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THE SECRETARY OF EDUCATION'S COMMISSION

ON

OPPORTUNITY IN ATHLETICS

SAN DIEGO TOWN HALL MEETING

WYNDHAM EMERALD PLAZA HOTEL

400 WEST BROADWAY

SAN DIEGO, CALIFORNIA 92101

THURSDAY, NOVEMBER 21, 2002

Reported By Lynne E. Woodward, CSR No. 10440, RPR
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I N D E X

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1 their microphones, we will transcribe the
2 proceedings, but we will not engage in dialogue
3 with the general public today.

4 So our invited speaker is Deborah
5 (Debbie) Corum. She is the Associate Commissioner
6 for Championships of the Southeastern Conference.
7 In this job she is responsible for oversight of 17
8 conference championships. Debbie is also the
9 Southwest conference, or Southeast Conference
10 Liaison for the Senior Women's Administrators. Her
11 role also includes supervision of officiating
12 programs for four women's sports and function as
13 the Title IX liaison for the Southeastern
14 Conference.

15 Prior to joining the SEC, Debbie was
16 Associate Athletic Director for Olympic sports at
17 Louisiana State University. There she supervised
18 17 varsity sports, including a selection of coaches
19 budget oversight. Debbie was head contact with
20 university attorneys in the president's office
21 regarding all Title IX issues at LSU, including
22 reporting to Judge Rebecca Doherty regarding
23 ongoing Title IX compliance issues.

24 Prior to being at LSU Debbie was
25 Assistant Athletic Director of Intercollegiate

1 Sports at Stanford University, a small school in
2 California.

3 (Laughter.)

4 MR. LELAND: Debbie, thank you for coming.

5 MS. CORUM: Thank you for allowing me to be
6 here and also for making the concession to let me
7 speak this morning. I appreciate that.

8 For the record, you indicated I'm
9 here from the Southeastern Conference, but my
10 comments today are not the opinions of the
11 Southeastern Conference, they're my personal
12 opinions.

13 I've actually been asked to address
14 this Commission regarding my involvement with the
15 Pederson vs. Louisiana State University case, and I
16 want to make it understood that my involvement, I
17 was hired at LSU after the lawsuit was underway,
18 and I was actually hired as part of the compliance
19 plan to come in and try to be sure that LSU was
20 currently under Title IX compliance and was
21 following the three-part test.

22 Obviously, as evidenced by what
23 you've been hearing over the last three months,
24 there's tremendous confusion regarding Title IX,
25 and I have to say until I became personally

1 involved in an LSU lawsuit, I had many of the same
2 misunderstandings that you all have been hearing
3 over the last three months.

4 However, once I was given the
5 responsibility on a daily basis to monitor LSU's
6 progress to meet -- I had to meet every six months
7 personally with the judge that was involved and I
8 had to do an annual report to the university
9 regarding Title IX progress, obviously I became a
10 little bit more familiar with Title IX law, and a
11 lot of the misunderstandings that I think you've
12 been hearing that I had misunderstandings about had
13 cleared up in my mind.

14 I started understanding that there
15 are three choices for compliance and that the
16 circuit courts have been very consistent in their
17 rulings with this three-part test. The law, as
18 it's written, does not condone the stereotypical
19 notion that girls and women are inherently less
20 interested in participating in sports or the
21 debatable statements that women will not walk on to
22 teams, therefore roster management and capping
23 men's teams are necessary for compliance.

24 So why is there so much confusion
25 about this law if the courts have been so clear and

1 the law, since 1979, has been stated the same way?

2 I agree with Secretary Paige that I
3 think the Department of Education, not by their own
4 efforts, but there's been a failure to provide
5 clear guidance to the public. Even though OCR
6 clarified their policies in 1996, there's still
7 confusion, and I am hopeful that this Commission
8 will be able to put, in a language that athletic
9 administrators such as myself can understand, what
10 OCR policies are. And I'm hopeful, I think if
11 nothing else comes out of this Commission, that
12 will be a real positive for Title IX.

13 Because it's easy to understand
14 numbers, I think a test two and test three are
15 misunderstood, because administrators can very
16 quickly understand whether the numbers are there or
17 not and they tend to use the proportionality prong.
18 That's led to even more confusion about test two
19 and test three.

20 I also think that there's special
21 interest groups on both sides that lobby so hard,
22 either for or against proportionality, that it's
23 given a more emphasis to proportionality and has
24 created even more confusion about test two and test
25 three.

1 So how do we bring clarification to
2 test two and test three? I'm here -- I'd like to
3 begin by talking about the LSU case, which was
4 compliance with test three of the three-prong test,
5 so that's what I'm going to focus on with you
6 today. I don't think you've heard too much about
7 test three.

8 So just to give you some background,
9 LSU was sued by women wanting to participate in
10 soccer and softball. The district court considered
11 proportionality an inappropriate standard, but then
12 focused on the women's interests, not the men's,
13 because the women were underrepresented. The
14 numbers weren't there, so the women were
15 underrepresented.

16 The court then found that LSU had not
17 added any women's sports in 14 years and there was
18 apparent interest by women in sports that were not
19 currently being offered. So the court applied the
20 three-part test and found that LSU was in violation
21 of Title IX.

22 The district court also decided that
23 the discrimination was not intentional. The part
24 about the LSU case that gets confusing is whether
25 LSU had intentional discrimination or not.

1 The plaintiffs appealed this decision
2 so that they could recover damages. There was a
3 Franklin versus Gwinnet County Public Schools case
4 which allows those who have been intentionally
5 discriminated against to recover damages, so there
6 was an appeal regarding whether this discrimination
7 was intentional or not.

8 In the appeal to the fifth circuit,
9 the circuit court disagreed with the lower court,
10 which was why you had to reverse the decision, and
11 said that the discrimination was intentional.

12 So the circuit court also confirmed
13 that there are three tests, and since the district
14 court found that LSU was in violation of Title IX,
15 the circuit court also agreed with that conclusion.

16 The circuit court also said that the
17 policy interpretation, which contains the
18 three-part test is, and I'll quote the circuit
19 court, the proper analytical framework for
20 assessing a Title IX claim. So the circuit court
21 did give credence to the three-part test, which is
22 often misunderstood when people are talking about
23 the LSU case. Because LSU basically, if you want
24 to say, lost the case, people are saying, well,
25 that means that the three-part test didn't hold up.

1 Well, the three-part test did, it's just that LSU
2 was not following it at the time of the lawsuit.
3 So that's the confusion oftentimes about the LSU
4 case.

5 Those who claim that proportionality
6 is the only test have used this over and over
7 again. It was upheld in the district court in
8 practice, and LSU's violation of Title IX was
9 confirmed in the circuit court. What's more, the
10 district court continued to monitor LSU's actions
11 for several years to make sure that they were
12 following the three-part test.

13 LSU added soccer during the course of
14 the case and then added softball in the 1996/'97
15 academic year. So LSU is meeting the three tests
16 and the courts, although not ruling formally,
17 acknowledged this. They did not instruct LSU to
18 add any more teams for women or to achieve
19 proportionality.

20 LSU is not alone in its compliance
21 with test three. The general accounting office
22 records show that two-thirds of the time,
23 two-thirds to three-quarters of the time
24 institutions are using test three to comply.

25 There's also, I think, another

1 confusion. We use the term, quote, safe harbor to
2 describe proportionality, and I think that's a
3 correct statement, but it's often used to
4 misinterpret the three-part test. It doesn't mean
5 that proportionality is the only harbor, and so
6 that's not what is meant by the term safe harbor.

7 If participation numbers are
8 reflective of the student enrollment, then there is
9 no underrepresentation. This proportionality is
10 the compliance method most easily understood, and I
11 think that's why there's a lot of emphasis on it.

12 If the numbers show an
13 underrepresentation, then what happens is, there is
14 an obligation for the institution to show that this
15 underrepresentation is not a result of
16 discrimination. So the obligation is for the
17 university to show that.

18 In essence, this is exactly what LSU
19 had to prove in their lawsuit. They did not have
20 female athletic participation percentage that
21 equalled its female student enrollment percentage,
22 and therefore, according to Title IX, they had to
23 show that this was not the result of
24 discrimination. Obviously the court of appeals
25 found that it was a result of discrimination.

1 It's important to note that the
2 Title IX audits, following this initial finding,
3 ruled that LSU's plan of compliance was effective
4 and that the university had taken steps to meet
5 test three, so therefore was in compliance with
6 Title IX following this.

7 One of the most common
8 misunderstandings that I realized existed while I
9 was going through this case was that people
10 really -- athletic administrators really don't
11 understand how to conduct test three. Simply
12 stated, if women are underrepresented, meaning that
13 they participate at a rate that is less than their
14 enrollment rate, then to meet test three they have
15 to meet three factors. So there's three factors of
16 the three-part test on test three. Number one,
17 there has to be sufficient interest to form a team;
18 number two, there has to be sufficient ability; and
19 number three, and this is the part I want to
20 emphasize because this is the part that you never
21 hear when people are talking about test three,
22 there has to be a sufficient number of
23 intercollegiate teams in which to compete within
24 the university's normal competitive region.

25 All three factors have to exist

1 before a sport has to be added. And once again, I
2 just want to emphasize that that sufficient
3 competition part of the test is what is usually
4 left out when you're hearing about test three.

5 Administrators are fearful that test
6 three means that if two women -- this is what you
7 hear all the time in my world -- if two women show
8 up and want to start a team, then the interest is
9 there and the women must be accommodated, so how do
10 I decide whether they're really supposed to start a
11 team or not? Well, they don't have to start a team
12 unless those three factors are met. So it's
13 inaccurate to say that just a small number of women
14 can come in and demand that we have a team and then
15 therefore I'm not in compliance with Title IX
16 anymore.

17 To begin with, there's got to be
18 enough women to form the team, but the part that is
19 really misunderstood is there has to be enough
20 competition for that team where the university
21 usually competes. I think a lot of the
22 institutions that may not be meeting test three
23 right now probably maybe only have one or two
24 sports for which there's sufficient competition
25 within their region.

1 I would suggest that a good way for
2 an institution to determine if it's meeting test
3 three would be to analyze the factors backwards, if
4 you will. Start by determining if there is enough
5 competition for a sport for women in the
6 competitive region, and then go down and figure out
7 if there's a sufficient interest and ability on
8 your campus. This can reduce the work of trying to
9 determine every sport in which women might be
10 interested. Narrow it down to just those sports
11 where there is sufficient competition and then try
12 to determine the women's interest in only those
13 sports.

14 If there's no other sports for which
15 sufficient competition exists in the competitive
16 region, then the institution is fully and
17 effectively accommodating the interests and ability
18 of the underrepresented sex and in compliance with
19 Title IX.

20 In LSU's compliance plan,
21 Division I institutions within a ten-state area,
22 which is LSU's normal competitive region, are
23 surveyed annually to determine if there are any
24 sports being offered that LSU does not offer. The
25 plan also includes surveys, interest surveys in the

1 area to show if there is sports -- if there is an
2 interest in that area for those sports that might
3 be being offered.

4 The plan calls for a review of club
5 teams and intramural programs, community and age
6 group and Olympic development programs, high school
7 participation and the student enrollment interest.

8 Another misunderstood fact about test
9 two and test three is that an institution can be in
10 compliance with either of these tests and still add
11 opportunities for men.

12 MR. LELAND: One more minute.

13 MS. CORUM: One minute? I got it.

14 This makes it difficult to reach
15 proportionality, if an institution decides later
16 that they want to go towards proportionality, but
17 test two and test three have no bearing on men's
18 opportunities at all.

19 Since 1979, Title IX compliance has
20 included this test, and there's twelve other areas
21 also. Meeting proportionality doesn't necessarily
22 mean you're in compliance if you're not meeting
23 with those treatment areas also.

24 I have two recommendations quickly.
25 One is to clarify that three-part test. Establish

1 the measurable standards that everyone understands.
2 Under test one, come up with a percentage
3 difference that's acceptable. Test two, establish
4 a time frame, a number of years that opportunities
5 need to be added for women. And in test three, get
6 instructions that identify that you should identify
7 competition first and then interest second.

8 My second recommendation I won't go
9 into was to fix the Equity, the EADA report, the
10 Equity in Athletics Disclosure Report, which I
11 talked to you all about in Atlanta, so I will
12 conclude my comments, and thank you very much for
13 having me.

14 MR. LELAND: Thank you.

15 (Applause.)

16 MR. LELAND: We passed all the commissioners
17 a document that we produced that had some
18 background materials. We gave it to you this
19 morning. Questions?

20 MR. REYNOLDS: During your discussion you
21 commented that the district court judge in the LSU
22 case concluded that the first prong was
23 inappropriate. Could you discuss that a little
24 more and talk about the rationale that the trial
25 court judge gave?

1 MS. CORUM: I really have a hard time
2 understand the rationale, to be honest with you,
3 because she said that using proportionality was
4 inappropriate, but then she ended up using the
5 three factors of the three-part test to decide
6 whether LSU was in compliance or not. So it's very
7 confusing, but I didn't want to leave that part out
8 because I thought it was necessary for you all to
9 know the facts. Then the circuit court came back
10 and applied the three-part test also.

11 MR. REYNOLDS: Yes, but, well, did the trial
12 court judge say that the problem with the
13 proportionality prong was that it was not related
14 to interest?

15 MS. CORUM: My understanding was she was
16 saying that it led to discrimination because it was
17 a quota based decision, and that's why she didn't
18 want to use -- she personally felt these were, you
19 know, her opinions was that proportionality was an
20 inappropriate tool to use for Title IX, then she
21 turned around and used it.

22 MR. REYNOLDS: She turned around and used
23 another prong.

24 MS. CORUM: Prong.

25 MR. REYNOLDS: She concluded that the first

1 prong was inappropriate because it was a quota and
2 then she turned to a prong that wasn't a quota.

3 MS. CORUM: Correct.

4 MR. REYNOLDS: Thank you.

5 MS. CORUM: But in her interpretation she
6 kept referring to the three-part test, so it is a
7 tad bit confusing.

8 MR. LELAND: Muffet?

9 MS. MCGRAW: Debbie, just so I have this
10 straight in my head, if you comply with prongs two
11 and three, you don't need to roster manage or cap
12 men's sports?

13 MS. CORUM: Oh, no, not at all. If you're
14 meeting the interest and ability of the women, it
15 has no relation with what you're doing with the
16 men. That's the wonderful thing about test two and
17 test three is it doesn't cut any opportunities for
18 anyone.

19 Title IX was supposed to be good for
20 everybody and not discriminate with any group at
21 all, and that's why it was so beautiful, in my
22 opinion it was so beautifully written, because you
23 can -- an institution can choose which of those
24 prongs to use, and if they have a high interest
25 level of men's sports on their campus, there's

1 no -- if they're using one of these other two
2 prongs, they don't need to discriminate.

3 MS. MCGRAW: On the three-part test, part
4 three of the three-part test, sufficient interest
5 in the intercollegiate opportunities in the area,
6 was there a number on that or how many games would
7 you need to play to have sufficient --

8 MS. CORUM: It really -- Muffet, it really
9 depends on the sport. Like in lacrosse you would
10 look at how many -- I'm familiar with lacrosse
11 because that's one of the things that we're looking
12 at in the SEC. You kind of look at how many
13 competitive -- how many competitions you need, you
14 know, to -- during the course of the season. And
15 let's say you need 17. Well, if you only have two
16 intercollegiate teams in that area, you don't have
17 enough teams to compete against. So you really
18 kind of have to analyze each sport and go in and
19 see what would you need to be able to conduct a
20 competitive environment.

21 MS. DE VARONA: Individuals who have had
22 their sports dropped, sometimes unceremoniously at
23 the last minute, and a lot of them are Olympic
24 related sports, if you could help clarify what's
25 happening and what would be your suggestions when a

1 school is looking at that issue.

2 MS. CORUM: I really believe that the reason
3 why we're seeing men's opportunities dropped is
4 because people do not understand that they only
5 have to choose one of these three prongs to be in
6 compliance, and there's such an emphasis on
7 proportionality because it's really easy. You
8 know, your numbers are there or they're not and you
9 can really quickly reach numbers by dropping or
10 adding or whatever. So I think that there's just
11 been a real overemphasis of the proportionality
12 prong.

13 One of the comments that I hear a lot
14 is that, okay, well, we're going to meet test three
15 until we can get to proportionality, and that might
16 be your institution's goal, that you want to get to
17 proportionality, but the thing is that you're not
18 in compliance by only halfway meeting test three or
19 halfway meeting test one. You have to be fully
20 complying with one of those tests, and it doesn't
21 really matter which one you're complying with, but
22 obviously if you don't have the numbers there, you
23 do have an underrepresentation of the -- you know,
24 of the women in this case.

25 So the institution does have an

1 obligation to show that it's not doing that, you
2 know, with discrimination.

3 MS. DE VARONA: Is there any language you
4 could -- because yesterday we talked about some due
5 diligence or some best practices when schools are
6 looking at their athletic -- how they provide
7 opportunities to the student athlete, and it is
8 relating to -- if it is related to cutting a team,
9 then women's teams have been cut, would you suggest
10 any language that should be looked at as it relates
11 to that option?

12 MS. CORUM: I'm sorry. Would I suggest
13 what?

14 MS. DE VARONA: Do you have any language you
15 might suggest as it relates to the dropping of
16 teams?

17 MS. CORUM: I just really, I really think
18 that the language -- what has happened is that the
19 Office of Civil Rights puts their -- like in 1996
20 when they did their policy interpretation,
21 everything is in a language that, I'm not saying
22 we're simple minded, but us athletic administrators
23 don't understand.

24 And going across the country, you
25 know, to LSU to the Southeastern Conference, I

1 mean, there's so many athletic administrators who
2 don't understand the language, and it's been very
3 clear since 1979 but it's not written in a way we
4 understand.

5 So really what I think this
6 Commission could do, so many of you are in
7 athletics, I really believe that what you could do
8 is take this language and reword it into a form
9 that we in athletics can comprehend and clear all
10 this -- you know, clear all this up. I really
11 think it's very simple, but we need it in a
12 language -- have you read the 1996 clarification?

13 MS. DE VARONA: (Nods.)

14 (Laughter.)

15 MS. CORUM: Yeah, I tried. You know, it's
16 very difficult, so we just need a clear language.

17 MR. LELAND: Okay, a couple more questions
18 here. Brian and then --

19 MR. JONES: Sure. Just a very quick
20 question. There's been a lot of talk about prong
21 three and about, you know, the measurement of
22 interest and use of surveys and that sort of thing.
23 I just wonder if you could give us your thoughts on
24 how it is that an institution can go about
25 measuring interest and what's the appropriate

1 universe to study, what are the appropriate
2 instruments for doing that.

3 MS. CORUM: I'll very quickly do that, and I
4 gave all of you LSU's plan just so you see one that
5 was approved by the courts. But very quickly, the
6 first thing you need to do is survey, what LSU is
7 doing, is survey your Division I institutions
8 within your competitive region, and say that
9 they're -- and try to find out if there's a sport
10 that's growing in your region or that is offered in
11 your region which you're not offering. And then
12 focus in on those sports and start surveying --
13 when I was at LSU, I had to annually or bi-annually
14 survey my Olympic development programs, the age
15 group, you know, see what's going on in the area
16 that is not -- you know, is there an interest in
17 that sport coming up in the area, what is happening
18 in the high schools. I monitored the high school
19 numbers to see what was growing of interest in the
20 high school.

21 And then every year we surveyed,
22 during the orientation program we surveyed freshmen
23 and transfer students for their interest in
24 athletics to see is there, you know, a growing
25 number of interest in some sport that we might not

1 be offering. So it was really wonderful because we
2 kept abreast of what was going out there.

3 Now, the discrimination would be if
4 there's something out there and we decide not to
5 add it, you know, then there would be
6 discrimination. But fortunately, at the time when
7 I was at LSU, nothing really started getting to
8 that point.

9 MR. LELAND: Debbie, clarification, you
10 didn't administer to the matriculated freshmen and
11 transfer students, sort of a general question,
12 would you like to participate in sports, you asked
13 them specifically about would you like to play on
14 this kind of team, didn't name the sport?

15 MS. CORUM: We asked them -- they basically
16 had to identify that they were interested in
17 playing a sport and at what level, whether it was
18 intercollegiate, club or intramural.

19 MR. LELAND: A particular sport, though?
20 Did you ask them was it rugby or bowling or --

21 MS. CORUM: We had sports listed and they
22 marked if they were interested. And then if they
23 did show an interest in participating, then we did
24 a follow-up survey with them just to really -- and
25 actually we had -- we conducted a meeting every

1 year for those people to come in and talk to us.

2 MR. LELAND: But it wasn't a general
3 interest survey, gee, are you interested --

4 MS. CORUM: Oh, no.

5 MR. LELAND: -- in playing sports when you
6 go to college, it was do you want to be on the
7 bowling team.

8 MS. CORUM: Correct.

9 MR. LELAND: If you do, what level, that
10 kind of thing.

11 MS. CORUM: Correct.

12 MR. LELAND: Okay. We've got two more
13 questions.

14 MS. YOW: I had one question but you caused
15 me to ask another one. It's your fault.

16 MS. COOPER: Just to make that clear it's
17 not going to be two minutes long.

18 MS. YOW: You're going to be so pleased.

19 Debbie, when you said the interest
20 survey, did it matter in the survey -- I mean, do I
21 have an interest in bowling. Did it matter what my
22 ability was to bowl, if I had any prior experience?

23 MS. CORUM: For the first survey all we were
24 doing was determining interest. All we did was
25 determine interest, and then we did the follow-up

1 survey if they indicated interest. There was a
2 follow-up survey that was much more intricate about
3 did you play in high school, you know, a little bit
4 more into what their ability was.

5 MS. YOW: Does ability matter?

6 MS. CORUM: Yes.

7 MS. YOW: So if I had not participated in
8 high school and I just checked I am interested in
9 bowling, that didn't equal you're going to add a
10 bowling team because I had an interest in bowling
11 but I had no experience?

12 MS. CORUM: Correct. If bowling had been a
13 sport that was really growing in our area and then
14 they showed an interest, then they would have been
15 invited to come and try out for the team. But the
16 ability is really, in my opinion, the third thing
17 to check for. Obviously if you've got an interest
18 there, you've got to have a tryout for the team and
19 then the ability is going to present itself.

20 MS. YOW: Well, that's not how I view
21 ability. I view ability as something that's proven
22 because you've participated in it for years, those
23 of us that have been participating --

24 MS. CORUM: I agree with you and that's why
25 I wouldn't make the team.

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(Laughter.)

MS. YOW: The real question, you referenced Brown, the decision against Brown in -- the court decision, and you referenced the fact that Brown did not meet any of the prongs, including three, interest and abilities, and my recollection and I guess what I am asking, what I remember about Brown was that it was a very, very broad based athletic program for women. So I guess my question to you is, how broad based was it and why do you think they didn't meet -- I mean, how much of an interest and ability do you need to meet before you get there?

MS. CORUM: You're going to get my opinion of Brown.

MS. YOW: That's just fine.

MS. CORUM: You know, I'm not a legal person here, but I'm sitting here at Brown as the associate athletic director (inaudible) because number one, I'm not meeting proportionality. Even though I have a broad based program, they were not meeting proportionality. I'm not meeting test two because they had not, even though they widened their base in the '70s, they hadn't done anything recently, so I was not adding -- I was not in a

1 continual adding of interests for women at Brown.
2 And then number three, they could not be meeting
3 number three because they had just dropped sports
4 that there was an obvious interest and competition
5 in the area.

6 So the whole time this Brown case was
7 going on, me in my little simple mind was going
8 this just doesn't make sense. They're not meeting
9 anything. So I think that's why, you know, Brown
10 didn't win their case. They really simply were not
11 meeting any part of the three-part test.

12 MR. LELAND: Okay. Debbie, if you don't
13 mind, we've got a couple of other questions.

14 MR. GRIFFITH: I'm confused, and you've
15 given a very good presentation. I'm certain that
16 the misunderstanding is mine.

17 You're describing the LSU compliance
18 plan that came out of the litigation, and out of
19 the LSU compliance plan you got court approval to
20 focus on the third prong. Right?

21 MS. CORUM: Yes.

22 MR. GRIFFITH: Because we have heard from a
23 number of witnesses, athletic directors in the last
24 couple of town hall meetings who say that when they
25 interact, not with the courts but with the OCR,

1 that that isn't the name of the game, that the OCR
2 doesn't seem to be interested in prongs two or
3 three, that the OCR seems to be interested in
4 substantial proportionality alone.

5 Now, are we getting different
6 experiences, because yours is through the court
7 system and theirs is dealing directly with the
8 Department of Education or what?

9 MS. CORUM: I would go to the GAO reports,
10 the General Accounting Office reports, and tell you
11 that, if three-quarters of the schools are using
12 test three to comply, my understanding is OCR is
13 not going after them, you know, with the
14 noncompliance. So I do think that there's some
15 misunderstanding there.

16 My understanding is the GAO reports,
17 and maybe you all could clear this up, are
18 accepted, you know, that those schools that are
19 complying that way are being accepted.

20 MR. REYNOLDS: Thanks for the opportunity to
21 clear this up. I've been hearing about these 74
22 cases, or however many cases that have been
23 referenced in that GAO report. The thing that we
24 have to remember is, it doesn't matter if every
25 last one of the cases that the GAO examined used

1 the third prong, it doesn't matter if those cases
2 didn't represent the cross section of the country.
3 It's just like trying to protect a presidential
4 election, it has to be a cross section, and the
5 problem with that analysis is the 74 cases did not
6 represent the cross section, so we can't draw an
7 inference that two-thirds of the university
8 communities are coming into compliance by prongs
9 two and three.

10 MS. CORUM: Okay.

11 MR. LELAND: Brian, did you have --

12 MR. JONES: Yeah, just again one more
13 follow-up on the interest question, just again
14 trying to get some clarification.

15 You said that one of the things you
16 do is monitor what's going on in the high schools,
17 and then you do the survey of the incoming freshmen
18 and transfers. So does the monitoring of the --
19 well, first I would be interested in just knowing,
20 you know, where you -- you know, what statistics
21 you look at at the high school level, and then just
22 to get some sense of how that information is used
23 when you start to measure interest. Does that --
24 do you use that information that you get from the
25 high schools to sort of determine what sports

1 you're going to list on that survey for the
2 freshmen and transfers?

3 MS. CORUM: Yes. That's one of the --
4 actually, to be honest, when we were starting this
5 out we put every sport we could possibly think of
6 on the interest survey. But obviously, from what
7 was going on in the high school and the ODP area,
8 in the area, it caused us to put a little bit
9 more -- you know, we had a special section in the
10 survey for those sports to try to draw that out a
11 little bit.

12 MR. JONES: So you're not using, if I
13 understand correctly, you're not using the high
14 school information to say, well, you know, X
15 percentage of boys and girls in high school are
16 interested in athletics and so therefore we'll
17 transfer, you know, that percentage to our
18 analysis, you're basically just looking to that to
19 see what sports people are interested in and then
20 in terms of the actual, you know, numbers, the
21 percentages to measure interest, you're getting
22 that from your freshmen and your transfers.

23 MS. CORUM: Correct.

24 MR. LELAND: Okay, Debbie, we've got two
25 more, Percy and then Julie.

1 MR. BATES: Just a very short question.

2 How is this ten-state region somehow
3 determined? Is that a set number?

4 MS. CORUM: It was an analysis of all the
5 other sports that LSU offered to see where they
6 compete, and that was a result of looking at
7 what -- to determine what LSU's normal competitive
8 region was. And obviously, most of those states
9 were the states that other SEC schools were
10 involved in because we were in that conference.

11 MR. BATES: But is that something that can
12 be transferred to other regions; in other words,
13 some sort of road map if one wanted to find out
14 what their basic region was?

15 MS. CORUM: I think you do an analysis of
16 the travel, of where your teams are traveling to
17 compete, and then do, you know, you do a percentage
18 of where are our teams traveling to compete and
19 that would give you the -- so it could be used to
20 do an analysis.

21 MR. BATES: Thank you.

22 MR. LELAND: Last question?

23 MS. FOU DY: I have a question relating to
24 when you talked about the GAO reports, and Jerry,
25 you mentioned that it doesn't truly represent a

1 cross section of the United States. And my
2 question, I think, is more to Jerry because I think
3 this is an important point here.

4 You know, we're looking at these
5 numbers as some of the most valid numbers out
6 there, and this is done by the government, by the
7 General Accounting Office, so are you saying that
8 these reports aren't valid in terms of what they're
9 presenting? I just think that's a bit confusing.

10 MR. REYNOLDS: What I'm saying is that it
11 was a limited universe that was examined, and that
12 is fine. We don't survey the entire United States
13 when we try to predict an election, but it is a
14 critical step. In order to be valid you have to
15 have a cross section. If you don't have a cross
16 section you have nothing. You don't have a basis
17 to draw an inference if you don't have a cross
18 section. And that's the problem with trying to
19 draw any inference from 74 cases that don't
20 represent a cross section.

21 MS. FOU DY: But I still think it's important
22 to note that many universities have used prong two
23 and three, even though we're not looking at maybe
24 necessarily the numbers we need to, but --

25 MR. REYNOLDS: That's true.

1 MS. FOU DY: -- the focus I think we have
2 heard many times over and over is there's not
3 enough guidance on prongs two and three.

4 MR. REYNOLDS: It's true, universities have
5 used all the prongs, but the issue that we're
6 trying to wrestle with is what percentage, and the
7 best numbers, the best analysis that we have that
8 we've depended on has been the GAO report, and I'm
9 suggesting that there may be a problem with relying
10 on those 74 cases unless we can assure ourselves
11 that it represents a cross section.

12 Another way to get at it is to look
13 at the incentives that are attached to each of the
14 prongs. Putting on my hat as an attorney, if the
15 president comes to me and asks, "Okay, Jerry, which
16 way do we go?" now, taking that approach, the fact
17 that there are three avenues that you can go down,
18 that's fine, and in some cases it may be
19 theoretical because you want to know what the
20 lawyer is, what type of advice the lawyer is going
21 to provide.

22 We are very conservative people, and
23 when you look at the -- look at prong one, and you
24 have something that's mechanistic, it's
25 mathematical, that's a slam dunk. You turn to

1 prong two and prong three and then you have to read
2 the tea leaves a little bit. Yes, you've added
3 teams for a number of years, but yeah, do you
4 remember that retrenchment back in the early '80s?
5 We didn't add any teams for seven years. Is that
6 too long to qualify for prong two? And there are
7 problems associated with prong two in terms of the
8 clarity and the same thing would hold true for
9 prong three.

10 MS. FOU DY: Right.

11 MR. REYNOLDS: And I agree with you, it's
12 clarity is what is needed.

13 MS. FOU DY: Right.

14 MR. REYNOLDS: And clarity has been needed
15 for a very long time. And we tried it back in 1996
16 but apparently we need to try again.

17 (Laughter.)

18 MR. LELAND: Okay.

19 MS. CORUM: Just a note, the plan of
20 compliance that I've given to you all, first, it's
21 in three parts. The first part is about adding
22 soccer and softball, the first two parts, but the
23 plan that I'm talking to you about begins around
24 page 81, so if you want to get rid of the first two
25 parts --

1 MR. LELAND: The first 80 pages.

2 (Laughter.)

3 MS. CORUM: I just wanted to give it all to
4 you.

5 MR. LELAND: Thank you very much.

6 MR. BATES: Thank you.

7 (Applause.)

8 MS. COOPER: Good morning. Welcome to the
9 second day in San Diego. I'm Cynthia Cooper, along
10 with Ted Leland I serve as co-chair as everyone
11 knows, so I'll just skip that part.

12 As Ted mentioned yesterday,
13 Wednesday's hearing marked the end of the listening
14 phase of our work. This morning is the start of
15 our deliberations. Ten weeks from tomorrow we must
16 submit our report to Secretary Paige. In order to
17 do so, we will need to act together to formulate
18 our findings, develop our recommendations, and
19 finalize our report.

20 Our timeline is this. According to
21 the timeline, I want to, just by show of hands, see
22 who can -- who can make December the 4th.

23 (Show of hands.)

24 MS. COOPER: Okay. And -- yes, you're fine.
25 And then who can make January 8th?

1 (Show of hands.)

2 MS. COOPER: Okay. So we're all set.

3 MS. SIMON: I will not make January.

4 MS. COOPER: Between December 5th --

5 MS. PRICE: They changed it to --

6 MS. YOW: I'm sorry, it's the 8th now?

7 MS. COOPER: Yeah, I think it's the 8th,

8 right.

9 MS. PRICE: Yeah, it is.

10 MS. COOPER: Next Friday, November 29th, we
11 will close the window for submission of written
12 public comments. I urge all members of the public
13 to submit comments by that time. If you need
14 instruction on how to submit comments, please see a
15 Commission staff member. There are several staff
16 who are seated at the table in the back of the room
17 also, if you need information on how to submit your
18 comments.

19 After -- over the next few days I
20 urge all commissioners to contact Commission staff
21 if they need background documents, articles, data,
22 or transcripts of our meetings. In other words, if
23 there are things you need to go, you need to go
24 about your work, ask for it now. If there are
25 things you need to go about your work, ask for it

1 now. I need to start writing my own opening
2 comments.

3 On December 4th the Commission will
4 meet in Philadelphia to identify our findings and
5 develop our recommendations. Between December 5th
6 and January 7th, the Commission staff and its
7 outside editor, Jay Diskey -- Jay, do you want to
8 come up here?

9 MR. DISKEY: Sure.

10 MS. COOPER: -- will work to pull together a
11 report based on the findings and recommendations we
12 developed in Philadelphia. On January 8th the
13 Commission will meet in Washington, D.C. to
14 finalize the draft report. Following -- following
15 the Washington meeting the Commission staff and our
16 editor will edit our work and attempt to move the
17 document toward a final published product. On
18 Friday, January 31st, we will submit our final
19 report to the Secretary and all fly to the Virgin
20 Islands. Just kidding.

21 (Laughter.)

22 MR. LELAND: At our own expense.

23 MS. COOPER: If there are any questions
24 about this timeline, we should discuss them now.
25 We are at the start of the final period or the

1 fourth quarter or the second half or whatever
2 sport. I knew you would have a question.

3 MS. FOU DY: I have a question.

4 So December 4th we get a copy of the
5 draft or we start talking about the draft?

6 MR. LELAND: I think we have a little bit
7 more detailed outline to go through a little bit
8 later in the opening statements. Could we get our
9 opening statements done first?

10 MS. FOU DY: Go ahead. I thought she just
11 opened it up for questions. You're absolutely
12 right.

13 MS. COOPER: I just said on my own opening
14 comments.

15 MS. FOU DY: Then I'm coming back to that
16 question.

17 MR. LELAND: Okay. You'll be the first.

18 MS. FOU DY: Okay.

19 MR. LELAND: Good morning. Thank you,
20 Cynthia.

21 As Cynthia indicated, we're now in
22 our deliberations phase in which we will develop
23 our report. The timeline for that phase is a very
24 important one. I feel all of us can leave here
25 today with a firm understanding of what we have to

1 do and the time frame in which we must do it.

2 To help us take the next step in our
3 process, we will discuss a variety of resources and
4 documents that the staff has prepared us and for
5 our briefing book. So let me -- I'm going to very
6 quickly walk you through the relevant documents and
7 then we're going to ask each of the particular
8 Department of Education staff person or consultant
9 who has prepared that document to appear in the
10 corner spot there and we'll go through each one of
11 the documents in more detail. So first I will
12 point them out to you and then we will go through
13 them in a more deliberative manner and give you
14 plenty of time to ask questions about those
15 particular documents.

16 The first document is -- excuse me,
17 is a detailed outline of the development and
18 production of our report. Our outside editor, Jay,
19 will walk us through this document at a later time.
20 That's tab P. Look at tab P in your book, you'll
21 see what -- and this will be the first item on the
22 agenda when I'm done with my opening statement.

23 The second document that we'll look
24 through is a section-by-section draft outline of
25 the report, so this isn't the timeline of the

1 report, this is the outline of the report, and Jay
2 will also walk us through that, and that is Q. If
3 you will all turn to tab Q, we'll have a very
4 detailed discussion and introduction to Q.

5 The next one, which I think is
6 vitally important, is a list of possible
7 recommendations that have been raised in our
8 meetings. The staff has begun to go through the
9 transcriptions, and this document is S, tab S.
10 This document hopefully lists all considerations or
11 recommendations that have been presented to the
12 Commission. This is a work in progress so we're
13 not completely done with it yet. That is tab S and
14 we'll have a staff person walk us through that in a
15 second. And please note that this is a list of
16 what we have heard for our consideration. This is
17 not an exhaustive list, it's not a draft list, it's
18 just the first of a work in progress, so it would
19 be really great if you could not put too much stock
20 in what's written on that piece of paper. It's
21 there just to show you what we want to do. We want
22 to make sure that we acknowledge every
23 recommendation given to us and that it was given
24 consideration by this Commission.

25 The next one is an administrative law

1 primer prepared by the general counsel's office. I
2 think this is U. Yes. This is at the request of
3 one of the commissioners who wanted to know sort of
4 how the laws work.

5 Next is a history of Title IX
6 prepared by the OCR and this is section V.

7 MS. KEEGAN: Wait, wait. That's U in my
8 book. Was that just me?

9 MR. LELAND: U is the administrative law
10 primer, should be.

11 MR. BATES: Look in the other book.

12 MS. PRICE: If it's not, it's the next one.

13 MR. LELAND: That's why we're doing this, to
14 make sure that everybody can identify these things
15 when we get to the more --

16 The history is V.

17 There is a comparison chart on sports
18 and emerging sports. This is the what's the
19 definition of a sport issue. This is section T,
20 and the staff has done a lot of work on that. I
21 don't expect anybody to understand this chart first
22 glance.

23 And then there's a section R, which
24 is -- and again, this is just a draft, it's a first
25 shot by the staff people to pull together some of

1 the -- this is sort of a draft outline maybe of the
2 reports given when we broke down into subcommittees
3 the second day in Chicago, tried to wrestle with
4 some arguments pro and con regarding the specific
5 questions that the Commission has been asked to
6 submit answers to to Secretary Paige.

7 So those are our -- hopefully we will
8 start with the first one of these and go through
9 them. Our ex officio members, Brian, Jerry and
10 Sally are here to help us answer questions
11 regarding this document.

12 One final note, we will not take
13 questions or comments again from the public on our
14 meeting today. Our discussion will be only among
15 the commissioners and the staff, and let's get
16 started. So Jay, if you could walk us through --
17 Julie, your question?

18 MS. FOU DY: I --

19 MR. LELAND: Do you want to start with him
20 or --

21 MS. FOU DY: Can I just talk about the
22 timetable?

23 MS. PRICE: Sure.

24 MS. FOU DY: Looking at the big picture of
25 things, the December 4th date and the January 7th

1 date, where is there -- because the January 7th --

2 MR. LELAND: 8th.

3 MS. FOU DY: 8th, sorry, January 8th, that is
4 pretty much one of the ones that -- it should be
5 pretty final, because then it's got to be done by
6 January 31st. Right? And I know that I've heard
7 it takes a long time to get it walked through. So
8 my question is, between December 4th and
9 January 8th, what are we doing in terms of
10 providing feedback? Because it's Christmas, it's
11 the holidays, there's no meeting in between those
12 two. We start December 4th with a very rough
13 draft, January 7th we're supposed to have pretty
14 much a final draft and there's no chances for
15 feedback, or opportunities for feedback.

16 MS. PRICE: I really -- I want Jay to do a
17 real focus and walkthrough, but in just generally
18 responding to that, Julie, we will be e-mailing,
19 phoning, talking back and forth as the work is in
20 progression, getting input constantly.

21 MS. FOU DY: Okay. Well, with all due
22 respect I've heard that once before when we were
23 supposed to do conference calls and all that. So
24 my concern is that we get so busy with the
25 holidays, and no one's fault, we get so busy and

1 overwhelmed with everything that there's no chance
2 as a group to give feedback, which I think is very
3 important in the building of this report.

4 MR. LELAND: Yeah, I think -- let me respond
5 over here. Percy had suggested to Cynthia and I
6 that maybe during that period of time from early
7 December to early January that we have a
8 subcommittee of the commissioners be appointed to
9 help with the editing and the writing so there
10 would be a sort of a more focal point, and in my
11 conversations with Percy, we decided that let's
12 wait and see how the process goes before we decide
13 to do something, but there are other commissioners
14 that have brought up the same question you have
15 just now, so I think it's on all our minds. Let's
16 just sort of listen to this.

17 My suggestion would be, if it's okay
18 with you, let's just listen to the time frame and
19 keep in our minds that I don't think any of us are
20 going to be real comfortable, being the
21 commissioners, just saying okay, we're going to
22 meet in Philadelphia and then the next time we see
23 the thing it's all done. But let's find out what
24 the staff has planned and then we can respond.
25 Jay?

1 MR. DISKEY: Great, thank you.

2 As Ted made reference to tab P is a
3 report development outline. There's a number of
4 tasks on this outline that have already been
5 discussed, and many of them have been completed,
6 for example, compilation of findings, in some
7 cases --

8 MS. COOPER: Can you move your microphone
9 closer?

10 MR. DISKEY: Sure, I'm sorry. And
11 individual recommendations. So again, some of the
12 bulleted items I will just breeze through very
13 quickly. You're about to hear a lot more of them
14 over the course of the next few days or the hour.

15 How this timetable came about was, in
16 October, looking at the number of things that it
17 takes to get a report finished. We all know that
18 January 31st is the deadline for submitting this,
19 and what does it take? We have to give thought to
20 what type of style would this be written in, what
21 sort of inventorial duties are involved, who would
22 be doing some of the writing. I have been hired as
23 an outside editor to help the Commission write
24 this, Commission staff pull it together.

25 Obviously there are times where there

1 may be instances of a commissioner wanting to
2 submit sections or portions of a section. I was
3 recently the editor of the White House Commission
4 on Excellence in Special Education, and in that
5 instance, for example, one of the commissioners
6 wrote a chapter on special education findings,
7 which was very important to that document.

8 We have also taken steps to work with
9 the OPA, the Office of Public Affairs, and the U.S.
10 Department of Education to begin looking toward a
11 design of the report. OPA has developed a
12 statement of work which they're putting out for
13 outside bid for a designer or a design firm. I've
14 been asked a number of times since coming on board
15 as a consultant, what should this look like? How
16 long will it be? Those are all Commission
17 decisions.

18 Obviously the report is a Commission
19 product. It's not a product of the designer, it's
20 not a product of the outside editor.

21 Commission reports can take all sorts
22 of shapes and forms. Debbie asked me to bring just
23 a few for show and tell. Here is one that Sally
24 was involved in, actually we were both involved in
25 on the Hill, College Costs Commission was completed

1 in August 1997 and made recommendations in January
2 1998. It was also on a very quick time frame like
3 yours, six months. Basically this a 64-page
4 report. Do you want to see it? This report, by
5 the way, has not stopped college costs from rising.

6 (Laughter.)

7 MS. YOW: A disclaimer.

8 MR. DISKEY: There's other ways of going
9 about this. That's a 64-page report and it has a
10 large appendix that is also available, a technical
11 report so to speak.

12 A Nation at Risk, which was a very
13 important commission which celebrates its 20th
14 anniversary next year. This, too, is, I believe,
15 64, 68, 64 pages. The report had a lot to say and
16 it didn't need 600 pages to do it.

17 A question I was asked last night
18 over dinner was gee, will this thing be hundreds of
19 pages? Again, that's up to you, but you don't need
20 necessarily 600 pages to say a lot.

21 There's other reports that have made
22 tremendous impact. This is not a Commission
23 report, but it's the Third International
24 Mathematics and Science Center which came out in
25 1996, it had a huge impact on math and science

1 education at the K-12 level. It, too, is about 80
2 pages, but it also had large technical reports.

3 The White House Commission on Special
4 Ed, which I previously made reference to, is about
5 a 96-page report. However, in the back of the
6 report is a CD ROM holding all of the transcripts
7 of the hearings. It's a very good idea, quite
8 frankly. It's one I recommend. A lot of people
9 want that sort of record without having big thick
10 volumes on their shelf. Moreover, it is of
11 particular use to those who are visually impaired.
12 They can put the CD ROM on their machine, blow the
13 view up format 200 percent and start to look at the
14 transcripts. We also put the copy of the report
15 itself.

16 I'm not in the general counsel's
17 office and can't say necessarily what sort of
18 administrative requirements there are for archiving
19 materials, but the CD ROM certainly as part of the
20 package helps.

21 So again, those are some of the
22 various sizes and formats. No one has said that
23 this has to be 60 pages or 16 pages or 600 pages,
24 but we are moving forward to try to determine a
25 look and a feel for the report.

1 In terms of when we might have a page
2 design to look at, we hope relatively soon. Again,
3 I believe OPA is getting bids to do that.

4 Now, this takes me to and I'll -- I'm
5 jumping ahead of myself a little bit, but after
6 your January 8th meeting when the report is
7 finalized, that's when the design firm kicks into
8 high gear and will need anywhere between about five
9 and fifteen business days to take your report,
10 which is headed to the Secretary on the 31st, and
11 lay it out in page design. It will then go to GPO.

12 I cannot imagine a scenario in which
13 you will be submitting a final published report to
14 the Secretary on January 31st. The time frame is
15 too short. Again, after January 8th there will
16 probably be several weeks of editing and polishing
17 and then you will be submitting, I imagine, a word
18 document to the Secretary. Once that is finalized,
19 then the designer then kicks into high gear and the
20 firm does its work and it goes to GPO. GPO can go
21 relatively fast. It has a national reputation for
22 going very slow, but it's improved its time quite
23 remarkably.

24 It's also hitting GPO, however, at a
25 very interesting time, which is January and

1 February. This is when the president puts out his
2 budget, OME has huge documents, it's a very, very
3 busy time for GPO. I'm not telling you now that
4 that will be a huge roadblock, but those are the
5 type of things that get in the mix.

6 I have a few other documents here if
7 you want to look at. Again, we will determine, you
8 know, or you will determine obviously, based on
9 your recommendations, how long this will be and
10 that may lead us to decisions about the size.

11 That too, the timetable, there was a
12 question as to whether there will be a draft to
13 look at in Philadelphia. Quite frankly, I did not
14 prepare a draft. There is no draft floating
15 around. It's my understanding that Philadelphia is
16 where you will come together and finalize
17 our -- come close to finalizing the findings and
18 recommendations.

19 There is no writing that has taken
20 place at this point. From my point of view there
21 cannot be. The Commission has to provide that
22 architecture, so to speak, findings and
23 recommendations, and then a draft will be built up
24 from those findings and recommendations over the
25 course of basically a month during the holidays,

1 obviously. It's not a great time of the year, but
2 it's the timetable that's been handed us.

3 So again, from December 5th, the day
4 after Philadelphia, to January 7th is when this
5 draft is built.

6 Are there any questions regarding the
7 timetable and the look and feel of the report?
8 I've thrown a lot at you very quickly.

9 MR. LELAND: Yeah. I've got a question.
10 Just like all the timetables I do at Stanford we're
11 behind already, but November 13th, there's some
12 dates here that we've missed. Seems like we're
13 behind.

14 MR. DISKEY: Yeah, and some of these
15 November 13th regard review of findings. This may
16 be the way I am phrasing this and the way I wrote
17 it on October 25th. Those findings you began
18 compiling in Colorado Springs and you made
19 reference there to a list of findings. Now, from
20 my point of view you're accomplishing this at
21 San Diego. You're taking a look at the findings.
22 I don't know what process you will use an hour from
23 now to go through those findings, etc.

24 This timeline is in need of some
25 revision. It was written in late October. We are

1 in a phase starting today where every day counts a
2 great deal in order for the -- in order for the
3 Commission to meet this deadline.

4 MR. LELAND: Let me ask you just a couple of
5 questions then --

6 MR. DISKEY: Sure.

7 MR. LELAND: -- I think that might reflect
8 concerns. I think there's a, some of the
9 commissioners are very concerned that as soon as
10 the open access laws under which we function, that
11 the minute we start putting anything in writing
12 regarding findings, they become politicized or they
13 become issues, and sort of who is going to be the
14 first person to write one of those things down that
15 might become public and what kind of oversight do
16 commissioners have regarding that and what kind of
17 oversight do commissioners have, have they had on
18 other commissions that you've worked with? We're
19 all afraid that somebody will go away and they are
20 going to write a finding that is not necessarily
21 agreed to by the rest of us and causes us to react
22 or something publicly.

23 MR. DISKEY: Right. Without sounding
24 preachy, ultimately it goes back, I believe, to
25 personal responsibility, each commissioner take

1 personal responsibility for their own documents,
2 keeping them to themselves, discussing them only
3 with the Commission itself.

4 When I was a newspaper reporter I
5 loved all this openness. Now I'm obviously on the
6 other side of it. Invariably, and I hate to say
7 it, but things will probably indeed leak out, so to
8 speak. In effect we have two meetings coming up in
9 which you will be discussing much of this report in
10 public, and there's not anything any of us can do
11 about it. But obviously the staff has gone to
12 great pains to keep things with the Commission.
13 But again, it does go back to that. There's no
14 magic bullet, the system simply needs to be one of
15 personal responsibility amongst staff and --

16 MR. LELAND: Yeah, and I was really just --
17 it was really just a small part about what might
18 actually leak, but who is actually going to write
19 it down the first time. Just I can think of two or
20 three, you know, issues that have been debated back
21 and forth in front of this Commission where we have
22 heard testimony that's clearly not -- there's no --
23 among the people testifying there's not a
24 consensus, but we probably need to have a finding
25 in that area.

1 MR. DISKEY: Uh-huh.

2 MR. LELAND: Who writes that down the first
3 time? Do you guys sit down and look at all the
4 testimony and take your best shot at it, and how
5 does that work?

6 MR. DISKEY: It can work any number of ways
7 in terms of developing a finding. We need to hear
8 as staff what findings you have come to, bits of
9 evidence that you feel support those findings. You
10 could say gee, I heard so and so at the Colorado
11 Springs meeting say that. We will need to
12 determine the level at which we will evidence these
13 findings, whether it's only done in notes, or
14 whether we don't -- or whether it's done directly
15 in the report, but yes, a process needs to be --
16 that sort of process needs to be developed,
17 particularly for Philadelphia in terms of, not only
18 findings, but recommendations.

19 MR. LELAND: It almost sounds like you're
20 asking for some guidance from the Commission
21 regarding how -- you heard Julie's concern and it's
22 reflected in other people's concerns, you know, and
23 we need to leave here today with some guidance
24 regarding that.

25 MR. DISKEY: Yeah, we do. This is a joint

1 effort, and the Commission report is clearly a
2 product of the Commission. I think that if the
3 Commission staff and myself had produced any sort
4 of draft today or shown up in Philadelphia with a
5 draft, it would probably not necessarily be a good
6 situation.

7 These are things that the Commission
8 needs to act on in some way. Commissions I've been
9 involved in in the past do it in a very painstaking
10 manner, begin to develop those things, sections of
11 the report are filled up around those things. In
12 some cases the various commissioner may come
13 forward and want to submit part of a section. It's
14 a lot like making sausage, I hate to say.

15 MS. YOW: Can we develop a number of the
16 findings today? I mean, as an example, maybe one
17 of the findings would be to look for something that
18 we can all agree on. That no one -- one of the
19 findings is that, I mean, don't hold me to my
20 wording, but that 30 years after the enactment of
21 the law, no institution has been -- has been
22 penalized in the ultimate way, which was supposedly
23 the lack of federal funds. That could be a
24 finding, couldn't it? And then there could be a
25 recommendation related to whether or not that

1 standard should stay as is or should be modified?

2 Is that what --

3 MR. DISKEY: Without commenting directly on
4 the finding, I would think so. A finding would be
5 facts that you've heard, opinions that you've
6 heard. No piece of evidence that --

7 MS. YOW: That's a fact. That's why I chose
8 that one because it was --

9 MS. DE VARONA: I think, to a person, no one
10 has objected to Title IX as law. I haven't heard
11 anyone say that --

12 MS. YOW: The concept.

13 MS. DE VARONA: The concept of Title IX --

14 MS. YOW: There's two.

15 MS. DE VARONA: Two.

16 MR. LELAND: Let me back up. I was looking
17 at it from --

18 MS. KEEGAN: We're lapsing into content.

19 (Laughter.)

20 MR. LELAND: Slow down, you guys. Slow
21 down.

22 MS. KEEGAN: Deep breath.

23 MR. LELAND: It's time for me to step in.

24 I think the concept that the staff
25 and Cynthia and I have sort of come up with is at

1 the end of today, as we walk through these
2 documents, and we're on the first one of eight so
3 we've got to get moving to the next one, the idea
4 is at the end we were going to talk about asking
5 the people, all of us commissioners to spend some
6 time at home over the next week or two weeks or
7 whatever it is and get to the staff some of what
8 you think should be the findings.

9 MS. COOPER: Well, I agree that we should at
10 least start the dialogue here and have some sort of
11 discussions here and then come up with, if, you
12 know, you find on the plane back home, oh God, I
13 remember, then you can submit that also.

14 MS. FOU DY: My concern is that we start -- I
15 mean, I totally agree we start the dialogue now,
16 but is that when we find -- when we come to these
17 findings, there's no -- seems to me, and I mean, my
18 learning curve is very large in the process of how
19 commissions work and how you finish a report, but
20 it seems to me there's a missing step there in
21 terms of how do we debate these findings? We all
22 come from different perspectives and different
23 environments and different opinions and --

24 MS. COOPER: And I think we will do some of
25 that debating in Philadelphia.

1 MS. FOU DY: But that's supposedly when we
2 are still talking about findings, and that process
3 is going to continue, and to me I'm just struggling
4 with the concept that there's no forum for us to
5 get together as a group. I mean, we all can submit
6 e-mails, but January 8th comes and that's supposed
7 to be pretty final, yet we haven't discussed it as
8 a group, which I think is very important because
9 everyone comes from such different perspectives.

10 MS. PRICE: Regarding findings in general,
11 and this is very much in general, not specific
12 about what we would do, but my relationship with
13 findings always comes from legislation. In the
14 beginning -- working on the Hill for 16 years, in
15 the beginning generally it will say findings, and
16 they're informative types of facts. Sometimes
17 they're conflicting facts. You might say, like for
18 example, if I'm just off the cuff thinking about
19 something regarding men's sports being cut, some
20 say it's for finances, some say it's for Title IX,
21 others say it's a combination. Those could all be
22 findings, but findings are sort of the basis from
23 which you then go to your recommendations and the
24 actions that you want to take regarding them.

25 So if you start the process of

1 thinking about findings here today and then take
2 the time -- because you'll need more than just
3 today to really process this and come up with the
4 findings that you think are appropriate, to pull,
5 to get everybody's input on what the findings are,
6 pull those together by the 4th of December to work
7 through that type of document, you know. So the
8 Commission as a whole would be going through those
9 findings to say, you know, these are the important
10 findings for the report, this report.

11 And some will be directed by the
12 questions, but -- and then from those findings, you
13 know, you can expound a little, in fact, but from
14 those findings then you develop, you know,
15 therefore all these things, you know, are true or
16 have been said to be true, and you develop your
17 recommendations. Is that somewhat helpful?

18 MS. FOU DY: It just seems to me that there
19 should be a draft that we are looking at on
20 December 4th, if that's our last time that we are
21 all going to get together before --

22 MS. COOPER: I totally agree.

23 MS. FOU DY: Jay just said we won't have a
24 draft, so I just feel like we're missing a step
25 there in terms of we haven't decided what we want

1 to put in the draft yet, so we can't have a draft
2 by December 4th, yet there's no other meeting
3 that --

4 MS. COOPER: Okay. Wait, wait. I think
5 we're saying that we're going to discuss it
6 here and have some type of draft to look at
7 December 4th, and then between now and
8 December 4th, if there's anything, any other
9 findings --

10 MS. YOW: You're going to have a draft of
11 findings.

12 MS. COOPER: Right.

13 MS. YOW: I was going to say, there will be
14 a draft of findings, there will not be a draft of
15 recommendations. We will use the draft of findings
16 as a document to initiate further discussion. We
17 might modify some findings, we will talk about
18 recommendations.

19 MS. COOPER: Yes. You're my hero.

20 (Laughter.)

21 MR. DISKEY: I cannot imagine a scenario in
22 which you would be looking at a draft of the entire
23 report. I can certainly imagine a scenario in
24 which you might be looking at drafts of findings,
25 the length of which I have no idea, a page or a

1 hundred pages, I don't know, but findings that I
2 believe were developed the second day at Colorado
3 Springs. You've seen a list of those under one of
4 the tabs, and then again the process which the
5 co-chairs and Debbie made reference to, leave here
6 with the idea of working on your own, developing
7 findings, submitting those, staff putting those
8 together, putting them on paper and bringing them
9 to Philadelphia. But again, only a draft of
10 findings, certainly not a draft of the entire
11 report with recommendations.

12 MR. BATES: Ted, I guess I'm beginning to
13 wonder, as I listen to our discussion, how long we
14 might want to wait before thinking about, I guess,
15 a subcommittee to work jointly with the writers,
16 because even a summary of findings, it seems to me,
17 is going to have some view that is going to have to
18 be imposed upon it. So I guess I'm thinking that
19 we ought to, soon rather than later, begin to think
20 about a subcommittee that might be in on this from
21 the very beginning, so that by the time the 8th
22 comes, that we've already had some work on this.

23 MS. YOW: I think part of the disconnect is
24 this: When you say findings, we automatically go
25 to some kind of a concept of findings equal truth.

1 They don't equal truth as, you know, ultimate
2 truth. They're findings. It's kind of a report of
3 what we've heard. It doesn't mean that we agree
4 with every one of the findings. If this person
5 said in this group there seems to be a large number
6 of people who think X, this group thinks Y and this
7 group thinks Z, but it doesn't equal that us, as a
8 group, think this X is right, Y is right or Z is
9 right.

10 MR. DISKEY: And Debbie made reference to
11 the fact, I believe, that you may very well develop
12 some conflicting or competing, let's say, findings.
13 And it certainly seems to be the case, without
14 addressing it in a substantive sort of way.
15 Obviously you're hearing competing findings in some
16 areas, so you may very well have those, and the
17 report may certainly contain those.

18 MR. LELAND: Let me step in for a second. I
19 want us to move along. We have to move this thing,
20 but there seems to be sort of a consensus, because
21 I think your questions reflect a concern a lot of
22 people have. It seems to me that the process for
23 the findings is sort of as follows; have a
24 discussion, a preliminary discussion today. People
25 will then be asked to submit what they think are

1 findings, at least in their professional opinion,
2 to the office. The office will do some kind of
3 compendium in a super draft, a preliminary super
4 draft, we'll see that in December and then we can
5 hone it down there, and we'll just delay Percy's
6 suggestion about do we want that oversight by the
7 Commission from now as this process winds through
8 the next three weeks or do we want it starting in
9 December. But I'd like to postpone that until
10 10:30 or 11:30 so we can get through some more. We
11 still need to be informed about what our required
12 task is here.

13 MR. BATES: I'm willing to wait.

14 MR. LELAND: Thank you, sir.

15 MR. SLIVE: Ted, on page 2 of tab P there's
16 a -- towards the bottom it says January 2 with a
17 question mark. I have some concerns about that
18 particular piece of the process. It talks about
19 submitting for review a draft report. I don't
20 understand why we would be submitting for review a
21 draft report. I would assume we submit the report.

22 MR. DISKEY: This is January 2nd? I can't
23 imagine working within this timetable.

24 MR. LELAND: But is it common? If we read
25 this --

1 MR. DISKEY: In terms of an informative, and
2 Debbie is kept, obviously, the Secretary's office
3 in the White House, apprised all the way along of,
4 gee, what do they need to know when she's asked how
5 is the Commission -- how did the Commission go in
6 San Diego? Where do you stand at this point? I'm
7 sure that there will be that information, but in
8 terms of a draft report --

9 MR. SLIVE: It says for review.

10 MS. PRICE: Yeah. Review not for editing,
11 for them to review to see what there is going. If,
12 in the report, the Commission -- I mean, the only
13 way there would be an edit, and I'm doing this off
14 the top of my head, if per chance the Commission
15 made a recommendation that is not under the purview
16 of the Department of Education, you know, and the
17 report, you need to provide this for review, the
18 Secretary's office says this is a fine
19 recommendation but I can't do anything about it,
20 that would be an important thing for the Commission
21 to know and to then reworking that so that it
22 doesn't bite into the entity that it affects.

23 But it's not saying that we're
24 submitting this document to the Secretary's office
25 for them now to edit it as they see fit and give it

1 back to us with their edits. This is for their
2 review for them understand what is going on in the
3 process of this.

4 MR. REYNOLDS: An example would be, several
5 of the presenters have suggested that we would
6 eliminate -- well, exempt football from Title IX.
7 That's not in the statute. It does not provide an
8 exemption for any sport. So that would be an
9 example whether, if we were to receive a
10 recommendation, something that we just can't do, we
11 don't have statutory authority, then I would think
12 that, rather than permit the Commission to go down
13 that road, we would just point out that --

14 MR. SLIVE: Jerry, it would seem to me that
15 a draft report could be reviewed by legal counsel
16 for issues that relate to legal matters, and that
17 would be sufficient rather than the way it's
18 outlined in this document.

19 MR. REYNOLDS: Okay.

20 MS. PRICE: Okay.

21 MS. SIMON: I want to go back to something
22 that Debbie mentioned. It seems to me that if on
23 December 4th we are trying to decide what the
24 findings are, if, as you interpret findings, it's
25 this group said this and this group said this and

1 I agree. We will look at that and see how we can
2 work that out.

3 MS. PRICE: We're under no constraints
4 for -- no limitations by the number of meetings.

5 MS. COOPER: Yeah, these are --

6 MS. PRICE: If we need to add a meeting, we
7 can certainly do that.

8 MS. FOUDY: Just lengthen the meeting.

9 MS. PRICE: It's going to be all day.

10 MR. LELAND: Okay. Let's -- we have to do a
11 little bit of parliamentary procedure. Let's try
12 to organize the conversation, if we can. It's not
13 easy, but if we can.

14 I think Mike sort of got his question
15 answered. I would take Julie's suggestion of maybe
16 extending the length of the meeting. Let's just
17 hold that until later on today and we'll act on
18 that as we are -- we'll put that on our list with
19 Percy's suggestion about some kind of editing team
20 or something. Let's see where we get today before
21 we decide whether we need to do that or not.

22 Donna?

23 MS. DE VARONA: I was going to make a
24 personal plea that if we do do an extra day, it
25 would be on the 3rd.

1 MR. LELAND: Okay. Let's wait until --

2 MS. DE VARONA: That's fine.

3 MR. LELAND: Any other questions on Q? I
4 hope the staff heard the concern that Mike Slive
5 expressed regarding the issue of, you know, the
6 independence of the Commission versus the view of
7 the senior staff.

8 MR. SLIVE: I revised it, if this is
9 satisfactory to the Commission, submit the draft
10 report for legal review to the Secretary's office
11 and ex-officio members, strike the White House and
12 put a period after members.

13 MR. LELAND: Okay. Any other concerns?

14 Okay, let's move on to our next,
15 which is section Q. Jay is going to walk us
16 through this again, and this is an outline of what
17 the draft, what the report might look like.

18 MR. DISKEY: Thank you, Ted. And this
19 should only take a few minutes.

20 This is a draft outline of the final
21 report. This is only a starting point, and one
22 suggestion to organize the report. Let me say
23 first of all, first of all, there are things in the
24 front end of the report and the back end of the
25 report, there are some items you more or less have

1 to do. For example, a letter of transmittal from
2 the co-chairs. It's simply what you do with the
3 Commission. Letter of transmittal to Secretary
4 Paige and executive summary.

5 At the back end there are items such
6 as a historical record, more or less where are you
7 now. A list of meetings and a list of witnesses
8 and presenters, not necessarily all the names of
9 the individuals who made public comment, but
10 certainly the expert witnesses who sat on panels.
11 These things it references in those, a copy of the
12 charter, etc., all form part of the historical
13 record and must be included in the report. So
14 that's the form in the vacuum.

15 What comes in the middle, what I
16 suggest appear are seven sections that follow a
17 very simple organizational structure, which is one
18 section per each of the seven questions that you
19 are to review and the section of recommendations.
20 Again, it's a starting point. We all may want to
21 discuss a different organizational scheme, but the
22 seven questions certainly provides you with a very
23 easy organizational structure, and that's what this
24 outline is built off from.

25 MR. LELAND: Questions? Concerns?

1 MS. COOPER: Good. All right. Next?

2 MR. LELAND: I've got one. Okay, I hate to
3 keep slowing us down.

4 I don't see an area in here where the
5 findings, the sort of passion and concern we've
6 heard from the public and from our invited
7 presenters is, in terms of the overall issue of the
8 quality in athletics, quality of opportunity,
9 etc. in athletics. Where is that? Is it possible
10 to have sort of a long finding preamble of some --

11 MR. DISKEY: It's certainly possible. In
12 fact, there was a preface in here, and like most
13 prefaces they can, in some cases be no more than
14 two paragraphs, sometimes they can be several pages
15 long and can really set the tone for the report.
16 Other reports accomplish it through the inclusion
17 of sidebars, pullout quotes, people telling their
18 stories, a key piece of testimony that you believe
19 is important. Again, so there's any number of ways
20 to go about that.

21 MR. LELAND: I think that most of the
22 commissioners, at least in conversation may have
23 said, you know, the questions are fine and we will
24 do our duty and answer them, but many of the real
25 issues we've heard from the public and from our

1 invited presenters aren't sort of assumed
2 underneath the rubric of those questions, and
3 there's bigger issues about the impact of Title IX
4 on people's lives, etc. that I think many
5 commissioners might feel compelled to make sure
6 that's part of the report.

7 MS. SIMON: On this same point, I think when
8 we talk about chapter one, major issue, maybe we
9 should say major issues, because I don't think the
10 way this major issue is stated really captures what
11 we're talking about. I think we need a better way
12 of stating what the major issue is, and maybe you
13 need to have it plural, maybe major issues. This
14 doesn't capture much of the essence of our town
15 hall meetings.

16 MR. LELAND: These are the mandated
17 questions.

18 MS. SIMON: Yeah. It's not well --

19 MR. LELAND: Yeah, I don't know. That's
20 frankly -- Jay, I don't want to prescribe it, but I
21 just think that the passion and the clarity of the
22 people's presentations needs to be somehow captured
23 in this.

24 MR. DISKEY: Sure.

25 MS. FOU DY: Along with what Rita is saying,

1 what you're asking, I wasn't at the Colorado
2 Springs meeting, but reading the transcripts, the
3 question came up, you guys dealt with everyone's
4 different perspectives on the different questions,
5 and Brian mentioned, you know, whether we can take
6 a look at questions and thinking it was fine and if
7 we needed to clarify some. I know there was a lot
8 of discussion on that. When is that going to
9 happen where we talk about the wordings of the
10 questions maybe and if we're going to change them
11 and --

12 MR. LELAND: Let me make sure that we --
13 Brian, can we tinker with the questions?

14 MR. JONES: Well, I mean, I think we need to
15 answer the questions that are put, you know, in the
16 charter. Those are -- that's not an exclusive list
17 of questions, but what I was talking about in
18 Colorado Springs was, to the extent, you know,
19 there was some discussion about whether the
20 questions were clear and what our interpretation of
21 the questions was. So I think we do have some
22 latitude to be able to address these questions, to
23 sort of define what we interpret the question to be
24 asking, but I do think that we need to begin by
25 trying to answer --

1 MR. LELAND: We are required by law.

2 MS. FOU DY: Yeah, no question. But if we
3 need to add some clarity -- and I guess my question
4 is when are we going to do that, because that is
5 going to give us the structure of the report.

6 MS. SIMON: Seems to me --

7 MR. LELAND: Well --

8 MS. SIMON: Seems to me that that major
9 issue, are Title IX standards for assessing equal
10 opportunity in athletics working to promote equal
11 opportunities for the female athletes, is what the
12 issue is.

13 MS. DE VARONA: I think it's the
14 underrepresented sex, if we're looking further. I
15 mean, the law does not expressly define the gender,
16 it says underrepresented sex or you can't
17 discriminate on the basis of sex.

18 MS. SIMON: But nobody was worried about
19 whether males were being given equal opportunities.

20 MS. DE VARONA: According to Mr. Kravitz or
21 whatever his name is, he's worried that in 2012
22 that there is going to be a concern that males may
23 be the underrepresented sex.

24 MS. SIMON: But that's not what the major
25 issue is.

1 MR. LELAND: Are you specifically saying
2 that this is -- that this first question, which is
3 the question we were given, should be reworked and
4 really --

5 MS. SIMON: Yes.

6 MR. LELAND: -- and really captures the
7 essence of discussions that we have had?

8 MS. DE VARONA: I agree. I agree with you.

9 MR. GRIFFITH: I disagree.

10 MR. LELAND: Well, let me --

11 MR. BATES: I --

12 MR. GRIFFITH: I'm sorry.

13 MR. BATES: I guess I had originally raised
14 the issue because, as I read the question I had
15 some concerns, and I think we did get an answer
16 that said answer the questions we were given. I
17 guess I'm comfortable answering these questions as
18 long as I'm convinced that we have another way to
19 answer things that the questions may not, you know,
20 include. So from that sense I think we shouldn't
21 get now into, you know, sort of the words making up
22 each of the questions. I think we can go with them
23 as they are, but I think the issue is we need to
24 also be able to answer things that these questions
25 may or may not include.

1 MR. LELAND: Okay, thank you Percy. Tom,
2 did you have --

3 MR. GRIFFITH: That's fine. I don't think
4 we have the authority to create new questions.
5 This is the question as posed to us, we can respond
6 to it one way or another. I think, like Brian and
7 Percy said, if there are other issues we'd like to
8 address, I think we can. But we are not a free
9 floating legislative body that's free to do
10 whatever it wants to do. We could come up with a
11 plan for Northern Iowa. If we can get through
12 Title IX we could probably --

13 (Laughter.)

14 MS. YOW: That might be easier.

15 MR. GRIFFITH: But I think we're bound by
16 the questions.

17 MS. COOPER: I agree.

18 MS. DE VARONA: But are we saying we're
19 bound by the questions but we can deal with
20 whatever this might imply in a different statement?

21 MR. LELAND: Yeah.

22 MS. DE VARONA: Because I think this
23 question does imply, are we treating athletes
24 fairly in our colleges, regardless of gender, and
25 then we get into these other things we wanted to

1 address anyway, we wanted to address all the way
2 along. So is it possible we can add that as a --

3 MR. LELAND: Well, sure.

4 MS. DE VARONA: I think one is a legal issue
5 and one is a resource issue and how that's
6 included.

7 MR. LELAND: What I'm hearing as the
8 consensus is that, I think we're all after the same
9 thing clearly, and consensus might be that we go
10 ahead and answer these questions as they're written
11 and then -- but we also free ourselves to tackle
12 issues surrounding opportunities in athletics in a
13 different part of the report in a different way
14 still to be determined.

15 MS. DE VARONA: Because I didn't bring this
16 up in Colorado, how this was framed.

17 MR. JONES: That makes sense, what you just
18 said, except that I -- when we respond to
19 questions, I think we ought to, you know, sort of
20 make clear what our collective understanding of the
21 questions is.

22 MR. LELAND: Right.

23 MR. JONES: I just don't want to have a
24 situation where you've got -- you know, people are
25 reading different things into the questions, so we

1 may think there's a consensus where there is none,
2 coming at it from different angles.

3 MR. LELAND: We're still talking about the
4 format of the report here. Any other --

5 MS. FOU DY: No.

6 MR. LELAND: Okay. I think that should get
7 us through. You're off for a moment, Jay.

8 Now we'll turn to S, which is the
9 third, and I've -- I'll bring this before you. I
10 don't -- you know, I saw these as potential, or
11 these are suggested recommendations, I guess.
12 These are recommendations that the staff has pulled
13 from the transcripts.

14 I think there's no need for any
15 testimony or any staff input. My feeling is we
16 ought to make sure that you take a real look at
17 this and make sure that your thoughts and
18 recommendations and the recommendations -- this is
19 not meant to be an exhaustive list. It's sort of
20 to show you what we need to do to all of the
21 testimony that we have heard, to make sure that we
22 acknowledge the recommendations that we've heard
23 and then we can, at least when we get them in front
24 of us in Philadelphia, then we can begin narrowing
25 down to those we think are the most important and

1 those that can achieve the consensus of some kind.

2 Okay?

3 Any other -- I mean, what I did when
4 I saw this last night is I just started writing
5 down other recommendations that I heard that
6 weren't here, so I know there's a lot of them that
7 aren't here, but Debbie and the staff aren't saying
8 this is an exhaustive list, nor a complete list.
9 So if you can work on that, I think it's very
10 important.

11 Next let's go to U, or might be V in
12 some people's books, Lisa.

13 MS. KEEGAN: I fixed my book.

14 MR. LELAND: Thank you. The administrative
15 law primer. Is there any questions -- this was
16 done sort of at the request of us, and is there any
17 information in there that you don't have that you'd
18 like to see, any question that you wanted to ask
19 that is not answered?

20 MR. JONES: Ted, one note on this point.
21 Let me just clarify in case it's not clear to you
22 folks that, you know, there's a definition there of
23 rule making, and then what you have below there is
24 notice of intent to regulate the NPRM final regs.
25 I just want to make clear that those are elements

1 of the rule making process. Those are those three
2 documents, those three documents that you have
3 there, the two notes is the final regs. Those are
4 part of the rule making process, if that's not
5 clear from the face of the document.

6 MR. LELAND: Let me ask, you know, Brian, a
7 naive question here. Is part of the issue -- I
8 don't think we have heard any testimony, that I can
9 recollect, from any of our invited presenters or
10 any of the general public regarding, you know,
11 miscategorization or faulty process as it relates
12 to these particular processes here in Title IX. Is
13 there -- are there issues on --

14 MR. JONES: Well, I mean, the one place
15 where that issue comes up is in the wrestlers'
16 lawsuit. They argued that, in publishing the
17 policy interpretation and the '96 clarification
18 that the appropriate procedures weren't followed,
19 but, you know, but again, I don't know that that's
20 anything that needs to bog us down. I think what I
21 just wanted to make clear here was just to be able
22 to appreciate what the distinction is, the
23 practical, legal distinction is. But in terms of
24 our process, you know, we have got this litigation,
25 you know, we have taken a position in the

1 litigation and that is what it is.

2 MR. LELAND: Okay. Any other thoughts on
3 this one? Hearing none, seeing none, let's go on
4 to section V, which is the history prepared by the
5 OCR of Title IX. I think this is just overheads
6 from the first discussion that we had, I think, in
7 Washington, D.C. The first time -- was it
8 Washington we got that?

9 MS. PRICE: (Nods.)

10 MR. LELAND: The first time we pulled
11 ourselves together such as this. Any thoughts or
12 comments? Any questions? We've also received some
13 other pretty nice histories. Yes.

14 MS. FOU DY: Didn't we receive a letter of
15 clarification?

16 MS. PRICE: Uh-huh.

17 MR. LELAND: Yes.

18 MS. FOU DY: Received the --

19 MS. PRICE: In the original notebook we got
20 at the first meeting.

21 MS. FOU DY: That was all there?

22 MS. PRICE: Yeah.

23 MS. FOU DY: And the clarification.

24 MS. PRICE: If you need it again, we can
25 send it to you again. Just let me know.

1 MS. FOU DY: Yeah.

2 MR. JONES: It's also on the Website.

3 MS. PRICE: Yeah.

4 MR. LELAND: And I was chastised earlier for
5 going off, so I'll apologize. But I do think that,
6 I hope somewhere on CD or something that the huge
7 volume of information that we received is, at least
8 one copy is kept and is accessible to the public,
9 but if I were a scholar or a student or interested
10 in the history and the effects of this statute and
11 the different opinions regarding it, I would look
12 at the materials we have gotten. I don't know if
13 there any -- first of all, they're about that high.
14 But also I think they're really broad based and
15 interesting and I just hope we can keep them
16 somewhere.

17 MR. DISKEY: On that note, Ted, with the
18 White House Commission on Special Education there
19 was a decision made initially to include a lot of
20 so-called outside reports and put them on the CD
21 ROM. However, a decision eventually was made not
22 to do that for two reasons. One was that, in the
23 pursuit of various permissions, it got to be very
24 labor intensive to track down the various attorneys
25 and publications directors and so forth.

1 MR. LELAND: Okay.

2 MR. DISKEY: And then once we realized some
3 reports were going on and some reports weren't, the
4 issue became to what extent is this White House
5 Commission endorsing those reports. When it failed
6 to capture the entire universe to put them on
7 there, it was a different matter.

8 MR. LELAND: Okay.

9 MR. DISKEY: That's not to say the
10 Commission might choose to put some reports on
11 there. Obviously all the public comments that
12 you've received are part of the transcripts, which
13 would be part of that CD ROM, whatever record you
14 choose.

15 MR. LELAND: We just received such rich
16 written materials from different advocacy
17 organizations and different people who have
18 testified, there's really an incredible amount of
19 good stuff in there.

20 MR. DISKEY: You can also accomplish some of
21 that in terms of a simple list of references.

22 MS. PRICE: And every document, that's why
23 whenever we pass a document out to the
24 commissioners we need to make sure we get a copy
25 for the Commission, all of us, because that is part

1 of the record of this Commission. So while it may
2 not be put on a CD ROM, it's all an aspect of the
3 record and it's crucial for the record of the
4 Commission that we do have -- every document will
5 be included.

6 MR. LELAND: All right, I apologize.
7 Hearing nothing more on section V, section T is a
8 comparison chart of sports and emerging sports.
9 Any -- is Bill here?

10 MS. PRICE: Bill?

11 MR. LELAND: Let's try to do this quickly so
12 we can make sure we get to the discussion phase
13 quickly.

14 MS. PRICE: Let me just introduce you to
15 Bill Duncan. He is the legal counsel and
16 Commission staff. And we sent a letter to OCR,
17 USOC, NCAA, NJCAA, NAIA, and the National
18 Federation of High Schools and asked them how they
19 defined sport, what is their definition, what
20 sports did they find emerging sports. We all sent
21 identical letters.

22 The answers to the letters were far
23 broader than we ever expected. I mean, there's not
24 a lot of relationship from one to the other. But
25 Bill took all of that, put it in a chart and tried

1 to make a little paragraph before each question
2 analyzing it, and he can -- it was a big task.

3 MR. LELAND: I think this is pertinent to
4 one of the questions we have been asked to answer,
5 directly pertinent. So any -- Bill, do you want
6 to --

7 MR. DUNCAN: I just think it's probably
8 self-explanatory, but the thing worth noting is
9 that the -- fortunately each box is the verbatim
10 response, so there was no editing on my part. I
11 just cut and pasted. It wasn't that easy, but
12 close to just cut and pasted that. Any questions?

13 MR. LELAND: Okay. Any questions on this?
14 Yes.

15 MS. KEEGAN: I want to be careful here. Are
16 you asking do we understand the columns and the way
17 this is -- the columns and the way this has been
18 set up, or is this an opportunity for us to discuss
19 what is in the little boxes or not, because so far
20 we have not lapsed into content except by accident,
21 and I'm okay with that. But --

22 (Laughter.)

23 MS. KEEGAN: I'm serious. I mean, because
24 reading this some of this, it is so clear to me why
25 we are up a creek. Some of them said nothing,

1 nothing. Others list sports. So these are being
2 used as a bases, but I don't understand how any
3 athletic director is doing what they're doing given
4 OCR's definition of a sport, because they really
5 don't define sports except that to say those are
6 the things that we count to comply with Title IX.
7 That's what that says. And it's impossible.

8 So that's a rant and it's content,
9 kind of.

10 (Laughter.)

11 MS. KEEGAN: But what are you asking if we
12 have questions about? What are you asking us if we
13 have questions about? What do you want us to do
14 with this, give you feedback or talk about it or
15 just look at it?

16 MS. FOU DY: Can I comment on that? Graham
17 is not here, but this is our -- Cynthia and I's
18 subcommittee was this question about emerging
19 sports in bowling and cheerleading, and one of the
20 things we talked about was different definitions of
21 all the different groups, and I went back and did
22 some more research on that specifically, and one of
23 the things OCR came up with was, they went to all
24 the different groups and said what are your
25 definitions and let's create something that can be

1 binding for all the different groups.

2 And so their criteria is pretty
3 straightforward about what a sport is, and some of
4 it says, well, the selection of the team is based
5 upon factors related primarily to athletic ability,
6 whether the activity is sponsored for the primary
7 purpose of preparing for and engaging in athletic
8 competition against other similar teams, whether
9 the team prepares for and engages in competition
10 the same way as other teams' athletic program. It
11 goes on to list the criteria for a sport, and
12 thinking about it more with the volume of things we
13 need to get to, why are we trying to reinvent the
14 wheel, I guess is my question. Why are we looking
15 at all these things. OCR has done the work.
16 They've created a definition.

17 MS. KEEGAN: Where is that in here? Where
18 is what you're holding?

19 MS. FOU DY: This is something that I pulled
20 off that report that was given to us on their
21 criteria, and we can get it from, I'm sure, someone
22 from the office.

23 MS. KEEGAN: But what about --

24 MS. FOU DY: It says, "In determining whether
25 an activity is a sport, OCR will consider these

1 criteria," and it lists them, and that came from a
2 letter, Department of Education Office for Civil
3 Rights letter on definition of varsity sport, given
4 to someone that was inquiring about this. And
5 my -- I guess my response is that we have a
6 definition, we have these criteria listed by the
7 OCR that they use. Let's move forward, because I
8 don't think we have the time to reinvent a
9 definition for sport and I don't think that's
10 really the purpose of this Commission.

11 MS. KEEGAN: Nope.

12 MS. COOPER: Well, I guess if we are going
13 to ever get to discussing the findings, etc. etc.,
14 and some of the content that we all want to
15 discuss, that we need to get through this, and
16 these things here can be reviewed by each and every
17 one of us, and if you have any questions then send
18 it e-mail.

19 MR. LELAND: I think, Julie, we'll want to
20 postpone your question. I'm not sure there is --
21 there's no motion on the floor to change anything.

22 MS. FOU DY: Right.

23 MR. LELAND: Right now the status quo is the
24 status quo. The people that eventually have to
25 answer that question now have more information on

1 which to answer it, and I think that's where I
2 would leave it.

3 MS. KEEGAN: So for example, I'm supposed to
4 say because sport -- or you want me to somehow take
5 these, all of us as commissioners, and comment on
6 whether that might be contributing to confusion
7 or -- no.

8 MR. LELAND: I think we're giving this to
9 you as -- I think the staff is giving it to us as
10 background information per our request to try to
11 clear up confusion, which Julie says they're not
12 all confusing, it seems pretty reasonable to her.

13 MS. FOU DY: I was trying to explain that the
14 catalyst behind this was us saying last time in our
15 subcommittee, what are the definitions.

16 MS. KEEGAN: I just --

17 MS. FOU DY: That's why --

18 MS. KEEGAN: This may be tedious, but I am,
19 just by nature, sport is a denominator in all sorts
20 of calculations, and if we don't know how you
21 define it, how will we --

22 MS. FOU DY: I'm saying we do.

23 MS. KEEGAN: Emerging sport, if that's what
24 I'm looking at, and this column goes on and on and
25 on --

1 MS. COOPER: But that's just one question.
2 If you turn to other questions --

3 MS. KEEGAN: I've got them all. I looked at
4 all the pages. What I'm saying is, okay, so I
5 should stop talking and we should basically say, if
6 we think this might be a problem, we should
7 probably mention that.

8 MR. LELAND: Correct.

9 MS. KEEGAN: Okay, fine.

10 MR. LELAND: It could come out as --

11 MS. KEEGAN: It's a huge problem.

12 MR. LELAND: It could come out as a finding
13 or it could come out as a recommendation. I don't
14 think we're quite in that deliberation phase, but
15 it was a good question.

16 MS. KEEGAN: Thank you, Ted. I feel
17 validated.

18 MR. LELAND: Anything else on that one?
19 Thank you. All right, let's go on to section R,
20 which is -- this is a -- and I think what we're
21 asking you to do here is read through this.

22 MR. GRIFFITH: What document is this?

23 MR. LELAND: Outline of contrasting
24 arguments identified in town hall meetings,
25 September 26, 2002. Has everybody found it? I

1 think you can see what the staff has done here is
2 taken the questions that were required to be
3 answered and tried to answer competing arguments,
4 tried to sort of take a stance on each end of the
5 spectrum is how you might answer that. And this
6 was mostly from that subcommittee meeting we had
7 the second day and Julie referred to earlier.

8 I don't think there's any need to act
9 on this right now, other than, I guess, this is
10 sort of a preliminary answer to some of the issues
11 that are going to be surrounding the questions that
12 we know we're going to have to answer, and you
13 might want to review those so that when we actually
14 have to draft the answers, we have got the drafts
15 of your opinion and what the other opinions might
16 be.

17 MS. SIMON: There's a typo in 22, should be
18 as had.

19 MS. COOPER: Just make that correction.

20 MR. LELAND: As has. Is there any other
21 questions on that? And what we said earlier, next
22 thing we were going to do was talk about, we still
23 have some questions from Julie and Percy that we
24 need to answer, but we wanted to talk about the
25 process of pulling together the findings and the

1 recommendations. So that's our hope. So you want
2 to pass that around now?

3 MS. PRICE: Sure.

4 MR. LELAND: Give all the commissioners a
5 chance to read it.

6 So the public can try to follow along
7 with this rather disjointed discussion this morning
8 and give it -- the commissioners time to read this,
9 let me read it as quickly as I can. It's from
10 Cynthia and I to members of the Commission
11 regarding development of findings and
12 recommendations.

13 In two weeks time you will convene in
14 Philadelphia to begin to develop the Commission's
15 final report. In recent weeks, the Commission and
16 its staff have engaged in various activities
17 designed to set the stage for the Philadelphia
18 meeting. At the Colorado Springs meeting the
19 Commission spent several hours discussing findings.
20 In addition, staff has inventoried the various
21 recommendations that have been brought before the
22 Commission. That was tab S.

23 While these activities have helped
24 give the Commission a head start in developing the
25 final report, I suggest that each Commissioner --

1 we suggest that each Commissioner take the time to
2 prepare their own list of potential findings for
3 discussion on December 4th. Your starting point
4 for this list should be the seven questions
5 Secretary Paige asked the Commission to review.
6 Tab on that.

7 For each of the seven questions,
8 please list the findings you believe emerged during
9 the course of the Commission's work for each of the
10 seven questions. Findings should describe the
11 facts established by testimony and/or opinions
12 presented to the Commission. Findings are brief
13 statements of fact without necessary explanation.
14 It is possible for two findings to conflict with
15 each other and still both be valid findings.

16 Any recommendations the Commission
17 will include in the final report will have their
18 basis on the findings the Commission develops. To
19 that end, it would be helpful if you would review
20 the list of recommendations under tab S in your
21 binder and add any you have heard or read from the
22 testimony or submissions to the Commission. You
23 can also add recommendations that are not yet
24 presented but which should be considered.

25 Please let me know if you have any

1 questions about this exercise. Please let us know.
2 And again, it's an important one that we believe
3 will further facilitate our work.

4 So I hope that answers some of the
5 questions and gives a little bit of a look at the
6 process.

7 Now let's open up for discussion.

8 MR. BATES: We will bring these to the
9 meeting on the 4th or will there be some summary of
10 this before the 4th? I guess there's a question
11 about where we are.

12 MS. PRICE: If you have an opportunity to
13 get those to me by e-mail, I will consolidate the
14 list. I won't eliminate any, there may be some
15 duplication from different commissioners, we'll
16 make note of that, but if at all possible, and I'll
17 do it the day before we go so everybody has an
18 opportunity to get their findings in, just make a
19 consolidated list.

20 If we get there and in the meantime
21 you've thought of other findings, it is not an
22 exclusive list, we'll add to it, so it's not the
23 in-concrete final document, it will be a working
24 document to work from. Is that helpful?

25 MS. FOU DY: Is that separate from the

1 questions we're going to address? We're going to
2 do like a list of findings that are just like facts
3 that we --

4 MS. PRICE: As Ted mentioned --

5 MR. LELAND: Go ahead.

6 MS. PRICE: I need the mike. I'm confused.

7 Where Jay pointed out, possibly in
8 the preface you can go through all kinds of
9 findings, and there will be findings most likely
10 directed to each of the questions. They may fall
11 in place there, they may fall in place someplace
12 else. You may have a whole -- I mean, me being a
13 Senate brat, findings always precede all of the
14 legislation. They sort of lay some groundwork for
15 why particular senators decided to pursue this
16 piece of legislation. That's kind of the tool.

17 For us they're a different type of a
18 tool. Here we can say, you know, here are the
19 findings we have heard, these things. Could be in
20 the preface, they could be placed throughout the
21 document. Some of that then will determine
22 support. Is that helpful?

23 MR. GRIFFITH: It's my understanding of what
24 the purpose of findings is is to say, this is what
25 we've learned. We have learned this stuff, we have

1 learned that some people believe this, some people
2 believe that. This is what we have learned and
3 that's separate and apart from, now that we've
4 learned that, here is what we think we ought to do.
5 Is that too simple? That's how I view it.

6 MR. LELAND: Let's talk about the process,
7 because I think that this is one of the things we
8 really want to make sure you guys are comfortable
9 with.

10 MS. COOPER: Are we saying that we're going
11 to have findings in relation to the questions and
12 then recommendations in relation to the findings?

13 MS. PRICE: We may.

14 MS. COOPER: Or are we just going to have a
15 section where we have findings and recommendations
16 to those findings and then in a separate section
17 have the questions, findings, and particular
18 recommendations?

19 MS. PRICE: Cynthia, it could be laid out
20 exactly like that, it could be laid out as well
21 where you deal with the questions, you state the
22 findings, do some discussion on those questions,
23 move to the next question, and at the end of the
24 document you have your list of recommendations you
25 made from all that. It really is your choice of

1 how you lay that out, you know, what logically
2 seems to make sense, which probably will surface
3 when you've got this list and you've had some
4 thoughts on recommendations. Because while you may
5 answer some of the questions, you may not have a
6 recommendation addressing that specific question.
7 The facts may be sufficient, they may not be
8 sufficient. So you can lay it out how you see fit.

9 MR. SLIVE: Ted, I think I'm having a
10 difficult time understanding what we're talking
11 about in terms of findings. In other forums, a
12 finding of fact is usually the resolution of
13 conflicting evidence on a point. My sense is here
14 that we aren't talking about that, that Tom has
15 found some different language which is that we have
16 learned from the various folks who have testified
17 about positions and information that has been
18 provided to us.

19 Are we going to reiterate in some
20 fashion this information and call it findings and
21 then make recommendations to what we think ought to
22 happen in the future? Are we supposed to take all
23 the statistical data that was thrown at us
24 yesterday and reconcile and make it -- that's what
25 a finding is. So I'm just having a little trouble

1 understanding what we're doing.

2 MS. SIMON: I agree.

3 MR. LELAND: Jay, can somebody who --

4 MR. REYNOLDS: It may be helpful if we moved
5 away from the term findings. It seems to me,
6 listening to what Tom just said, that what we're
7 talking about doing is identifying the competing
8 arguments, and I don't know what term people would
9 feel comfortable with, but just identifying the
10 competing arguments, and then I guess we have to
11 start the process of deciding which of the
12 arguments or a particular area this Commission
13 supports or embraces. That's my two cents.

14 MS. DE VARONA: I think points of view, just
15 competing points of view, maybe that's a --

16 MR. LELAND: I think we have to acknowledge
17 there can be some areas maybe where there's not
18 competing points of view.

19 MS. DE VARONA: Right, yes.

20 MR. LELAND: I guess, you know, are we
21 comfortable saying that we are not going to use
22 the -- Mike's legal definition of findings, that it
23 means something different to us, it means what Tom
24 said, which basically we're telling the government
25 this is what we heard, you know, this is what we

1 found out there?

2 MS. KEEGAN: In which case, Ted, we would
3 rip this up?

4 MR. LELAND: Rip what up?

5 MS. KEEGAN: What you just handed us and we
6 would throw this away and we would be using Tom's
7 definition?

8 MS. PRICE: (Inaudible) definition.

9 MS. KEEGAN: No, Tom's definition -- I'm
10 sorry, but --

11 MS. COOPER: It's because we are going every
12 which way.

13 MS. KEEGAN: It says findings -- it says
14 list the findings you believe has emerged during
15 the course of the work through testimony and public
16 comment or a review of literature or research.
17 Findings describe facts established by testimony
18 and/or opinions. So they're not the same, they
19 describe facts established. Findings are brief
20 statements of fact without explanation.

21 MR. LELAND: Says facts or opinions. Right?
22 If you read that sentence it says facts or
23 opinions. And we can pick apart this memo all we
24 want, but the reality is --

25 MS. KEEGAN: But you know, Ted, it's really

1 important. It's really important. It says
2 findings describe facts that are established by
3 testimony.

4 MR. LELAND: Findings describe facts
5 (inaudible). There's a second part to the
6 sentence.

7 MS. KEEGAN: There is, which is why we have
8 to get back into breaking down the sentences in the
9 grammar. But let's do this: Findings should
10 describe facts which are established by, this is
11 the next part of the sentence, testimony and/or
12 opinions, but -- and truly, they are different
13 things, and I just think we're going to keep coming
14 back to this and we're going to be worried that
15 whatever we find somehow floats away or somebody is
16 going to feel like they are pointing to things --

17 MR. LELAND: Well, what is your suggestion?

18 MS. KEEGAN: I don't know, Ted. If you want
19 us to just list what people said, that's --

20 MR. LELAND: I don't want you to do that. I
21 want to get a consensus here, and I'm looking for
22 solutions. This isn't a dictatorship.

23 MS. KEEGAN: No, no, no.

24 MR. LELAND: Mike?

25 MR. SLIVE: This may be out a little bit of

1 what we're talking about. For example, we've got
2 to decide, for example, possibly, whether
3 cheerleading is a sport or not. That's going to
4 require some fact. We have to make a decision
5 about the definition of a sport. If we adopt a
6 certain definition, cheerleading may not be a sport
7 for the purposes of our discussion.

8 We may also want to talk about other
9 kinds of things more general in nature in which it
10 is more appropriate to list a series of different
11 issues that relate to the recommendations. So, you
12 know, we can debate it, you know, in the
13 atmosphere, but I think it will come together when
14 we start talking about specific things.

15 MS. SIMON: In any social science journal,
16 when you come to the section on findings, what
17 you're talking about are the results of the study,
18 and if you're going to use the term findings, it
19 seems to me you take Tom's statement to the next
20 step. You say the various advocacy groups argue
21 this point, argue that point, the data on one
22 report says this, the data in the other report says
23 this, but our findings are, and you make a
24 conclusion. A finding is a conclusion. You may
25 describe how you got to that conclusion, you

1 should, but the findings sections are conclusions
2 about what the Commission is accepting. That's how
3 the term findings is usually used.

4 MS. COOPER: Please, Tom.

5 MR. GRIFFITH: The word finding is used in
6 different settings. Mike has talked about findings
7 of fact in a judicial setting, and all I was trying
8 to say is, that's not us. We haven't had sworn
9 testimony, you know, we haven't had the type of
10 information that is presented to a court upon which
11 a court can make a finding. I don't think it's the
12 same as a finding in a social science journal. I
13 don't think we have the expertise to do that. We
14 certainly don't have the resources or the time to
15 do that.

16 I think this is more akin to a
17 legislative finding, which is neither of those.
18 It's simply describing again what we have learned.
19 I don't think we're going to be able to get at some
20 of the ultimate, empirical questions that we'd like
21 to be able to get at. We're not going to be able
22 to resolve conflicts between statistics, so I don't
23 think we're required to go to the ultimate step.

24 Now, if we can, undoubtedly there are
25 probably going to be some things that we can arrive

1 at. Let me give you a finding that I think we can
2 get to. That would be Title IX is good.

3 MS. SIMON: Tom, it seems to me that if, as
4 a Commission, we can't decide what the findings
5 are, then what have we been doing?

6 MR. GRIFFITH: All I suggest is you're using
7 findings in a way that's a little too restrictive
8 of what we're supposed to be about.

9 MR. BATES: Question. I know we're having
10 trouble trying to define finding, but I guess I do
11 hope that, as we think about our process, that we
12 will get beyond sort of describing what we have
13 learned. It seems to me we have to go beyond that,
14 and I'm not sure whether that's December 4th or
15 some other date, but I do think we do need to
16 figure out, as we move along the line, when are we
17 going to at least move to that next step.

18 MR. LELAND: Which is?

19 MR. BATES: Which is to look at what we've
20 heard, what we've found, and what sense we make of
21 this, and I don't know that it has to be in
22 judicial or legislative, but I do think we need at
23 some point to talk about what does all this mean at
24 this point in time to this Commission that needs to
25 be passed on to --

1 MR. GRIFFITH: I don't disagree with that.

2 MR. BATES: Okay.

3 MR. GRIFFITH: In fact, I agree with that.

4 MR. LELAND: Would you say that's part of
5 the findings?

6 (Laughter.)

7 MR. LELAND: No, that's not a -- would
8 you -- would you see what he just said as part of
9 the findings? Percy.

10 MR. GRIFFITH: Sure. Yeah, I didn't mean to
11 suggest that findings are simply a recitation of
12 everything that's been said to us. There are some
13 things that we have learned that we can reach
14 consensus on about what has happened.

15 MS. SIMON: We have to take positions.

16 MS. KEEGAN: But we are listing sort of
17 opinions and facts or opinions, which is
18 basically --

19 MR. LELAND: Yeah, I think, you know, not
20 the whole -- but I read that sentence to be facts
21 or opinions. Other people may read this
22 differently. So whatever I can do to edit that,
23 instead of throwing the whole memo out, let's just
24 edit that sentence in such a way that Lisa is
25 comfortable with the idea that we're going to

1 describe both facts and opinions of testimony that
2 we have heard so that we can sort of subsume what
3 both Tom and Percy have talked about, because I do
4 think we want to have something that says this is
5 what we've heard from the American public and this
6 is sort of our evaluation of it, here is where
7 we're at, where the implementation of this law and
8 the impact of it has been.

9 Are we okay on that now? I mean, it
10 was necessary we have this conversation. I think
11 we would have had the same reaction had we come
12 here with an absolutely bullet proof plan and told
13 you that's what we were going to do, so I'm
14 comfortable we had to have a discussion.

15 Any other -- let's talk through this
16 memo now. Any other thoughts on it? Are we all
17 comfortable doing this? Do we want to have a date,
18 we'd like all your input by two days before the --
19 by the Monday before the December 4th meeting?
20 Does that sound --

21 MS. KEEGAN: So December 2nd?

22 MS. PRICE: Yeah, because we will have to go
23 up a day early to set up and that will give us time
24 to consolidate everything.

25 MS. FOU DY: Sounds good.

1 MS. PRICE: Also may I make an aside? We
2 still are receiving information and still are in
3 the position of receiving information, even though
4 we don't have any more opportunity for public
5 comment. Anyone who wants to get information to
6 the commissioners, if they could get it to us by
7 November 29th, and the only reason we defined that
8 day is because that way we have an opportunity to
9 get it to the commissioners before that
10 December 4th meeting so they could have taken that
11 into consideration.

12 Please send it to the Commission
13 office. We will get that information to the
14 commissioners. If something comes in on December,
15 whatever, November 30th, we'll pass it on. But for
16 it to be most likely for it to reach the
17 commissioners in time, any person that we want to
18 hear from and we haven't had an opportunity to hear
19 from, and I do know, commissioners have asked me
20 specific questions about the documents we have sent
21 them, so I know they're not ignored, and they will
22 be part of the public record, so I just wanted to
23 make that plug for anybody.

24 MR. LELAND: All right. Any other comments
25 or thoughts on that?

1 Let's deal with Percy's idea then, if
2 you don't mind me describing it that way, Percy, as
3 your ideas of having some volunteer slash
4 appointments from the chair who would help Jay and
5 Debbie and others edit this thing so we could make
6 sure that we sort of have the eyes and ears of the
7 Commission watching that.

8 Is there any -- well, I think it's a
9 good idea. Is there anybody who disagrees with
10 that as an idea? Does the staff have any problem?
11 Jay, are you all right with that if we get two or
12 three people that will be actively engaged in the
13 editing process?

14 MR. DISKEY: Personally I don't. Obviously
15 there's other staff that will be involved, and I
16 think in most cases as these reports come together
17 there's usually an executive committee who are
18 engaged looking over their shoulder.

19 MS. DE VARONA: I volunteer.

20 MS. FOU DY: Way to go, Donna.

21 MR. LELAND: Donna volunteers. Is there --
22 Percy? We need at least one or maybe two. Tom?

23 MS. SIMON: What are we volunteering for?

24 MR. LELAND: Rita, because of your location
25 we would love to have you volunteer also, but we

1 have decided that the commissioners would like to
2 have a subset of the Commission that's sort of
3 working actively with the people in the Department
4 of Education that are editing and writing this
5 document as we pull it together so that we can make
6 sure that there's commissioner input always in the
7 process. So we've already had three people that
8 volunteered. Would you be -- because I believe
9 probably some of it will be -- I think four is
10 enough.

11 MR. JONES: Who are the four? I didn't hear
12 the third.

13 MR. LELAND: Donna, Percy and we've got Tom.
14 I think that's a good cross section of our group.

15 MR. GRIFFITH: We're going to have our
16 meeting in the Caribbean.

17 (Laughter.)

18 MS. SIMON: We can all meet in Cuba.

19 MR. LELAND: Okay, we're still talking about
20 process now. Let's open it up for -- we've sort of
21 promised everybody at the end of the -- after we
22 went through all the handouts and memorandum we
23 promised we would sort of open it up for a general
24 discussion, not substantial issues but procedural
25 issues. What is still left on the table? Julie,

1 you had --

2 MS. FOU DY: Procedural?

3 MR. LELAND: Yeah.

4 MS. FOU DY: Just whether we should extend
5 December 4th. I'm in favor of adding time on there
6 instead of making us all come back together during
7 the holidays, either before the 3rd or after the
8 4th.

9 MR. LELAND: Thoughts on --

10 MS. PRICE: So make it a two-day meeting
11 instead of a one-day?

12 MS. SIMON: Could we do it the 4th and 5th?

13 MS. DE VARONA: No. I wanted the 3rd.

14 MS. FOU DY: Debbie offered, even if we did
15 the 3rd, doing like a 1:00 to 8:00 meeting.

16 MS. SIMON: I can't do it the 3rd.

17 MS. FOU DY: So extending it maybe over
18 dinner, making it so it starts later and ends later
19 so it doesn't have to end at 5:00.

20 MR. GRIFFITH: Where would dinner be?

21 (Laughter.)

22 MS. PRICE: You have to remember, it's got
23 to be cheap.

24 MR. LELAND: Is there any objection to
25 trying to get together on the 3rd?

1 MS. SIMON: I can't.

2 MR. LELAND: One can't do it. Is there any
3 other?

4 MR. SLIVE: Late afternoon.

5 MR. BATES: If we did the 1:00 to -- as
6 indicated.

7 MR. LELAND: 1:00 to 8:00?

8 MS. PRICE: It would be in the same
9 location.

10 MR. GRIFFITH: So we're talking about doing
11 it the 3rd and 4th?

12 MR. LELAND: Starting sometime after lunch.

13 MS. FOU DY: Am I the only one that thinks
14 this is necessary or is this --

15 MS. PRICE: No, it's a great idea.

16 MS. DE VARONA: No.

17 MS. PRICE: So the 4th is a Wednesday?

18 MS. SIMON: I can't do it on Tuesday.

19 MR. LELAND: I think the other thing that
20 Cynthia and I talked about, I believe we may need
21 to have some kind of a sidebar editorial group
22 that's going to oversee or work with Jay and the
23 staff on that, and we shouldn't cut off the idea
24 that, once we meet on December, that we're just
25 going to sort of go away and show up again in

1 January. We may end up with different kinds of
2 subcommittees, and my thought, I can be corrected
3 if I'm wrong, but my thought would be let's do the
4 December meeting and then at the end of that we can
5 say, well, here's two or three issues that are
6 unresolved, or let's divide up by subcommittees
7 again, whatever. I think once we do the dump of
8 all of the potential recommendations and the
9 potential findings, no matter how we define that,
10 then I think we will know what the scope of the
11 work is and we might do a better job, if that's
12 okay with everybody.

13 MS. KEEGAN: And even, Ted, if the
14 subcommittee wants to give certain parts of this,
15 if members throw it out and say this is being
16 discussed, if you want to try to give that a shot,
17 I would be happy to write what I think we might be
18 saying and give it back to the subcommittee.

19 MR. BATES: That might be a good idea.

20 MR. LELAND: All right. Other thoughts? We
21 are talking about process now. Is there -- I think
22 we're done with that part. Is there any desire
23 right now --

24 MS. SIMON: Can we take a break?

25 MR. LELAND: Yes.

1 MR. SLIVE: Shall we adjourn?

2 (Laughter.)

3 MR. LELAND: Let's wait a minute.

4 MR. SLIVE: Can we adjourn?

5 MR. LELAND: Rita, could we wait a minute?

6 The only thing we have left is if there was a
7 desire on the part of the commissioners to begin
8 today to discuss substantial issues or issues
9 regarding the substance of the report, not the
10 process nor the editing of the report. Mike?

11 MR. SLIVE: It seems to me yesterday that we
12 had a very significant day of testimony with a lot
13 of important information, and for example, Val has
14 submitted a notebook which I haven't seen. I, for
15 one, am not prepared to go beyond what we've done
16 today.

17 MR. LELAND: He's arguing for not talking
18 about the issues today, just doing our dump of
19 information and showing up to December a little
20 more informed. Any --

21 MR. BATES: I second that.

22 MS. FOU DY: I disagree. I think we don't
23 get together enough that we should at least talk
24 about things we haven't already discussed. I mean,
25 I don't think we have enough time together, is my

1 feeling.

2 MS. MCGRAW: I agree with Julie. I mean, I
3 think it's always good to see what people think and
4 it gives you different ideas too.

5 MR. LELAND: Well, that means we need to
6 take a break.

7 MS. FOU DY: I have an issue.

8 MR. LELAND: We're going to lose two or
9 three members if we do take a break because of
10 plane flights. Julie, if it's okay, unless I
11 hear -- I know I got two people that want to do
12 this, but I'm worried we don't have a framework
13 right now to frame a discussion regarding all the
14 complicated issues that we've heard, and I think we
15 have tried to provide a framework for you to be
16 able to do that when we come back in December.
17 That would be my thoughts.

18 I agree with you on the fact that we
19 need to get into the issues, come on, let's quit
20 fooling around, let's get going, we don't get
21 enough time together, but I'm worried that we're
22 just going to have sort of a free association of
23 ideas.

24 MR. GRIFFITH: What have we decided about
25 the time of our December meeting?

1 MR. LELAND: After lunch on the 3rd.

2 MR. GRIFFITH: So we'll start Tuesday the
3 3rd in the early afternoon and we'll go through to
4 close of business on the 4th.

5 MS. SIMON: Could we possible start early in
6 the day on Tuesday? I could make it early in the
7 day and then I could go back to Washington for my
8 seminar and come back. We can't do that?

9 MR. LELAND: I think it would be hard for
10 people to get in.

11 Okay. Was anybody else -- do we have
12 a consensus that we should stay and discuss the
13 substantial issues or do we just have a couple of
14 people that are going to be disappointed?

15 MS. COOPER: We can adjourn, but I also
16 agree that we should start the discussions.

17 MR. LELAND: Okay.

18 MS. FOU DY: What was that?

19 MR. LELAND: There's not a consensus
20 here. Cynthia agrees with you that we should spend
21 whatever time we have together, which is another --

22 MS. PRICE: About 15 minutes.

23 MR. LELAND: 15 minutes and a 10-minute
24 break, so maybe we should break and then spend the
25 40 minutes --

1 MR. GRIFFITH: Why don't we take a break and
2 then whoever wants to go can go and whoever wants
3 to stay can stay.

4 MR. LELAND: Thank you. I'll take that in
5 the form of a motion.

6 All those who would like to stay
7 until the appointed hour, twelve o'clock, and
8 discuss issues following a short break, raise your
9 hand.

10 (Show of hands.)

11 MR. LELAND: All those who would -- three,
12 four -- move to adjourn. Lisa, was that a yes?

13 MS. KEEGAN: That was a yes.

14 MR. LELAND: Okay. So there was five.

15 All those that would like to adjourn
16 now and commence the discussion again later, raise
17 your hand.

18 (Show of hands.)

19 MS. DE VARONA: (Inaudible.)

20 MR. LELAND: Let's -- she's going to vote
21 for us to stay and then she is leaving. That's
22 great.

23 (Laughter.)

24 MR. LELAND: All those who are in favor of
25 staying and spending the next hour and doing good

1 work, raise your hand.

2 (Show of hands.)

3 MR. LELAND: One, two, three, four, five.

4 All those opposed.

5 (Show of hands.)

6 MR. LELAND: So we'll stay.

7 MS. PRICE: Well, if we have present eight

8 members. We have to have a quorum. And

9 ex-officios don't count. Donna is leaving.

10 MR. LELAND: But she just voted. The issue

11 was to vote.

12 MS. PRICE: But even if we -- to conduct

13 business we have to have a quorum.

14 MR. LELAND: And Sally is not --

15 MS. PRICE: Sally and Brian and Jerry don't

16 count.

17 MS. STROUP: You can't count us.

18 MR. LELAND: Let's take a ten-minute break

19 and come back and see if we have a quorum.

20 (Recess.)

21 MR. LELAND: We have a quorum. There are

22 eight of us. We're official.

23 I hadn't really thought through how
24 we want to structure this conversation, but we will
25 reconvene so we can talk about issues that are not

1 procedural, but that are -- I think we can go down
2 a list of questions.

3 MS. FOU DY: I'm sorry, I'm hogging the mike
4 this morning since I missed yesterday.

5 MR. LELAND: That's okay.

6 MS. FOU DY: I have something I want to bring
7 up, that I wanted to bring up while all of us were
8 here but we were still talking procedural, and Bob
9 and Ted can help on this issue, and then at least
10 we get it into the transcript and we can further
11 discuss it December 4th. Is this okay?

12 MR. LELAND: Yes.

13 MS. FOU DY: One of the things that we
14 continually hear is this arms race, and I know it
15 was discussed a lot reading the transcript from
16 Colorado Springs and the train wreck that you
17 referred to. Debbie has a quote from the
18 transcript that I'm going to read that is really
19 interesting, and I wanted to kind of talk a little
20 bit further about that, the resource issue and the
21 loss of men's non-revenue sports.

22 So one of the things she mentioned in
23 the transcript from, this is Debbie Yow, from the
24 Colorado Springs meeting, she says, so now we are a
25 free -- we're in a society where we have a free

1 enterprise system where it's a matter of supply and
2 demand, market value, and so it becomes more
3 expensive to better ensure that we are successful
4 in those sports, so that gives the opportunity for
5 us to do more. And who has to give in that
6 scenario to stay in compliance with Title IX, as
7 you do that, is the men's non-revenue, men's
8 Olympic sports. You might be able to hang on to
9 them and have them exist, but they're only
10 partially funded.

11 As an example, in a worst case
12 scenario, they can't even exist and you have to cut
13 them. Some of us haven't yet had to cut, but we
14 know it's ever ever present. I don't think that
15 part of the equation is going to change. I think
16 it's going to continue to become more and more
17 expensive. For those reasons, and the reasons are
18 good reasons, so we have the money to take care of
19 the women and minor men's sports.

20 And my follow-up, and I would love to
21 hear from you all that are dealing with this every
22 day is, is this is something that -- continually I
23 look at and I see in all the transcripts and in all
24 the discussions we have had, and the thing I find
25 so interesting is that, is there no possible way,

1 and I'm going to become long-winded in this because
2 I want to get it all out, is there no possible way
3 that we could put a mandate across the board, I
4 know it's impossible to say individually each
5 school do this or do this, but you put some
6 controls in across the board where it didn't affect
7 your revenue.

8 I mean, the whole arms race is
9 dealing with how you recruit players, getting them
10 to come, making it as appealing as possible to
11 recruit the best football players, the best
12 basketball players in the country or the world or
13 whatever it is. And so you get stuck in the cycle
14 of building a 50-million dollar weight room, you
15 get stuck in the cycle of having to upgrade
16 everything because the other school is doing it.

17 So if you made it across the board
18 and it was things that didn't affect the
19 competitive level of your school, you're still
20 going to get the best athletes. It's not going to
21 affect how they perform on the field. You're still
22 going to win, so which means you're going to be
23 making a lot of money, but in doing so you're
24 making this revenue and now all of a sudden you
25 become profit-producing because you've mandated

1 across the board that you cut these expenses.

2 For example, I look back and I think,
3 well, you know, I didn't choose Stanford University
4 because it had new hammer strength weights, you
5 know. I would have gone there for the rest of
6 dumbbells. And what happened to this idea of you
7 don't need air conditioned facilities, and you're
8 still going to get the best recruits, but why can't
9 we put some type of sensible control on things that
10 don't affect your competitive balance. And do we
11 need to be having the whole team stay in -- you
12 know, you've heard all the list of things, the
13 hotels the night before, do we need these new
14 facilities.

15 And I mean, that seems like such an
16 easy solution. You free up resources, you're still
17 making money, and now these non-revenue sports are
18 being able to benefit from the resources you're
19 freeing up. And you're still getting the best
20 recruits because it's across the board. There's no
21 disadvantage there.

22 MR. COOPER: Please go ahead.

23 MR. REYNOLDS: Well, I'm not much of a
24 sports fan, and I agree that there are a lot of
25 things that happen with respect to expenditures

1 that are puzzling. But I don't see how we could
2 control or prevent people from making stupid
3 mistakes, unless of course there's some legislation
4 where Congress decides that stupid mistakes are
5 outlawed.

6 One part of the Brown litigation
7 involved controlling expenditures, I think that was
8 a part of the case, and the judge ruled that -- the
9 circuit ruled that how they come into compliance is
10 the school's business.

11 And also there's a value question
12 that's embedded in your comments. Who is going to
13 decide what doesn't affect the competitive posture
14 of a particular team? You know, I have my own
15 opinions, but I'm sure that the coach has his or
16 her opinion, and who is going to be the arbiter
17 between the varying opinions, the conflicting
18 opinions over what constitutes a change that
19 doesn't impact competitiveness?

20 MS. FOU DY: Right. And I know that that has
21 been one of the sticking points is who makes these
22 determinations, but to me, if we keep thinking, if
23 we stay with the assumption that it can't be done,
24 we're just going down this road towards the train
25 wreck in that we're just going to keep losing more

1 men's sports, the non-revenue sports, and it's just
2 going to get worse, this isn't going to get better,
3 and it's a resource issue.

4 So why hasn't there been -- I mean, I
5 would imagine -- I'm not in the middle of it every
6 day, but I would imagine the presidents, I would
7 love Graham to be here, because I would imagine the
8 presidents of universities, the athletic directors,
9 they all want to see this happen, because, you
10 know, you're making decisions based on what another
11 school is doing.

12 I've heard an example of, you know,
13 one basketball team wanting to bus down to North
14 Carolina, but because that team had chartered a
15 plane, the other team had chartered a plane to get
16 to the game, they had to charter a plane because
17 that would be a recruiting disadvantage for them.
18 So you get stuck in this cycle, and I would imagine
19 there's got to be some way you can stop it.

20 MR. REYNOLDS: Another approach in dealing
21 with the Olympic sports, ensuring that we create
22 some incentives so that colleges won't make this
23 decision, is to deal with other aspects of the
24 equation. I'm not sure what we can do with
25 football. Legislation has been introduced in

1 Congress exempting it. That failed. It's not
2 clear to me as a legal matter that we could issue a
3 rule telling schools how to spend money. Same, you
4 know, as a regulator. I don't feel comfortable --

5 MS. FOU DY: And I'm not saying, Jerry, it's
6 necessarily the federal government that is
7 mandating this. I don't mean to say that. I'm
8 saying why isn't it coming from NCAA or from the
9 institutions themselves?

10 MR. BOWLSBY: Well, I think the answer is,
11 if it was easy, we would have done it by now. And
12 there isn't -- first of all, institutions don't go
13 into the battle all even, and so there's a
14 disproportionate effect of regulation on
15 institutions that are at varying levels in the
16 competition.

17 It's frequently been said that the
18 only thing worse than being in the arms race is not
19 being in the arms race, because you fall behind
20 very quickly.

21 Is there a fairly substantial
22 initiative among directors of athletics and
23 presidents to control costs? The answer is yes.
24 It's also fallen on the cutting room floor on
25 several junctures in the past. I served on a

1 Financial Conditions in Athletics Committee in the
2 early '90s that developed something in the low
3 number, low 90s of proposals to save money, and
4 twelve of them got adopted by the NCAA membership.

5 So you know, if there was coalescence
6 on obvious things that would save money for
7 everybody and if that impact on each of those
8 institutions was consistent, it would be a very
9 easy process. It's not. It's a very complex
10 process. It's driven in some regards by geography,
11 it's driven in some regards by weather, it's driven
12 in some regards by competitive issues. Each
13 institution, each athletics program has its own
14 strength and weaknesses, and I think the
15 expectation has been that institutions would deal
16 with those things on an individual basis. I don't
17 think we can paint everybody with the same brush.

18 Having said that, there are some
19 areas of commonality that there can be significant
20 revenue enhancements and expense reductions, and
21 I think there's a desire to make that work. I'm
22 not -- I wouldn't say to you that finances haven't
23 had a bearing on some of the discontinuations of
24 sports, but there's a whole lot more going on there
25 than just finances.

1 And, you know, we aren't going to sit
2 around this table and solve the issues that are
3 attendant to the athletics arms race. I won't say
4 that it's unrelated to some of the things that
5 we're discussing, but it certainly isn't central to
6 the issue. And you know, I think all the
7 commissioners around the country, all the faculty
8 athletics representatives and those of us that
9 manage athletics programs day in and day out see
10 the places where we think there could be some
11 opportunity and are seeking to act on that, but I
12 don't know that that can come from the initiative
13 of this group necessarily, I think it has to come
14 because it's the right thing to do for the
15 enterprise of athletics.

16 MS. FOU DY: But Bob, you agree that one of
17 the reasons we're here is because of the loss of
18 men's sports. And what we disagree on was what the
19 cause of that is. People on this Commission,
20 people that come and talk, people that have
21 testified, and one of the things that we keep
22 pointing to is this finite pie and that, you know,
23 you can --

24 MR. BOWLSBY: In some ways it's finite, in
25 some ways it's not. I think one of the things

1 that's in issue and we'll get into discussing at
2 greater length, I think, in December is that, you
3 know, what some of the stipulations have done with
4 regard to compliance. It hasn't necessarily said,
5 if you don't have the money you got to drop a men's
6 sport. What it has said is if you need to save
7 500,000 dollars, you can't close up your tennis
8 facility and drop both men's and women's tennis
9 because you may not be fully in compliance.

10 So it hasn't driven that
11 discontinuations have occurred, it's driven what
12 discontinuations have occurred, and that has fallen
13 disproportionately on wrestling and gymnastics and
14 swimming and tennis on the men's side. And so it
15 really has tied the hands of administrators.

16 I have an 85-year-old swimming pool,
17 and if somebody said to me, you've got to save
18 750,000 dollars or you're going to have to jump in
19 and build a 20 million dollar pool and continue to
20 fund these two sports, you know, I probably can't
21 discontinue women's swimming but I could
22 discontinue men's swimming for savings reasons.

23 Now, I wouldn't advocate that
24 discontinuation of sports is a good way to save
25 money on any level, but if I'm faced with building

1 a brand new pool facility for 20 million, you know,
2 there are issues there, and I think athletics
3 administrators, conference administrators have felt
4 like their hands were tied a little bit. Now, I
5 don't know if that's good or bad, but I think
6 financial realities are such that there may need to
7 be program discontinuations at some junctures in
8 the lives of individual programs.

9 How those discontinuations have been
10 taking place has been influenced by the law that's
11 in place, and it's just one of the issues we're
12 going to have to deal with. But finances are a
13 part of it, I wouldn't suggest to you that they are
14 not. As I said earlier, I don't think it's central
15 to the issue, because we have to deal with that on
16 a whole other set of criteria other than how it
17 applies in equity matters.

18 We're dealing with it on a day-to-day
19 basis in terms of the vitality and life of the
20 program and the support that we provide to coaches
21 and student athletes, and, you know, we haven't
22 spent very much time in these hearings talking
23 about the quality of the experience, but I can -- I
24 know that I can speak for Ted when I say it, and I
25 know it's true at our institution, you go right

1 down through the list of sports, the quality of the
2 student athlete experience is really priority one
3 for us. You know, are the facilities the same, is
4 the access the same, is the sports medicine
5 treatment the same, is the travel opportunity the
6 same, you know. We have tended to spend our time
7 on opportunity issues and not on quality issues,
8 but the financial aspects of this are all about the
9 quality issues for those of us that run programs
10 day in and day out.

11 MS. FOU DY: And I guess that goes back to my
12 question of have we gotten away from the idea that
13 the purpose for educational institutions is to
14 provide opportunity and not necessarily to provide
15 a 50 million dollar weight room or, you know --

16 MR. BOWLSBY: I don't know that anybody has
17 a 50 million dollar weight room, so that --

18 MS. FOU DY: Stanford University does, I
19 think.

20 (Laughter.)

21 MR. LELAND: She hated lifting weights
22 anyway. Now she's advocating weight rooms.

23 (Laughter.)

24 MR. BOWLSBY: Your point about finances is
25 well taken. It's an important consideration and

1 it's one that we deal with day in and day out.

2 MR. LELAND: Let me hop in and try to answer
3 it another way. I think we have heard testimony
4 that, early on in Atlanta, I remember specifically
5 that people said that, gee, the escalation in the
6 costs, the resources that had to go into women's
7 programs during the ramping up of women's
8 opportunities is about the same as the ramp up in
9 football and basketball, men's football and
10 basketball dollar wise, and we have been working
11 with some people here, we have been trying to get
12 that number. It's been suggested at one of our
13 meetings we should really get some numbers and
14 bring them out and agree on a number, gee, is that
15 really true? Is it the ramping up and the opulence
16 in some of the revenue producing sports, net
17 revenue producing sports on the men's side that is
18 causing the financial crutch that's eliminating
19 opportunities or is it the ramping up of women's
20 opportunities? And I think having a number is hard
21 to find, and I think each school has made its own
22 decision. I do know Christine Grants has been
23 trying to help me with this and she's got a report
24 here. It's more of an anecdotal, some anecdotal
25 instances where schools have dropped sports and put

1 money into coaches' salaries or weight rooms or
2 other things like that. So we'll make this
3 available to all the commissioners.

4 But it is sort of something in the
5 sort of battle out in the public, that's something
6 that people are insinuating, and I don't know if
7 we're going to have a good answer for -- based on
8 the evidence that we have, if we don't -- at least
9 I haven't seen good numbers to tell me -- that are
10 believable. When I hear those numbers I'm just as
11 confused as I was yesterday about the participation
12 numbers. I don't see a clear --

13 MS. DE VARONA: This brings me to a question
14 of procedure and how we frame the report, because
15 we have just discussed a very interesting issue and
16 we heard from our legal counsel that, and I wonder
17 if this is going to happen. We've heard from our
18 legal counsel that football can't be exempt so we
19 can't go there. Are we hearing that, if we suggest
20 in language that we look at the opportunity to
21 suggest to the NCAA they use more ways to cut
22 expenses, that we can't do that because that's not
23 our purview? I would hope that that's not the case
24 because I know you -- I'm just trying to follow
25 this down the line.

1 MR. REYNOLDS: Well, I don't think there's
2 anything to prevent us from recommending to
3 Congress that we should revisit the issue, if
4 that's what is --

5 MS. DE VARONA: That's all I needed to hear.
6 I just was curious as to where this discussion was
7 going because I needed clarification. So thank
8 you.

9 MR. GRIFFITH: But I think it is important
10 to understand that it would take an act of
11 Congress. Right now such a mandate would be
12 illegal.

13 MS. FOU DY: Right.

14 MS. DE VARONA: Bye everybody. See you in
15 December. Thank you.

16 MR. LELAND: But I think that's an issue
17 that we certainly have heard a lot of testimony on.
18 Sometimes we have got to ask why we hear about the
19 football people all the time. Football, you know,
20 might be part of the equation, it might not be.
21 But I think that is certainly an issue we need
22 to -- I don't have -- I didn't ever see during our
23 testimony, numbers, I heard assertions about
24 numbers, and we certainly have anecdotal evidence
25 about schools that seem to have made choices as

1 opposed to being mandated (inaudible). Is there
2 another -- that was a good question, though.

3 MS. FOU DY: Thanks.

4 MR. LELAND: Anybody else have any
5 other -- that may be the way to proceed now, to see
6 if there's any commissioners that have any
7 questions. Do we still have a quorum?

8 MS. PRICE: We can have a general
9 discussion.

10 MR. GRIFFITH: Eight is a quorum.

11 MS. PRICE: Ex-officios don't count.

12 MR. LELAND: One, two, three, four, five,
13 six, seven, eight.

14 MR. GRIFFITH: Mike, why don't you try again
15 your motion to adjourn.

16 (Laughter.)

17 MR. SLIVE: Two threes in one day, three
18 tries.

19 MS. KEEGAN: Just sounds like another day of
20 work to me.

21 MR. LELAND: Well, I'm not -- I don't feel
22 compelled to instigate the discussion if there's
23 more questions you people have and there's some
24 people that want to have discussions, so if you
25 want -- Rita?

1 MS. SIMON: I would open up for general
2 discussion, where do we stand on this whole
3 question of what we're going to say about so many
4 of the schools dropping the men's minor sports,
5 gymnastics and wrestling that we've heard so much
6 about? Many of the -- much of the testimony that
7 we heard, the young men involved think it's because
8 of Title IX. Do we know where we're going on that
9 issue?

10 MR. REYNOLDS: Well, some colleges, and I
11 know I have some college administrators here, but
12 some administrators hide behind Title IX. Some
13 folks, when they have to make a hard decision that
14 is grounded primarily in finances, find it easier
15 in a political sense to point to Title IX. That is
16 one category of case, of cases.

17 But there are instances where a
18 decision is made and the reason is Title IX. You
19 have to either be in compliance or you have to take
20 steps to get into compliance, and it's difficult
21 sometimes to determine when an administrator is
22 telling the truth. Again --

23 MR. LELAND: That's hard, coming from a
24 lawyer. That's hard to take.

25 (Laughter.)

1 university perceives a need for more money for an
2 existing team sport, we use -- let's use
3 basketball, we always use football and basketball,
4 but one of the larger sports that isn't basketball
5 that can be revenue producing, etc., but there's a
6 need for money. You said you want to go to tennis,
7 maybe, you cannot, because of Title IX numbers, you
8 cannot eliminate the women's tennis, or you cannot
9 eliminate women's gymnastics but you might
10 eliminate men's and then take that money and use
11 it, not so much to enhance women's sports but
12 probably to enhance basketball.

13 But I just think to call that out as
14 something that is -- it's an unintended pressure
15 here which is so incredibly important, because I
16 mean, we hear this, we hear it on the Hill all the
17 time, it is so easy to set this up as a battle, and
18 I really really am disappointed in those who come
19 to us and try to give the impression, particularly
20 the young women, that Title IX is going to be done
21 away with. That's not what is happening here.

22 Likewise, to suggest that wrestling
23 is dropped solely because of Title IX because that
24 money is necessary for women is also not true. And
25 so it seems to be. It was very pedantic this

1 morning, or the facts were.

2 MR. GRIFFITH: Is that a finding?

3 (Laughter.)

4 MS. KEEGAN: I'd like to get back to Ted on
5 his grammar issues, but it's why I think it is so
6 so important, this clarity, because if anything we
7 need to be able to say to the country, the
8 intention, the intention might be exactly right and
9 it's being misused on both sides of this argument.

10 MR. REYNOLDS: Well, I can tell you from my
11 professional experience that I catch hell from both
12 sides, and they're both looking at the same set of
13 rules and they both have completely different
14 interpretations of how the world should be based on
15 these rules, so I think that it is extremely
16 important that we provide some clarity. We need a
17 set of rules that are reasonable, rational,
18 logical, easy to understand. The athletic
19 directors should not have, you know, the Brian
20 Joneses of the world, the lawyers of the world
21 attached to his or her hip when they're making
22 decisions about -- decisions regarding the athletic
23 department. But as the rules are currently
24 structured, it seems to me that indeed, it would be
25 imprudent not to consult a lawyer in making many

1 decisions relating to the athletic department.

2 MR. LELAND: It seems to me too, Jerry, that
3 the ADA forum is part of the problem as it relates
4 to a misunderstanding regarding prong two and prong
5 three, because it sort of forces you to, you know,
6 work with prong one, but it subjects you to public
7 ridicule at times. When you may think that your
8 institution is complying with the law under prong
9 two or prong three, there are people that say, you
10 know, gee, it's a three-prong test, it's fair, it's
11 flexible, but your AD numbers are bad, you're out
12 of compliance. People say that, the same people.
13 So if we could somehow operationalize the ADA
14 forum, that would give prong two and prong three a
15 place on it, then maybe we could make two and three
16 more robust, more meaningful.

17 MR. REYNOLDS: Yeah. I think that it's
18 important that two and three get some life, or at
19 least at a minimum we have to dispel this belief, I
20 don't know why the hell it is, but there's a fair
21 number of folks out there who don't believe that
22 two and three are viable options. Whether that's
23 true or not, I think that we need to convince
24 people that two and three -- that it really is a
25 three-part test, and I'm sure that we'll fix it

1 this time because we tried to clarify this issue in
2 '96

3 MR. GRIFFITH: I want to pick up on
4 something that Lisa said, and I think it's
5 critically important. I think the thing that has
6 concerned me most about the town hall meetings is
7 the stridency of the folks on both sides. And I
8 would hope that, among the other things that the
9 Commission can do, I would hope that one of them
10 would be that we can say, this is an issue on which
11 reasonable, fair people can differ, so that those
12 who take a view that proportionality is not fair
13 are not castigated as misogynists, we heard the
14 word used yesterday, and on the other hand that
15 those who are in favor of the status quo are not
16 categorized as radical feminists, which is what we
17 heard yesterday.

18 There are lots of things we're
19 supposed to do. I would hope that one of them
20 would be that we can approach this issue and then
21 give to the nation a model of civility in dealing
22 with this.

23 It is not my impression that there's
24 any themality on either side, that the wrestlers
25 and the folks that they represent come by their

1 feelings honestly, based on some experiences, that
2 they think they have been mistreated, and on the
3 other hand those who are in favor of the status quo
4 look to Title IX as a source of very significant
5 and important changes in terms of increasing
6 opportunities of the woman.

7 I was just seconding what you said,
8 Lisa, and I hope that we can find a way between
9 those shoals, and in the process of doing so, let
10 people know that this is an issue on which
11 reasonable people can differ.

12 MR. LELAND: Let me just add one other
13 thing, because I know we're transcribing this, but
14 I would add to that, I think this, you know, this
15 disagreement and the stridency has affected the
16 quality of experience student athletes have on
17 campuses, because it does tend to pit male athletes
18 against female athletes, and most of them are sort
19 victims of this, you know, they want to go in the
20 locker room and they want to be treated with
21 respect, and most of the time that happens, but
22 when it becomes politicized, normally the athletes
23 are the ones that lose in the end. And so, at
24 least on my campus I know there have been times
25 when it has significantly affected the quality of

1 experience they have, because they see perceived
2 discrimination or real discrimination and it
3 becomes an issue. So I absolutely agree with you,
4 Tom, when you were talking about the athletes'
5 experience.

6 MS. SIMON: I just wanted to add that I
7 hope, after all these discussions that we have,
8 that when we write a report and we ask that more
9 data be collected in the future as a way of
10 operationalizing Title IX, that it isn't viewed as
11 the Commission recommending weakening of Title IX.
12 For example, I hope that we continue to have
13 participation surveys in high schools, boys and
14 girls involved in high school sports, maybe even
15 attitude and surveys, but that because we're asking
16 that more data be collected on a regular basis,
17 that doesn't mean that the Commission is trying to
18 weaken Title IX, I hope.

19 MR. REYNOLDS: Well, after listening to
20 that, I'll just say good luck.

21 MS. SIMON: I know, I know.

22 MR. REYNOLDS: Some people have strong
23 views, but that's a goal we should work for.

24 MR. LELAND: Okay.

25 MS. KEEGAN: Just one more issue. Jerry, I

1 wanted to ask you a question. I also wanted to
2 clarify, just because we've heard this as a
3 whipping horse, the desert has water in it.

4 (Laughter.)

5 MS. KEEGAN: I would like to invite all of
6 you out to see the Colorado, the Gila and the Salt
7 River where we do row crew at a lake called Tempe
8 Town Lake. I got the impression that people
9 thought we sat in a boat going damn, I cannot do
10 this.

11 (Laughter.)

12 MS. KEEGAN: We actually have water in the
13 desert. Other than that, Jerry, one of the things
14 that I want to ask on two and three of this issue,
15 it seems to me that the only way to get people to
16 use those more is if they are more clear. If OCR
17 never has a working definition of a sport, and I
18 realize that is my interpretation, I understand the
19 criteria thing, I've read it all and we've talked
20 about this at another meeting, but it seems to me
21 even, for example, if OCR can say, and I want you
22 to tell me if you can't, but if you can say we
23 count as sport everything that NCAA, all the groups
24 count as sport, and we are open to other sports if
25 they have these criteria, they are competitive,

1 etc., is that possible?

2 MR. REYNOLDS: I would have to see the
3 specific proposal, but I think that, as a practical
4 matter, there's a lot of overlap between how we go
5 about determining, and I guess I should rephrase
6 that, including that certain activities constitute
7 a sport. It's important that I point out that we
8 don't want to be in the business of deciding what
9 is a sport or not. I mean, that's not our area of
10 expertise, but there are certain characteristics
11 that are associated with sports; for instance, a
12 season, the use of coaches, the provision of
13 scholarships, and we can structure it so that if
14 you have, if you have many of these characteristics
15 that we generally associate with sports, say let's
16 pick baseball for instance, then we will presume
17 that whatever the activity is, that it's a sport.

18 The Olympics, they have -- it's a
19 robust, organic process where new activities that
20 once weren't considered a sport or eventually
21 deemed to be a sport and we take a similar process,
22 but we don't want to be arbiters of what activity
23 should be viewed as a sport.

24 But it's important that any activity
25 share many of the characteristics with activities

1 that -- whether it's a consensus, I think there's a
2 consensus around the country that baseball is a
3 sport, and there's certain activities. I mean,
4 there's generally a season, there's generally a
5 coach involved, there's generally --

6 MR. GRIFFITH: Do any of the organizations
7 consider cheerleading a sport? Do any of them?

8 MS. KEEGAN: The high school does.

9 MR. GRIFFITH: How about ballroom dance?

10 MS. KEEGAN: You know what? I didn't check
11 for ballroom dance.

12 MR. GRIFFITH: In some --

13 MR. REYNOLDS: And not all cheerleading is
14 considered a sport.

15 MS. KEEGAN: Right.

16 MR. REYNOLDS: Sideline cheerleading is not
17 a sport.

18 MS. KEEGAN: Competitive cheerleading,
19 though, is a sport.

20 MS. FOU DY: It has to meet the criteria.

21 MS. KEEGAN: And you could -- here is my
22 problem. And you put your finger on it before,
23 Jerry, when you said attorneys are cautious by
24 nature, and my guess is, this isn't my tribe or
25 anything, but my guess is that most athletic

1 directors are being advised by their attorneys to
2 go with what is most objective, that we can count.

3 MR. REYNOLDS: Sure.

4 MS. KEEGAN: And if you don't define sport,
5 it seems to me that prongs two and three, if you
6 don't at least say here is our criteria and
7 included within those are these, and you can, you
8 know, the obvious, competitive cheerleading is a
9 sport, sideline cheerleading is not a sport or
10 something, I guess I just am convinced that if we
11 are not clear on those other two prongs, we will
12 leave ourselves in this position unnecessarily.

13 MR. REYNOLDS: I am convinced that if I sat
14 down with you and we went over the OCR's criteria,
15 you would have a higher level of confidence in
16 terms of emerging sports. I don't think that that
17 is -- that there's much controversy connected with
18 how we go about determining what is an emerging
19 sport.

20 MS. KEEGAN: What about a real sport? Why
21 is it, this is just a bimbo question then, emerging
22 sport, sport --

23 MR. REYNOLDS: Okay. An emerging sport is
24 basically some activity that hasn't traditionally
25 been considered --

1 MS. KEEGAN: Okay.

2 MR. REYNOLDS: -- a sport.

3 MS. KEEGAN: But we don't even define sport
4 other than by criteria.

5 MR. REYNOLDS: Well, maybe I shouldn't be as
6 confident in convincing you.

7 (Laughter.)

8 MS. KEEGAN: I may be your biggest
9 challenge, Jerry, but we'll work on that. I just
10 think it's of great importance. Otherwise I do
11 think what happens is legally attorneys will have
12 to go wherever it is most predictable. It just
13 seems to me that --

14 MS. FOU DY: Are you asking, Lisa, to define
15 the actual sport as being a sport, like the entire
16 sport across the board, like, okay, bowling is a
17 sport?

18 MS. KEEGAN: Yeah, so long as it's
19 competitive.

20 MS. FOU DY: The problem is it's different
21 in, you know, like cheerleading, there's some that
22 are competitive and there's some that aren't
23 competitive, or it depends on where you're at, you
24 know, and it's not -- you can't say that every
25 bowling program or every --

1 MS. KEEGAN: Right, right. No, I
2 understand.

3 MS. FOU DY: And that's why it has to be case
4 by case, but you already have a set of criteria
5 that are already there. We do have a definition.

6 MR. REYNOLDS: Well, the standard --

7 MS. KEEGAN: I'll talk to Jerry about that.

8 MS. COOPER: Jerry, I have a question. I'm
9 sorry.

10 MR. LELAND: Well, we're transcribing this.
11 Trying to.

12 MS. KEEGAN: Sorry.

13 MR. LELAND: So we have to sort of --

14 MS. COOPER: This is for Jerry and for
15 Julie. If I were a university and I wanted to, in
16 my numbers, to count cheerleading as a sport, then
17 I would come to you, in order to comply, I want to
18 count cheerleading as a sport, I would come to you
19 and you would go down your criteria, the criteria
20 that Julie mentioned earlier --

21 MR. REYNOLDS: To --

22 MS. COOPER: -- to determine whether that
23 was a sport or not. Am I right?

24 MR. REYNOLDS: Well, I try to stay out
25 of --

1 MS. COOPER: Wait, wait, wait. -- to
2 determine whether you will count it in the numbers
3 to determine whether I'm in compliance.

4 MR. REYNOLDS: I hope no one at OCR will be
5 that specific. I don't like to provide these type
6 of opinions. I don't want to answer hypotheticals
7 because I don't know if the --

8 MS. COOPER: This is no hypothetical. I'm a
9 university and -- well, I guess it is hypothetical
10 because I'm not a university.

11 (Laughter.)

12 MR. REYNOLDS: What I'd like to do is
13 provide technical assistance where we discuss what
14 the criteria are. So for instance, we'll ask, is
15 the team a part of a conference? Is there a coach
16 involved? Is there a season? And there's a
17 checklist. And if you can answer yes to most of
18 the checklist, then it's likely we're going to
19 presume that the activity, whether it's
20 cheerleading or something else, is a sport.

21 MS. COOPER: Right. And that's my question.
22 Right? That's what happens?

23 MR. LELAND: We are no longer official.
24 We're now unofficial. We're now in a discussion.

25 MS. FUDY: Who left?

1 MS. COOPER: But that was my question. If a
2 university were to come to OCR with their attorney
3 attached to their hip and they said, you know, we
4 want to consider cheerleading, and then you guys
5 just go down the list of criteria for --

6 MS. SIMON: In other words, you meet
7 operational definitions. You need to say
8 cheerleading is a sport if it is, one, competitive,
9 two, has a coach or whatever.

10 MR. REYNOLDS: I'm sort of -- well, I think
11 it's important for everyone to know that this
12 particular issue does not take up a lot of time at
13 OCR. There are a lot of areas where we need more
14 clarity.

15 MS. FOUDY: But it could.

16 MR. REYNOLDS: And we can provide clarity on
17 this issue, but I think that answering questions
18 like what does a history of continuing expansion,
19 what does that mean in practical terms, that takes
20 up a lot more of our time than determining what is
21 or isn't a sport.

22 MR. LELAND: Let me step in here. I think
23 since we've lost our quorum and we are a little
24 past our stated adjournment time, why don't we try
25 to close this thing off.

1 First of all, anyone who is waiting
2 for me to try to diagram a sentence with Lisa,
3 don't wait.

4 (Laughter.)

5 MR. LELAND: Lunch is for the invited
6 speakers and for the panelists and has been moved
7 to the Ivy Room, which is one floor up.

8 I have to say that I did ask cast my
9 little ballot against us spending this 45 minutes,
10 but I'm really glad we did. Very very good
11 discussion and hopefully we can expand on it when
12 we get back together. So we are now adjourned.

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14 (Proceedings concluded at 12:00 noon.)

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REPORTER'S CERTIFICATE

I, Lynne E. Woodward, CSR No. 10440, hereby
certify that I reported in shorthand the above
proceedings on Thursday, November 21, 2002,
beginning at 9:00 a.m., at the Wyndham Emerald
Plaza Hotel, 400 West Broadway, San Diego,
California; and I do further certify that the above
and foregoing pages contain a true and correct
transcript of all said proceedings of said
transcript.

Lynne E. Woodward, CSR No. 10440

