comment but I'm  
6 not going to make it under the time frame.  
7 Later.

8 MR. LELAND: Any other questions or  
9 thoughts on this one?

10 Now we need to turn to  
11 recommendation 20. We talked a little bit about  
12 this, but let me read it. It is on page 40,  
13 line 13:

14 The Office for Civil Rights should  
15 allow institutions to conduct interest surveys  
16 as a way of demonstrating compliance with the  
17 three-part test.

18 The Office should specify that the  
19 criteria necessary for conducting such a survey  
20 is a way that is clear and understandable.  
21 Recommendation 20.

22 MS. SIMON: Ted, I think that what I

1       said as we were talking about Cynthia's  
2       recommendation is closer to where, since I'm put  
3       down as the author of 20, and that is the  
4       importance of continuous interest surveys on a  
5       regular basis to predict men and women's  
6       interests, and also to provide information for a  
7       student.

8                       So I would like the editors of this  
9       document to take the new wording of  
10      recommendation 20, if I may give it to them.

11                      MR. LELAND:  It is not substantial  
12      change?  You are just talking about continuing  
13      surveys?

14                      MS. SIMON:  Right.

15                      MR. LELAND:  Is that correct?

16                      MS. SIMON:  And also that surveys  
17      provide a second function of stimulating  
18      interest.

19                      MR. LELAND:  Are you okay with that,  
20      Mr. Authors?

21                      MS. SIMON:  I can give it to you if  
22      you need it.

1                   MR. LELAND: Okay. Comments or  
2 questions on recommendation 20?

3                   MR. BATES: Rita, I just need some  
4 clarification here. This says to allow  
5 institutions to conduct interest surveys as a way  
6 of demonstrating compliance with the three-part  
7 test.

8                   Now, you don't mean just conducting?

9                   MS. SIMON: No, that's why my new  
10 statement, I think, is more appropriate.

11                  MR. LELAND: Any other comments or  
12 thoughts?

13                  Hearing none, let's move on to the  
14 next recommendation that seems pertinent to the  
15 substantial proportionality formula, and that's  
16 recommendation 22.

17                  MS. COOPER: Recommendation 22, page  
18 40, line 37:

19                  In demonstrating compliance with the  
20 proportionality requirement of the first part of  
21 the three-part test, the male-female ratio of  
22 athletic participation should be measured



1       against the male-female ratio of the  
2       institution's undergraduate population, minus  
3       non-traditional students.

4                   MS. MCGRAW: I'm basing this on,  
5       according to the National Center for Education  
6       Statistics, in 1999-2000, only 27 percent of all  
7       undergraduates were traditional students.

8                   This obviously has a huge impact on  
9       the community college level. We heard a lot  
10      from those people in the California community  
11      colleges, how they had a lot of non-traditional  
12      students.

13                   I don't think it would impact most  
14      of the people in this room. It would not impact  
15      high school, and I think that it would really  
16      help certain schools at the community college  
17      level to take the traditional student and figure  
18      that into the mix.

19                   MR. LELAND: Any questions, thoughts?

20                   MS. de VARONA: Debby in prong three  
21      already allowed for this analysis. When we get  
22      into non-traditional, aren't you treading on

1 nondiscriminatory risk, in defining what a  
2 nontraditional student is?

3 MS. MCGRAW: I think there's a  
4 definition of it in the section -- in the  
5 educational statistics of what a traditional  
6 student is.

7 Most prominent, I think, was age.  
8 From 19 to 23, I think, is the traditional  
9 college student in -- at the community college  
10 level. The majority of the people were over 30,  
11 and I guess a lot of them had a lot of other  
12 things that would preclude them from  
13 participating in athletics.

14 MR. LELAND: Any other questions?

15 MS. de VARONA: I just want to go on  
16 the record that prong three already allows for  
17 this analysis as it relates to this issue.

18 So are you suggesting it should be  
19 in prong one, when it applies to this  
20 discussion?

21 MS. MCGRAW: Yes.

22 MS. de VARONA: I just wanted to

1 clarify that.

2 MR. LELAND: Any other thoughts and  
3 questions?

4 MS. YOW: I have a comment. 50/50  
5 doesn't look that bad right now.

6 MR. LELAND: Okay. Let's turn back,  
7 then. We'll start again on proposal number 13.

8 The proposal -- or the procedure --  
9 that Cynthia and I talked about, let me  
10 elaborate on very quickly.

11 Our intention would be to try to  
12 have a discussion on each one of these in order.  
13 So it is 13, 14, 15A, 15B, 16, 18, 19, 20 and 22  
14 in that order, and then we'll vote them up or  
15 down.

16 I think we should -- if it's the  
17 will of the group, we can -- and I think it is  
18 probably appropriate to have a ten-minute  
19 discussion period. Then I think it's time we  
20 start to vote on these and start moving through  
21 them. That's what we had in mind.

22 Graham?

1                   MR. SPANIER: On recommendation 13,  
2 here are the things I like about it.

3                   MR. LELAND: Excuse me. Let me make  
4 sure the procedure is clear. Let's talk about  
5 the procedures for a second, and then we'll call  
6 on you first. Yes?

7                   MR. GRIFFITH: I'm going to sign the  
8 author of recommendation 15, just to, you know --  
9 I'm going to propose an amendment to  
10 recommendation 15 that would say the OCR should  
11 not use numeric formulas in determining whether  
12 an institution is in compliance with Title IX,  
13 and logically speaking, if that were to carry,  
14 that would affect many of the others.

15                   I don't know if that means you would  
16 want to have discussion of my proposed amendment  
17 first or last, but it seems to be, logically  
18 speaking, if it is the will of the commission  
19 that numeric formula is not be used, then I  
20 think that affects all of the others.

21                   But I'll make that amendment when  
22 the chair tells me -- I'll propose that

1 amendment when the chair tells me to do so.

2 MR. LELAND: That's an interesting  
3 proposal. The problem I have with it, I'm not  
4 sure that it's a -- I would like to talk to  
5 Cynthia about this. I'm not sure it's in order.

6 MR. GRIFFITH: No, it's an amendment  
7 to recommendation 15. What I would do is propose  
8 it as an amendment to recommendation 15. It  
9 would obviously need a second and discussion and  
10 it would need to carry.

11 MR. LELAND: I understand about this.  
12 We also discussed earlier in our process here  
13 that this wasn't the time for new proposals.

14 I'm wondering whether, in my own  
15 mind, having just heard it, Tom, that is not a  
16 new proposal. Even though it could be disguised  
17 and voted in as an amendment to an old proposal,  
18 I'm not sure it's not so different than -- but I  
19 guess I'm just -- let us ponder that.

20 MR. GRIFFITH: Well, a couple of ways  
21 you could do it is if it fails for lack of a  
22 second, then it dies; if it gets a second we have

1 a discussion. You could let the commission --  
2 you could -- if the commission is opposed to it  
3 and thinks it's outside the bounds, they could  
4 certainly vote it down. Tom?

5 Talk about process --

6 MS. de VARONA: I just think that  
7 this is the most important part of our  
8 discussions, and as a Commission we've been given  
9 the task to deal with this. I'm open to any  
10 amendment that deals with the process of us doing  
11 our job. This is all about why we are here.

12 MR. LELAND: So you would suggest  
13 that Cynthia and not rule his proposal out of  
14 order when we get to 15?

15 MS. de VARONA: I would suggest you  
16 would not rule his proposal out.

17 MR. GRIFFITH: Let me discuss it for  
18 ten minutes and we'll vote it up or down.

19 MR. LELAND: Any other thoughts on  
20 the -- any argument about the ten-minute time  
21 limit?

22 I think we need to have more

1 discussion, so ten minutes means that we'll have  
2 to keep our comments succinct. I think would be  
3 very good to have a little philosophizing and a  
4 lot of sort of concrete discussion about these  
5 things might do about that.

6 MS. FOU DY: My only concern about  
7 that is that it be a flexible ten minutes with a  
8 variance on it, because I think if we start  
9 saying yeah, okay, we are right in the middle of  
10 something, you have 30 seconds, that really  
11 doesn't serve us well, or the secretary.

12 So I understand the need to keep  
13 moving on issues but I would request that it be  
14 a little bit flexible.

15 MR. LELAND: Okay, let's try this:  
16 We'll try to use our -- Cynthia and I will try to  
17 push us along and move us along, because we do  
18 need to get these votes recorded.

19 We have -- Ruth's got to leave at a  
20 certain time. We need to be fair to the  
21 commissioners; we need to get this thing done  
22 and we need to act on this and be fair to our

1           commitment to do so.

2                         But at the same time we'll try not  
3           to cut off debate. We don't want to stop people  
4           from feeling like they had a chance to have  
5           their say on the record.

6                         So let's begin with 13. Graham?

7                         MR. SPANIER: What I like about this  
8           is that it's unambiguous, and it would be nice to  
9           have something unambiguous. I do think some of  
10          the other proposals help us in that direction, as  
11          well.

12                        It also avoids the problem that we  
13          have already been seeing, in that many people  
14          who testified have indicated we are going to  
15          continue to see, which is that we will be  
16          shooting at a moving target any institution's  
17          enrollment from year to year, shooting at a  
18          moving target.

19                        You might think you're in compliance  
20          with substantial proportionality tests. Your  
21          numbers come in, you find out you are a percent  
22          off. And the idea that there needs to be some



1 flexibility is good.

2 What makes me nervous about it is  
3 that it feels arbitrary. As fair as half the  
4 apple sounds, it is an arbitrary number. It  
5 happens to be half and half, but is that  
6 necessarily the right number?

7 And then I do wonder about schools  
8 like the Air Force Academy, which, I recall, is  
9 85/15 in enrollment.

10 What about a historically women's  
11 school that may now be 80/20 instead of 100 the  
12 other way? And what about a school like Penn  
13 State, where we are in compliance with a  
14 proportionality on a strict proportionality test  
15 right now, but for us that's 47 percent women,  
16 53 percent men.

17 We have the nation's largest school  
18 of engineering and we just have more men in  
19 engineering, for example.

20 MS. YOW: Graham, that's a good  
21 question, and the answer to that, in all three  
22 cases that you cited would be that they would use

1       prong three.

2                       They don't have to gravitate to  
3       prong one.  If the Air Force Academy can prove  
4       that they've met the interests and abilities of  
5       their, whatever it is, 10 percent female  
6       enrollment, just as Georgia Tech with about a 28  
7       percent female enrollment, they have other  
8       options that they can pursue.

9                       MR. LELAND:  Any other comments and  
10       questions?  Cary?

11                      MS. GROTH:  Actually in looking at  
12       all of these proposals -- and I know we're on one  
13       specific one -- but I feel irresponsible if we  
14       were to vote on any of these proposals without  
15       looking at the impact, the numbers:  What does  
16       three percent mean?  What does 5 percent mean?  
17       What does 7 percent mean?

18                      I mean, what does it do to the  
19       current participation rates as they are today?  
20       Or if institutions were in total compliance?

21                      The current 1996 interpretations --  
22       okay?  -- I'm not going to pass them out, Ted --

1 provide three examples in prong one: A one  
2 percent, a two percent and a 5 percent variance,  
3 depending on the size of your program,  
4 institution and circumstances.

5 It is on a case-by-case basis.  
6 There's flexibility. It's substantial  
7 proportionality. I'm not -- again, I won't  
8 request the distribution of the '96  
9 interpretations.

10 However, I think it is very  
11 important to note that every proposal before us  
12 are different because in fact they do establish  
13 a quota that's numerical now, if we were to  
14 approve them.

15 If we look at the recommendations  
16 before us, what I think is -- and what the  
17 impact would be, no matter what the gender would  
18 be, would they accept them? Would the men  
19 accept these? Would the women accept these? We  
20 all know that minimums become maximums. We do  
21 it every day.

22 I took at look at just one example

1 and calculated the end result. If you look at  
2 the high school female enrollment, which  
3 nationally is about 50 percent -- 49.1 -- and  
4 you use the 50/50 proposal with a 3 percent  
5 variance, there would be an approximate loss of  
6 305,000 opportunities for girls, assuming boys'  
7 participation stays the same.

8 You could do the numbers for college  
9 athletics, as well.

10 All I'm saying is, before we vote on  
11 these -- and I don't know if OCR or anyone else  
12 has done the numbers -- but I think we do this  
13 in our daily lives and our businesses.

14 Before we make any recommendations  
15 in our departments, we look at what the impact  
16 is, the realty, and we haven't done that.

17 MS. YOW: I agree with that, Cary,  
18 and I think you should look at it, and I will  
19 remind everybody that it is a suggestion, it is a  
20 recommendation to OCR to look at it. It isn't a  
21 recommendation that they implement it.

22 Certainly we should consider the

1        impact. I will say this, however: I think for  
2        us to continue to in the year 2002 -- and you  
3        know, I'm with the guys a lot; you are, too.

4                    So I'm surprised to hear you say as  
5        a fellow female AD that once we establish this,  
6        that the minimum becomes the maximum. That is  
7        not my experience with the male ADs at the  
8        places like the University of Virginia, Duke  
9        University, the University of North Carolina.

10                   I personally do not see that in my  
11        life and I am not going to stay in that old  
12        paradigm and insist that if they can screw us,  
13        they will. Figuratively, of course.

14                   MS. GROTH: Well, Debbie, I'm not  
15        suggesting that, either, but you allude to a few  
16        examples. But overall, that's a fact: The  
17        minimums become the maximums. I --

18                   MS. YOW: It's not a fact; it is your  
19        opinion. You can't back that up with empirical,  
20        statistical data. That is your opinion.

21                   MS. GROTH: I stand corrected.

22                   MR. LELAND: Let's get some other

1 people.

2 MR. BATES: Ted, I think I read  
3 someplace earlier where you indicated that if we  
4 were for or against a proposal, we should  
5 indicate that up front.

6 I guess I want to say that I am at  
7 this time opposed to this. In the support  
8 information below, it says this recommendation  
9 would dramatically alter the current enforcement  
10 of Title IX.

11 We have, in my view, a time-honored  
12 method of arriving at the number relative to  
13 proportionality, and I guess I view it as an  
14 expectation and a probability model, rather than  
15 what I've heard people use as quotas. And so I  
16 guess for me it is a time-honored method that  
17 I'm not willing to sort of quickly around this  
18 table suggest that we shift from where we are  
19 now to a new method.

20 MS. FOU DY: Percy, on that note, one  
21 of the issues I've looked into is, where did this  
22 proportionality comparison come from? What's the

1 history of it?

2                   If you look at basic civil rights  
3 law, this is a standard of measure where you  
4 take a larger population, you have a group in  
5 the larger population, and you try to match it  
6 to a group in a smaller population.

7                   And if you can show that it matches  
8 to the same extent, then it is considered  
9 compliance. If it doesn't match to the same  
10 extent as your large population, then it doesn't  
11 mean that you are not compliant. It just means  
12 that you have to show why you are non-compliant,  
13 which is basically the way Title IX was set up,  
14 with the three prongs.

15                   If we look at going either way, if  
16 you have men at 60 percent and women at 40  
17 percent, I think then the men should have a  
18 right to 60 percent of participation  
19 opportunity, because there is more of them  
20 there.

21                   And if you look at universities,  
22 we've talked about Graham's issue with

1       universities, with large variances in student  
2       bodies. I think that -- again, because they  
3       have a larger variance in the student body, they  
4       should have a larger percentage of athletes  
5       participating.

6                       And that was the way our civil  
7       rights laws were constructed. And I think to  
8       tamper with that is really not the task of this  
9       commission.

10                      MS. SIMON: I like the simplicity of  
11       the 50/50. It certainly makes everything much  
12       easier.

13                      But on the other hand, because I  
14       believe very strongly in applying valid data in  
15       helping to arrive at some of the things in these  
16       decisions, I think that if you don't know what  
17       the real interests of men and women are, as they  
18       enter the university, in terms of their desire  
19       to participate in varsity sports, we will be  
20       doing students an injustice.

21                      If in fact the interest survey,  
22       properly conducted, would show that there are



1 big differences in men's and women's interests,  
2 and 50/50 percent meant nothing, then I think we  
3 would be distorting what we are supposed to be  
4 doing if we simply relied on 50/50.

5 MS. YOW: Let me say one more thing  
6 about the surveys.

7 The reason I'm nervous about surveys  
8 in general is because we continually refer to  
9 this primarily as interest.

10 Let me say this: If there are  
11 scholarships available, there will be interest.  
12 If I am choosing between working part-time or  
13 being on an athletic team, and I could either  
14 have a partial scholarship or work, there would  
15 be lots of people who choose the scholarship.

16 So, you know, we're not --  
17 intercollegiate athletics, whether it was  
18 Division 3 level, Division 2, Division 1, NAIA,  
19 NCAA, junior college, community college, we are  
20 not about creating opportunity for everybody.

21 We have intermurals, which are not  
22 -- we are not considering; we have club teams,

1       which we are not considering. We should be the  
2       elite athletes in our respective category on  
3       that institution.

4                       So my concern is how you could  
5       measure not just interest but ability.

6                       MR. LELAND: Okay. Let's hear from  
7       Bob?

8                       MR. BOWLSBY: The reason I like this  
9       proposal -- not to the exclusion of others, but  
10      just as a stand-alone -- is because it gets us  
11      off undergraduate student population.

12                      Once again, our participation,  
13      Division 1, 2 or 3, has not one thing to do with  
14      undergraduate population.

15                      And to go back to Julie's point, if  
16      you apply the rule of thumb that has been used  
17      in other civil rights legislation through the  
18      years, the student population wouldn't be the  
19      body you'd use as a comparative group.

20                      You would -- either the percentages  
21      of the population at large, which are roughly  
22      50/50, or the population in the feeder system,

1 either one would be more logical and dependable.

2 I just cannot bring myself to remain  
3 wed to something that is so flawed in its  
4 original state.

5 Our programs have nothing whatsoever  
6 to do with what is going on in the undergraduate  
7 population. And this proposal gets us off of  
8 that. These are students. They attend the  
9 university. They are in classes every day with  
10 people who are non-student athletes.

11 But the vast majority at all  
12 divisional levels are invited to come to campus  
13 and participate. And this proposal at least  
14 gets us off that piece of the paradigm that is,  
15 in my estimation and as -- it really defies  
16 logic.

17 MR. LELAND: Okay. We are over time  
18 limits, so a couple or more of you, be quick. We  
19 will go ahead.

20 MS. SIMON: I just want to respond to  
21 Debbie's comment about interest surveys. So they  
22 express interest, you won't need competence, you

1       won't need skill.

2                   I agree with that. That's the same  
3       notion of scholarship. You don't give every  
4       student who is in need a scholarship, an  
5       academic scholarship. You've also got to pick  
6       out on the basis of grade-point average, other  
7       kinds of -- SAT scores and so on.

8                   Well, similarly, with the athletic  
9       interest, you don't give everybody an athletic  
10      scholarship because he or she is interested.  
11      You also then look at skills and competence and  
12      so forth.

13                  MR. LELAND: Are there other  
14      comments?

15                  MS. YOW: I have to change my  
16      variance, remember? I want my variance changed  
17      to much smaller, and you said think about it.

18                  MR. LELAND: Okay. It would have  
19      been nice to do that at the start of the session  
20      today.

21                  MS. YOW: In the last one Ted and you  
22      wouldn't let me.

1                   MR. LELAND: What do you want to  
2                   change it to?

3                   MS. YOW: No empirical statistical  
4                   data or what we do now with the plus or minus  
5                   1 percentage point in place, and --

6                   MR. LELAND: All the comments that  
7                   you -- totally harmless here --

8                   MS. YOW: Two to three percent.

9                   MR. LELAND: Pardon me?

10                  MS. YOW: Two to three percent.

11                  MR. LELAND: Two to three percent.

12                  MS. YOW: Because I know one percent  
13                  is not enough; just experience.

14                  MR. LELAND: Okay.

15                  MR. GRIFFITH: Question. Point of  
16                  order.

17                  Before we go, wouldn't it make more  
18                  sense to vote on the proposal I'm going to make,  
19                  and that is not use numerical proposals at all,  
20                  and see the will of the commission on that; let  
21                  it rise or fall?

22                  Because if it is the will of the

1           commission that numericals not be used, again, I  
2           think that affects all the others.

3                       So I thought I'd --

4                       MR. LELAND:  But I think we've said a  
5           couple times, we could have the conflicting  
6           recommendations.  So I think we are okay in just  
7           following this procedure.

8                       Go ahead; Graham?

9                       MR. SPANIER:  Well, I would like to  
10          suggest an amendment which, if passed, I think I  
11          could vote for it.  If it didn't, I'm not sure if  
12          I could.

13                      It follows to the comment you just  
14          made, Ted:  I think we're going to end up with  
15          several suggestions.  Some of them are written  
16          as if in this month it must be that way.

17                      And that's more than just putting a  
18          few ideas on the table.  It sounds too  
19          conflicted to me.

20                      So I would like to suggest that this  
21          be reworded to say, institutions governed by  
22          Title IX standards, as one approach to meeting

1 the standard of proportionality, maybe allot  
2 50 percent, and so on.

3 I just think the way it is currently  
4 worded sounds like that's the way it's got to  
5 be. It is almost a mandate.

6 MS. YOW: Graham, I'm perfectly  
7 comfortable with that. It was never meant to be  
8 the end-all.

9 MR. SPANIER: Okay.

10 MS. YOW: It's just an opportunity as  
11 a way, surely; bring the amendment.

12 MR. LELAND: Graham, would you read  
13 that again?

14 MR. SPANIER: Institutions governed  
15 by Title IX standards, as one approach to meeting  
16 the standard of proportionality, may allot  
17 50 percent of their participation opportunities  
18 for men and 50 percent for women. A variance of  
19 two to three percent in compliance with the  
20 standard would then be allowed.

21 MS. FOU DY: Question on that.

22 MR. SPANIER: Yes.

1                   MS. FOU DY: Are you saying, Graham,  
2                   that the institution gets to dictate how it will  
3                   comply with Title IX, rather than the government  
4                   dictating to them the standard?

5                   MR. SPANIER: Well, it just says one  
6                   approach to meeting the standard of  
7                   proportionality. I assume that what will happen  
8                   is that we will have three or four of these  
9                   approaches to approach proportionality put on the  
10                  table. We'll forward it. The Department then  
11                  has to figure it all out, and one reason, what --  
12                  what Tom said, I think, has some validity, but  
13                  people still need guidance, and I think we begin  
14                  to accommodate, to some extent, what your concern  
15                  is if we put through three or four ideas on the  
16                  table that give guidance to schools about how to  
17                  get there, as opposed to one rigid measurement,  
18                  which, as you describe, done the way it's been  
19                  done does not seem to be very sensitive to the  
20                  letter of the law.

21                  So that's why I'm thinking a wording  
22                  change like this and little bit of similar



1 sensitivity on some other recommendations gives  
2 the office guidance to go out and say to  
3 schools, here's some different ways in which you  
4 can look at doing this. It's your school, your  
5 situation and your demographics. Now let's --  
6 we'll decide if you are being reasonable about  
7 it.

8 MR. LELAND: Let's -- you know, all  
9 kinds of comments are welcome, but let's move  
10 toward a vote fairly soon.

11 MS. FOU DY: Can I just comment one  
12 last thing on this proposal?

13 MR. LELAND: Yes.

14 MS. FOU DY: Just to point out, so  
15 that we understand, because one of the points  
16 Cary made is we don't understand the  
17 repercussions of something like this.

18 And I think, just to point out, I  
19 think we should all know that what we are  
20 proposing here would take, for example, a school  
21 that had a 56 percent percentage of women and a  
22 44 percentage of men, it would take that right

1       now, they would have to become substantially  
2       proportionate if it dropped then potentially  
3       from the 56 percentage for women down to a 47  
4       percentage for women, with the variance that  
5       we're allowing, which is a nine percent  
6       difference.

7                     And I just want people to understand  
8       what we're actually putting out there.

9                     MR. LELAND:  Let's go to Tom and then  
10       Graham; just a quick followup to yours.

11                    MR. GRIFFITH:  I think you are right.  
12       I think -- as opposed to where we are now, giving  
13       a range of options -- and I think the commission  
14       has expressed that interest already -- that  
15       options two and three ought to have more life to  
16       them than they have, but nevertheless I think --  
17       I'm still opposed to giving schools the option of  
18       using numeric formulas.  That shouldn't be one of  
19       the options that they're given.  It is contrary  
20       to the letter of the law; it is unfair.

21                    So I'm not certain where I'll be on  
22       the amendment.  Give me 30 seconds to think

1       about that.

2                       But I appreciate the sentiment that  
3       there ought to be more options that are given to  
4       schools.

5                       MR. BATES: I'll be quick, but I  
6       guess, in listening to this, I think one would  
7       have to assume that prong one is broken, and I  
8       guess, in my mind, I'm still not convinced that  
9       it's broken, and talked a lot about trying to do  
10      something with two and three.

11                      And to modify one before we are  
12      assured that we are doing something with two and  
13      three, I guess, just seems to me to be getting  
14      the cart ahead of the horse.

15                      And so, I guess I wanted to say that  
16      before we took a vote on this and started down  
17      this road.

18                      MS. YOW: Percy, I just want to  
19      follow up.

20                      I was just reminding everybody that  
21      we are not telling the Office of Civil Rights to  
22      do this. We are going to end up give them all

1 kinds of recommendations and none of them, as I  
2 understand it, are going forward with a mandate  
3 from us that this is what you must do, should  
4 do, and if you don't do this, then, you know,  
5 you don't know what you are doing.

6 There are going to be contradictory  
7 recommendations going to them.

8 MR. LELAND: In other -- Donna?

9 MS. de VARONA: Tom mentioned his  
10 objection to the numerical standards as it  
11 relates to the civil rights laws, and I am very  
12 concerned that when we forward any kind of  
13 recommendation in tinkering with the guidelines  
14 that we were entrusted to strengthen, and give  
15 the Office of Civil Rights direction, that we  
16 don't force it, that we do not, when we do  
17 suggest whether, you know, this passes or not,  
18 the impact of what we are asking.

19 Not the numerical impact of what the  
20 result in a 50/50 formula with a variance,  
21 because the numbers will be impacted with  
22 participation.

1                   I don't know what they are, but I  
2                   think we should be responsible enough to, when  
3                   we are looking at GAO reports and statistics in  
4                   other areas, to know where we're going.

5                   I'm not so sure we are going to  
6                   solve -- we're solving the problems that were  
7                   presented to us, as it relates to men's minor  
8                   sports. I just heard that if we changed it, we  
9                   are not going to get our wrestling programs back  
10                  or our swimming programs back.

11                  So you know, I am very uncomfortable  
12                  with forwarding something to the office, the  
13                  secretary's office what we feel the impact would  
14                  be.

15                  MS. YOW: I appreciate that, Donna.  
16                  I really do. I just -- I don't know how to find  
17                  out what the impact would be if we don't forward  
18                  it. I think it's a good thing we have the  
19                  opportunity to, and I just want to go on record  
20                  to say that I really do believe the 50/50 has  
21                  merit in terms of the American way, what's equal,  
22                  sharing equitably.

1                   And I have to also say my goal, my  
2                   number-one goal here is that equity in athletics  
3                   for women, not reinstating men's teams.

4                   If there are men's teams that are  
5                   reinstated, I think that's fantastic. I have  
6                   not cut a team at Maryland, a men's team, don't  
7                   plan on doing that, but it is not my primary  
8                   goal.

9                   MS. SIMON: I want to say that I'm  
10                  very troubled at the idea that we have come up,  
11                  as a commission, with contradictory  
12                  recommendations. It seems to me that one of the  
13                  things we should do is come up with consistent  
14                  recommendations and then, as we take the vote on  
15                  these things and we see how much agreement and  
16                  how much consensus there is, those people who  
17                  disagree, their position could also be reflected.

18                  But on the whole, I think that as  
19                  commissioners, we should come up a series of  
20                  consistent recommendations.

21                  MS. COOPER: Let's take a vote.

22                  MR. SLIVE: Ted, before we vote,

1 would it make some sense to hear Tom's amendment  
2 and to see what impact that would have on this  
3 discussion.

4 And also, to figure out a way to  
5 mandate with the secretary that these are just  
6 proposals for him to think about, that it be  
7 mandated in terms of whatever decision he makes,  
8 by this commission, that he justify by  
9 statistics that anything that he recommends will  
10 not in any way impact the progress we've made in  
11 women's opportunities.

12 I think that Donna made the point  
13 that she doesn't know what it means. Debbie's  
14 made the point that she know what it means.

15 I'm not sure we know exactly what  
16 each of these statistical impacts will be.

17 On the other hand, we are all  
18 trying to get to something that's fair and  
19 equitable and non-discriminatory. We are trying  
20 to find vehicles; we're trying to get out of a  
21 circle that seems to presented to all of us, and  
22 we would all like to be somewhere else this

1 morning.

2 But I am concerned. I would like  
3 for the secretary to entertain options that  
4 think about it, but I would like for him to  
5 prescribe, in considering those options, in  
6 guaranteeing this commission that we continue  
7 the progress we've made for women in athletics.

8 MR. LELAND: Mike, I was under the  
9 impression we did that under recommendation four  
10 yesterday, just what you said. And maybe we  
11 didn't; maybe it's distorted in some way, but I  
12 thought we said that we didn't want to take a  
13 step backwards in the course of the time line, in  
14 terms of providing women's opportunities.

15 I thought we are on record as doing  
16 that; do you disagree? You do?

17 I mean, you know, I've chaired a lot  
18 of commissions and committees and you guys, I  
19 mean, we have got to move forward. There is a  
20 sense you need to help the chair move this thing  
21 along.

22 You have to be a little bit of



1       disciplined here. We've talked about these  
2       issues over and over. We are not gagging  
3       anybody; we'll vote past ten minutes; we are now  
4       on 35 minutes on this discussion, and we're just  
5       trying to get a vote.

6                   I don't understand why people can't,  
7       after all the work we have done, can't put their  
8       hand up immediately in favor or not in favor of  
9       a proposal that's been before us for over a  
10      month.

11                   So I -- I mean, where the chairs,  
12      where we could do a better job of moving this  
13      thing along. I feel like it's a simple  
14      commitment to the Communist party; I'm not -- I  
15      mean, we can't get anything -- I want to write  
16      to the Olympic Committee people here to run this  
17      thing.

18                   I mean, I hope you could understand  
19      that the level of frustration that we have as we  
20      stand up here and we can't even agree to stop  
21      debate after ten minutes.

22                   MS. de VARONA: Ted, what do you

1       expect? This is the most important discussion  
2       we've had.

3                   MS. COOPER: There is no question  
4       about it. But there's no question that's  
5       important. I think everyone around this table,  
6       everyone's here, we all know it is important, but  
7       we are all intelligent people and we have a  
8       process and we've discussed this.

9                   But we've played the role in the  
10      ground and it is time to vote. It is simple; it  
11      is not even complicated. We have discussed  
12      three months, four months; we've been here.  
13      We've talked about, we have discussed it,  
14      everyone has voiced their opinion. Let's vote.

15                   MR. BOWLSBY: Ted and Cynthia, to  
16      Mike's point, I think the proposal that Tom  
17      forwarded yesterday and that we approved  
18      regarding making sure the changes in management  
19      of this whole Title IX environment go through the  
20      process that was prescribed, also gets at  
21      directly what you were talking about, Mike.

22                   These are recommendations. I agree

1 with what both our chairs have said. We have  
2 got to get on down the path. And we've got  
3 people who do this for a living and work at it  
4 every day that are going to take it from our  
5 recommendations through to fruition, one way or  
6 another, and we have to go down the path.

7 MR. LELAND: I'm about ready to hit  
8 my forehead on the table if we can't get somebody  
9 to agree to follow some procedure.

10 MR. GRIFFITH: I think we are going  
11 to -- Facing a church and state here; I  
12 apologize.

13 We have a proposal before us now.  
14 It's been amended to change the variance and  
15 also to change the first sentence in the way  
16 that Graham indicated.

17 Is there any other questions on the  
18 substance of the vote?

19 Okay; all those in favor of --

20 MR. GRIFFITH: Can we read it?

21 MR. SPANIER: I'd be happy to read  
22 it.

1                   Institutions governed by Title IX  
2 standards, as one approach to meeting the  
3 standard of proportionality, may allot  
4 50 percent of their participation opportunities  
5 for men and 50 percent for women. A variance of  
6 two to three percent, in compliance with the  
7 standard, would then be allowed.

8                   MR. LELAND: Any other questions?

9                   All those in favor of supporting  
10 this recommendation, raise your hand?

11                  MS. PRICE: Seven in favor.

12                  MR. LELAND: Opposed?

13                  MS. PRICE: Seven.

14                  MR. LELAND: Oh, my goodness.

15                  MS. PRICE: In the case of a tie  
16 vote, the commission would have the  
17 recommendation in the report with a comment that  
18 this recommendation received a tie vote; the  
19 commission neither supports nor opposes it.

20                  Any recommendation that received a  
21 tie vote would be listed separately at the end  
22 of the recommendation for that location.

1 MR. LELAND: Next. Okay.

2 Recommendation 14.

3 MS. COOPER: Do I need to read  
4 recommendation 14 again? Do we need to discuss  
5 it for ten minutes?

6 Any questions, comments?

7 MR. SPANIER: I suggested an  
8 amendment to 14, which said that in place of the  
9 words, within the Office for Civil Rights regions  
10 --

11 MS. COOPER: Is it just the line that  
12 isn't?

13 MR. SPANIER: The line is 17 on page  
14 38, replacing those seven words, with, within an  
15 appropriately defined geographical region.

16 MS. FOU DY: Can I comment on this?

17 Bob, I totally agree with you in  
18 that we need to incentivize the feeder systems,  
19 and in terms of becoming more compliant by  
20 participation numbers, where I think this  
21 recommendation is inherently flawed is that we  
22 are assuming -- we are going assume that the

1 feeder system dictates our percentage rates in  
2 that we are assuming that the feeder system is  
3 already in compliance.

4 So in a situation where the  
5 proportionalities are not in compliance and  
6 where your numbers are not in compliance, you're  
7 still going to be passing on those numbers into  
8 the collegiate system.

9 So in essence, if you have  
10 discrimination at the feeder system level, you  
11 are then having it at the collegiate level, as  
12 well, because you are basing those numbers on  
13 the collegiate system.

14 And so I agree with you that we need  
15 to incentivize the feeder system and make them  
16 more responsible for Title IX, but at the same  
17 time to lock discrimination into place.

18 MR. BOWLSBY: I think I earlier said  
19 that this was an option that I thought the  
20 secretary and the staff ought to look at.

21 I certainly understand the impact of  
22 it, but I think from a logical standpoint it

1 does make more sense, and the incentivization of  
2 it is certainly critical in my mind too, Julie.

3 So I don't -- I think this is one  
4 that I don't feel particularly strongly about  
5 but I do think it's an alternative that the  
6 Department of Education staff ought to take a  
7 look at.

8 It is also one where, to go to the  
9 point that several of you have made, you would  
10 want to take a very close to look at what  
11 happens with the numbers before you consider the  
12 matter.

13 So I don't think there is any harm  
14 in forwarding it on. It's one of the ways in  
15 which this topic ought to be considered.

16 Having said that, there are  
17 obviously some numerical things that need to be  
18 considered, and I wouldn't say it's a  
19 non-starter, necessarily, but it certainly is  
20 different than some of the other proposals.

21 MR. SPANIER: Just a point in  
22 clarification, Bob, based upon what you've said

1 and what Debbie said earlier, do we need to vote  
2 this up or down, or it sounds like this is one  
3 that could be put somewhere in the report for the  
4 secretary to see without either support or  
5 nonsupport of the commission.

6 MR. BOWLSBY: Yeah, that would be  
7 fine with me. I just think it's something we  
8 ought to take a look at.

9 MS. FOUDY: How about rewording it so  
10 that quickly, so that it calls more to the  
11 incentivization, if that's a word, in high  
12 schools instead of drawing off those numbers,  
13 instead of trying to say whatever numbers are in  
14 high school, we are going to carry them on to  
15 college.

16 I mean, the point is that we want to  
17 get the high schools to come up with their  
18 numbers, not that we want to necessarily use  
19 them as a basis for collegiate participation, if  
20 those numbers aren't --

21 MS. GROTH: My concern that I have  
22 with this is, all across the country the



1 percentages vary across by state. Some states  
2 are at 70 percent male, 30 percent female, and  
3 then there are some states it's almost 50/50. So  
4 it's such a wide variance of participation.

5 MR. BOWLSBY: I think that's what  
6 Graham was trying to get at with his amendment,  
7 using some pre-determined -- it wouldn't be state  
8 by state, but some regional or feeder system.

9 You know, I don't know exactly how  
10 it would be accomplished at a national  
11 university that routinely draws student from all  
12 50 states, and there are some of those.

13 But that would be something that the  
14 Department of Education would have to pursue and  
15 consider it, determine if it was viable at all.

16 MS. COOPER: Donna?

17 MS. de VARONA: This is going to be  
18 short, Cynthia.

19 I think one the things we are  
20 missing in this statistic, if you want to look  
21 at it that way, are all the club programs that  
22 women athletes participate in because the sport

1           isn't offered in the high school.

2                         For instance, soccer, which has, you  
3           know, 8 million young girls playing across the  
4           country, so to use this as a standard, I think,  
5           is flawed.

6                         So that's why I have a problem with  
7           the proposal.

8                         MS. MCGRAW: My concern is that all  
9           these proposals deal with how to see Title IX at  
10          the college level, and how do we measure it at  
11          the high school level? We're going to go to the  
12          middle schools to determine that?

13                        I think we need to have an all-  
14          encompassing idea that we can use at every  
15          level.

16                        MR. BOWLSBY: Well, I'm comfortable  
17          not having this as something we act upon and just  
18          send it forward to the secretary as something  
19          that ought to be considered.

20                        I don't think it is necessarily an  
21          option as a stand-alone venture. I think it's  
22          just that -- what Muffet just said is a real

1 good point: How do we measure at the  
2 high-school level? How do we measure in the  
3 feeder system?

4 It isn't just high school programs;  
5 that's exactly right. I don't know that that's  
6 something that's necessarily within the province  
7 of this group to try and figure out. I think we  
8 have to allow somebody else that's got more time  
9 and staff to do it.

10 MS. SIMON: Why don't we vote on  
11 that? Why don't we make a motion and vote on  
12 that?

13 MS. COOPER: Okay. You made a  
14 motion; I second it.

15 MS. SIMON: Good; terrific.

16 MS. COOPER: All in favor of  
17 recommendation 14 just to pass along with the  
18 amendment that Graham made?

19 MS. FOU DY: It is either we are  
20 passing it along as a recommendation as it  
21 stands, and we have to take ownership of it; it  
22 can't just be oh, here are a few we're going to

1 pass along everything.

2 MS. COOPER: We're going to vote on  
3 passing it along as a recommendation.

4 MR. LELAND: Yeah, I think what she  
5 is suggesting was something that Percy had  
6 suggested, correct? Rita -- I want to call her  
7 Rita, on days like today.

8 MS. COOPER: So we are voting on it  
9 as recommendation 14.

10 MR. LELAND: I don't see a way that  
11 we could just pass this along without acting on  
12 it. I don't know what -- I don't know how that  
13 looks. I don't know what that looks like. It is  
14 really before us as a recommendation. It's not  
15 -- I think we have all agreed it doesn't have to  
16 be mutually exclusive. It's not -- we're not  
17 telling the secretary that they have to do; we're  
18 just suggesting this as an option to be looked  
19 at.

20 So I think it is still before us.

21 So let's --

22 Yeah, just quickly. The reason I

1       said that -- in listening to Bob we are treating  
2       these all as though they are equally weighted,  
3       and hearing him, it sounded to me as though he's  
4       saying, I'm not that wedded to this, and then I  
5       was really saying if that's the case then  
6       perhaps it should be in the report, but not  
7       necessarily carrying the same weight as other  
8       recommendations that we are going to pass along.  
9       That was the spirit in which I was suggesting  
10      it.

11                   MS. SIMON: I don't think you want to  
12      withdraw it.

13                   MR. BOWLSBY: That's exactly right.  
14      I'm more than comfortable withdrawing it, if  
15      that's easier for the group.

16                   MS. SIMON: Okay; do it, then.

17                   MR. BOWLSBY: I just think there is  
18      some meat in there that somewhere ought to be  
19      considered.

20                   MR. LELAND: But let me ask you a  
21      question, then, and I guess we'll have to vote on  
22      it, Bob.

1                   Where, then, in the recommendations  
2                   do we deal with your interest in what you called  
3                   earlier the flawed entry assumption, you know,  
4                   about measure?

5                   I saw this as a recommendation that  
6                   would be -- give the secretary some instigation  
7                   or some momentum to look at the whole entry  
8                   level assumption that you've been concerned  
9                   about.

10                  I'm not sure I'm in favor of this  
11                  proposal myself, personally, so I'm not trying  
12                  to keep it alive. I just want to accommodate  
13                  your interest. I don't know where else we are  
14                  going to be able to accommodate your interest  
15                  and vote on it.

16  
17                  MR. BOWLSBY: Well, remember, that  
18                  was the proposal that came out of being last on  
19                  the rotation.

20                  But having said that, I think the  
21                  proposal of recommendation number 13 does some  
22                  of that and I guess we'll get into it as we

1 discuss Tom's proposal.

2 MR. LELAND: He's willing to withdraw  
3 it. Are -- do we need a vote to withdraw it  
4 or --

5 MR. SPANIER: I think we should vite  
6 it down because a lot of -- we don't want to be  
7 in that position with other recommendations,  
8 because many of them emerged from discussion with  
9 several people contributing, even though this  
10 one --

11 MR. DE FILIPPO: Okay; I'd agree with  
12 that. Is Bob going -- are you going to withdraw  
13 that, make a motion to withdraw?

14 MR. LELAND: Let's vote it up or  
15 down. The technique we'll use is to vote it up  
16 or down. Are we ready to vote on recommendation  
17 14?

18  
19 MR. LELAND: Okay. All those in  
20 favor of recommendation 14, raise your hand.

21 All those opposed?

22 MS. PRICE: I'm not counting; 14 to

1 zero.

2 MR. LELAND: Do you want me to do  
3 recommendation 15?

4 MS. COOPER: Go ahead.

5 Fourteen to zero.

6 MR. LELAND: Okay, we're now into  
7 15A, which we understand Tom is going to amend.

8 MR. GRIFFITH: Right.

9 First of all, I want to thank Donna  
10 for her support in allowing me to do this, and I  
11 think that says something, and I'm going to  
12 speak to the media for a second.

13 I've been reading some reports that  
14 have talked about acrimony. Now, the acrimony  
15 that I see is going on outside the commission. I  
16 want to commend my fellow commissioners. I  
17 think Donna and I probably disagree on the value  
18 of substantial proportionality, but I think she  
19 know that I don't question her motives and I  
20 don't think she questions mine.

21 I wish that could be said for those  
22 who are agitating on the outside. I wish people





1 and I got some titters from the crowd -- I for  
2 one don't believe in the infallibility of the  
3 judiciary. Maybe some do; I don't.

4 My arguments for that are two cases,  
5 Dredd Scott and plus E. B. Ferguson. Those were  
6 cases where courts decided something and we all  
7 agreed they're wrong.

8 The courts here weren't saying that  
9 the use of numeric formulas was required by  
10 Title IX. All they were saying was that that  
11 was a reasonable interpretation among many  
12 interpretations the Department of Education  
13 could have used.

14 They said it was reasonable, not  
15 required. Now I disagree with that. I think  
16 they were wrong, given the plain language of the  
17 statute.

18 Numeric formulas are unfair. I  
19 think each of us feels that, and my guess is  
20 each of the athletic directors here know that.  
21 And they know that from personal experience.  
22 They know that and they associate that concept

1 with names and individuals who are treated  
2 unfairly because they were on the wrong side of  
3 the numeric formula.

4 We have a chance to do the right  
5 thing here, and I urge you to vote against the  
6 perpetuation of this fundamentally unfair way of  
7 going about remedying discrimination.

8 Numeric formulas are wrong, so  
9 here's -- I would move to strike recommendation  
10 15 and amend it as follows:

11 The Office of Civil Rights should  
12 not use numeric formulas to determine whether an  
13 institution is in compliance with Title IX.

14 MR. REYNOLDS: Now, Tom, when you say  
15 numeric formulas, would you include the use of an  
16 interest survey?

17 MR. GRIFFITH: I think interest  
18 surveys are fine. I'm not certain -- what would  
19 be the connection between the two?

20 MR. REYNOLDS: Okay. Because when I  
21 listen to you, it is not clear to me that you  
22 want to get rid of the proportionality standards

1 under all circumstances or whether, if it was  
2 amended, and the fix that I'm thinking about is  
3 tying proportionality to quantified interests  
4 through the use of surveys.

5 MR. GRIFFITH: I think that's  
6 entirely legitimate, if we can determine what the  
7 interests and abilities of the student body  
8 population is through the types of surveys that  
9 Rita is discussing.

10 Then I think it's entirely  
11 appropriate to use that to determine whether  
12 those interest and needs are being met.

13 MS. FOU DY: Tom, if you don't have  
14 any quantifiable goal in this and the goal of  
15 Title IX is to prevent discrimination, then how,  
16 in effect, do you do that without some measure?

17 MR. GRIFFITH: Well, you look for  
18 equality of opportunities under equal  
19 opportunities. Has someone been discriminated  
20 against because of their gender? What I  
21 understand that to mean is, has a decision been  
22 made arbitrarily that someone is not allowed an

1 opportunity because of their gender.

2 So the practical impact of this is  
3 -- the chair has been good at urging us to be  
4 practical -- I think the practical impact of  
5 this means that you would go largely to the  
6 interest and needs of prong, that it's incumbent  
7 upon schools, in an effort to provide equal  
8 opportunity, to determine what the interests,  
9 what the abilities are of the population.

10 MR. LELAND: Debbie?

11 MS. YOW: So I think that  
12 philosophically there would be a number of people  
13 in the room who would agree with you, as you  
14 referred to being on the wrong side of the  
15 numerical formulas, which by the way is why I  
16 suggested 50/50.

17 But never mind that right now.

18 But the problem with it is this:

19 There is a major trust issue.

20 Those of us who have come through  
21 the rank in athletics, first as athletes,  
22 coaches, administrators, know that even when we

1       can identify discrimination, the process you  
2       have to go through to ever, ever remedy that is  
3       so cumbersome, takes so much time and there is  
4       so many problems, is fraught with problems just  
5       to get those things taken care of, that when we  
6       look at in the aggregate and think about what  
7       it's really been like, we gravitate toward -- or  
8       I do; maybe I just should say I gravitate toward  
9       a numerical formula. So that I know what the  
10      target is, I know if I don't hit the target then  
11      I have a problem.

12                   And I also guarantee, via that  
13      numerical formula, that that's where women will  
14      be. You can't do less than that and get away  
15      with it.

16                   Because it's so readily -- you can  
17      see it. You know it when you see it.

18                   So it's just a trust issue.

19                   MR. GRIFFITH: I understand.

20                   There is no question -- and I don't  
21      dispute that numeric formulas are more efficient  
22      -- they are very efficient -- but I don't think

1 efficiency is the value here. Fairness is the  
2 value here. Equality of opportunity is the  
3 value here.

4 And I think when we slip into  
5 numeric formulas we compromise fairness for  
6 efficiency, and I do not think that is something  
7 that we should allow to continue.

8 MR. LELAND: Let me call on myself  
9 here, Ted.

10 I will vote against this. I'm  
11 concerned that right now, with numerical  
12 numbers, it is sort of like the institution has  
13 to prove they are innocent, and I think there's  
14 some complications with that and some of us are  
15 uncomfortable with that.

16 The problem I have with no  
17 numericals, it seems to me we put the burden of  
18 proof on the student. Now they have to prove  
19 they've been wronged, and I think that's -- I  
20 would rather have the a burden on us to deal  
21 with a messy, complicated formula than put the  
22 burden on female students who come to school and

1 all they want to do is play their sport and go  
2 to school, and all of a sudden they are involved  
3 in this set of issues.

4 So I'm also for the -- ditto, for  
5 some of the reasons that Debbie talked about in  
6 terms of, we love targets and I like to get the  
7 target. So I'm going to vote against this here.

8 MR. GRIFFITH: I think Gerry's point  
9 perhaps addresses that, addresses that, that  
10 numeric values would be used but they would be  
11 used once you could determine what the interests  
12 and needs are.

13 I think that's -- again, as I said,  
14 that's the practical impact of this, is you move  
15 to putting a lot of emphasis on interests and  
16 needs.

17 MR. LELAND: Okay. Julie?

18 MS. FOUDY: Tom, one of the issues I  
19 have with surveys, if that's going to be your  
20 basis for determining whether they're meeting the  
21 interests or whether they're not discriminating,  
22 is if you were to take a survey back when Title



1 IX was passed in the early '70's on how many  
2 women were interested in sports, you know, you  
3 would have gotten maybe eight or nine percent.

4 And in essence, if you took those  
5 surveys and then locked them into numbers, we  
6 would still be at eight or nine percent.

7 MR. GRIFFITH: Sure.

8 MS. FOU DY: And so that is the  
9 problem with surveys, is, you are freezing  
10 discrimination into place. And so to base your  
11 system for athletics at every level on interest  
12 surveys is fundamentally flawed.

13 MS. SIMON: Julie, you're not locked  
14 in. You do continue a survey on a regular basis.  
15 So of course you don't use a one-time survey. Of  
16 course we recognize that things change, attitudes  
17 change, and so on.

18 It's continuous surveys that are  
19 important.

20 MR. DE FILIPPO: Mr. Chair, I too am  
21 against this for reasons that you spoke about and  
22 Debbie, but it -- would it be in line to call the

1 question and end this debate and let's vote?

2 I think we've heard from all sides.

3 MR. LELAND: Okay; any other --

4 any -- questions been called? Any objections?

5 We now have our tiebreaker here.

6 Okay, we have before us a substitute  
7 motion 15. Does it need to be read again? Do  
8 you think everybody understands it? Do you need  
9 to hear this?

10 MR. GRIFFITH: It's a motion to  
11 strike recommendation 15 and replace it with the  
12 following language:

13 The Office of Civil Rights should  
14 not use numeric formulas to determine whether an  
15 institution is in compliance with Title IX.

16 MS. KEEGAN: I'm sorry, Mr. Chairman.  
17 I've been talking to people sort of about it.  
18 No, we can go ahead; we can go ahead and vote.

19 MR. LELAND: Are you sure?

20 MS. KEEGAN: Yeah, I'm sure.

21 MR. LELAND: Okay; let's vote.

22 All those in favor of the substitute

1 motion 15 that Tom just read, raise your hand.

2 MS. PRICE: Four.

3 MR. LELAND: Opposed?

4 Eleven opposed; four for.

5 MS. PRICE: Eleven opposed; four for.

6 MS. COOPER: It's defeated; we'll now  
7 take a break.

8 I would say to the commissioners,  
9 though, if I thought having an emotional break  
10 down would get us moving like it did, I would  
11 have tried that at an earlier meeting.

12 MS. SIMON: Ted, Ted.

13 MR. LELAND: Yes.

14 MS. SIMON: I've lost every time I've  
15 made this suggestion, but I leave here, no matter  
16 what happens, in 45 minutes.

17 MR. LELAND: Do you want to just  
18 continue on?

19 MS. SIMON: No, but could we probably  
20 move and look at the interest survey  
21 recommendations 19 and 20.

22 MR. LELAND: That's a sort of a

1 motion to reorder so that Rita has a chance to  
2 talk about what's she's interested? I'm fine  
3 with that.

4 Let's do it this way, though. If  
5 someone has to leave for a break, get our  
6 attention and we'll try to make sure you're back  
7 for the vote, okay?

8 Because I -- the other day, I guess  
9 I want to say it might be okay if someone misses  
10 a little bit of the debate to take care of  
11 biology, but if you have -- let's not miss any  
12 votes. So let us know when you are gone.

13 We are on number -- Rita, was it 18  
14 first?

15 MS. SIMON: No, it was 19 and 20.

16 MS. COOPER: 19 and 20.

17 MS. de VARONA: I am going to excuse  
18 myself.

19 MR. LELAND: You don't have to  
20 publicly announce it; just give us --

21 Do you want me to read this?

22 MS. COOPER: Oh, I'll read it.

1                   Recommendation 19 -- now am I  
2           getting the right -- are we putting 19 and 20  
3           together, or are we --

4                   MR. LELAND: No; do them one at a  
5           time.

6                   MS. COOPER: Okay; we're doing them  
7           one at a time.

8                   Recommendation 19, page 39, line 42:

9                   The Office for Civil Rights should  
10          explore the possibility of allowing institutions  
11          to conduct scientifically-based surveys to  
12          determine the actual athletic interest of its  
13          student body on a continual basis.

14                   The number of interested students  
15          would then become the measure for determining  
16          whether an institution is in compliance with the  
17          proportionality requirement of the first part of  
18          the three-part test, i.e., if 50 percent of  
19          interested students are female, 50 percent of  
20          athletic participation opportunities would need  
21          to be provided for females.

22                   MS. SIMON: Cynthia, I'm going to

1       vote against this, I think, not because I'm not  
2       interested in and don't want the interest  
3       surveys, but I think the interest surveys have to  
4       be used as one measure of the granting of varsity  
5       scholarships that, as Debbie pointed out awhile  
6       back, you also have to look at skills, competence  
7       and so forth.

8                       And I would say that we should use  
9       the interest surveys as a way of finding out the  
10      relative interest and abilities of -- and then  
11      also look at abilities of the male and female  
12      students.

13                      I also urge that on a continuous  
14      basis, we could see change in the development of  
15      interest, and my guess is the surveys themselves  
16      will stimulate interest on the part of both men  
17      and women to consider varsity sports.

18                      MS. COOPER: Well, I do agree that  
19      this recommendation should include ability and  
20      athletic interest and ability of its student  
21      body, I do agree this recommendation should  
22      include that.

1                   But I just can't imagine us assuming  
2                   whereas at other times we don't want to assume.  
3                   You know, i.e., the high school situation, we  
4                   don't want to assume that the feeder system, et  
5                   cetera, et cetera.

6                   Here we want to assume. We want to  
7                   assume that this student body, the undergraduate  
8                   enrollment is the target and we should measure  
9                   the interest by just assuming that they, you  
10                  know, they want to participate in sports,  
11                  especially in varsity sports.

12                  I just might add, most varsity  
13                  athletes are recruited, whether they're walk-ons  
14                  or not. They know what they are going to  
15                  college for.

16                  Just as academic students that  
17                  receive academic scholarships, you know, they  
18                  know why they are going to that school.

19                  MS. SIMON: Well, could we then,  
20                  Cynthia, fold in recommendation 20 into  
21                  recommendation 19. Recommendation 20, as it's  
22                  been revised, is the Office of Civil Rights

1       should allow -- and I would say encourage --  
2       institutions to conduct continuous interest  
3       surveys on a regular basis as a way of allowing  
4       schools to accurately predict and reflect men's  
5       and women's interest in athletics over time and  
6       also to stimulate student interest in varsity  
7       sports.

8                        Could we just -- I don't see why we  
9       need these two separate proposals. I think if  
10      we fold 20 in with 19, we've got the  
11      recommendation on the importance of regular,  
12      continuous surveys by the institutions.

13                      MR. LELAND: I think, Rita, one  
14      difference I would say is proposal 19 is  
15      specifically -- sort of pushes someone to -- the  
16      Department of Education to consider interest  
17      surveys as they relate to the proportionality  
18      formulas. That's something I'm not comfortable  
19      with.

20                      Recommendation 20 talks about  
21      meeting the three-part test, and I'm comfortable  
22      saying that somewhere in thee-part test interest



1 surveys might work. I wouldn't see it for  
2 proportionality; that's my ---

3 MS. SIMON: Cynthia, would you -- I  
4 agree with Ted. Would you consider it for all  
5 three prongs?

6 MS. COOPER: Sure; sure. But no -- I  
7 agree with Ted in the sense that they are two  
8 separate things.

9 MR. LELAND: Yeah.

10 MS. COOPER: I'm saying the  
11 undergraduate population, that you need to survey  
12 them to say, to ask them if they are interested  
13 in SPORTS.

14 And I think you're saying in 20 that  
15 surveys needs to be used as part of, you know,  
16 the third prong of the three-part test.

17 MS. SIMON: No, I'm saying it should  
18 be used in all three prongs.

19 MS. COOPER: There you have it.

20 MR. LELAND: Okay. So I think there  
21 is a difference between the two proposals, 19 and  
22 20.

1                   Any other discussion on 19 that's  
2 before us now? Cary, and then Tom?

3                   MS. GROTH: I disagree. I think  
4 surveys, again, belong in prong three. It  
5 already allows schools to make the showing with  
6 the surveys, and to import it into prong one  
7 would violate, in my opinion, basic civil rights  
8 principles by requiring women that they were  
9 entitled to equal opportunity before they can be  
10 awarded it.

11                   And I want to cite an example, what  
12 we were told in Chicago by the Executive  
13 Director of staff of the Illinois State High  
14 School Association.

15                   When Illinois decided to add women's  
16 volleyball or girl's volleyball as a state  
17 championship opportunity, after that decision  
18 was made, after the opportunity was afforded,  
19 over 400 high schools in the State of Illinois  
20 then offered volleyball as a sport.

21                   Had a survey been taken earlier that  
22 year, I'm not so sure that survey would have

1 provided the results such offering the sport of  
2 volleyball, and then those individual schools  
3 offering that sport. I'm not so sure that we  
4 can rely just on surveys.

5 MR. LELAND: Okay. Other discussion?  
6 Julie?

7 MS. SIMON: We don't have to rely  
8 just on surveys.

9 MR. LELAND: And we come up with the  
10 question of --

11 MR. GRIFFITH: I'm sorry; you may  
12 have said this before and I just missed it.

13 How does the survey work on prong  
14 one? I don't --

15 MS. SIMON: I'm saying it should be  
16 used to replace prong one.

17 MR. GRIFFITH: I see; okay.

18 MS. COOPER: I'm not saying that it  
19 should replace prong one; I'm saying that right  
20 now, OCR has been assuming that the undergraduate  
21 enrollment -- they said if it's 56 to 44, then  
22 56 percent women -- we're just assuming that they

1 are interested in playing varsity sports.

2 And I'm saying use a survey to find  
3 out if they are interested and if they have  
4 ability to participate in varsity sports.

5 MS. SIMON: I agree with that,  
6 Cynthia.

7 MR. LELAND: Yeah, and the language  
8 police reflect that.

9 MS. de VARONA: Cynthia, question:

10 MS. COOPER: Yes.

11 MS. de VARONA: When you ask for  
12 surveys, are you going to survey the men, too, on  
13 campus?

14 MS. COOPER: Absolutely; you survey  
15 everyone.

16 MS. FOU DY: I just want to comment --

17 MR. LELAND: A couple more questions;  
18 then we can call the question.

19 MS. FOU DY: I wish we lived in a  
20 world where you could say that opportunities have  
21 been created from the time you were born, for  
22 both men and women.

1                   I wish you could say that we live in  
2                   a world where opportunities were given equally,  
3                   at least offered; whether they were taken or  
4                   not, offered equally between men and women when  
5                   you were born.

6                   But unfortunately, that is not the  
7                   history that we are dealing with, and to try and  
8                   then say that we would -- to try and recommend  
9                   to the secretary to use surveys instead of  
10                  proportionality in prong one would be in essence  
11                  saying to, if he proposed it to the Office of  
12                  Civil Rights, we want you to use an instrument  
13                  that every court has found to only freeze  
14                  discrimination into place, to use that  
15                  instrument against Title IX.

16                  The irony in it is --

17                  MS. COOPER: I'm not using any  
18                  instrument against Title IX, first of all.

19                  And we're not talking about the law  
20                  of Title IX. The law of Title IX stays as is.

21                  We are talking about the three-prong  
22                  test and we're talking about, you know, I don't

1 understand why everyone is so afraid to ask a  
2 very simple question: Do you want to play  
3 sports?

4 MS. FOU DY: Because, Cynthia --

5 MS. COOPER: No, wait; no, wait; no,  
6 wait.

7 Do you want to play sports? That's  
8 pretty simple; it is pretty basic. Are you  
9 attending this university to participate in  
10 sports? If you are not, why should you then be  
11 counted as part of the proportionality prong and  
12 -- I just think you complicate --

13 MS. FOU DY: Let's not forget that  
14 Title IX applies to more than just colleges.

15 So now when you ask a seven-year-old  
16 whether she's interested in playing sports, at  
17 seven years old, if says no, then you are  
18 assuming then that your numbers are tied into  
19 that.

20 And if you looked at -- I mean,  
21 let's take it if you looked at -- just to make  
22 an analogy; I'll only make one -- if you looked

1 at airline pilots, 3 percent, I just read, are  
2 Black, right?

3 So is that then going to say that  
4 Blacks are afraid of flying because only 3  
5 percent are pilots?

6 MS. COOPER: They may very well be  
7 afraid of flying, but ask them: Are they afraid  
8 of flying?

9 You don't just assume by the  
10 percentages that they are afraid of flying.  
11 They might just not want to be pilots. So you  
12 ask them.

13 MR. LELAND: I mean, could I call the  
14 question on --

15 Okay; let's go here first and then  
16 we'll do Tom.

17 MR. REYNOLDS: Cynthia brings up a  
18 very important point. It makes no sense to  
19 assume that -- why rely on an assumption when you  
20 have the capability of assessing that assumption  
21 to see if it is accurate. It makes no sense.  
22 There is nothing --

1                   MR. GRIFFITH:  Furthermore, the  
2                   assumption you are relying on is one you are  
3                   forbidden to rely on.  You are assuming that  
4                   because of someone's gender, that they have  
5                   certain interests.

6                   Well, that's exactly the evil that  
7                   Title IX was designed to combat.  That's sort of  
8                   stereotyping, and it is just ironic that we are  
9                   now using that same stereotyping for laudable  
10                  goals, laudable goals.

11                  But no question, the goals are  
12                  laudable, but the means are strictly forbidden  
13                  to do so.

14                  Now, if there were arguments that  
15                  dealt with the methodology, if there were  
16                  reasons why surveys were inappropriate  
17                  instruments to use to assess the interest of men  
18                  and women on campuses, then we should not do it.

19                  But I haven't heard any of those  
20                  arguments yet.

21                  MR. LELAND:  Okay.  A couple more and  
22                  then we'll end -- Lisa and then --



1 MS. KEEGAN: I just want to speak in  
2 favor of Cynthia's proposal and what she just  
3 said, and also, Rita's point about surveys over  
4 time.

5 Time has changed us incredibly. It  
6 seems to me you would want the information. At  
7 seven years old, Annie, my baby, was not playing  
8 sports. Now, quite frankly, ladies and  
9 gentlemen, she is the best goalkeeper in  
10 America.

11 She would have said no, but I  
12 wouldn't have been interested in the things I'm  
13 interested in later on. It would be fascinating  
14 to know that young men and women, is it still  
15 evolving? Is there a point at which it goes  
16 static?

17 Is -- does it -- at some campuses  
18 because there is greater marketing of sports,  
19 does it go up?

20 I got to tell you guys, it really  
21 bothers me to assume that the be-all and end-all  
22 of the university experience and what Title IX

1 is meant to do is to enhance varsity sports.

2 Are we going to do this in  
3 engineering? Are we going to make sure there's  
4 50 percent of, a reflective proportion of women  
5 in engineering?

6 How about in math, science? How  
7 about we start dis-aggregating and make sure  
8 that every group is equally represented in  
9 perspective to how they are in the university.

10 Title IX is not solely about sports,  
11 and I just think we need to be consistent in  
12 discovering what it is that young men and women  
13 want about sports and not assuming that  
14 everybody wants it and it is just about where we  
15 put the barrier.

16 MS. FOU DY: I don't disagree with  
17 you, Rita, that there's a use for surveys. But I  
18 believe we already have in prong 3.

19 If you are not meeting  
20 proportionality, you have a right to show it in  
21 prong 3, why you're not meeting it, and there is  
22 where surveys can be very valuable.

1                   And they could probably use some  
2                   feedback in how they could be used more  
3                   effectively.

4                   But to use it to tie in your numbers  
5                   initially is where I have a problem. But there  
6                   is a purpose for them, and that's why they are  
7                   used in prong three.

8                   Because if you are not at  
9                   compliance, then you have a great way of showing  
10                  why not, and if you could show that it's not  
11                  through actions of discrimination through your  
12                  surveys, then you are in compliance for prong  
13                  three.

14                  MS. SIMON: Julie, this doesn't  
15                  directly go to your point -- I will in a minute  
16                  -- but I just want to assure people if there's  
17                  any doubt or question about it, one of the few  
18                  things that social scientists and particularly  
19                  sociologists know how to do is to run surveys.

20                  We really do know how surveys that  
21                  are impartial, that will provide you with valid  
22                  and reliable data.

1                   So I think that, given an impartial  
2                   group like National Opinion Research Survey or  
3                   the center at the University of Chicago or Johns  
4                   Hopkins University has a survey research outfit  
5                   or individual sociologists could advise you --  
6                   we know how to run surveys that will give you  
7                   valid and reliable data.

8                   And the other thing -- this is  
9                   partially in response to Julie -- I'm not saying  
10                  that we should use surveys on seven-year-olds.  
11                  I'm saying that we should use the surveys for  
12                  people who are entering universities.

13                  MR. LELAND: Okay. Let's -- I think  
14                  people pretty well know how they are going to  
15                  vote on this. So let's keep the discussion  
16                  going, but Cary?

17                  MS. GROTH: My comments were covered  
18                  by Julie's.

19                  MR. LELAND: Julie and Rita? Do you  
20                  have any more?

21                  MS. FOUDY: I was just going to  
22                  respond to that. I think that's wonderful and I

1 think we can use that in prong three, Rita, and  
2 you could help them devise something that would  
3 help show the interests in prong 3.

4 MS. de VARONA: I'll make it short.

5 I agree under prong three and I  
6 agree with Rita's desire to conduct tests as  
7 long -- as well as Cynthia.

8 However, I think one thing we  
9 haven't discussed in this assessment of  
10 scientific research is that we also have to look  
11 at how the school recruits athletes, women  
12 athletes: What programs are available within  
13 that context, if we are looking at interest?  
14 How open was the university? What did they  
15 offer? Where do they recruit from? What kind  
16 of programs in coaching did they give, and what  
17 kind of support?

18 Because then I think only interest,  
19 only are you interested is not a valid measure.

20 MR. LELAND: Okay. Percy, and then  
21 I --

22 MR. BATES: I just wanted to move

1 that we close debate on this item.

2 MR. LELAND: Thank you, Percy.  
3 Anybody disagree with the idea of coming to a  
4 vote?

5 MS. SIMON: Ted, are we voting on 19  
6 and 20 combined?

7 MR. LELAND: No, just 19.

8 MS. de VARONA: Could we move this  
9 one as an amendment to 20? Could we vote on  
10 that?

11 MR. LELAND: No, I think we decided  
12 earlier that they're separate issues.

13 MS. de VARONA: I'm sorry. I was in  
14 the -- I was on the phone.

15 MR. LELAND: Hand signals, Donna.

16 Okay. Proposal 19 is before us.  
17 It's as written. No more discussion.

18 All those in favor of recommendation  
19 19, raise your hand.

20 MS. PRICE: Seven in favor.

21 MR. LELAND: All those opposed?

22 MS. PRICE: Eight opposed.

1 MR. LELAND: Okay. It's defeated.

2 Now we're on to recommendation 20.

3 This is Rita again.

4 MS. SIMON: I think we can just vote  
5 on it. I think we've discussed these issues when  
6 we were talking about 19. I suggest we just vote  
7 on it.

8 MR. LELAND: Okay. Call for  
9 question. Any concern about that? Go ahead.

10 MS. FOU DY: What if you amended it  
11 for prong three? I mean, we've agreed that we  
12 need more education about prong three and we want  
13 to strengthen prong three and give more weight to  
14 two and three. So what if you amended it to  
15 something that would educate institutions about  
16 the use of interest surveys, specifically for  
17 prong three?

18 MS. SIMON: I don't accept that as a  
19 friendly amendment.

20 MR. SPANIER: Could I suggest a  
21 slightly different amendment? That we say  
22 demonstrating compliance with Title IX.

1                   The three-part test is a construct  
2                   that has evolved and could very well change.  
3                   There could be a five-part test by the time we  
4                   are done with this --

5                   MS. SIMON: I agree; right.

6                   MR. SPANIER: -- and so I don't even  
7                   like the argument whether it's a prong one or  
8                   prong three thing.

9                   MS. SIMON: Right; I agree with that.  
10                  I would accept that.

11                  MR. LELAND: We are still on 20; it's  
12                  been amended. Yes?

13                  MR. DE FILIPPO: I just wanted to  
14                  second that, because we said yesterday that we  
15                  need more clarity and definition in prongs 2 and  
16                  3. I mean, we made that clear and we wanted to  
17                  make it that the Office of Civil Rights would  
18                  give us at least three safe harbors, one, two and  
19                  three.

20                  So Graham is exactly right: This  
21                  could change, and I would feel a lot more  
22                  comfortable in saying Title IX with how many



1 prongs that we are going to have? And I would  
2 second that.

3 MR. LELAND: I don't think there is  
4 an objection to it.

5 MS. SIMON: Fine.

6 MS. GROTH: I don't object to that,  
7 as long as interest surveys are not tied to  
8 proportionality.

9 MR. GRIFFITH: No. That restriction  
10 is not in here.

11 MR. SPANIER: Let me just, you know,  
12 say for clarity's sake.

13 Demonstrating compliance with Title  
14 IX, I would substitute for the words three --  
15 and I would be happy to make that a formal  
16 motion, if there's any --

17 MR. LELAND: No, I think we are okay  
18 with that, Graham. I think that substitution is  
19 done. I just think -- clarity here --I think as  
20 chair I have to agree with Tom that the  
21 prohibition on using -- there is no prohibition  
22 in this proposal right here on using interest

1 surveys to relate to prong one.

2 I would say, however, that we just  
3 didn't support one that specifically -- a  
4 recommendation that specifically asked for that,  
5 so I think -- you know, the way I'm interpreting  
6 this is that this wouldn't require that it be  
7 used for prong one, but it would, somewhere down  
8 the road, may allow for that.

9 We're not -- we specifically didn't  
10 support that initiative right before though, and  
11 this is all public record. So that's where we  
12 are.

13 MS. SIMON: Ted, you're the one that  
14 said our recommendations don't have to be  
15 consistent.

16 MR. LELAND: That's right -- so I  
17 think -- that's where we are. Someone may want  
18 to amend this and say I'd like specifically to  
19 prohibit this from being in the three-prong test;  
20 but right now it's not -- it's not in there.

21 Yes?

22 MS. de VARONA: I really want to vote

1       for this, but, you know, I've learned a lot by  
2       going this Title IX exercise and the three-part  
3       test.

4                   And we've all talked about  
5       strengthening the other two parts, and the prong  
6       that talks about needs and interests does  
7       support interest surveys; it always does.

8                   But I think the Office of Civil  
9       Rights has to perfect that system and come up  
10      with better tests, more comprehensive tests.

11                   So I want to vote for it but I can't  
12      vote for it if it is just blanket, because we've  
13      already had that in the guidelines; we already  
14      have interest surveys.

15                   MR. LELAND: I understand.

16                   MS. FOU DY: Just a point: The  
17      rationale under it talks about the third part of  
18      the three-part test twice, so are we saying now  
19      that it's not -- it doesn't necessarily say prong  
20      three in the recommendation, but now we are  
21      saying that it's going to be for all three  
22      prongs.

1                   MR. LELAND: It could be. It doesn't  
2 have to be; it could be.

3                   MS. FOU DY: I would feel more  
4 comfortable if we put something specifically in  
5 that first -- the third test, the test three,  
6 prong three.

7                   MR. LELAND: Okay. So you want to  
8 put something in there that says it relates only  
9 -- demonstrates compliance with Title IX, prong  
10 three?

11                   MS. FOU DY: We need an amendment to  
12 that, right?

13                   MR. LELAND: We need an amendment,  
14 yean, don't you think? I mean, to me this is an  
15 issue that we ought to --

16                   MS. SIMON: We have to vote on that  
17 because I don't accept that as a friendly  
18 amendment.

19                   MR. LELAND: Correct.

20                   MR. BATES: Was that a motion?  
21 Because I would second the amendment.

22                   MS. FOU DY: Yes, but can we get the

1       wording right, so that we know what we are voting  
2       on?

3                       MR. LELAND:  Yes, do you want to give  
4       us that?

5                       MS. FOU DY:  I have something to the  
6       effect of the Office of Civil Rights, because  
7       again, the point is that we are going to  
8       strengthen prong three.

9                       Should educate institutions about  
10      the interest surveys as a way of demonstrating  
11      compliance with prong three.

12                      MS. YOW:  And I want to add to what  
13      Julie is saying, respond to Donna.

14                      In view what the differences and the  
15      value is, if you add her sentence about the  
16      education part and you look at sentence two,  
17      where you -- where we asked the Office to  
18      specify criteria necessary for conducting a  
19      survey in a way that's clear and understandable,  
20      I think there's some value there, too.

21                      MR. BATES:  I second that.

22                      MR. LELAND:  Okay.  We now have --

1 before us, we have a proposed amendment, right,  
2 for recommendation 20.

3 Do you want to read it again, Julie?  
4 Read it again, please?

5 MS. FOU DY: The Office of Civil  
6 Rights should educate institutions about the  
7 permissible use of interest surveys as a way of  
8 demonstrating compliance with prong three.

9 MR. LELAND: That's a substitute.

10 MR. SPANIER: I'm going to vote for  
11 the motion, but against the amendment because I  
12 just see it as too limiting.

13 I believe that there is an important  
14 function for surveys, because information is  
15 good. Data are good and helpful to achieving  
16 objectives, and I've always been frustrated with  
17 the assumption of a lot of folks that we will be  
18 unalterably wedded to this particular three-part  
19 test for eternity.

20 Part two will have to disappear at  
21 some point, in my opinion, sooner rather than  
22 later, we hope.

1                   So to say that surveys can only be  
2 helpful and to water it down by saying educating  
3 people with regard to part three, as we  
4 currently know it, it just seems too limiting to  
5 me and it -- it downgrades the possibility that  
6 getting even better information than we have  
7 today could help us achieve our goals here.

8                   So I will vote for this no matter  
9 how it turns out. I just don't think this  
10 amendment is a good amendment.

11                   MS. SIMON: I very much agree with  
12 that. I think that we shouldn't be afraid of  
13 data. We should seek it out and use it as much  
14 as possible.

15                   And of course it will be used for  
16 part three or part six or how many other prongs  
17 we may end up having at some point. It should  
18 be used to help implement Title IX.

19                   So I hope you vote for the  
20 recommendation and not for the amendment.

21                   MR. LELAND: We are still discussing  
22 the amendment. Cary?

1                   MS. GROTH: My concern once again is  
2                   that down the road it may be tied to  
3                   proportionality.

4                   MS. YOW: I hate to sound not with  
5                   it, but I know there is a fear factor and I'm --  
6                   I can't decide how to vote because I don't  
7                   understand what the fear factor is. Cary, help  
8                   me. The three versus the one, and --

9                   MS. GROTH: Well, I think we are  
10                  getting back to the previous recommendation. I  
11                  mean, if we keep it open-ended -- and I would  
12                  agree with Graham.

13                  Right now it is in prong three. If  
14                  we rename that prong C or whatever we do down  
15                  the road or the Department of Education, as long  
16                  as it is not tied in to proportionalities, that  
17                  interest surveys then dictate the percentages  
18                  that institutions need to comply with,  
19                  proportionality-wise.

20                  And it goes back, again, to the  
21                  recommendation we just voted down.

22                  MS. SIMON: Let's vote.



1                   MR. LELAND: Okay. Were the  
2 amendments before us now? Does anybody need  
3 Julie to read it again? I think not?

4                   Okay. All those in favor of Julie's  
5 amendment to recommendation 20, raise your  
6 hands.

7                   MS. PRICE: Six.

8                   MR. LELAND: All those opposed?

9                   MS. PRICE: Nine.

10                  MR. LELAND: Okay. The -- it is  
11 defeated. The recommendation as amended by  
12 Graham earlier is now before us. Is there any  
13 need for more discussion?

14                  Okay. All those in favor of  
15 recommendation 20 as amended, raise your hand.

16                  MS. PRICE: Ten.

17                  MR. LELAND: All those opposed?

18                  MS. PRICE: Five.

19                  MR. LELAND: Okay; it passes as  
20 amended.

21                  Move back now to 15, proposal 15B,  
22 which is on page 38, line 32, and my

1       understanding is we amended this earlier to, in  
2       effect, say if substantial proportionality is  
3       retained as a way of complying with Title IX,  
4       the Office of Civil Rights should clarify the  
5       meaning of substantial proportionality, but  
6       leave the appropriate, the permissible as they  
7       are presently interpreted.

8                        Is that the right way to say it?  
9       Probably not the right way to say it but that --  
10      is that what you meant?

11                      So in effect we've changed it to,  
12      from allowing a 3 percent variance on  
13      substantial proportionality to saying that the  
14      variance would remain as it is now in the '96  
15      letter, I guess.

16                      A VOICE:  Ted, would you repeat that,  
17      please?  I don't understand.

18                      MR. LELAND:  I don't, either.

19                      In the ten-minute discussion period  
20      we had, Muffet indicated that she was --  
21      regretfully had been assigned this as the  
22      author, so we'll say for whatever reason we

1 attached her name to this and she suggested that  
2 we change the -- change it in way that removed  
3 the 3 percent relative ratio, and I would like  
4 participation to support the status quo. Did  
5 you do --

6 MS. MCGRAW: I think what I mean is,  
7 can we just keep it the same? Can we vote it  
8 on -- can we keep it the same?

9 MR. LELAND: That's what I meant; I  
10 think that's what I'm trying to say.

11 MR. DE FILIPPO: So what would the  
12 percentage be?

13 MR. LELAND: The same as it is now;  
14 not the same as it is on paper.

15 MR. SPANIER: How would the wording  
16 be changed?

17 MR. LELAND: Could somebody read us  
18 the --

19 MR. SPANIER: Instead of five  
20 percent, what -- what do the words say?

21 MS. MCGRAW: Leave prong one alone?  
22 I don't know. That's what I mean; I don't know.

1                   A VOICE: We should vote on it and  
2 have them mutually exclusive.

3                   MR. LELAND: I guess we could reword  
4 this to say if substantial force values are  
5 retained, it will remain as presently  
6 interpreted, or something, I guess.

7                   MS. de VARONA: And we direct the  
8 Office of Civil Rights to inform and educate our  
9 schools as to how they can comply with all three.  
10 It's elsewhere.

11                   MR. LELAND: It is an amendment to  
12 the former proposal, Gene.

13                   I mean, we're -- on second thought,  
14 the people didn't want to support the five  
15 person variance and they would rather substitute  
16 for that what we presently have.

17                   MS. YOW: Is what we presently have  
18 plus or minus one percentage point?

19                   MS. GROTH: No, no that's not true.  
20 That's not true. What we presently have is the  
21 '96 interpretation, and they give clear examples  
22 of a 1 percent variance, a 2 percent variance and

1 a 5 percent variance.

2 And I think, Debbie, you just said  
3 something that has been a concern for all of us  
4 all across the country throughout this whole  
5 process, is there's not a clear understanding of  
6 part one as it's stated in the 1996  
7 interpretations.

8 The one percent keeps coming up; I  
9 agree with you. But they give us concrete  
10 examples of a 1, 2 and 5 percent.

11 MS. YOW: I mean, we're not handing  
12 them out here, but can I have one of those,  
13 please?

14 MR. DE FILIPPO: You know, we have  
15 Jerry Reynolds right here, Mr. Chairman. He  
16 ought to be able to answer what it is. He deals  
17 with it on a day-by-day basis.

18 MR. LELAND: Okay; that's what you  
19 get for napping. Can someone give me the OCR  
20 question once again?

21 MS. de VARONA: What is the  
22 percentage -- in Title IX?

1                   MR. REYNOLDS: Oh, it's actually not  
2 a percentage. The example that's given,  
3 basically, you have to count the number of the  
4 underrepresented sex, and if that number can  
5 field a team, then you are out of compliance, and  
6 if you don't have enough individuals to make up a  
7 team, then you are in compliance.

8                   So it's not a percentage.

9                   MS. de VARONA: But isn't there a  
10 range of variance where you could still comply  
11 with prong one, arrange it with -- given in these  
12 examples from one to five percent, depending on  
13 the institution and the circumstances so there's  
14 flexibility and there's proportionality?

15                   MR. REYNOLDS: There's flexibility.  
16 Whether it is enough flexibility to constitute  
17 substantial proportionality or strict  
18 proportionality is another matter.

19                   And that's for, again, percentages,  
20 I do know that some people, as a rule of thumb,  
21 use three percent. I also know that some people  
22 use one percent.

1                   But if you are talking about what's  
2                   in the letter, it is not a percentage; it's not  
3                   a percentage. If you follow the instructions,  
4                   it's not a percentage.

5                   MS. GROTH: There is not a set  
6                   percentage. It's based on institutional basis. I  
7                   mean, per institution.

8                   So you are absolutely right; there's  
9                   not a set percentage. But you have the  
10                  flexibility within prong one -- not much, but it  
11                  gives examples of that.

12                  It also provides the larger schools  
13                  and the smaller -- there is a difference, and in  
14                  our recommendations when we just put out a flat  
15                  five percent or three percent, it doesn't take  
16                  into account the smaller school situations or  
17                  the larger school issues that we deal with,  
18                  whereas the current prong one does do that.

19                  MR. LELAND: Let me ask a procedure  
20                  question: Does anybody want to support what  
21                  we're trying to figure out here?

22                  What I worry about is, we're going

1 to address this thing for the next 45 minutes  
2 and then nobody is going to be in favor of it.

3 Do we want to have something that  
4 says, you know, support the status quo? Okay.  
5 Then are we condemning ourselves to years of  
6 confusion, here?

7 A VOICE: I would second that.

8 MR. SPANIER: Yeah, I am, at least.  
9 I think that's the problem, that just -- there  
10 aren't very many people who know more about this  
11 than we around this table who've spent the last  
12 eight months immersed in it, reading 8,000 pages  
13 of materials, having detailed briefings from  
14 attorneys.

15 What we are demonstrating is that  
16 there is confusion out there about concepts  
17 strict proportionality, substantial  
18 proportionality, proportionality. Even you go  
19 to that letter, one, three, five, what does it  
20 all mean? Who qualifies for what?

21 It is confusing. A lot of people  
22 have asked us to give some guidance about it.



1                   Now, we could take the position and  
2           just say, don't change a thing. Whatever messy  
3           thing that people are confused about now is  
4           there; let's keep it that way.

5                   On the other hand, people would say,  
6           well, just to come up with some new arbitrary  
7           percentage is not right, either, because people  
8           think you're up to mischief-making. Whatever  
9           percentage you come up with, people multiply it  
10          by how many have assumed that the worst-case  
11          scenario and come up with a number and, you  
12          know, things will happen.

13                   I think this commission could be  
14          helpful by giving some guidance on this entire  
15          issue. Obviously the lawyers and the Department  
16          of Education, the policymakers are going to have  
17          to get real specific about it, and maybe we need  
18          a better letter than the one from '96 that  
19          people are still confused about.

20                   Now there are a lot of people who  
21          don't think they're confused about it, but, you  
22          know, there are not ones in the Office of Civil

1 Rights implementing the law. They are not the  
2 athletic directors and presidents trying to  
3 figure out what to do.

4                   So I don't think we're being  
5 responsible if we just say, don't change a  
6 thing. Maybe we are not being responsible if we  
7 pick an arbitrary number and vote that up or  
8 down, but, you know, I would like to see us  
9 support the reality that every school has  
10 different circumstances, that we are shooting at  
11 a moving target, that it is very hard -- you  
12 have athletic budgets of millions or even tens  
13 of millions of dollars, in some cases, at stake  
14 and we've got to allow people to support Title  
15 IX and manage their institutions properly at the  
16 same time.

17                   So there needs to be some  
18 common-sense approach that includes flexibility,  
19 and I don't know if that's a particular  
20 percentage, but to say no flexibility, don't  
21 change anything doesn't seem entirely  
22 responsible, either.

1                   MR. REYNOLDS: Well, what we could  
2 do, and the path speaks to the right to use a  
3 statistical method called Z test. It's in the  
4 1990 investigators manual.

5                   And the purpose of that statistical  
6 test is to basically factor out  
7 non-discriminatory factors that would explain  
8 the variance.

9                   We've used it in the past and I know  
10 that with respect to larger schools it is pretty  
11 accurate. It won't give you a set percentage.  
12 It will fluctuate, depending on a number of  
13 factors. But that's an approach and it's been  
14 used before.

15                  MS. de VARONA: What would the  
16 percentage of variance be under the Z formula?

17                  MR. REYNOLDS: It fluctuates, so --

18                  MS. de VARONA: Could you give me a  
19 range?

20                  MR. REYNOLDS: Actually, no.

21                  MS. de VARONA: Would it be much  
22 different than the flexibility reflected in the

1           proportionality cases reflected in that document?

2                       MR. REYNOLDS: I suspect that it  
3           would probably go lower and higher, depending on  
4           the factors, anywhere in between --

5                       MR. LELAND: Let me try something  
6           here, since there is no proposal in front of us  
7           dealing with the Z test. We are just going to  
8           confuse everybody.

9                       Let me try a way to word this in a  
10          way that those people -- and I think there is a  
11          group that would like to see something like the  
12          following:

13                      If substantial proportionality is  
14          retained as a way of complying with Title IX,  
15          the Office of Civil Rights should clarify the  
16          meaning of substantial proportionality. It  
17          maintains the ratios present in the '96 letter.

18                      Not the current language, but the  
19          current requirements contained in the '96  
20          letter.

21                      That gets us to take care of a  
22          little bit of what President Spanier talked

1       about in terms of, let's make it clear; even  
2       though people say it's clear, it is not clear to  
3       a lot of people. It may be clear to a few but  
4       it's not clear to a lot.

5                       And yet at the same time, people who  
6       don't want to retreat from that standard, that  
7       may confuse people but people are comfortable.  
8       They won't take a step backwards in terms of  
9       lowering the proportionality requirements.

10                      That's a reasonable position for  
11       people to take. I think people have taken it  
12       around this table, and I think that's what  
13       Muffet would like to see in this; is that  
14       correct?

15                      Let's talk about that for awhile.

16                      MS. FOU DY: Can I just make one  
17       comment on that?

18                      In regards to Graham's comment on  
19       allowing universities the flexibility, because  
20       everyone does have different situations and  
21       different athletic department sizes and a  
22       different number of student athletes, et cetera,

1       and one of the confusions caused in prong one  
2       is, case in point, that we don't know what the  
3       percentage is: Is it plus or minus one percent;  
4       is it plus or minus two percent?

5                   And in the flexibility allowed by  
6       the language of the clarification letter of  
7       1996, which we could read from, the reason no  
8       strict percentage is given is because each  
9       university is different. You have different  
10      enrollment rates; you have different dropout  
11      rates; you have some of the factors that Debbie  
12      mentioned in her recommendation 13.

13                   And so that flexibility, in itself,  
14      is given in that clarification letter, and  
15      that's why you can't give a percentage, because  
16      everyone's different.

17                   If you have a junior college, that  
18      has two teams, total, in their entire athletic  
19      department, and they are going to come under  
20      different percentage rates than at Stanford  
21      University, who has almost all of their teams  
22      fielded.

1                   And so the flexibility is inherent  
2                   and what the problem is, is people don't  
3                   understand what that flexibility is.

4                   And so maybe the issue is, we  
5                   clarify the flexibility. We add more examples.  
6                   We give more hypotheticals like they in Norma  
7                   Canty's letter of '96 that said if you have  
8                   such-and-such university, you could have this,  
9                   in terms of flexibility, if you have this type  
10                  of university.

11                  Because the issue isn't that it's  
12                  not flexible. The issue is people who don't  
13                  understand its flexibility.

14                  MS. FOU DY: Lisa?

15                  MS. KEEGAN: Just really quickly,  
16                  Julie.

17                  Then 15 percent's okay, ten  
18                  percent's okay? I mean, that's almost Tom's  
19                  proposal: Don't use numbers.

20                  MS. FOU DY: Well, it's dependent on  
21                  the university, because if you have a small  
22                  university your percentage variance would go up,

1 and that's why it's hard to say across the board  
2 what it would be.

3 MR. LELAND: Ready to vote on this?  
4 Rita needs to go. I think -- Rita, would you  
5 like to vote on this one? Are you --

6 MS. SIMON: Yes.

7 MR. LELAND: Okay.

8 If substantial proportionality is  
9 retained as a way of complying with Title IX,  
10 the Office of Civil Rights should clarify the  
11 meaning of substantial proportionality.

12 That's reading from the old one,  
13 quite frankly, making clear the current  
14 interpretations of the 96 letter, with the  
15 purpose of maintaining the proportionality  
16 requirements.

17 MR. GRIFFITH: I understand this to  
18 be, Muffet's intent is pretty much status quo,  
19 but clarify.

20 So if you are satisfied with the  
21 status quo, you would vote in favor of this.  
22 If, like I am, you would be opposed to



1 substantial proportionality the way it is being  
2 used, you would vote against it.

3 MS. YOW: And I would also encourage  
4 people if you're voting on it because you think  
5 the clarification letter of '96 takes care of  
6 this, then I caution you; I just reread it.

7 Thank you, Cary, for letting me read  
8 it again. I think if we had the time, which we  
9 don't, there would be number of us who disagree  
10 with some of the clarifications in there.

11 MS. FOU DY: But that's the point is  
12 that it needs more clarification. I mean, that's  
13 the point, that that status quo right now, with  
14 what we have, is confusing to people. We are not  
15 saying that's a good thing. We're saying, add to  
16 it but don't change the fact that it's going to  
17 be successive.

18 MR. LELAND: My intention will be to  
19 vote for this because I think it is an active --  
20 I think we are doing something; we are asking for  
21 clarification, which we haven't had.

22 Yet at the same time we're trying to

1 give a message that we would like not to retreat  
2 from the higher proportionality standards we are  
3 now --

4 MS. YOW: I misunderstood. I thought  
5 we were voting to accept the status quo, I think  
6 is how we used -- the terminology was used.

7 MR. SPANIER: Could I suggest some  
8 alternative wording?

9 MR. LELAND: Yes, sir; thank you.

10 MR. SPANIER: If substantial  
11 proportionality is retained as a way of complying  
12 with Title IX, the Office of Civil Rights should  
13 clarify the meaning of substantial  
14 proportionality and allow for reasonable variance  
15 in the relative ratio of athletic participation  
16 of men and women while adhering to the tenets of  
17 Title IX.

18 MS. GROTH: What would be the  
19 reasonable variance? Based on institutional,  
20 what it is now?

21 MR. SPANIER: I put the word  
22 reasonable in there instead of a percent because

1 I think that whatever it turns out to be and  
2 whatever revisions there might be, that letter  
3 needs to be studied and subject to the rulemaking  
4 process, and so on.

5 I don't think we in a sentence or  
6 two can do that unless we want to be arbitrary  
7 about it and come up with a percentage like the  
8 two variations did, and that seemed unpalatable.  
9 So --

10 MS. FOU DY: But what if we changed  
11 reasonable to nondiscriminatory?

12 MR. SPANIER: I don't know what  
13 nondiscriminatory variance means. I'm not  
14 familiar with that concept.

15 I think if we said nondiscriminatory  
16 and reasonable -- what I'm trying to capture in  
17 there is not -- is the idea that in the normal  
18 course of conducting business in any athletic  
19 program or university, there are several  
20 variables at work at any moment related to  
21 proportionality that can move your numbers  
22 around.

1                   There needs to be some standard of  
2                   reasonableness. That's a term lawyers can  
3                   handle. There needs to be some standard of  
4                   reasonableness that takes into account that in  
5                   any given year you don't exactly how many new  
6                   freshmen are showing up on your campus, what  
7                   your attrition rates are, how many athletes have  
8                   left the team, how many are on scholarship or  
9                   not.

10                   MR. LELAND: Okay. We're -- Are we  
11                   okay with this -- his suggestion.

12                   MS. COOPER: Okay; let's vote.

13                   MS. FOU DY: What is the language?

14                   MR. LELAND: It says allow for  
15                   reasonable variance. Instead of maintaining the  
16                   status quo, we're trying for more clarification,  
17                   but instead of maintaining the status quo as it  
18                   relates to the ratios, we are now amending this  
19                   thing to say, allow for reasonable --

20                   MR. SPANIER: To allow for reasonable  
21                   variance in the relative ratio of athletic  
22                   participation of men and women, while adhering to

1 the tenets of Title IX.

2 MS. COOPER: If you want to vote for  
3 it, fine. If you don't let's vote it down.  
4 Let's vote.

5 MR. LELAND: Let's vote on the  
6 amendment first. Right now we have -- poor  
7 Muffet --

8 MS. GROTH: Graham is there any place  
9 where we could add Julie's words,  
10 non-discriminatory? I mean --

11 MS. FOU DY: Why not say  
12 nondiscriminatory and reasonable?

13 MR. SPANIER: I think we covered the  
14 non-discriminatory part somewhere else, and I  
15 don't want to lose the understanding of the  
16 concept, why the word variance is in there.

17 MS. McGRAW: Ted, can I accept that  
18 as my amendment, or as a --

19 MR. LELAND: I think so. We've been  
20 working on consensus. Now, there might be some  
21 people who --

22 MS. FOU DY: Graham, my only issue is,

1 I completely agree with you. I completely agree  
2 that we need to allow for all those different  
3 variances, but if you leave it open to  
4 reasonable, does that create in itself a problem?  
5 Is that another point of confusion? I mean, are  
6 we just compounding the problem.

7 If we could say that we're going to  
8 add clarity --

9 MS. KEEGAN: Could we put  
10 nondiscriminatory tenets?

11 MR. LELAND: So can we call the  
12 question now? Do we know what we're voting on?

13 And this is a substitute motion for  
14 15A -- 15B, excuse me. Thank you; somebody's  
15 awake.

16 All those in favor of the  
17 recommendation as amended, raise your hand.

18 MS. PRICE: Fifteen.

19 MR. LELAND: Okay; thank you.

20 Now we're on to -- you know, we need  
21 finish today. We are going to finish today and  
22 we really need to limit debate. I know

1       everybody, it's the old political thing,  
2       everything's been said, just not everybody's had  
3       a chance to say it.

4                    You really need to tell us if you  
5       are going to be in favor or against, and we need  
6       to hold pontificating to a lower level than we  
7       have, because we still have a number of  
8       recommendations some of which have substantial  
9       issues associated them that people are going to  
10      want to talk about.

11                   So recommendation 16. I've taken  
12      some of the verbiage out of this so the two  
13      authors could listen to this, but basically keep  
14      the first sentence, the Office of Civil Rights  
15      should consider a different way of measuring  
16      participation opportunities for purposes of  
17      allowing an institution to demonstrate that it  
18      has complied with the first part of the  
19      three-part test.

20                   Then I skip down, take out the next  
21      sentence and begin on line three of page 39:

22                   An institution could establish that

1       it has complied with the first part of the test  
2       by showing that the available slots for men and  
3       women, as demonstrated by a pre-determined  
4       number of participants for each team offered by  
5       the institution is proportional to the male and  
6       female ratio in enrollment.

7                     If I just took out the middle  
8       sentence and the last sentence and changed the  
9       -- because those two sentences didn't really --  
10      is there any -- this is the much-misunderstood  
11      and maligned Leland proposal.

12                    So let's have at it.  Yes.

13                    MS. FOU DY:  I think I talked about  
14      this in Philly, and one of my problems with this  
15      is that you are looking at recruiting budgets  
16      that are not equivalent, and if you are talking  
17      about, I think, the current NCAA statistic puts  
18      it at 32 percent spent on women's recruiting  
19      budgets, then to then go in and count those empty  
20      slots, given that they haven't been receiving the  
21      same amount of attention and recruiting and  
22      funds, I think it's an inherent problem in this



1 one.

2 MR. LELAND: My answer to that: On  
3 our campus that wouldn't be a problem.

4 MS. FOU DY: God bless Stanford  
5 University.

6 MR. LELAND: No, no, no, I don't mean  
7 it that way.

8 Just because football and men's  
9 basketball spend opulently, there is no  
10 difference in the spending in women's tennis  
11 recruiting and men's tennis; men's soccer,  
12 women's soccer, across the board.

13 Just because men's and women's  
14 sports -- men's football and basketball spend so  
15 high on recruiting would not limit opportunities  
16 or interest on our campus for women to fill  
17 these slots. It just wouldn't -- that just  
18 wouldn't happen. That is such a -- wouldn't --  
19 and my impression is that in other schools that  
20 would be a real sort of an intellectual stretch  
21 to say that that would have an affect.

22 Because the difference between the

1 spending is in the men's and women's -- men's  
2 football and basketball.

3 MR. BOWLSBY: Ted, I guess this is on  
4 your motion and it's a general statement on  
5 walk-ons that I can't find a better place to put  
6 than right here. Is it permissible for me to  
7 make it at this time?

8 MR. LELAND: Go ahead.

9 MR. BOWLSBY: On our campus and on  
10 campuses across the nation, the number of men on  
11 sports rosters is larger than the number of  
12 women. Like what you just said, you go down the  
13 comparisons of tennis and golf and swimming and  
14 gymnastics and track and field, cross-country,  
15 the budgets are the same, the opportunity for  
16 allocation of those moneys for recruiting  
17 purposes are the same.

18 We are being asked to assume that  
19 differences are due solely to discrimination,  
20 and I'm not prepared to accept that premise.

21 We've been asked to accept that it  
22 is the responsibility of individual institutions

1 of higher education to correct and  
2 counterbalance whatever societal differences and  
3 discrimination there may be in the feeder  
4 system.

5                   While I believe that our educational  
6 institutions bear responsibility for societal  
7 evolution, I do not believe individual  
8 institutions can be reasonably expected to fully  
9 shoulder the burden of what stereotypes society  
10 may impose on our young boys and girls.

11                   We have not done our work if we do  
12 not recognize that practices seek to force  
13 institutions to both re-engineer societal  
14 tendencies and to accommodate for whatever real  
15 discrimination there is in the feeder system.

16                   There is no way to avoid -- there is  
17 a way to avoid capping teams for either gender,  
18 and it is my opinion we should seek whatever  
19 means we can to avoid it.

20                   As I said yesterday, these kinds of  
21 cappings and restrictions create no opportunity  
22 for anybody at any level, and it is one of the

1 most contentious issues of Title IX. It is one  
2 that has been very divisive and  
3 counter-productive, and it seems to me whether  
4 we adopt this proposal or some other that takes  
5 into consideration what -- I'm certainly not  
6 assigning reason for this, but I can tell you,  
7 on our campus the resource issue is not the  
8 factor in comparing these rosters, but you look  
9 at them right across the board and the men's  
10 rosters have somewhere between 30 and 50 percent  
11 more head count than the women's rosters do in  
12 the comparison sports. And I would suggest to  
13 you that that is true across this nation.

14 We aren't here to determine why it  
15 occurs. If there's discriminatory factors, we  
16 ought to identify them and fix it. If there are  
17 other differences, we ought to seek to try and  
18 research that and identify it, as well.

19 But the way we have proceeded is  
20 counterproductive, divisive and it doesn't  
21 create any real opportunity for anybody.

22 MR. SPANIER: Number 18 deals with

1       that.

2                       MR. BOWLSBY:  Yeah, it does in two  
3       different ways, I think.  One establishes, as I  
4       understand it, a target number and the other  
5       exempts.

6                       MS. GROTH:  I'm opposed to this  
7       recommendation and I feel very strongly about the  
8       costs associated with walk-ons.  Perhaps Iowa and  
9       some other institutions can afford participation  
10      at any level they want to have.

11                      However, walk-ons do cost money, not  
12      only for uniforms and travel, if they do travel,  
13      but you also have support units, whether they be  
14      athletic training or academic support, and those  
15      are real dollars that are spent on walk-ons, as  
16      well.

17                      And we have to get to a point as to  
18      what we can afford, because we can go right back  
19      to the center of all these discussions, and that  
20      is money.

21                      I mean, would we rather spend our  
22      money on an endless amount of walk-ons or try to

1 retain some of our men's programs or add  
2 additional programs?

3 And I know that's philosophical  
4 question but I have a problem with not counting  
5 walk-ons.

6 Further, my second point is we  
7 roster cap or roster manager at Northern  
8 Illinois University, not because of Title IX.  
9 As a matter of fact, for the opposite reason,  
10 and that is, we roster management on what we can  
11 afford; you know, what our budget allows, what  
12 is safe, what is the player-coach ratio.

13 I mean, there is other reasons that  
14 institutions are doing some roster management,  
15 other than strictly Title IX.

16 MR. BOWLSBY: Well, as a  
17 clarification, we and a lot of other institutions  
18 are spending exactly the same amount of money on  
19 the program, whether we have 50 student athletes  
20 in track or 35.

21 The men's and the women's budgets  
22 are exactly the same, and so one could logically

1       argue that the quality of life for the female  
2       student athlete is higher than that for the  
3       male, because it's being divided fewer ways.

4  
5                   MS. GROTH:  And also, your have in  
6       your amendment -- I mean, in our proposal, Ted --  
7       a predetermined number of slots.  It is not an  
8       endless number of walk-ons.  There would be some  
9       methodology to establish what would be reasonable  
10      for a number of the slots -- the number of slots  
11      on any team, male or female, correct?

12                   MR. LELAND:  Yeah, but I think the  
13      assumption that Bob and I are working under is if  
14      the coach chose to -- if you said you had 20 male  
15      slots in soccer and 20 female slots, if one of  
16      the coaches decided to keep more or keep less,  
17      that would be in their purview to do that.

18                   And I agree with Bob on the  
19      budgeting.  We don't -- walk-ons at our place.  
20      We give the coaches the same amount.  If they  
21      choose to carry the same number of uniforms,  
22      same number of lockers, if they choose to carry

1 a few more athletes, they get to do that.

2 MS. YOW: But it wouldn't keep  
3 another institution from not doing that, if they  
4 so chose? If they didn't have the financial  
5 support to do so, or whatever?

6 MR. LELAND: Right, they could  
7 choose. But at least if they chose -- Northern  
8 Illinois chose to limit walk-ons, they couldn't  
9 blame it on the women. They'd have to say, the  
10 law allows me to let you on this. The women  
11 allow me. I'm doing it because I don't have any  
12 money.

13 MS. COOPER: Ready to vote?

14 MS. FOU DY: Can I just say one more  
15 comment?

16 When I brought up the point about  
17 the differences in recruiting dollars and how  
18 that clearly is a factor in many women you are  
19 getting into your university versus men, and I  
20 think you said -- and I think Bob may have said  
21 something about it -- was that in actuality,  
22 Stanford wasn't like that.



1                   But could you say that -- I mean, I  
2                   wish that a lot of schools were in that  
3                   situation, where they are spending equal amounts  
4                   on both the men and the women to come to their  
5                   universities -- could you say that that is  
6                   something that is typical: Your university  
7                   across all three divisions?

8                   I mean, because you're looking at  
9                   the NCAA numbers of 32 percent. They speak  
10                  differently, and that's my problem with this one  
11                  is, if you had equal numbers that you were  
12                  recruiting and you could say okay, but they're  
13                  still not coming.

14                  Okay, then, but we are not spending  
15                  the same amount of money recruiting the women.

16                  MR. BOWLSBY: I think what you would  
17                  find, Julie if you -- and this is one of the  
18                  significant flaws of the EADA report -- if you  
19                  would go back and break that down, you'd find  
20                  that those average numbers are very significantly  
21                  skewed but the recruiting costs in football and  
22                  men's basketball.

1                   And if went down through and made an  
2                   assessment of tennis, track, soccer, gymnastics  
3                   and comparable sports, mirror-image sports, I  
4                   would be very surprised if you found wide  
5                   variations in operational dollars on most  
6                   campuses.

7                   MR. LELAND: You also sort of -- in  
8                   my opinion you sort of, under the law, have an  
9                   additional protection here for what you are  
10                  concerned about, and that's that when you get to  
11                  the laundry list of services and goods and  
12                  services you are to provide, you are to provide  
13                  those equally.

14                  So it's even separate from the  
15                  proportionality issues. You can't have a big  
16                  locker room for men and no locker room for  
17                  women. I mean, you just can't do -- you have  
18                  another set of protections that protect the  
19                  quality of the experience the student has.

20                  I want to say one other thing. This  
21                  is not about, for me, only 30, 40 percent of  
22                  this is about male walk ons. Seventy or 80

1       percent of it is about the false opportunities  
2       for women, which I see all the time and no one  
3       -- very few people seem to be concerned about,  
4       where people just pump their numbers up by  
5       having a huge roster the first day of  
6       competition and then they can't accommodate  
7       those female students. The kids get left out;  
8       they don't get to practice. They don't get a  
9       uniform. They don't get anything but they are  
10      on the list, and you do it because the law made  
11      this and then forced you to do it, but it  
12      instigates, pushing you towards doing that.

13                     This is another way to do that,  
14      because I think, just as bad as keeping three or  
15      four extra men soccer players might be to gender  
16      equity, I think having 140 women on the rowing  
17      team when you're only going to have 25 or 28 or  
18      30 in competition is just as bad.

19                     MS. FOU DY: But wouldn't that call  
20      for just changing your times of when you're  
21      actually counting these numbers?

22                     I mean, couldn't that be solved by

1       saying, okay, instead of counting them on the  
2       first day of season, it's the first day of  
3       competition?

4                   MR. LELAND: I suppose it could, but  
5       my way solves it also, and also solves the other  
6       problem.

7                   MS. COOPER: Okay. So basically  
8       what --

9                   MR. GRIFFITH: Can you educate me --  
10      I'm sorry.

11                   How do you get the predetermined  
12      number of participants for each team?

13                   MR. LELAND: Well, the statistics  
14      I've used, the average number of athletes on a  
15      Division 1 squad.

16                   So we went to the NCAA manual and we  
17      said how many are on the average women's team  
18      and how many on the men's soccer team, and we  
19      sort of came to an average.

20                   John -- a friend of mine who's an  
21      instigator, John Perry from Butler, thinks we  
22      all ought to sit down as experts.

1                   MR. SPANIER: The point is, there  
2 would have to be a process.

3                   MR. LELAND: This isn't a proposal;  
4 it's just an idea.

5                   MR. SPANIER: It's just an approach  
6 to consider.

7                   MS. COOPER: Okay; I move to vote.

8                   MR. LELAND: All those in favor of  
9 proposal 16, as amended, which took out those two  
10 sentences, raise your hand.

11                   MS. PRICE: Ten.

12                   MR. LELAND: Opposed?

13                   MS. PRICE: Three.

14                   MR. LELAND: Okay.

15                   We're now on to recommendation 18,  
16 since we said we would take the ones that dealt  
17 with proportionality first, and now we are at  
18 18 --

19                   MS. COOPER: Yeah, I'll read 18, and  
20 then I'm going to move to vote right after I read  
21 it.

22                   MR. SPANIER: I don't think it's been

1 changed, so you don't need to read it; I mean, we  
2 all have it.

3 MS. COOPER: Well, I'm going to --  
4 quick. Here we go.

5 Any student who is not a recipient  
6 of a full or partial scholarship will be defined  
7 as a walk-on or a non-scholarship student  
8 athlete for the purpose of calculating  
9 proportionality with the male female ratio of  
10 enrollment in both scholarships and  
11 participation. These ratios will exclude such  
12 individuals.

13 Proportionality ratios will be  
14 calculated through a comparison of full or  
15 partial scholarship recipients.

16 MR. LELAND: Move the question.

17 MS. COOPER: Oh, I'm sorry. I move  
18 to vote.

19 MR. SPANIER: Second.

20 MS. FOU DY: Wait. Anybody up for  
21 discussion, because I don't even think we came to  
22 an agreement on what walk-on -- how you define

1 walk-on yesterday.

2 MR. LELAND: Procedurally there's a  
3 motion and a second that we vote; there needs to  
4 be a discussion of whether we are going to vote  
5 note, and then a vote on whether we are going to  
6 vote. That would cut off debate.

7 First we have to vote on whether we  
8 want to vote. All right? So you're voting on  
9 whether you want to have a debate or not.

10 If you vote in favor of the question  
11 then -- right now -- then you are saying you  
12 don't want to debate this. If you are opposed  
13 to this question, then you are saying that you  
14 don't -- you do want to debate it.

15 MS. FOU DY: Have we been doing that  
16 all along?

17 MR. LELAND: No, but it's a normal  
18 procedure; it's a normal procedure. Somebody can  
19 call a question at any time they want during a  
20 parliamentary procedure.

21 Yeah; is there an objection to  
22 closing debate?

1 MS. FOU DY: Yes.

2 MR. LELAND: Okay. So now we have to  
3 vote on it.

4 All those in favor of the question,  
5 raise your hand to close debate. Call the  
6 question, yeah.

7 MS. PRICE: Five in favor of closing.

8 MR. LELAND: Okay; opposed?

9 MS. PRICE: Eight opposed to closing.

10 MR. LELAND: We are now having  
11 debate. Okay? Yeah, Cary?

12 MS. GROTH: Graham, I would just like  
13 us to use the definition that the NCAA provides  
14 with walk-on, and that was my recommendation with  
15 the glossary, as well.

16 MR. SPANIER: That's fine with me. I  
17 don't -- I was trying to capture it in one of the  
18 previous discussions because someone asked for  
19 that clarification, so that was partial; any full  
20 scholarship, partial scholarship -- if they have  
21 a different definition, that's fine.

22 MS. GROTH: There is a recruiting



1 walk-on, but if we could keep it clean and just  
2 always refer to that, and I think that was our  
3 recommendation. I don't know if it ever passed  
4 with the glossary, but to use the definition that  
5 the NCAA --

6 MR. SPANIER: What is that  
7 definition?

8 MS. YOW: I agree with what Cary's  
9 saying because we do know there are recruited  
10 walk-ons.

11 MR. GRIFFITH: Are they part of the  
12 NCAA definition?

13 MR. LELAND: Yes. It has to do with  
14 the number of phone calls, the kind of letter,  
15 the kind of contact. It's a very complicated --  
16 they either qualify as a recruited student  
17 athlete or they don't, if they're non-scholarship  
18 and they're on your team.

19 MR. SPANIER: Cary, are you  
20 suggesting -- and this is frankly a nuance I  
21 hadn't thought of -- that if you're a recruited  
22 walk-on, then you're really the same as a

1 scholarship athlete for calculations? Is that  
2 the intent of your suggestion?

3 MS. GROTH: Yes. Perhaps what we  
4 could do is any student who does not meet the  
5 definition of an NCAA -- well, I think we need to  
6 work on this a little bit, but I think that  
7 what's important is that a walk-on is not related  
8 just to scholarship dollars.

9 MS. YOW: All you have to do is just  
10 add, "or is a recruited walk-on."

11 So you've covered people who are  
12 partial scholarship people count; full  
13 scholarship student athletes count and recruited  
14 walk-ons count. Correct? I think that's what  
15 Cary's intent is.

16 MR. SPANIER: I have to ask the ADs.  
17 I have no idea what proportion of walk-ons are  
18 recruited walk-ons. I would think most of them  
19 are, at least at Division 1A schools.

20 MS. YOW: It varies depending on your  
21 definition of partial. Part depends on the sport  
22 and also on your scholarship funding.

1                   I mean, I have a men's tennis team  
2                   that has one-half of a scholarship, so all the  
3                   guys that play for us are recruited walk ons.  
4                   That's how we have a team.

5                   So even if you are fully  
6                   scholarshipped, you are going to count their  
7                   scholarship recipients and you probably aren't  
8                   going to have as many recruited walk-ons in that  
9                   sport, but all the other people are going to  
10                  court.

11                  So it doesn't -- if it's not -- it's  
12                  a good thing. It is reasonable to count  
13                  recruited walk-ons.

14                  MR. LELAND: Yes, I would agree. It  
15                  should be, because the institution has put some  
16                  time and effort to make sure that student was  
17                  there to play that sport, so they ought to count.

18                  Where we have been concerned about a  
19                  team, to be sort of philosophic, is a student  
20                  who just, on their own volition, decides they  
21                  want to try out for a team, not one that's been  
22                  brought all the way across the country with a

1       promise of a scholarship as a sophomore and all  
2       that stuff. I mean, we don't --

3                   MR. SPANIER: I'm ready for a vote,  
4       but I would like Bob to just weigh in on that,  
5       because this was in part -- I mean, he had a role  
6       in this particular one.

7                   Bob we are asking the question in  
8       number 18 about walk-ons: Should recruited  
9       walk-ons be treated the same as scholarship,  
10      full or partial scholarship athletes?

11                  If you are exempting walk-ons from  
12      the calculations, do you exempt all walk-ons or  
13      just non-recruited walk ons?

14                  MR. BOWLSBY: I don't think there are  
15      many of the latter involved in programs. I think  
16      most of the time there has been some contact with  
17      the student, with the prospect that would be  
18      triggered recruitment, as defined by the NCAA.

19                  I think we have very few people on  
20      campuses like yours and mine where people just  
21      show up on campus and decide to go out for  
22      baseball. Usually somebody has been in touch

1 with them and encouraged them one way or the  
2 other.

3 MR. SPANIER: I guess my thinking  
4 originally was that the major thing that is  
5 looked at here is scholarship support and the  
6 financial support that goes to men's and women's  
7 athletes.

8 So I never made the distinction  
9 between recruited and non-recruited walk-ons,  
10 because they're not getting any financial  
11 support, and a lot of those extra players that  
12 you see on wrestling teams, gymnastics teams,  
13 men's volleyball teams, swimming teams, track  
14 and field, down the line are walk-ons, and those  
15 are the folks that we are keeping out through  
16 roster management.

17 MR. BOWLSBY: Exactly right.

18 MR. SPANIER: And I think some of  
19 them, apparently, are recruited walk-ons. The --  
20 even the folks -- I mean, we heard testimony from  
21 some folks who were cut, and I think they would  
22 fit the definition of recruited walk-ons. So I'm

1 not sure I would want to exempt --

2 MR. BOWLSBY: I think most teams are  
3 making some cuts. I don't think the baseball  
4 coach at Penn State is probably allowing  
5 everybody that wanted to come out, to come out.

6 And when you say retrigger and  
7 recruitment, it may be nothing more than a  
8 telephone call saying, if you are headed to  
9 college, you might want to get involved in our  
10 program.

11 But it seems to me the line of  
12 demarcation is full or partial scholarship,  
13 rather than either versions of walk-ons.

14 As I said, I think the recruited  
15 walk-on is the majority.

16 MR. LELAND: Okay, we need to --  
17 let's clarify what the proposal is, and we need  
18 to move this thing along; that is minor.

19 MS. FOU DY: But this is a very  
20 important debate, because essentially what you're  
21 saying, if you allow a recruited walk-on to not  
22 be counted, then you could be a full time

1       participate -- you could be a starter on your  
2       team and simply because you're not receiving a  
3       scholarship -- you could have been recruited.  
4       You could be enjoying all the benefits of -- and  
5       amenities of being a full-time student athlete,  
6       and yet you wouldn't count in the participation  
7       numbers.

8                   MR. LELAND: I'm not saying we should  
9       abandon it. I'm saying we should decide, are  
10      walk-ons in here or not, are recruited walk-ons  
11      in or not, and then vote it up or down.

12                   The issues aren't that complicated.  
13      Let's get it -- let's get it and let's vote it.

14                   So are -- we have it defined as  
15      walk-on or non-scholarship student athlete. Do  
16      you want to differentiate between recruited  
17      walk-on and walk-on or just all --

18                   MS. GROTH: Well, there is another  
19      issue here, too, Ted, and that is, what do you do  
20      for Division 3? I mean, Division 3 doesn't give  
21      scholarships, so --

22                   MR. SPANIER: We're talking here

1 about -- I mean, for many institutions, whether  
2 you're in compliance with Title IX has to do with  
3 your scholarship support.

4 We do -- in our reports we do  
5 calculations of scholarship reports. That's an  
6 important indicator of whether you're in  
7 compliance or not.

8 It is not just participation.

9 MR. BOWLSBY: Ted, I understand what  
10 we are trying to do, but it's the confusion along  
11 the lines of the definition that's creating a  
12 problem for me, and I guess I would have to vote  
13 against this.

14 MR. LELAND: Okay. Because right now  
15 it stands as it reads; nobody has made an  
16 amendment to it. Right? It's as it reads.

17 And if somebody wants to make an  
18 amendment, let's make an amendment; if somebody  
19 doesn't want to make an amendment, let's no.

20 MS. FOU DY: The amend to treat a  
21 walk-on as an NCAA walk-on was Cary's amendment,  
22 that it wouldn't be a recruited walk-on.



1                   MR. LELAND: Right now, I mean, the  
2 chair is ruling it's not in there. If you want  
3 to put it in there, let's make a motion; let's do  
4 it.

5                   If you don't, let's move on.

6                   MS. GROTH: Would you accept that  
7 amendment, that a walk-on is defined as the NCAA?

8                   MR. LELAND: Non-recruited walk-on,  
9 right.

10                  MS. GROTH: Non-recruited.

11                  MR. LELAND: Your only definition  
12 would be a non-recruited walk-on?

13                  MR. SPANIER: I think your suggestion  
14 was just to accept the NCAA definition of  
15 walk-on.

16                  Maybe what we need is just to vote  
17 up or down a separate amendment on whether to  
18 add in here non-recruited walk on.

19                  MR. LELAND: Recruited walk on.

20                  MR. SPANIER: Right. Let's vote that  
21 up or down and then we could vote --

22                  MR. LELAND: In addition to walk on

1       there would be recruited walk-on, or would it be  
2       substitute for walk-on?

3                       They would be defined as a recruited  
4       walk-on or a non-scholarship athlete or do you  
5       want -- I'm just trying to get it -- I think  
6       people know how they want to vote. I think  
7       people know it but we have to get it in front of  
8       them.

9                       MS. GROTH: Well, my recommendation  
10       with using the NCAA definition; includes  
11       recruited walk-ons.

12                      So Graham either accepts that or we  
13       vote the recommendation as is.

14                      MR. SPANIER: Any student who is not  
15       a recipient of a full or partial scholarship or  
16       is a non-recruited walk-on will be defined as a  
17       walk-on.

18                      The wording can be cleaned up but I  
19       think the intent is clear. Maybe go on to the  
20       next one; I'll fix the wording.

21                      MR. LELAND: Okay; that's a good  
22       idea.

1                   We'll move on to the next one, which  
2                   is 22. We are still trying to work on ones that  
3                   deal with proportionality.

4                   22. In demonstrating compliance  
5                   with the proportionality requirement of the  
6                   first part of the three-part test, a male female  
7                   ratio of athletic participation should be  
8                   measured against the male-female ratio of the  
9                   institution undergraduate population, minus  
10                  non-traditional students.

11                  MS. MCGRAW: Again, I just put this  
12                  in for the community college level. I don't know  
13                  that it has a big impact on us. I don't know  
14                  that we need to discuss it. It's not quite as  
15                  important as some of the other ones.

16                  MS. FOU DY: The only thing is that  
17                  prong three takes care of them at the community  
18                  college level because -- and they have said this  
19                  -- because they come in, a lot of them come in as  
20                  part-time students, which wouldn't count as a  
21                  traditional student. They would then become  
22                  non-traditional.

1                   But they also have traditional  
2                   students that are 40; I mean, they have a lot of  
3                   full-time students that are over 30.

4                   MS. FOU DY: In the same breath it is  
5                   hard to make athletes of some who are not  
6                   interested, regardless of age or regard less of  
7                   whether they have kids or anything.

8                   MR. GRIFFITH: Hard to make interest  
9                   based on age but not on gerund.

10                  MS. FOU DY: We have surveys in three  
11                  to determine that.

12                  MS. McGRAW: I move we vote.

13                  MR. LELAND: All right. The question  
14                  has been called.

15                  All those -- there's no objections  
16                  -- all those in favor of recommendation 22 raise  
17                  your hand.

18                  All those opposed?

19                  MS. PRICE: Eight with Gene.

20                  MR. LELAND: Okay; opposed?

21                  MS. PRICE: Four opposed.

22                  MR. SPANIER: Okay, I think I've got

1       this.

2                   MS. COOPER:  Nine to four; it passes.

3                   MR. SPANIER:  Yeah, on 18. I've tried  
4       to make this real simple.

5                   For the purpose of calculating  
6       proportionality -- I'd eliminate the first  
7       sentence and start, For the purpose of  
8       calculating proportionality with the male female  
9       enrollment in both scholarships and  
10      participation these ratios will exclude walk-ons  
11      as defined by the NCAA.  Proportionality ratios  
12      will be calculated through a comparison of full  
13      or partial scholarship recipients and recruited  
14      walk-ons.

15                  MS. COOPER:  I move to vote.

16                  MR. BATES:  I have question for  
17      Debbie.

18                  When you use example of your tennis,  
19      how do you differentiate there, because  
20      obviously the team is made up of people who are  
21      not receiving scholarships.

22                  MS. YOW:  They would all count in

1       this proposal because they would all be recruited  
2       walk-ons, because we don't have the scholarships  
3       for the team. We spent a lot of time recruiting  
4       them. So they would count.

5                   MS. FOU DY: Can I make one point.

6                   And I have tremendous sympathy for  
7       walk-ons because I had friends at Stanford, male  
8       and female, who didn't make a team and -- but  
9       I'm a strong believer in that at some point, you  
10      can't -- I mean, if we had, for example, the  
11      U.S. women's national team, soccer team, my  
12      team, I mean, everyone could want to go to the  
13      Olympics to get a gold medal, but we can't allow  
14      everyone on the team.

15                   And at some point -- I mean,  
16      especially with our resource issue in such dire  
17      straits at the collegiate level -- and we've  
18      talked about that a lot -- at some point you  
19      have to put some type of restraints on teams.

20                   And I love Rudy, I love the movie,  
21      but to base a recommendation on that idea,  
22      there's got to be a point at some time where we

1 say, not everyone can go to the Olympics. Not  
2 everyone can compete for a gold medal.

3 And great that you want to and it's  
4 great that you're interested, but there is  
5 intermurals and there's Jr. Varsity and there's  
6 other levels that they could compete and still  
7 fulfill that expectation.

8 So at some point I think we need to  
9 recognize that our resources are limited and  
10 this is also -- this is another issue that goes  
11 into that, into that pie that is so finite.

12 MR. LELAND: Any other comments?

13 MS. YOW: The only comment I have  
14 about that, and I think that Julie's point is  
15 valid, is that nothing about this amendment  
16 precludes any individual institution from making  
17 those determinations for themselves.

18 MS. FOU DY: I think my last comment  
19 is, my other worry is that these walk-ons now  
20 could possibly replace the money needed. Cary  
21 said it costs her money.

22 That money that we are using on

1       these extra walk-ons could now be the money  
2       we're using to keep that wrestling team or to  
3       keep that men's swimming team.

4                   And so is there a tradeoff in that?  
5       I mean, are we going to be losing more men's  
6       minor sports by doing this?

7                   MR. LELAND: Any other comments and  
8       questions?

9                   MS. COOPER: I move to vote.

10                  MR. LELAND: Any objection? Call the  
11       question?

12                  Okay. Hearing none, we have  
13       recommendation 18 as amended in front of us.

14                  Everybody's heard it, I think.

15                  All those in favor of 18 as amended,  
16       raise your hand.

17                  MS. PRICE: Eight.

18                  MR. LELAND: All those opposed.

19                  MS. PRICE: Five. Seven for, five  
20       against.

21                  MR. LELAND: It passes.

22                  MS. COOPER: Seven to four?



1                   A VOICE: Seven to five.

2                   MS. COOPER: Seven to five.

3                   MR. LELAND: Now it looks as though,  
4 I think, if Debbie and Cynthia and I have added  
5 these up right, that we have, what, four more to  
6 go, beginning with number 17. We are going back  
7 now and taking on those that don't deal with  
8 proportionality.

9                   MS. FOUDY: Can I just make one  
10 comment?

11                   I'm uncomfortable with us just  
12 rushing through and asking for a vote. If we  
13 have to stay a little longer than one o'clock to  
14 at least -- to discuss this to some degree, I  
15 think that's important; I think we owe that to  
16 the public, after the time we spent on this, not  
17 to just rush through these last four.

18                   MS. COOPER: I don't think we are  
19 rushing through anything. We've been here, we've  
20 discussed them, we have heard from everyone and  
21 we have heard several different points of views  
22 several times, and I don't think we are trying to



1                   In providing technical assistance,  
2           the Office for Civil Rights should advise  
3           schools as necessary that walk-on opportunities  
4           are not limited for schools that can demonstrate  
5           compliance with the second or third parts of the  
6           three-part test.

7                   MR. LELAND: Okay. Questions,  
8           discussion?

9                   Hearing none, are we -- we are minus  
10          a few of our --

11                  MS. FOUDY: Just to explain this one.

12                  This was simply as we talked about  
13          Philadelphia, one of the things we talked about  
14          was providing more weight to prongs two and  
15          three and educating people more on some of the  
16          value of two and three.

17                  MR. LELAND: Okay. Bob?

18                  MR. BOWLSBY: I'm voting yes.

19                  MR. LELAND: Oh, you're already  
20          ahead.

21                  Is anyone -- just -- is anyone --  
22          yeah, I think we'll -- I'm just worried we have

1       some people out here, and if it's a close vote  
2       -- is there a consensus? Good idea. Is there a  
3       consensus for this one? Legal pass by con sense  
4       sun recommendation two is and.

5                   Okay. Passed by consensus; thank  
6       you.

7                   All right, recommendation 21, we  
8       have President Spanier sign this one, but let's  
9       read it and begin the discussion.

10                   MR. LELAND: The Office of Civil  
11       Rights should study the possibility of allowing  
12       institutions to demonstrate that they are in  
13       compliance with the third part of the three-part  
14       test by comparing the ratio of male and female  
15       athletic participation at the institution, with  
16       the demonstrated interest and abilities shown by  
17       region, state, national or high school  
18       participation rates, or by the interests levels  
19       indicated in surveys of prospects or enrolled  
20       students at that institution.

21                   MR. GRIFFITH: This is simply the  
22       study, right?

1 MS. de VARONA: It still leaves out  
2 other organization that promote and support  
3 sports opportunities for athletes outside of the  
4 school system, which is where we get a lot of our  
5 athletes.

6 MR. LELAND: Would you like to add  
7 some more organizations or --

8 MS. de VARONA: I think we've already  
9 covered this in an earlier recommendation, so I'm  
10 not going to support this one.

11 MR. LELAND: I thought this was  
12 already the case. I'm surprised but I'm  
13 perfectly willing to vote for it.

14 MS. de VARONA: If you vote for it  
15 then I would like to amend it by adding that  
16 surveys also include participation numbers in  
17 national governing bodies that offer  
18 opportunities outside the school system.

19 MR. LELAND: We'll take that as a  
20 friendly, don't you think?

21 I don't hear any opposition to this,  
22 so could we do this by consensus?

1 MS. MCGRAW: My only concern is the  
2 same as I said earlier: If you keep looking at  
3 the high school numbers, how do you determine  
4 when the high schools are in compliance?

5 You know, if you're talking about  
6 looking at the high schools and the lower  
7 levels. It's a university, right? I mean, how  
8 do you determine if the high schools are in  
9 compliance? Do you go down lower than that?

10 MR. LELAND: No, but this deals  
11 specifically with third part of the three-prong  
12 test, so I'm assuming that this deals with  
13 colleges and universities. I may be wrong, but  
14 I'm assuming that it does.

15 MS. de VARONA: I just thought that  
16 our earlier recommendation covered this. I don't  
17 know why we're doing it again.

18 MS. FOU DY: This is actually prong  
19 three --

20 MS. de VARONA: Yeah, yeah.

21 MS. FOU DY: -- and the earlier one  
22 was prong one, correct?

1                   MR. LELAND: Sort of Title IX;  
2 remember Title IX.

3                   MS. FOUDY: Pardon me?

4                   MR. LELAND: We changed the prongs to  
5 Title IX, I think, didn't we?

6                   MS. FOUDY: You know, that was -- but  
7 aren't we talking about when we covered this was  
8 in Bob's previous proposal, which was comparing  
9 the high school's rates, and that was  
10 specifically comparing them for prong one  
11 purposes. This is comparing them for prong three  
12 purposes.

13                   MR. LELAND: So is anybody going to  
14 vote against this? Muffet, are you? I mean,  
15 could we do it by consensus?

16                   All those in favor of -- well, don't  
17 nod your head or anything -- with the amendment,  
18 we'll just take it, it's passed by consensus.  
19 Thank you.

20                   Now we are on to recommendation 23.  
21 I'll read it.

22                   The designation of one part of the

1 three-part test as a "safe harbor" should be  
2 abandoned in favor of a way of demonstrating  
3 compliance with Title IX participation  
4 requirements that treats each part of the test  
5 equally.

6 Additional ways of demonstrating  
7 equity beyond the existing three-part test  
8 should be explored by the Department of  
9 Education.

10 In addition, the evaluation of  
11 compliance should include looking at all three  
12 parts of the test in aggregate or in balance, as  
13 well as individually.

14 Okay, comments and discussion.  
15 Anybody object to this?

16 Go ahead. Cary?

17 MS. GROTH: I think part of my  
18 recommendation was to ensure that educational  
19 institutions knew that prongs two and three were  
20 safe as well.

21 So somewhere in here there should be  
22 a sentence that reads, OCR should educate



1 educational institutions that all three prongs  
2 are safe options.

3 I don't know if that is exactly the  
4 language, but I remember this discussion where  
5 we're just -- you know, there are three prongs  
6 to comply and I think that language needs to be  
7 in there.

8 And I'm not comfortable -- or maybe  
9 this was Graham's -- but additional ways of  
10 demonstrating equity beyond the existing  
11 three-part test should be explored by the  
12 Department of Education. That's where you are  
13 getting into prongs four, five --

14 MR. SPANIER: Yeah, I think one of  
15 the problems we've had -- well, we've talk about  
16 all those things before, but we -- I think we  
17 have been very weak on Title IX enforcement  
18 generally. No school has really ever been  
19 punished in the end, and I think a lot of the  
20 frustration that we have had around it is that  
21 you have to pick one part or one number or one  
22 survey -- whatever it might be -- and pin your

1 whole case on that, and the reality is that there  
2 are a lot of different aspects to this.

3 And I think the notion of one prong  
4 being the safe harbor just doesn't seem right  
5 for a lot of reasons we've talked about.

6 The schools could be making some  
7 degree of progress but maybe not enough that  
8 that would be a -- this whole thing you're doing  
9 -- I think in the real world you look at the  
10 whole balance and you encourage people to make  
11 progress on all the different areas at once.

12 So I just -- and there may be some  
13 additional ways, coming out of this commission,  
14 that you demonstrate compliance with Title IX,  
15 and I would hope that the making progress part  
16 of it, at some -- within a few years, that  
17 shouldn't be an excuse for not being there. And  
18 that may not be a prong any more.

19 So I think all of those things are  
20 collected in here, and the part about further  
21 education, which is part of some of the  
22 amendments you made before, I do think we -- I

1 don't think we need another sentence here  
2 because we have adequately said that in some  
3 other recommendations.

4 MR. LELAND: Okay; other comments?

5 MS. FOU DY: Yes.

6 The safe harbor issue -- and Tom and  
7 Mike can probably speak to this better -- but  
8 the safe harbor is a protection for the  
9 institutions, correct, in that once you get to  
10 those numbers, someone -- for example if you  
11 were at proportionality and a woman comes to see  
12 you and says hey, but I'm interested; I want to  
13 -- I want you to start a program. I've got 15  
14 women that want to play who are interested at  
15 this university.

16 You are protected because you have  
17 reached that safe harbor. So its terminology  
18 comes from protecting universities and saying,  
19 we are allowing you this safe harbor, and if  
20 more people come to you with interest you will  
21 not have to fulfill that interest because you  
22 are already not discriminating.

1                   Is that correct?

2                   MR. GRIFFITH: I think that's how it  
3 practically works and I'm not comfortable with  
4 that.

5                   I think my university, if they're  
6 approached that way, ought to consider it. I  
7 don't think they ought to rely on, well, we've  
8 reached some, you know, numeric balance and we  
9 don't need to consider your interest -- I think  
10 that actually demonstrate the problem with  
11 relying on numeric formulas.

12                   MS. FOU DY: I should have known,  
13 right. I forgot that; short-term memory lapse  
14 again.

15                   MR. SLIVE: Anybody who represents  
16 himself has got a fool for a client, so.

17                   My position is that we want to  
18 create more of a safe harbor in prong three.  
19 That's one of goals here.

20                   And the more we can do, to do that,  
21 Julie, the better off we are, and the sooner we  
22 can do that the better off we are.

1                   MS. FOU DY: And does that say that  
2 here? This language, I think, is what I have  
3 problems with. I don't like the second sentence  
4 as well.

5                   MS. GROTH: Julie, I think it does in  
6 the first sentence, where it says compliance with  
7 Title IX's participation requirement to treat  
8 each part of the test equally. That takes care  
9 of one of the issues.

10                  MR. BOWLSBY: I think also as an  
11 assignment, it's not just pertinent to this item,  
12 but the secretary, as I understand our process,  
13 is not duty-bound to embrace any of these things  
14 we forward, nor is this an all-inclusive group.

15                  I think the secretary and Department  
16 of Education staff have the opportunity to do  
17 sentence number two, whether it is in there or  
18 not.

19                  MS. FOU DY: I would feel more  
20 comfortable if we kept in one and three and took  
21 out two, the second sentence.

22                  MR. LELAND: Additional ways of

1 demonstrating; that sentence?

2 MS. FOU DY: Yes, because in essence  
3 the idea is we want it like Mike said: Make  
4 three more palatable and stronger, and we can do  
5 that without the second sentence.

6 MR. LELAND: I don't take that as a  
7 friendly, but that changes the substance so we  
8 have to have that as an amendment.

9 Is there a second?

10 MR. SPANIER: I've been trying to  
11 encourage creativity in the sense of maybe  
12 there's some other ways to promote gender equity,  
13 get credit for it, be able to demonstrate it. I  
14 Haven't been able to think enough about what  
15 those specific things are. I would have  
16 suggested them.

17 But I just don't think there's any  
18 merit in closing off the possibility that there  
19 are other ways to get from here to there.

20 Particularly ten or twenty years  
21 from now. Maybe now we look, we have to look at  
22 this narrowly. But, you know, where we are now

1 is very different than what a lot of people were  
2 thinking 10, 20, 30 years ago.

3 MS. FOU DY: But don't we --

4 MR. LELAND: Julie suggested an  
5 amendment; is there the second to the amendment?

6 MS. GROTH: I second.

7 MR. LELAND: All right; it's moved  
8 and seconded. Let's discuss the amendment. Now  
9 we are going to remove there-going to remove the  
10 second sentence if this passes.

11 MS. de VARONA: I would like to  
12 remove the second sentence in this, and I don't  
13 know if this is possible to indulge this, but I  
14 think one of the time constraints of this  
15 commission has not let us think outside the box  
16 or have a solution panel so that we can address  
17 other ways in which we can think outside the box  
18 and accommodate more programs and pool more  
19 resources.

20 So that's why I would favor voting  
21 for removing the second sentence.

22 MR. LELAND: Okay. Other talk about

1 removing the second sentence?

2 MS. GROTH: One last comment.

3 Graham, I'm in favor of removing the  
4 second sentence because I think it is a stronger  
5 recommendation without it.

6 It hits to the point that we have  
7 been talking about over and over that the other  
8 two prongs are not perceived as a safe harbor.

9 There might be another place for  
10 this, but this was one of my recommendations. I  
11 think they combine the two of them, yours and  
12 mine.

13 And I just don't think it belongs in  
14 this one.

15 MR. SPANIER: I just see it as  
16 limiting to take it out. I mean, Donna is  
17 saying, you know, we need -- we haven't had the  
18 time in this commission; we should be thinking  
19 outside the box.

20 Well, sentence two says, let's think  
21 outside the box.

22 So I think we just vote. I mean,



1       it's not earth-shattering one way or another so  
2       I think we just vote on that.

3               MR. BATES:  But I don't see why we  
4       couldn't do it as two separate, because it seems  
5       to me sentence one actually is a very succinct  
6       recommendation, that the, I guess, opens it up a  
7       little bit more.

8               MR. SPANIER:  I think that's an  
9       excellent suggestion.  I mean, if we -- that's an  
10      excellent suggestion, in light of the positive  
11      comments about sentence two, about taking it out.

12              I mean, I think now we should vote  
13      on them separately and have sentence two be a  
14      separate recommendation.

15              MR. LELAND:  Well, why don't we --  
16      we'll vote this way.  We'll vote on this --

17              MR. SPANIER:  Could we have that as a  
18      separate thing.  I would be very happy voting on  
19      23 without that sentence.

20              MR. LELAND:  So what we are looking  
21      is -- hopefully there will be a consensus here --  
22      that we take the second sentence out and set it

1       alone as, let's say, recommendation 25 or 23A or  
2       whatever it is, and then we act on 23, as it then  
3       would be written, and there might be a consensus  
4       to do both those things: pass 23 and 23A as a  
5       separate -- are we okay with that?

6                   MR. BATES:  Yes.

7                   MR. LELAND:  So before us is a motion  
8       to pass recommendation 23, minus the second  
9       sentence, and the second sentence would become an  
10      individual recommendation by itself; we'll number  
11      it later.

12                   Any questions or concerns about  
13      that?  Is there a consensus?

14                   A VOICE:  Yes, thank you.

15                   MR. LELAND:  Okay, great.  Thank you.

16                   Now we are down to 23A, then,  
17      additional ways of demonstrating equity between  
18      the existing three-part test should be explored  
19      by the Department of Education.

20                   Excuse me for doing that so fast.

21                   Okay.  Discussion now before us?

22                   Ready to vote?

1                   MS. GROTH: Can we just make it 24 or  
2                   25? 23A, it makes it, again, part of that  
3                   recommendation where I don't think it belongs.

4                   MR. LELAND: Okay, we'll make that --  
5                   and we can number it later, but we'll do it that  
6                   way.

7                   Okay. We now have a  
8                   separately-numbered recommendation. Donna?

9                   MS. de VARONA: Could we just add,  
10                  additional ways of demonstrating equity and  
11                  providing more opportunities that meet the needs  
12                  and interests of the students should be explored  
13                  by the Department of Education?

14                  MS. GROTH: Would it be simpler to  
15                  say compliance with Title IX?

16                  MS. de VARONA: Okay. I just think  
17                  -- I want to get the idea in there with some  
18                  words in the thing, that we want to provide -- we  
19                  want to pool resources and expand opportunities.

20                  MS. FOU DY: Is that opportunities for  
21                  the underrepresented gender, which is the  
22                  language.

1                   MR. LELAND: Additional ways of  
2 demonstrating equity beyond existing three-part  
3 tests should be explored by the Department of  
4 Education. Very simple. How do you want to  
5 change this?

6                   I'm not gagging anybody; how do we  
7 want to change this?

8                   MS. de VARONA: I just want to find  
9 ways that we can, you know, think outside the box  
10 and provide more opportunity.

11                  MS. FOU DY: Maybe additional ways of  
12 demonstrating equity or offering participation  
13 opportunities for underrepresented gender beyond  
14 the existing three-part test?

15                  MR. LELAND: We sort of said that we  
16 were going to --

17                  MS. de VARONA: Let's just vote on  
18 it. It's fine with me; let's move it.

19                  MR. LELAND: So the proposal  
20 separately numbered whatever it is, is now before  
21 us and it is written the way it is written.

22                  MS. de VARONA: Okay; let's go for

1 it.

2 MR. LELAND: Is there consensus or do  
3 you want to vote.

4 MS. FOU DY: I would like to vote.

5 MR. LELAND: Vote? Okay.

6 All those in favor of the  
7 newly-numbered recommendation, raise your hand.

8 MS. PRICE: Twelve.

9 MR. LELAND: All those opposed?

10 MS. PRICE: Twelve to one.

11 MS. FOU DY: Is it possible just to --  
12 because it's important. I'm comfortable with the  
13 idea of thinking outside of the box and I'm  
14 comfortable with that idea. I'm not comfortable  
15 with it if we are not staying within the tenets  
16 of Title IX.

17 MR. SLIVE: Julie if we could just  
18 substitute the words, compliance with Title IX  
19 for equity, don't you get the --

20 MS. FOU DY: Yeah, but we didn't do  
21 that.

22 MR. SLIVE: We should have.

1 MS. FOU DY: Let's do that.

2 MR. SPANIER: Let's reconsider.

3 MR. LELAND: There is a motion to  
4 reconsider. All those in favor of  
5 reconsideration, raise your hand? Aye? Any  
6 no's?

7 Okay. Now you want to call the  
8 question on the amendment?

9 MR. GRIFFITH: The amendment will be,  
10 we will replace the word equity with compliance  
11 of Title IX.

12 MR. LELAND: That takes care of  
13 Julie's and others' concerns.

14 We can assume that by consensus?

15 The amendments made in the total  
16 recommendation passes by consensus.

17 MR. GRIFFITH: Can I read the  
18 question? Julie said she wanted to make a  
19 statement on the record about her dissent.

20 I'm assuming that the rules that  
21 we're following is that if you -- if we lost,  
22 that there will be an explanation. I mean,

1       that's what we've done, or talked about  
2       yesterday.

3                       So all those where I lost, I mean,  
4       there's going to be an explanation given.

5                       MS. de VARONA: And we'll get to look  
6       at those.

7                       MS. COOPER: Recommendation 24.

8                       MS. FOU DY: Let's discuss that at the  
9       end, though, right? We are going to have that  
10      discussion?

11                      MR. LELAND: Yeah, I think we need to  
12      because we have perplexed looks from our authors.

13                      So I have to make sure that we're  
14      comfortable. That was an issue when we first  
15      started yesterday, to make sure that we gave  
16      dissent its proper due, and we all agreed we  
17      would do that, so let's make sure we are going  
18      that.

19                      Recommendation 24.

20                      MS. COOPER: Page 41, line 20.

21                      The Office for Civil Rights should  
22      be urged to consider reshaping the second part

1 of the three-part test, including by potentially  
2 adding a sunset provision designating a point at  
3 which a school can no longer establish  
4 compliance through this part.

5 MR. GRIFFITH: Why -- it reads  
6 awkwardly. Why do we have by potentially in  
7 there, Gerry? Why don't we just say, by adding.  
8 I think that's --

9 MR. REYNOLDS: I can't take the blame  
10 for the phraseology.

11 MR. SPANIER: I can. I think that  
12 was my doing, and yea, I don't think --  
13 potentially could come out.

14 MR. GRIFFITH: I think it would just  
15 be strike five potentially, including adding a  
16 sunset provision. That would leave other  
17 opportunities to reshape it.

18 MS. FOUDY: I have question on  
19 conceptually on this, and you guys would know  
20 better than me, but what happens if you have, for  
21 example, an institution or high school that is  
22 changing conferences or is adding football or



1           they're changing their competitive divisions.

2                         I mean, how do you allow for that,  
3           because they're going to need some time in the  
4           interim to adapt to those changes.

5                         Are we in essence hurting a lot of  
6           institutions by not allowing them that lag time?

7                         MR. SPANIER:  Again, I think, if this  
8           gets adopted, you know, there has to be, again,  
9           some standard of reasonableness here.

10                        But Title IX's been in operation for  
11           30 years now and there's been tremendous  
12           progress, and I think most of us around the  
13           table would agree that there will be some more  
14           progress in the next few years.

15                        But if you think ten years out, now  
16           schools have not only had 30 years of the whole  
17           gearing-up process but they've had ten years  
18           between now and then when this got a lot of  
19           attention and everything is going to be  
20           clarified very nicely by the Office of Civil  
21           Rights and there shouldn't be an awful lot of  
22           doubt left about what you have to do, to get

1 from here to there, and I would see some point  
2 in the future at which you say, you know, that  
3 is just not a good excuse any more.

4 You added volleyball three years  
5 ago, soccer 11 years ago, so you say you made  
6 normal progress but you're still at 75/25, no we  
7 don't buy it.

8 At some point you have got to be in  
9 compliance for good conceptual and factual  
10 reasons, and the fact you are making progress  
11 just doesn't cut it at some point.

12 We don't do that in a lot of other  
13 areas of law.

14 So that's the intent there, and the  
15 sunset clause was just -- it is one possible way  
16 of making that happen. I guess the word  
17 potentially is in there because maybe  
18 technically that's not the best way.

19 But maybe different institutions are  
20 given different dates by which they have to do  
21 it, as opposed to sunset sounds like the whole,  
22 you know, everybody has done it at some point.

1 So that's why I said it.

2 MR. REYNOLDS: Julie makes a very  
3 good point, I think, that we should be careful.

4 After thinking about this sunset  
5 provision, I think the first order of business  
6 is coming up with a set of rules that are  
7 logical, rational and reasonable, and that needs  
8 to be done before we start talking about taking  
9 away the ability to come into compliance with  
10 prong two.

11 MR. LELAND: Okay. Other comments  
12 and questions that --

13 MS. YOW: I just want to point out  
14 that Jerry and Julie have agreed on something.  
15 Would someone mark the time and date?

16 MR. GRIFFITH: I move that we all  
17 hold hands and sing Cumbaya together now.

18 MS. YOW: And then I'd like to  
19 support what Graham said.

20 Those of us in the industry know  
21 that the majority of institutions have never  
22 been reviewed. We also know anecdotally the

1 majority of them, or many of them have been  
2 hanging their hat on continuing expansion and  
3 they've got this all worked out: How many years  
4 between adding sports can I get away with et  
5 cetera, et cetera, et cetera.

6 So we do -- it's way past time that  
7 we deal with this one.

8 MS. GROTH: You know, I agreed  
9 initially but Julie just brought up a really good  
10 point: What if you take Institution X that's in  
11 compliance with Title IX for prong one that does  
12 not have a football program, but enters a  
13 conference that requires football.

14 Now that institution doesn't meet  
15 Title IX with prong one nor with prong three.  
16 So what's the other option for that institution  
17 for that change?

18 MS. YOW: The sunset, the sunset.  
19 They'll have a discussion with OCR; there'll be a  
20 reasonable time frame developed and they'll have  
21 the chance to get it together.

22 MR. SPANIER: Let me ask if this

1 helps.

2                   What if we took out the words, the  
3 five words, "potentially adding a sunset  
4 provision." Then we would be saying, including  
5 by designating a point at which a school can no  
6 longer establish compliance.

7                   That allows for the possibility that  
8 it would be different, depending on a school's  
9 situation, as opposed to, prong two is gone for  
10 the whole world at a fixed point in time.

11                   Does that do it?

12

13                   MS. COOPER: Yeah. So any more  
14 discussion, notes, vote, consensus? Do we have a  
15 consensus?

16                   If not, do we need to vote? Yes?

17                   Consensus; passed by consensus.

18                   MR. LELAND: Good. Holy cow.

19                   We are done with the recommendations  
20 now. Is there other business -- we may have a  
21 couple announcements here -- is there other  
22 business? We said we would talk a little bit

1           about the dissent issue. I don't know how else  
2           to say it.

3                       MS. PRICE: I want to make one  
4           announcement for the public.

5                       When we had the vote -- because I  
6           know that some of you are keeping track of the  
7           vote -- on recommendation 18, the vote was 8-7.  
8           When I then announced it -- I mean 8-5; I said  
9           7-5. I just want to make clear it was 8-5. It  
10          doesn't make any difference in the outcome of  
11          the vote; I just said it wrong, and it is in the  
12          transcript, to check it.

13                      MR. LELAND: Yes, Julie?

14                      MS. FOUDY: One thing we missed was  
15          the introductory comments for the recommendations  
16          section. We said we'd go back there.

17                      MR. LELAND: You are right; thank  
18          you. Which is on page what, Julie?

19                      MS. FOUDY: I can't find it,  
20          actually.

21                      A VOICE: We are on page 34.

22                      MR. LELAND: Thirty-four. So I think

1 we're all -- and we said we were going to come  
2 back now and adjust this in a way that reflects  
3 the will of the group.

4 So let's start.

5 MS. FOU DY: I have a comment on  
6 sentence number two.

7 All of these recommendations are  
8 designed to strengthen and improve Title IX  
9 enforcement. Since we are not certain of the  
10 impact of a lot of these recommendations and are  
11 not sure what the impact will be, if it were in  
12 fact strengthened or weakened, Title IX, I don't  
13 feel comfortable with that sentence.

14 MR. GRIFFITH: Well, but, could you  
15 modify it to say it is the intent?

16 I mean, I think what we are saying  
17 here is that I presume it's the intent of every  
18 commissioner, in whatever proposal he or she  
19 made, to strengthen Title IX. I think that's  
20 what it's getting at.

21 Now whether it will accomplish that,  
22 you're right, is not clear.

1                   MS. GROTH: I agree with Julie. I  
2                   don't think we need to have it in there. I think  
3                   we make our case throughout the document, in the  
4                   beginning about our intent not to compromise the  
5                   integrity of Title IX, and it just doesn't  
6                   belong. If we could just remove that?

7                   MR. LELAND: Any other comments?  
8                   We're talking about the second sentence, all of  
9                   these recommendations -- go ahead, Tom.

10                  MR. GRIFFITH: One the -- I mean, the  
11                  idea of the intent, I think, is important because  
12                  we voted on a series of different concepts.

13                  If those concepts turn out to bring  
14                  us in the wrong direction, then I would not -- I  
15                  would have reversed my vote if I had known that.

16                  So what I want to say, Julie, here,  
17                  is that these recommendations, at least for me,  
18                  are designed to strengthen Title IX, provide  
19                  more opportunities for equal participation.

20                  So I would be in favor of saying  
21                  that's the intent, and if the data and the  
22                  thinking outside the box on any one of these



1 proposals is contrary to that then I think those  
2 of us who voted in favor of it would not be in  
3 favor of it.

4 MS. FOU DY: What would your language  
5 change be, Mike?

6 MR. SLIVE: Well, it would be a  
7 tentative recommendation, is to strengthen Title  
8 IX and to strengthen opportunities for equal  
9 participation, and obviously if you strengthen  
10 the opportunities for women to compete in  
11 intercollegiate athletics.

12 MS. FOU DY: I'm comfortable with  
13 that.

14 MR. BATES: I had.

15 MR. LELAND: Tom, did that take care  
16 of what you were thinking?

17 A VOICE: I have some questions on  
18 number three.

19 MR. LELAND: Well, are we done with  
20 sentence number 2? Are we okay with --

21 MS. FOU DY: What did we decide on,  
22 something similar to what Mike said?

1                   MR. LELAND: I think so, right.

2                   I'm looking at our offers; are we  
3 okay with that?

4                   In effect, you are taking out the  
5 designed to and in the intended to and then  
6 adding a little bit at the end of the sentence  
7 regarding, you know, providing equal opportunity  
8 and some other things that Mike talked about.

9                   MR. GRIFFITH: I would suggest we  
10 strike the next sentence, though. I don't  
11 think --

12                  MR. LELAND: Let me just over here to  
13 Percy. He was patient today and he has the next  
14 sentence in mind.

15                  MR. BATES: Well, yes, I -- if you  
16 recall, when we started this I raised this  
17 question about our indicating that some of these  
18 may prove not to be feasible, and my assumption  
19 was that what we put forward, where they all  
20 portended to be feasible, so I didn't really like  
21 that statement.

22                  MS. COOPER: Yeah, let's take it out.

1                   MR. SLIVE: You know, they may not  
2                   turn out to be feasible.

3                   I mean, I think that part of what  
4                   I'm trying to say is that if some of these  
5                   recommendations turn out not to be feasible  
6                   because they don't accomplish our intent and  
7                   purpose, th, you know -- then we ought to be  
8                   instructors.

9                   So that's not what we intended.

10                  MR. BATES: And I think that's okay,  
11                  but I just don't think we need to say it up  
12                  front. I mean, if it turns out that way, that's  
13                  fine. That was my concern.

14                  MR. GRIFFITH: The way it reads now  
15                  is, if we have really stupid ideas, we still want  
16                  you to think about this.

17                  MR. LELAND: And I don't think we  
18                  want to say that. I think that's a kind of an  
19                  odd way to begin a document, I think.

20                  So what kind of changes do you want  
21                  in that sentence, Tom?

22                  MR. GRIFFITH: I would recommend just

1 dropping that.

2 MR. LELAND: I'm sorry; the whole  
3 thing?

4 From the Commission, all the way  
5 through the study.

6 MR. GRIFFITH: That's right.

7 MR. BOWLSBY: Or how about leaving  
8 the Commission in and striking, "recognizes that  
9 some of these recommendations not be feasible,  
10 but" and leave in, "urges the Department to give  
11 them serious consideration and study."

12 It is a simple statement of fact.  
13 Is there a consensus for that?

14 MR. LELAND: Yea.

15 MR. BOWLSBY: Are you okay with that?

16 MR. LELAND: Any other comments or  
17 concerns about that?

18 Okay. Any other unfinished  
19 business?

20 I guess -- it seems to be on the  
21 fine -- how does the sound? Are we -- do people  
22 feel that their voice of dissent was adequately

1 captured in the findings?

2 I think we went through the  
3 spectrum, the background, the appendix, but in  
4 the finding, I thought there was plenty of  
5 opportunity, at least -- I'm not sure they're  
6 there, for the people who didn't agree with  
7 those too, ought to sort of throw their two  
8 cents in.

9 That's probably demeaning, isn't it,  
10 but is there anyone who would disagree with that  
11 position?

12 MS. FOU DY: My -- when we talked  
13 about this yesterday, the point of adding in a  
14 voice for the actual report, regardless of who  
15 the minority voice is, that is crucial to the  
16 process and we agreed that it was going to go in  
17 there.

18 Now, my concern is with the net,  
19 that we are not meeting again.

20 MR. LELAND: Let me finish with the  
21 dissent issue. I know you may be concerned about  
22 the missing. I almost forgot about the dissent

1 issue.

2 I mean, I'm trying to organize this  
3 in a way we can -- are we comfortable the  
4 dissent orders, comfortable that they're what we  
5 call maybe minority opinion is adequately  
6 captured in the recommendations -- I mean, in  
7 the findings.

8 MS. de VARONA: What I don't  
9 understand is, where are you going with this  
10 question? Are you asking this question as a  
11 substitute for the verbal dissent that we  
12 expressed during the process?

13 MR. LELAND: No, I'm trying to figure  
14 out -- the verbal dissent you've expressed during  
15 the process.

16 MS. de VARONA: -- will be reflected  
17 in the report?

18 MR. LELAND: Well, that's what I'm  
19 trying to --

20 MS. de VARONA: It's very important.

21 MR. LELAND: Let me finish my  
22 sentence. It is going to be reflected in the

1 minutes, okay? I mean, it is going to be  
2 reflected in the transcript, all right? But --

3 MS. de VARONA: Okay. I want to hear  
4 the end of your sentence.

5 MR. LELAND: It is hard to talk to  
6 somebody who is doing this.

7 MS. de VARONA: Okay.

8 MR. LELAND: Not impossible, but it's  
9 not --

10 Now, what I was hoping was that  
11 during the findings, that the dissent, when and  
12 if there was dissent, if it was to a point where  
13 there was a vote -- in other words, we didn't do  
14 this by consensus -- if we do it by consensus I  
15 have trouble thinking we are going to go back  
16 and add a lot of dissent.

17 I'm just throwing this out as a way  
18 to work our way through this. I'm not sure I'm  
19 right. I'm just saying this is a way to do.

20 MS. de VARONA: Yes.

21 MR. LELAND: So I was thinking, we  
22 could go back through the findings and ask

1 people, you know, which ones did we vote on and  
2 if they were consent we wouldn't worry about  
3 those, but if there was votes, we would say to  
4 those people who voted against the group that  
5 gosh, would you like to add something here, or is  
6 -- can you read what we have now and decide  
7 whether it is appropriate for you? I mean, does  
8 it adequately represent what you want to say?

9                   And then we would do the same thing  
10 for the recommendation. And those were  
11 recommendations. It seems to me if we voted by  
12 consensus there wouldn't need be a lot of  
13 verbiage in here -- and there's not a lot in the  
14 recommendations, anyway.

15                   But then we'll go back and look at  
16 those that we had voted on and the people had  
17 dissented and it got passed anyway, would have a  
18 chance to make sure that that part of the report  
19 reflected their concerns.

20                   MR. GRIFFITH: I would recommended  
21 that the STRAF draft an explanation for each of  
22 the votes, saying, this was the majority, this



1 was the minority, let the minority see it and  
2 work with the staff to come up with a finding.

3 I think the agreement that we had  
4 was that it was going to be succinct, right.  
5 For example, I will not put my whole speech in,  
6 you know, about numeric -- the problems of  
7 numeric formulas.

8 But staff will come up with a short  
9 description of that and I presume as a courtesy  
10 they'll run it by me to see if --

11 MS. PRICE: In every case where we  
12 had a vote, we have a recorded vote with a vote  
13 count.

14 We can add an additional section to  
15 the report, giving a record vote analysis or  
16 however you want to call it. That's what -- I  
17 worked in the Senate forever; that's what we  
18 called it.

19 Those documents gave the number of  
20 the -- identified what the vote was, what the  
21 question was, what the vote count was, and then  
22 said, states, "those voting in support of this,"

1 and then briefly describes that -- I don't want  
2 to use the word argument, but that argument.

3 "Those voting in opposition," and  
4 you state that argument and you -- you know, you  
5 can consolidate that into basically a paragraph  
6 and get those.

7 So that even in the case where we  
8 had a 12-1 or whatever vote, Julie's vote would  
9 be recorded, and those voting in opposition, and  
10 it gives that paragraph.

11 Now in -- you know, in the -- that's  
12 generally the best way to go about doing it and  
13 there is a section of the report clearly stating  
14 what the vote was.

15 MS. COOPER: Donna, Donna, is that  
16 what you want? That's what you asked for.

17 MS. de VARONA: First of all, I want  
18 to thank the chairs for allowing dissent and the  
19 ability for us to express it explicitly.

20 MS. COOPER: You're welcome.

21 MS. de VARONA: I think it was very  
22 important to the process and the trust issue.

1                   What I envisioned -- I don't know  
2           whether -- I think this is a question of  
3           understanding what you're trying to say to me  
4           and I'm trying to say to you -- it was my hope  
5           that after each recommendation or finding, below  
6           that specific one, not at the end of the chapter  
7           but as the secretary goes through it, you  
8           demonstrate the votes, you report the votes and  
9           then you -- if it passed; I'm not so sure --  
10          you'd explain why it passed and then the dissent  
11          is, you know, explicitly explained right below  
12          that.

13                   So it is embedded in the process,  
14          not at the end of the report, with the vote  
15          tally.

16                   MS. COOPER:  That's what you just  
17          said, right?

18                   MR. LELAND:  That's what I said.

19                   MS. de VARONA:  That would be  
20          something I'd prefer.  Now the question is, how  
21          do we accomplish that?

22                   MR. DISKEY:  Now are you saying this

1 goes for recommendations that passed and failed?

2 The dissent yesterday was talked  
3 about in a -- because it's not a recommendation  
4 if it failed.

5 MS. de VARONA: No, if it failed, we  
6 don't --

7 MR. DISKEY: So if it didn't fail, if  
8 it set, for example, I think Tom, recommendation  
9 five, if that failed -- so that's what we need to  
10 know.

11 MS. PRICE: Let me make one point.  
12 What Donna just explained is  
13 certainly something that can -- we can do, and  
14 talking through the recommendations and that  
15 part.

16 I do think it is also important  
17 historically, because some failed, some passed,  
18 to have a separate section stating the vote,  
19 stating the count, and the same with the  
20 recommendation with stating that count, whether  
21 it passed or failed, and giving -- and stating  
22 what those two arguments are.

1                   That way, it doesn't have to be a  
2                   separate thing. It is almost like -- it could  
3                   almost be an appendix on recorded votes, and  
4                   then you just, you know, it is just a brief  
5                   explanation so the report, you could clearly see  
6                   all the votes we took, what they were, what the  
7                   vote count the opposing side, you could you say.

8                   MS. FOU DY: But that's in addition  
9                   to --

10                   MS. PRICE: After you have the  
11                   recommendation then you have the rationale and  
12                   then you have the dissenting --

13                   MS. de VARONA: Do we have to vote on  
14                   this?

15                   MS. FOU DY: But the dissenting voice  
16                   is in the actual report?

17                   Okay. My next question is --

18                   MR. LELAND: I'm uncomfortable that  
19                   that's settled yet. I know you want to move on  
20                   to the next thing, but give me a chance here.

21                   I am -- we have worked for the last  
22                   day and a half and reviewed this particular

1 draft, and to create a whole new section now --  
2 which is what I'm understanding we are going to  
3 do for people who voted no -- I had more  
4 envisioned what Donna said, what I thought Donna  
5 said, which was we would take exactly what we  
6 wordsmithed here, and in those areas where we  
7 had a vote, where there wasn't consensus, we had  
8 a vote, we would give the people that voted in  
9 the minority a chance to read that, what we have  
10 written, and if they don't think that adequately  
11 captures their concerns we'd give them a chance  
12 to work with the authors to re-do it.

13 But it's right in the middle. So  
14 recommendation one on page 34 looks exactly like  
15 this, if it's passed by consensus.

16 And if recommendation two wasn't  
17 consensus but it passed ten to four, we give the  
18 people that were concerned enough to vote  
19 against it, make sure they get a chance to look  
20 at this and maybe add a paragraph if they so  
21 choose.

22 They don't necessarily -- they have

1 to do it, author it with these guys and we'll  
2 have to take a look and make sure it's all  
3 approved in the end.

4 That's -- I mean, because I don't  
5 want to redo all this wordsmithing we've done  
6 but I do want to give -- make sure that the  
7 people that -- and we committed at the beginning  
8 of this, people that had dissent would get a  
9 chance to throw their --

10 MR. GRIFFITH: The only thing I would  
11 suggest as well is that on the losing  
12 propositions, as Debbie said, we make a  
13 historical record, that that be included as well.

14 I think there were not many.

15 MR. DISKEY: Ted, and the approach  
16 would be to tackle that in the appendices -- one  
17 of the appendices?

18 MR. LELAND: Yeah, well I think --  
19 there are two issues.

20 MR. DISKEY: That keeps it out of the  
21 body of the record.

22 MR. LELAND: We could do what she

1 suggested, have a short appendix that would say,  
2 you know, these were the defeated recommendations  
3 -- these were draft recommendations that were  
4 defeated.

5 MS. PRICE: In that case, it really  
6 is -- I mean, if you do that for some of those,  
7 you really should do that for all.

8 And it isn't -- it would be  
9 inappropriate to have an index on recorded  
10 votes. It is such a standard document in most  
11 institutions that do votes, to do something like  
12 that. That way -- because --

13 MS. FOU DY: My point for the defeated  
14 documents at the end, if they've gotten defeated,  
15 the point is so that they don't go into the  
16 report. Now they're going in the report.

17 MS. PRICE: Okay.

18 MS. FOU DY: So why do we need that?  
19 I think should stick with the rationale and then  
20 the dissenting voice underneath.

21 MS. PRICE: Okay.

22 MS. FOU DY: And maybe you would just



1 put a vote tally right next to the  
2 recommendation. Why do you need an appendix for  
3 that?

4 MR. GRIFFITH: I think it was a --  
5 because you are creating historical records. You  
6 are not making a recommendation but you're saying  
7 this was discussed by the commission and it went  
8 down in flames.

9 MR. BOWLSBY: Why is the dissenting  
10 voice of a defeated not as valid as the  
11 dissenting voice on a passed recommendation?

12 MS. FOU DY: So you are going to put  
13 that where?

14 MR. LELAND: We'll have an appendix.  
15 I think what we're working on -- this is a work  
16 in progress, but the idea might be that an  
17 appendix, or an appendix at the end could be  
18 labeled as, you know, non-approved, non-forwarded  
19 motions, or whatever you want to call it, and  
20 that gives us a chance to use an appendix, right?

21 MS. FOU DY: And you give the vote  
22 tally on the --

1                   MR. BOWLSBY: Could we all agree  
2 here, leaving here, though, that what goes in as  
3 the dissenting voice after each of these  
4 proposals that we're forwarding is, as Tom said,  
5 succinct, captures the essence of what it is, but  
6 it isn't intended to flesh out an argument.

7                   And I think we need to be vigilant  
8 about that one.

9                   MS. FOUDY: Can I just bring up my  
10 point?

11                  MR. LELAND: ARE we okay on how we  
12 are going to handle dissent, at least to this  
13 point in time?

14                  MS. FOUDY: No, well, that's what my  
15 question's about.

16                  The dissenting voice, how we are  
17 going to handle it, fine with it. The context  
18 of it and the content and what goes in there,  
19 how, if we cannot give by law, I thought,  
20 without meeting --

21                  MS. PRICE: I can answer that easily  
22 for you. I can tell you exactly what you do when

1       you work in the House or the Senate and you write  
2       a record vote analysis.

3                   What you go is you take the text of  
4       the debate and you actually -- I mean, you  
5       generally take actual sentences from the debate  
6       that define the debate and put them in a  
7       paragraph that makes sense. You might have to  
8       edit a few words to make it grammatically  
9       correct, but you take that from the text of the  
10      debate.

11                   So there -- it isn't a matter of --  
12      it isn't all that different from what we did  
13      with our Philadelphia meeting. We discussed the  
14      recommendations and often you listed Bill and  
15      Jay and said you could put that into a  
16      recommendation, all those thoughts. They said  
17      yes and we did it.

18                   It's not all that different than  
19      that, but it reflects -- you know, it's just --

20                   MS. FOU DY: Something that was  
21      already on public record?

22                   MS. PRICE: Yeah, it's already on

1 public record.

2 MS. FOU DY: Okay. So my part B to  
3 that will be, do we get to choose? If we don't  
4 like -- I mean, there was a lot said. If we  
5 don't like what was reflected in there do we have  
6 an opportunity to say, of things we said off  
7 public record, I would rather have this in there,  
8 to make my point. more clear.

9 MS. PRICE: Okay. What we can do is  
10 -- Bill's eyebrows just did one of those things  
11 -- when we send the document out, it will go out  
12 for your comments for editing, and certainly that  
13 section will be edited.

14 All 15 of you will make edits and  
15 comments on it. Some may edit 20 -- ten  
16 different ways on one sentence. We will have to  
17 consolidate those edits.

18 But that will be -- yes. Basically  
19 the answer is yes, but in light of the fact that  
20 15 people will give their opinion on it, there  
21 does need to be a point of consolidation when  
22 that -- and that generally is the prerogative of

1 the co-chairmen of the committee to assess that.

2 MS. FOU DY: But if it is a dissenting  
3 voice, shouldn't that dissenting voice, whoever  
4 it is, decide on what it is?

5 It shouldn't be something that's  
6 left open to the debates.

7 MS. PRICE: You most likely will be  
8 the ones that have comment on that section and  
9 that would be taken more serious.

10 You know, if -- and for example if  
11 you were the only dissenting voice on that one  
12 votes, for everybody else to say, oh, no, Julie  
13 meant this --

14 MS. FOU DY: Let's go to one where  
15 there was, you know, maybe three of us  
16 dissenting, and what we want in there the rest of  
17 the group doesn't agree with? What's the process  
18 for that?

19 MR. GRIFFITH: Well, you know, I  
20 think realistically it is not going to happen.  
21 Staff is going to take the first crack at it, and  
22 they are going to be fair, right?

1 MS. PRICE: Yeah.

2 MR. GRIFFITH: And then you are going  
3 to get to look at it, and if you don't like it,  
4 you are going to work with them to wordsmith it.

5 It's -- you know, no one's going to  
6 pull a fast one here.

7 MS. FOU DY: We are allowed to make  
8 substantive changes to it.

9 MR. GRIFFITH: Recommendations to  
10 staff.

11 MS. FOU DY: Not just grammatical --

12 MR. GRIFFITH: They're going to get  
13 it right.

14 MS. PRICE: I mean, for example -- I  
15 can't even think of an example -- there's a vote.  
16 Four people opposed it, we send it out and then,  
17 best intentions summarized but missed the most  
18 important part of one of the four people and they  
19 said oh, I really wanted this aspect of it in  
20 there, we'll put it in.

21

22 MR. GRIFFITH: I don't know if you

1       want to -- I think if you have a particular  
2       portion of the proceedings you feel strongly  
3       about in your dissent, you could let it -- you  
4       could let them know and work with them from the  
5       very beginning: Gee, this number six was the one  
6       that bugged me the most, and let me tell you what  
7       I want to say.

8                       MS. PRICE: It generally works out  
9       actually quite well. When you look at the actual  
10      debate, it's not -- I'm sorry -- it's not rocket  
11      science. It usually comes together pretty well.

12                      But I would imagine there would  
13      probably be some --

14                      MS. FOU DY: Okay.

15                      My second question is, the entire  
16      draft isn't the entire draft.

17                      Some of these things we never got  
18      back to. We never got back -- I don't believe;  
19      I could be wrong. I've been known to be wrong  
20      before -- the Cohen case language, we never got  
21      back the Smith College numbers, and we never got  
22      back the language at the end of the background

1 section about decrease versus increase in  
2 numbers, which I think is a very important point  
3 that we debated on.

4 So when we get this draft back, I  
5 know because we can't meet, and we are not  
6 meeting again, that all we can give is  
7 grammatical changes; nothing of substance,  
8 correct?

9 And how -- I think -- I feel like  
10 there -- that we are walking away from this and  
11 it's like, wipe your hands clean; okay, it's  
12 done.

13 I feel uncomfortable because I  
14 haven't seen, and because I haven't seen it, I  
15 can't make changes to it because we have no form  
16 to do that, and I feel uncomfortable without  
17 having a form to do that, signing my name to it  
18 without seeing it; you know what I'm saying?  
19 Without that step.

20 MR. LELAND: Well, I think we are  
21 going to try to get you a copy of the next draft  
22 and ask you make comments on it and I think we'll



1       probably accommodate -- well, we will. We'll  
2       accommodate as many of those comments as we can.

3               If we can't accommodate them, I  
4       think it will be up to Cynthia and I to sort of  
5       adjudicate that and we'll try to give you a call  
6       or we'll work with you on what the issues are.

7               I don't think we want to hand in  
8       anything that, you stand up publicly and say no,  
9       I disavow this. That doesn't move equal  
10      opportunity forward at all.

11              So we're going to try to be as fair  
12      as we can, but we don't have the dates and stuff  
13      right now, because we have a lot of work to do.

14              MS. FOU DY: And I understand your  
15      point, but my point is, I can't make comments.  
16      Legally, I can't make comments because we are not  
17      in a public forum.

18              I thought you said we couldn't make  
19      any substantive changes to it without the  
20      agreement from the rest of the group.

21              MS. PRICE: What we will be talking  
22      about here will be regarding the Cohen case, the

1 four points that you made; the fellows will draft  
2 up those pieces.

3 We can e-mail you those in context  
4 so you can see how it flows.

5 Those specific ones an continue on  
6 with the draft, get that done and over, get your  
7 all to sign off on that language.

8 We may wordsmith it a tad, but I  
9 don't think that would -- I mean, we know what  
10 -- we had talked with the transfers. We talked  
11 those issues about what the desire for those  
12 section to be. I don't think that that is  
13 inappropriately making substantive changes.

14 That is responding to the dialogue  
15 that's occurred here occurring today.

16 So we can send those changes out.  
17 If you have edits to those changes -- I don't  
18 think those areas are a problem, Julie, is what  
19 I'm saying, because we've got the dialogue, we  
20 see the direction that you-all went.

21 MR. LELAND: Other questions?

22 MS. GROTH: I would like to reiterate

1        what Julie just said, and I appreciate your  
2        bringing up those -- the Cohen case and those  
3        others, because those are very important to this  
4        document.

5                        So we are going to be -- I'm trying  
6        to reiterate what you just said -- you are going  
7        to finish those or prepare those, send them out  
8        to the commission members, all of us.

9                        MS. PRICE: And you all will quickly  
10       get back. I mean, send them out so, you know, we  
11       can back with those within two business days or  
12       whatever. They'll be short piece so they won't  
13       take a lot of reading.

14                       MR. LELAND: Let's just answer the  
15       questions and then we'll go.

16                       MS. de VARONA: I just have a problem  
17       with two business days, because when this report  
18       was written, it got to me at a time when I'm on  
19       -- when I was on assignment, and I was only then  
20       allowed to participate in edits and not  
21       substantive stuff in writing it, so I never  
22       really wrote -- was part of the writing of this

1 document.

2 So I'm concerned about the other  
3 end, that I might miss, you know -- I think we  
4 need a little more time.

5 MS. PRICE: We will take that into  
6 consideration when we make any of those kinds  
7 of --

8 MS. FOU DY: Well, especially since  
9 the things that we need to look at are limited in  
10 number.

11 I mean, there was the edit of NCAA  
12 numbers. I wanted to be put in the background;  
13 the disparities fill the gap.

14 And can we get those within, like,  
15 five days, so that we have time? Can we say  
16 that so we are not getting it right at the end?

17 MS. PRICE: Yeah, no. We can get  
18 those -- seven days. Bill is moving  
19 cross-country this weekend and he's been working  
20 from laptops.

21 MS. GROTH: Once all the changes are  
22 made and the document is put together, the final

1 document, how do we approve that? I mean, what  
2 happens next? I mean, if --

3 MS. PRICE: Well, I mean, is this it?

4 MR. GRIFFITH: This is it.

5 MR. LELAND: Let me tell you what I  
6 think's going to happen, okay?

7 We no longer have a quorum so we are  
8 just talking, right?

9 What I think is going to happen is  
10 that we are going to work like crazy with the  
11 authors over the next seven or eight or ten days  
12 and try to get another draft of this document  
13 done that reflects, as best as possible, the  
14 will of the group.

15 It's not going to be perfect, but  
16 we'll do the best that we can. That's what we  
17 have done.

18 Then we're going to send it out to  
19 all of you and give you as many business days as  
20 we possibly can for you to make comments and  
21 changes in it.

22 We'd appreciate if those wouldn't be

1 substantial changes like new proposals or  
2 anything like that, but we to make sure and we  
3 won't have to spend -- have special awareness at  
4 that time that those that dissented would have  
5 appropriate -- feel good about the reflection of  
6 their dissent, all right? In the document.

7 Then you would send it back to us.  
8 And then, in effect, Cynthia and I will oversee  
9 the final document.

10 When it is done, it will be done, it  
11 will be printed, and Cynthia and I will deliver  
12 it to someone.

13 I think that's what's going to  
14 happen next. So we'll all get together again  
15 and sign it? No, I don't think so.

16 MS. YOW: So we could make  
17 suggestions but that's what they are, and we will  
18 not dictate what actually the final version,  
19 because you and Cynthia as co-chairs will take  
20 care of adding --

21 Would the document that you send us,  
22 will it be confidential? Would it be the kind

1 of document that if we have an issue we'd like  
2 to tell you instead of someone else?

3 MS. PRICE: The document is  
4 confidential until it is handed to the Secretary.

5 And obviously 99.89 percent of it is  
6 known.

7 MR. LELAND: We're going to just stay  
8 here all day.

9 MS. FOUDY: No, we're not. And  
10 you've heard my last comment about this.

11 But I just feel like in the future  
12 that we should have added. I mean, this is too  
13 late, but we should have had another meeting to  
14 at least go over a final copy, and then -- I  
15 mean, there's going to be changes, and how much  
16 we have to say in that is going to be left to be  
17 determined, and I know we've gone over a lot of  
18 it before, but it just seems to me that the  
19 process is flawed a bit and that we don't have  
20 one more small step in there that says okay;  
21 we've done all these things; here's our final  
22 draft; let's look at it and sign off and we are

1 done.

2 MS. PRICE: But Julie, you do realize  
3 that you did vote or have consensus on every, or  
4 almost every aspect of the document except for  
5 the four pieces that you mentioned, and I think  
6 there was a question on the definition.

7 Anything that we signed off on today  
8 doesn't get changed.

9 MR. LELAND: I would -- and since we  
10 are all talking, I would agree with you. It  
11 would be nice to have, because we have done a lot  
12 of wordsmithing. It would be nice to make sure  
13 all the wordsmithing that was done really works  
14 and that the words work together the way we hoped  
15 they would and the thing flows, because I think  
16 we've done a lot of good work with this  
17 wordsmithing.

18 I think we are going to have to do  
19 it electronically from here. We're just going  
20 to have to get your comments back, and get them  
21 back and put them in binders.

22 But I agree with you: It would be



1 nice if the world were perfect, if we could all  
2 get together again here and go through it page  
3 by page and make one final set of drafts.

4 MS. de VARONA: Thank you.

5 (Off the record 1:25 p.m.)

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