

# Archived Information

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1 THE SECRETARY OF EDUCATION'S COMMISSION ON  
2 OPPORTUNITY IN ATHLETICS  
3 PHILADELPHIA FULL BUSINESS MEETING  
4 MARRIOTT PHILADELPHIA  
5 1201 MARKET STREET  
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7 PHILADELPHIA, PA 19107  
8 (215) 625-2800

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11 TRANSCRIPT OF PROCEEDINGS

12 DECEMBER 3, 2002

13 1:00 o'clock p.m.

14 TUESDAY

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24 REPORTED BY: LORI ANN ASAUSKAS, CSR, RPR.

L.A. REPORTING (312) 419-9292

1 (Before the commencement of the  
2 proceedings, the draft finding  
3 reports by Ted Leland, Cary Groth,  
4 Gerald Reynolds, Julie Foudy and  
5 Gene DeFilippo as well as an e-mail  
6 from Percy Bates were tendered to  
7 the Commission.)

8 MS. COOPER: Can we have our  
9 commissioners make their way up to the front?

10 MR. LELAND: Good afternoon everyone  
11 and welcome to Philadelphia.

12 My name is Ted Leland and I'm  
13 director of athletics and recreation at Stanford  
14 University along with Cynthia Cooper, to my right,  
15 your left, is -- I'm co-chair of the Secretary's  
16 Commission on Opportunity in Athletics. The  
17 Commission has a lot to accomplish over the next  
18 two days so if we can get a quick start, I will  
19 just give a quick opening statement. Cynthia will  
20 provide the opening statement tomorrow.

21 The U.S. Secretary of Education,  
22 Rod Paige, appointed the Commission to examine ways  
23 to strengthen, enforce and expand opportunities and  
24 ensure fairness for all college and interscholastic

1 athletes.

2                                 President Bush and Secretary Paige  
3 fully support Title IX and many of the opportunities  
4 that have followed since its passage 30 years ago.  
5 Over the past five months, the Commission has  
6 learned how Title IX is serving our citizens. At  
7 town hall meetings in Atlanta, Chicago, Colorado  
8 Springs and San Diego, we have listened to dozens  
9 of experts and literally hundreds of citizens.

10                                This process has enabled us to  
11 have a conversation with the American people about  
12 Title IX. Now, the time has come for us to develop  
13 a report informing Secretary Paige of what we have  
14 learned.

15                                As we begin our work today, I  
16 want to remind us of our charge. Our charge is  
17 to advise Secretary Paige on Title IX. Our advice  
18 will be delivered in a report containing findings  
19 and recommendations. Throughout our work over the  
20 next two days, it will be very important for us to  
21 remember our charge. If we fail to do so, we may  
22 lead ourselves down a path where we should not go.

23                                For example, we are not here to  
24 make law. Obviously, we are not empowered to do

1 that. We are not here to adjudicate past disputes.  
2 We are not here to unravel conflicting sets of  
3 data and statistics. We are not here to assemble  
4 a lengthy research document. Those activities may  
5 be worthy tasks for other individuals to pursue.  
6 However, we lack the justification, time and  
7 resources to do so.

8                                 Again, our charge is to tell the  
9 secretary what we have found and what steps he can  
10 take to ensure that Title IX is working for all  
11 Americans.

12                                 Our basic agenda over the next  
13 few days is this: Today and this evening, we will  
14 development our findings and tomorrow, we will  
15 develop our recommendations.

16                                 So that we can stay on this task,  
17 our staff has created an hour by hour time line.  
18 Cynthia and I have that. We will review that with  
19 you if it's appropriate, but we have sat down and  
20 divided up how we will spend the next couple hours  
21 together and I want to walk you through the process  
22 we intend to use.

23                                 As you can see from today's time  
24 line, we will review one by one -- as the time line

1 that's in your chart, we intend to begin -- review  
2 findings by going down the questions one by one and  
3 we will devote at least 30 to 45 minutes to each  
4 question. In our own minds, Cynthia and I have  
5 divided up the time knowing, for instance, that  
6 question one will probably take more time than  
7 some of the other questions that we have been asked  
8 to answer. But we will try to devote time for each  
9 one.

10 We will develop findings  
11 for each of these questions. Many commissioners  
12 have already submitted draft findings by e-mail  
13 or fax. Others suggested findings at our meetings  
14 in Colorado and the staff has inventoried all of  
15 these draft findings. A master list can be found --  
16 a list can be found in what we've handed you today.

17 Today, you have two -- two  
18 documents -- two sets of documents; one is the  
19 time line, the other is Secretary's Commission on  
20 Opportunity in Athletics, it's called draft  
21 findings.

22 MR. GRIFFITH: What is the time line?

23 MR. BATES: Yes. Ted, what time line  
24 are you referring to?

1 MR. LELAND: It says agenda. Excuse  
2 me.

3 MR. BATES: Oh.

4 MR. LELAND: I'm sorry.

5 MR. BATES: I've got that.

6 MS. COOPER: The agenda called the  
7 time line!

8 MR. SPANIER: All right. Thank you.

9 MR. LELAND: Thank you. Then you  
10 have this sort of hefty packet of findings that we  
11 have collected from the commissioners who submitted  
12 them in writing before we got here today. You  
13 should also have a paragraph document from --

14 Percy, do they have this? Debbie?

15 MS. PRICE: It should be in here. It  
16 should be a Xerox -- yeah, it's in here.

17 MR. LELAND: Percy sent this in a list  
18 of some suggested findings and recommendations and  
19 we got that a little later in the day. So we put  
20 that -- it's in a separate format. We'll have to  
21 deal with the difference in the format for that.

22 MS. COOPER: What about Jerry's?

23 MR. LELAND: And lastly, you have  
24 Jerry --

1 MS. COOPER: Jerry Reynolds.

2 MR. LELAND: I don't have those.

3 MS. COOPER: I'm special.

4 MR. LELAND: Is Jerry here? Did he --  
5 did we -- did you guys have Jerry Reynolds' --  
6 there's Jerry.

7 MR. REYNOLDS: Yes, present.

8 MR. LELAND: Okay. So there's lists  
9 of -- there's some organized lists of findings from  
10 about five of the commissioners. There's one from  
11 Jerry and one from Percy that have a slightly  
12 different format. Okay?

13 In addition to that, we should  
14 have left you with a charge of the Commission.  
15 Open to the page that has the seven questions which  
16 we are required by law to make an effort to answer.  
17 All right. That should be what you have in front of  
18 you.

19 At our last meeting two weeks ago,  
20 we discussed the definition of the word finding. I  
21 believe -- Cynthia and I believe that a majority of  
22 the Commission agreed the simple definition provided  
23 by Tom Griffin last time is appropriate, quote, a  
24 finding for this Commission should be something we

1 have heard and learned about during the course of  
2 our work. Fairly simple. I thought there was a  
3 consensus last time.

4                   Each commissioner who submitted  
5 a draft finding to the questions will be asked to  
6 present it and then we will engage in discussion  
7 of the finding and see whether a consensus emerges.  
8 For those findings that we amend, the staff will  
9 quickly edit and rewrite the findings based on our  
10 collective comments. The staff will then print out  
11 a final version or near final version for us to  
12 review.

13                   If we run out of time for  
14 questions, we move on to the next. We want -- we  
15 need to keep to our time line. If we can't finish  
16 our findings, we will try to find some time at the  
17 end of the day to revisit the question, but I can't  
18 guarantee we will be able to do it so we need to  
19 move quickly.

20                   I encourage us to use our time  
21 wisely. The Commission and staff around the table  
22 who have worked in Congress know that the debate  
23 is structured always with rules and time limits.  
24 Similarly, athletes and coaches know that they play

1 contests under specific rules and time limits. So  
2 lets' be mindful of the clock. We are in the final  
3 period of time. The secretary has allowed us to do  
4 our job. There is no overtime for this Commission.

5 I'm confident that we can complete  
6 our task on time, the time that we have. I'm also  
7 confident we can create a report of great value to  
8 Secretary Paige and the American people.

9 A couple more comments I want to  
10 make is that I think our thought was that we would  
11 go no -- we would begin this morning -- this  
12 afternoon, I guess, with question number one and  
13 review findings that people have submitted related  
14 to question one and try to do that in as quick a  
15 time period as we can.

16 We will limit each commissioner  
17 to five minutes to present their findings that  
18 relate directly to number one. So if you look at  
19 the first set, Cary, for instance, we took -- the  
20 staff took your findings that you submitted to us  
21 and tried to group them by question so that we could  
22 go -- we can begin a period and maybe have an hour  
23 and a half discussion and findings on question  
24 number one.

1                   Our thought is, Cary, we would  
2 turn to you first maybe and ask you to present yours  
3 for five minutes and then we would go on to the next  
4 commissioner.

5                   MS. GROTH: Okay. Well --

6                   MR. LELAND: I'm not quite ready for  
7 you. Let me give a few more instructions.

8                   But that's our -- that's our idea  
9 about how we are going to move forward. This is  
10 going to be a very difficult process. I ask you to  
11 just sort of bear with us for a while, but we'll ask  
12 each person to talk for about five minutes.

13                   We are going to avoid voting today  
14 on the findings and really just letting us get a  
15 compendium of the findings, get a better  
16 understanding of the findings, and let staff write  
17 them up so that in our January meeting is the time  
18 when we will have a time to vote on the different  
19 findings.

20                   I think it's clear, though, that  
21 if there's a consensus on a finding, it doesn't  
22 belong, then, we can surely feel free to omit that.  
23 My understanding is when people have submitted it,  
24 we will talk about it, understand it better, get it

1 written up by staff and in January, have a chance  
2 to come back and talk with it.

3                   This isn't going to be necessarily  
4 a real elegant process today. We're going to have  
5 to work hard, cooperate with each other to move  
6 ourselves through it. We do ask you to avoid being  
7 redundant. If someone else has already said what  
8 you want to say, we can use the old term ditto.  
9 Just say ditto, I agree. We don't need to have  
10 everybody say everything over and over again.

11                   A couple other things that we  
12 have decided -- that Cynthia and I have decided  
13 is that under question number one, if you would  
14 pull out your questions, we think that some of  
15 the major issues that are probably up for discussion  
16 today, we think three of them at least are subsumed  
17 under this one and one is the appropriateness under  
18 the three-prong test.

19                   The second issue would be how do  
20 you measure proportionality.

21                   The third one is issues related to  
22 the dropping of men's sports.

23                   So as we looked at the global  
24 issues we've heard in testimony and heard from

1 commissioners, we thought we had to take a step  
2 as chairs to try to get some of those issues under  
3 one of the questions.

4                   You could argue that those three  
5 issues I brought could fit under another question,  
6 but I think we would like to start off today at  
7 least thinking that those three questions -- and  
8 let me repeat them, the appropriateness of the  
9 three-prong test, how to measure proportionality,  
10 and the dropping of men's sports -- would be  
11 subsumed under question number one.

12                   Question number two, we thought  
13 that enforcement issues and interest survey issues  
14 would be under number two.

15                   Then we thought under number five  
16 would be issues regarding capping of men's rosters  
17 and walk-on issues and the second issue under number  
18 five -- we thought fit under number five was the  
19 arm's race issues.

20                   Again, the questions that we  
21 were given, we were given. We did not develop  
22 those questions. It's our obligation to answer  
23 them as best we can. So we have a structure sort  
24 of thought through today.

1                   Let me open up. Before we ask  
2 Cary to start on question number one, let me open  
3 up -- yes, Graham?

4                   MR. SPANIER: Is a finding -- how  
5 is a finding different than a conclusion or a  
6 recommendation? Frankly, I'm not very interested  
7 in findings so much as I am having a discussion  
8 that would lead to a conclusion or a recommendation  
9 or is a finding what -- is that what a finding is?

10                  MR. LELAND: Well, we had a long talk  
11 about this last meeting.

12                  MR. SPANIER: I missed that.

13                  MR. LELAND: And we decided that a  
14 finding for this Commission, because we talked  
15 about academic definitions and legal definitions  
16 of findings, and we came up with the idea and that  
17 would be a finding for this Commission should be  
18 something we have heard or learned about during  
19 the course of our work. It could be -- my  
20 understanding -- Tom, do you want to elaborate  
21 on that? We'll sort of put you on the spot.

22                  MR. GRIFFITH: I think you stated it  
23 very well. Ditto!

24                  MR. SPANIER: But isn't there some

1 point at which we say and here's what we think about  
2 that?

3 MR. GRIFFITH: Yes. It's definitely  
4 different than recommendations. Recommendations  
5 gets us into the area of policy. We think we ought  
6 to do something.

7 MR. SPANIER: Do we get to do that at  
8 some point?

9 MR. GRIFFITH: Finding is sort of  
10 describing the way the terrain is right now.

11 MS. COOPER: Tomorrow.

12 MR. SPANIER: That's tomorrow.

13 MR. LELAND: That way we have the  
14 limit in the first place, divided the time of  
15 thinking that we would take today and work through  
16 all of the findings and then tomorrow work through  
17 all of the recommendations. Now, I think the  
18 recommendations are going to be a lot more fun  
19 and the free association arguments -- talks we've  
20 had -- not arguments, but discussions we've had  
21 are a lot of fun. So I think we're incentivized,  
22 all of us are, to move through these findings as  
23 quickly as we can so we can get to the  
24 recommendations.

1                   I think we have read the charter,  
2 Cynthia and I, and we're convinced that this is our  
3 first job, to get these findings done. Then, we  
4 move into what else is on our mind, which might be  
5 recommendations and other issues. Are we clear?

6                   MR. GRIFFITH: Yes. I just have a  
7 question. Do we know whether Bob and Debbie and  
8 Rita will be here and -- they will be here?

9                   MS. COOPER: Bob is going to be here.  
10 He is on a conference call.

11                   MR. GRIFFITH: Okay.

12                   MS. COOPER: And Debbie, I'm not sure.

13                   MS. PRICE: They are just arriving a  
14 little later.

15                   MR. GRIFFITH: Gotcha.

16                   MS. PRICE: They are just arriving a  
17 little later. Their flights -- Debbie and Rita will  
18 be late.

19                   MR. GRIFFITH: But it looks like  
20 Muffet will not be here.

21                   MS. COOPER: Not today.

22                   MS. PRICE: She is stuck at the  
23 airport.

24                   MS. COOPER: I think she's going to be

1 here tomorrow.

2 MS. PRICE: I don't think she's going  
3 to be here at all. She was only going to be able to  
4 come today and the flight difference would only give  
5 her, like, 20 minutes to be here before she had to  
6 leave.

7 MR. DeFILIPPPIO: And I spoke with Mike  
8 Slive this morning and he felt very badly that he  
9 would not be able to be here today. He's got the  
10 SEC championship on Saturday.

11 MR. LELAND: Okay. And we will -- if  
12 I could read my watch correctly, we will take a  
13 break at 3:30.

14 Any other questions on the  
15 process? We are going to -- again, this is an  
16 inelegant process. We're just trying this and let's  
17 make sure that we all go into it with sort of the  
18 best attitude we can, as quickly and succinctly as  
19 we can.

20 So, I think we are on question  
21 number one.

22 MS. COOPER: We're already five  
23 minutes late.

24 MR. LELAND: Cynthia tells me we are

1 already five minutes late. So I've taken five  
2 minutes too long.

3 MS. COOPER: We are on a time line.

4 MR. LELAND: So, Cary, could you -- do  
5 you want to talk through some of your  
6 recommendations?

7 MS. GROTH: Sure. When I was putting  
8 together the findings for question number one, I  
9 think the one -- one point that kept coming up over  
10 and over again is that there seems that there was so  
11 much misunderstanding with the three-prong test and  
12 over and over in our hearings we kept hearing that  
13 the only safe harbor is prong number one. So I  
14 tried to look at question number one and how can we  
15 strengthen the other two prongs so the institutions  
16 have a choice.

17 I mean, in the 1996 clarification  
18 from OCR and Norma Cantu, it clearly indicates  
19 there are three prongs to meet Title IX to be in  
20 compliance, yet we keep hearing again over and over  
21 there is only one that's being enforced.

22 So how would you like for me to do  
23 this; read through them and just summarize?

24 MR. LELAND: No, I think go through

1 the ones you think are most important and we'll try  
2 to --

3 MS. GROTH: Okay. After 30 years of  
4 Title IX, progress has been made, but there's more  
5 that needs to be done to create opportunities for  
6 women and girls as well as retain opportunities for  
7 men and boys. I feel that's very important because  
8 I think one of the reasons we're here is because we  
9 see the demise of many of our men's non-revenue  
10 Olympic sports, which has been a tragedy.

11 If you look at prongs two and  
12 three, we are able to retain those sports if we  
13 strengthen prongs two and three instead of just  
14 looking at proportionality.

15 Again, going on that same thing,  
16 Title IX does not require institutions to drop  
17 men's sports attempting to meet proportionality.  
18 It appears that it comes down to finances, always  
19 money. Those darn dollar signs.

20 Institutions choosing to comply  
21 again with prong three allow for the potential  
22 impact of non-traditional students in the campus  
23 population. I thought that was a very good point  
24 that was brought up, I believe, in Chicago, the

1 non-traditional students.

2 I think if we look at prong  
3 three, that allows us that opportunity to count  
4 non-traditional students in a different manner as  
5 well as addressed the issue that Debbie has brought  
6 up on several occasions that that is the walk-ons.  
7 We're able to count walk-ons again as long as  
8 there's a prong two and prong three that OCR and  
9 Title IX enforces.

10 MR. GRIFFITH: How come what she's  
11 saying doesn't bear too close a resemblance  
12 to the draft we have?

13 MS. COOPER: Because the printer  
14 wasn't working.

15 MS. GROTH: They didn't print all of  
16 mine, Tom.

17 MS. COOPER: So she is working off of  
18 a list that she --

19 MS. PRICE: Which they are printing it  
20 now.

21 MR. GRIFFITH: Gotcha.

22 MS. GROTH: I thought mine was pretty  
23 thin.

24 MR. LELAND: I apologize.

1 MS. GROTH: That's okay. That's okay.  
2 It's hard to be the first one when you really don't  
3 know what exactly you are looking for.

4 But I think if you look at prong  
5 one, I mean, if you look at question number one,  
6 over and over in all of our hearings, it's come  
7 down to the concern is proportionality and I think  
8 one of the ways that we can address that concern  
9 particularly with our non-revenue men's programs,  
10 in my opinion, is to strengthen prongs two and  
11 three and make those viable options for  
12 institutions.

13 At Northern Illinois University,  
14 we do meet prong three and I'd like to feel that  
15 we were safe or are safe with Title IX in meeting  
16 prong three because at our institution,  
17 proportionality just won't work depending on  
18 the finances that are available.

19 Were you going to say something?

20 MS. COOPER: I was going to say --  
21 I just want to make sure you stick with findings  
22 because --

23 MR. GROTH: Do you want me to read all  
24 of these?

1 MS. COOPER: We're on record now.

2 MS. GROTH: Okay.

3 MS. COOPER: So just any findings that  
4 you want on record.

5 MS. GROTH: Okay. Well, let --

6 MR. LELAND: Here's the confusion.  
7 We were told earlier by staff that all of your  
8 recommendations would be put in this format.

9 MS. GROTH: Uh-huh.

10 MR. LELAND: So we received a packet.  
11 I told you that they were all in this format.  
12 Apparently, that did not happen.

13 MS. PRICE: They're there, but they  
14 didn't get printed correctly.

15 MS. COOPER: Yes. There was a problem  
16 printing and that sort of --

17 MR. LELAND: There was a problem  
18 printing so now you're reading off of something  
19 that -- I think what we're trying to do now is  
20 get a copy of this.

21 MS. GROTH: Would you like to start  
22 with someone else?

23 MR. LELAND: Are we going to get a  
24 copy of this?

1 MS. GROTH: That might be a lot  
2 easier.

3 MR. LELAND: How long will that take?

4 MS. COOPER: Yes. Let's start --  
5 let's just start with someone else.

6 MS. GROTH: Let's do that since  
7 mine -- and there is only four of --

8 MR. LELAND: I'm sorry. I apologize.

9 MS. GROTH: Let's go with Julie or  
10 Ted.

11 MR. LELAND: Why don't we start with  
12 Gene next.

13 MS. GROTH: Gene? There we go.

14 MR. LELAND: Professor DeFilippo?

15 MR. DeFILIPPO: Okay. We were asked  
16 to submit five or six findings. Let me start by  
17 changing the order just a little bit.

18 The first finding is that both men  
19 and women gain substantial and important benefits  
20 from participation in intercollegiate athletics.  
21 There's no question that the same things that it  
22 takes to be successful in life are the same things  
23 it takes to be successful in sports. I think there  
24 is a great correlation there and that women have --

1 have benefited so much from athletics as have the  
2 men.

3                   Number two in a court of law,  
4 the only safe harbor for institutions appears  
5 to be prong one. I know that a lot of -- a lot  
6 of institutions out there, and we have heard  
7 from them, have used prong two and prong three  
8 with OCR.

9                   It appeared that the attorneys  
10 that we spoke with, a lot of the other experts  
11 that we spoke with that sit in a court of law,  
12 if an institution is ever taken to court, the  
13 only safe prong is proportionality.

14                   The number three, at institutions  
15 which have dropped men's sports programs, I think,  
16 that it was a fact that we heard the two most common  
17 reasons are financial and compliance with Title IX.

18                   OCR has not provided enough  
19 clarity to help institutions in using prong two  
20 and prong three. We have talked about this  
21 before in the history of adding women's programs.  
22 Is it a program a year? Is it a program every two  
23 years? Is it a program every three years? The  
24 interpretation certainly needs to be clearer

1 for us.

2                               As for prong three, the  
3 meeting of the needs of the under-represented  
4 sex, we institutions need a lot more clarity  
5 with regard to that.

6                               There has been inconsistent  
7 interpretation of Title IX at different regional  
8 OCR offices and that seems to have been something  
9 that we heard in Atlanta to Chicago to different  
10 areas of the country.

11                              Then we have heard that another  
12 finding was that men tend to walk-on at a higher  
13 rate than women. Now, we have heard that there --  
14 that that's not the case, but I think it's one  
15 of our findings that more people and more of the  
16 facts tended to tell us that men tend to walk-on  
17 to programs more than do women.

18                              That doesn't mean that women  
19 don't want to play or aren't as interested  
20 or as serious as athletics, but that men will  
21 tend to walk-on and be the last person on the  
22 bench, you know, more than women would.

23                              Those are my findings. If there  
24 are any questions or comments, I am happy to answer

1 them.

2 MR. LELAND: I think since we --  
3 since a couple of those last two findings, Gene  
4 went through his quickly, but the issue regarding  
5 OCR not providing clarity, that's really under  
6 prong two. It's an enforcement issue and I didn't  
7 explain this correctly. I again apologize.

8 There has been inconsistent  
9 interpretation of Title IX at different OCR offices.  
10 That's really under question two and the last one  
11 he had, the walk-on issue, is under question five.

12 Okay. So let's talk about the  
13 ones that are under question one first, which is  
14 only safe harbor in the court of law, the  
15 institutions that dropped men, the two most common  
16 reasons they drop men's sports are financial  
17 compliance, both men's and women's have  
18 substantially benefited.

19 Does anybody have any questions  
20 on this? So there's really three that Gene has  
21 submitted for question number one. I feel at least  
22 we are a little organized this time.

23 MS. COOPER: Could you reread the  
24 group?

1                   MR. LELAND: I can reread them. The  
2 three off the front is in a court of law, the only  
3 real safe harbor for institutions is prong one of  
4 the three-prong test. At institutions that were  
5 dropping men's sports, the two most common reasons  
6 are financial and compliance with Title IX and both  
7 men and women have gained substantial and important  
8 benefits for participating in competitive athletics.

9                   MR. BATES: Ted, I take it based upon  
10 that, your interpretation is that those fall under  
11 question one?

12                   MR. LELAND: Yes, sir, so far.

13                             Do you have a different --

14                   MR. BATES: Well, I'm just trying to  
15 look at the issue of assessing and to see how those  
16 fall under assessment. That's all. That is what I  
17 was trying to --

18                   MR. LELAND: Well, we sort of said  
19 that the three-prong test and proportionality would  
20 be under question one.

21                   MR. BATES: Okay.

22                   MR. LELAND: I think that's how we  
23 subsumed that.

24                   MR. BATES: Okay.

1                   MR. LELAND: The one question I would  
2 have, Gene, is that I would feel a little more  
3 comfortable with this one if it said that many  
4 practitioners feel that in a court of law, the only  
5 safe harbor for institutions because --

6                   MR. DeFILIPPO: I would agree with  
7 that.

8                   MR. LELAND: Okay.

9                   MS. de VARONA: Say that again, Ted,  
10 because I had this issue.

11                   MR. LELAND: I said many  
12 practitioners -- I think we heard some evidence  
13 that -- especially in the LSU case and a couple of  
14 others that said in the court -- the courts have  
15 upheld the other prongs at different times. The  
16 problem is is that a lot of practitioners, the  
17 Ted Lelands, and others of the world, many people  
18 in the press, many people making decisions regarding  
19 the allegation of resources, et cetera, feel that  
20 prong one is the only of the three prongs that  
21 provides a safe harbor. That was sort of a friendly  
22 amendment.

23                   MR. JONES: Ted, I have one thing.

24                   MR. LELAND: Yes.

1                   MR. JONES: I do think, though, just  
2 a clarification is important. I think what Gene's  
3 finding says is that, you know, that prong one is  
4 the only safe harbor, which is not the same thing  
5 as saying that's the only way to show compliance. I  
6 think -- I do think that that is what the courts do  
7 tend to say, that in terms of it being a safe  
8 harbor, that is you meet proportionality and that's  
9 basically the end of the game. You are then  
10 presumed, you know, in compliance.

11                   You don't have to worry about an  
12 OCR investigation into facts or anything like that  
13 other than just the numbers. So that -- that, I  
14 think -- I think that's the distinction that Gene is  
15 making. If not, it's the same as saying that it's  
16 the only test for compliance. It's just that it's  
17 the only one that's a safe harbor that doesn't  
18 require, you know, an OCR investigation and that  
19 sort of thing.

20                   Gene, is that -- is my  
21 understanding of what you're saying there correct?

22                   MR. DeFILIPPO: That is correct, but I  
23 must say we also learned that findings -- we could  
24 have heard different sides of findings, am I

1 correct?

2 MS. COOPER: There could be  
3 conflicting findings.

4 MR. DeFILIPPO: And there have been  
5 people that talked about the LSU case. I believe it  
6 was in Atlanta. So you are exactly right in what I  
7 was saying, but there is another side that have said  
8 something else. So, Ted, you are also right in your  
9 interpretation.

10 MR. GRIFFITH: Ted, is your point  
11 that when university administrators are going  
12 to get legal counsel, the overwhelming majority  
13 of the counsel that they are getting -- sort of  
14 the point Debbie made throughout, is that the  
15 university lawyers, I being one of them, is  
16 saying if you want surety here, the safest way  
17 to go is prong one? It's not the only way.

18 You can go down two or three,  
19 but if what you are looking for is to get the  
20 OCR off your back or be in full compliance, is  
21 that what you are saying?

22 MR. DeFILIPPO: It's the only real  
23 safe harbor.

24 MS. FOU DY: But the reason it's the

1 only real safe harbor is because they failed the  
2 other two tests is the reason they are in court, the  
3 other two prongs, the interest in --

4 MS. COOPER: No. They are not in court  
5 yet.

6 MR. DeFILIPPO: See, I thought Ted was  
7 making a different point.

8 MS. FOU DY: You're saying there's not  
9 enough education on prongs two and three to make  
10 them believe that those are valuable as well?

11 MR. LELAND: Right. That's what I  
12 was saying.

13 MS. FOU DY: Right.

14 MR. LELAND: And I think Brian might  
15 have been saying -- he took a little bit different  
16 tact on sort of the same point.

17 Yes, Donna?

18 MS. de VARONA: Well, I do feel that's  
19 an opinion more than it is a fact, although there  
20 are instances where prong one has been what the  
21 court has used to evaluate compliance. So I  
22 think -- I think that when you said many  
23 practitioners feel the only real safe harbor for  
24 institutions is prong one of the three-part test,

1 although other Title IX compliance issues have  
2 been resolved under prongs two and three.

3 I mean, you think you have to  
4 add that, don't you? Then you are working yourself  
5 into a situation where you are -- you are into an  
6 opinion rather than fact. I think there are some  
7 schools that have considered this, in the course  
8 of law, a safe harbor, but there are many other  
9 cases that have been resolved under prongs two and  
10 three.

11 MR. SPANIER: I think we may be  
12 spending a lot of time on something we don't need  
13 to here.

14 MS. de VARONA: Well, it's important.

15 MR. SPANIER: We all know that there  
16 are -- that there is a three-part test and  
17 presumably you can show compliance in any of those  
18 ways, but it is also a fact that the courts have  
19 said prong one is the safe harbor. Those words  
20 have been used. They are on paper. That's the  
21 fact.

22 MS. COOPER: Right.

23 MR. SPANIER: Now, that is not to say  
24 that this group is prevented from recommending that

1 that all be changed or some part of it be changed,  
2 but is it not a finding that you can have compliance  
3 in at least three different ways, but  
4 that prong -- the proportionality prong is the  
5 safe harbor. It's two different things, but they  
6 are both findings.

7 MR. JONES: I mean, that's my sense  
8 of it too. I just think we have a misunderstanding  
9 of what the term safe harbor means. Safe harbor is  
10 not the same thing as meaning that it's a route to  
11 compliance. It just means that the courts recognize  
12 it as the one part of the test that if you get  
13 there, you know, you don't need an OCR investigation  
14 or anything further. That's just -- it's just a,  
15 you know, you hit proportionality and boom, you are  
16 in compliance. There is no fact-finding needed and  
17 that's the distinction.

18 MR. LELAND: Yes. I'm comfortable  
19 with what you just said, but I'm also comfortable  
20 with what Donna said because I think the issue  
21 for me, as I read this, was not so much the legal  
22 ramifications, it was more the day-to-day  
23 ramifications on decisions that people make  
24 regarding the allocation of resources and it

1 seems to me this misunderstanding is part of it.

2 MS. de VARONA: Right.

3 MR. LELAND: So, you know, the  
4 ferreting out of -- is there a way that -- I'm  
5 looking at the guys who may have to write this up or  
6 are going to have to write this up, but is there a  
7 way that we could extrapolate what Gene said, keep  
8 the gist of it and also talk about sort of the legal  
9 issues surrounding it and then also the decision  
10 perception issues surrounding it?

11 (Whereupon, Mr. Bowsby  
12 entered the proceedings.)

13 MR. GRIFFITH: Let me see if I --  
14 maybe I misunderstood Donna.

15 I thought the point was, and  
16 really, this may be my misunderstanding, isn't the  
17 point that when a university administrator is making  
18 a decision right now, that he or she will be told by  
19 their legal counsel you have three ways to comply  
20 under the 1979 policy interpretation.

21 Now, you can go down prong one,  
22 prong two, or prong three. Now, when you go down --  
23 if you go down prong one, the courts have said safe  
24 harbor, you win, no further scrutiny.

1                   If you go down two and three,  
2 there's going to be a lot more intensive looking  
3 at what the interests are, what you did to find  
4 out what the interests are, what the history is  
5 of progress.

6                   I think all -- I think a point  
7 needs to be made that a university administrator  
8 is going to have three options, but they are going  
9 to be told that one of the options is -- is a get  
10 out of jail card! I don't mean that. That's not  
11 the right word, but one of them is going to be  
12 preferred. The way it exists right now, any  
13 good university counsel is going to tell the  
14 university president you've got three choices,  
15 but one is the one -- prong one is the one where  
16 you are absolutely safe.

17                   MS. de VARONA: We don't -- we don't  
18 want the lawyers to tell that to the athletic  
19 directors.

20                   MR. GRIFFITH: But I think the finding  
21 is that that's what is happening.

22                   MS. de VARONA: Well, that's wrong.

23                   MR. GRIFFITH: I think that's what's  
24 happening. Now, we may get to a recommendation

1 about how we can fix that if that's the problem,  
2 but that's what I understand Gene to be saying.  
3 That describes the way university administrators  
4 are -- the options they are faced with right now.  
5 That doesn't mean we are comfortable with that.  
6 Again, we may get to the point -- I think Cary  
7 is probably going to get us there in making the  
8 recommendations that we need to do more with two  
9 and three so that they understand.

10 MR. REYNOLDS: Well, another way  
11 to phrase this or at least to conceptualize it is  
12 while there are three choices, there are not three  
13 equal choices. There are certain risks associated  
14 with each of the choices and as a risk lawyer, I  
15 will tell you having a series of circuit courts  
16 talk about prong one as the safe harbor, having  
17 OCR refer to it as the safe harbor, it seems to  
18 me that you are entertaining a malpractice lawsuit  
19 as an attorney if you were to advise your client  
20 to select a prong that is not the safest one.

21 If there are three choices and  
22 one of the three is safer than the other two, as  
23 a lawyer, I think that you have a responsibility  
24 to point out the fact that you have a higher risk

1 of trouble with the other two.

2 MR. GRIFFITH: And if she questions  
3 that, just tell her to go talk to the president of  
4 Brown University. I mean, that's the practical  
5 decision.

6 MS. GROTH: And, Jerry, I couldn't  
7 agree with you more, but maybe what we are trying  
8 to get to is in making that not the case, you know,  
9 down -- I think you are right on. I think people  
10 have that mentality where it's number one. It's up  
11 to us, perhaps, to look at numbers two and three as  
12 equal prongs.

13 MR. LELAND: I still -- I still --  
14 besides playing out the athletic director,  
15 president, university attorney scenario, I still  
16 think there's the bigger issue that Donna sort  
17 of said more articulately than I could that it's  
18 sort of the public perception out there and the  
19 perception of a lot of day-to-day decision-makers  
20 is that there is only proportionality and the rest  
21 of it, it's all about quotas. I think we ought  
22 to -- I mean, that's what I heard. I've heard a lot  
23 of people come in and say this is about  
24 proportionality.

1 MS. COOPER: Could you repeat it?

2 MR. LELAND: It's about quotas.

3 That's where we are. I think over and above sort  
4 of the procedural and legal issues you guys are  
5 talking about, there's the other issue, which is  
6 sort of the public education issue.

7 MR. REYNOLDS: Well, I don't think  
8 that there's a disagreement, but we're sort of  
9 collapsing concepts. We're completing -- we're  
10 starting to discuss prongs one, two and three  
11 and the way that Gene's finding is laid out, he has  
12 limited his decision at least on the first page to  
13 the first prong, but that's not to say that there  
14 aren't problems with the second and third prongs.

15 MS. de VARONA: I think it's dangerous  
16 if you limit your focus to only prong one when the  
17 law is clear about three prongs being the test. If  
18 we limit that, then, we just focus on --

19 MR. REYNOLDS: But we're not going to  
20 limit it. I mean, just because we're dealing with  
21 this issue right now doesn't mean that we're not  
22 going to discuss the problems with prongs two and  
23 three. It's just this is how Gene wrote it up.

24 MS. de VARONA: Right.

1                   MR. REYNOLDS: And I am sure that  
2 there are other documents around here talking about  
3 the deficiencies in the second and third prongs that  
4 we'll get to.

5                   MR. BATES: Ted?

6                   MR. LELAND: Yes.

7                   MR. BATES: I guess I'm still  
8 struggling with hearing people sort of report  
9 essentially what we heard. Now, then, you have  
10 to get to the notion of after what we have heard,  
11 what's the finding that comes from that and I'm  
12 still struggling with that because clearly, we  
13 are now talking about some of the things that  
14 we heard and we have to move from that to pool  
15 all of that together to say based upon that,  
16 then, this is a finding for us and I'm -- I  
17 guess I'm still struggling with that aspect of  
18 it to move from what we heard to what we think  
19 it means to then put it into the form of a  
20 finding for this Commission.

21                   MR. REYNOLDS: But, Percy, on this  
22 issue, this is not a matter of what we heard.  
23 The fact that prong one is a safe harbor, that's  
24 in just about every circuit decision that's in

1 OCR documents. That's not debatable.

2 Prong one is the safe harbor.

3 Prong one is the only safe harbor. That's not  
4 a matter of opinion.

5 MS. de VARONA: I think the only  
6 safe harbor is what I object to. I think it's  
7 expressed as a safe harbor, but an only safe  
8 harbor presumes that two and three will bring  
9 you into compliance and we're back around in a  
10 circle.

11 MR. REYNOLDS: Oh, no, no, no.

12 MR. LELAND: Safe harbor just means  
13 something different.

14 MS. de VARONA: But only safe harbor,  
15 I would be -- I would rather, if we're going to go  
16 that route, we say safe harbor, not only safe  
17 harbor.

18 MR. REYNOLDS: I know, but that's the  
19 case, though. It's the only safe harbor. If you  
20 look at Norma Cantu's 1996 clarification, when she  
21 discusses safe harbor --

22 MS. de VARONA: I don't agree with  
23 you. I have real -- I'm reluctant to say only.  
24 I'll give you say, but I won't give you only.

1                   MR. REYNOLDS: I have the  
2 clarification right here and in her discussion of  
3 safe harbor, it is only in relation with prong one.  
4 In the court decisions, the discussion of safe  
5 harbor is only in connection with the first prong.  
6 There is no document in existence that talks about  
7 the second and third prongs as a safe harbor.

8                   MR. LELAND: How about if we eliminate  
9 the term safe harbor and say, you know, legally  
10 defensible program or something because if that's  
11 the issue, if it's just safe harbor -- I mean, the  
12 issues are we've had dozens of people testify for us  
13 saying that Title IX is the only safe harbor and  
14 then we've had dozens of people testify for us  
15 saying that they complied with Title IX in other  
16 ways.

17                   MR. REYNOLDS: Those are different  
18 concepts.

19                   MR. LELAND: Well, that's what I'm  
20 trying to --

21                   MR. GRIFFITH: It may be the  
22 understanding of safe harbor and maybe my  
23 understanding of safe harbor is it means that if  
24 this is a course that you follow, your judgment

1 won't be second guessed.

2                               On prongs two or three, if that's  
3 the course you follow, the courts are going to look  
4 at it pretty carefully. The safe harbor notion  
5 isn't whether it's compliance or not. You can  
6 comply in all three ways, but if you comply through  
7 prong one, the courts sort of step back and don't  
8 look at it as carefully as if you say I'm going to  
9 comply in two or three. That concept of stepping  
10 back and not really getting involved is what some of  
11 them have called the safe harbor.

12                           MR. BATES: Could I suggest -- it  
13 seems to me that everybody has to go through this  
14 and we seem to be trying to zero in now. We're  
15 going to hear a lot more on this and maybe we need  
16 to go through a lot of them and then come back to  
17 kind of see where we are as we zero in on the  
18 findings. It seems to me there is a lot more on  
19 this that we ought to be hearing before we start  
20 zeroing in on what Gene has indicated.

21                           MR. LELAND: What are you suggesting,  
22 Percy?

23                           MR. BATES: That somebody else now has  
24 a turn --

1                   MR. LELAND: That we go through  
2 everybody else's findings?

3                   MR. BATES: Right. And, then, it  
4 seems to me that's where we're going to make sense  
5 out of it or to zero in on where we are going to  
6 try to arrive rather than taking each person and  
7 going over and over it. That's my sense.

8                   MR. LELAND: I don't -- that's sort  
9 of a left hand turn I wasn't anticipating.

10                  MS. COOPER: So we are just going to  
11 have everyone go through their findings.

12                  MR. LELAND: Well, let me just do one  
13 other thing then because I thought that was just  
14 clarifying one of these findings. Is there anybody  
15 that wants to clarify or ask questions of Gene on  
16 the other findings that relate to question number  
17 one? There are three of them.

18                  MR. GRIFFITH: I have a question about  
19 the second one. At institutions which have dropped  
20 men's sports programs, the two most common reasons,  
21 would it be more accurate to say the two most  
22 commonly stated reasons? Does that make a  
23 difference?

24                  DR. YOW: Yes.

1 MR. BATES: Gene, was that--

2 MR. DeFILIPPO: That's a friendly  
3 amendment, the two most commonly stated reasons.

4 MR. GRIFFITH: Fine. Is that  
5 accurate? Donna, is that --

6 MS. de VARONA: Yes, I think it is.

7 MR. LELAND: Anything other on Gene's?

8 Okay. Let's -- I'm just taking  
9 these in order. Julie, are you ready to go with  
10 yours?

11 MS. FOU DY: Sure.

12 Mr. LELAND: Now, Julie presented  
13 quite an extensive document so I think there's about  
14 five of them.

15 Julie, Q1-F1 refers to question  
16 one, finding one?

17 MS. FOU DY: Right. I'm finally  
18 figuring that out.

19 MR. LELAND: Okay.

20 MS. FOU DY: Okay. Can I go over  
21 question one again?

22 Are Title IX standards for  
23 accessing equal opportunity in athletics working  
24 to promote opportunities for male and female

1 athletes?

2                               The first finding I put  
3 down there, it is not the purpose of Title IX  
4 or any civil rights law to promote opportunities.  
5 Title IX requires equal access to athletic  
6 participation opportunities and equal treatment.

7                               Do you want me to read them all  
8 before we discuss?

9                               MR. LELAND: I think people can read  
10 them.

11                              Any discussion on this?

12                              MR. REYNOLDS: Well, I guess I was  
13 thinking back to some of the comments that were  
14 made at other town hall meetings where some of  
15 the presenters viewed -- well, took the opposite  
16 approach that Title IX, one of the purposes, was  
17 to equalize opportunities and recognize the fact  
18 that women have been discriminated against for a  
19 long time so -- but in any event, that's just my  
20 comment.

21                              MR. LELAND: Other comments?

22                              MR. JONES: I guess my comment does  
23 sort of touch on Jerry's thought. I guess it's  
24 just the question of us trying to work out exactly

1 what we mean. I think Julie's point here  
2 fundamentally is a pretty good one, but it does  
3 beg the question for me here what is meant by  
4 the term equal access.

5 I think that sort of a more  
6 precise way to think about in the underlying  
7 Title IX statute is that what it requires is  
8 nondiscrimination on the basis of sex. So to  
9 the extent that there are some, you know, we  
10 did hear some testimony that the suggestion is  
11 Title IX is about -- is about sort of equalizing,  
12 you know, the provision of opportunity in terms  
13 of just raw numbers.

14 Again, I'm not sure that  
15 that's, you know, a correct statement of what  
16 the fundamental purpose of the law is. I think,  
17 you know, again, what the Congress intended for  
18 us to look at is, are institutions providing  
19 athletic opportunities on a nondiscriminatory  
20 basis. So this three-part test was just sort  
21 of a way of trying to get at whether institutions  
22 were, in fact, doing that and I would just hate  
23 for us to sort of set up a, you know, a suggestion  
24 that, you know, even if -- you know, for example,

1 if we are hearing testimony about, you know, the  
2 differing level of interests for men and women,  
3 and that may be attributable to all sorts of  
4 things. It may be attributable to past  
5 discrimination.

6                                 Again, the fact of the matter  
7 is, I think, fundamentally we need to be thinking  
8 about whether an institution is actually engaged  
9 in discrimination. I think that Title IX -- again,  
10 we heard some testimony, too, where there is one  
11 suggestion that the Title IX was really a social  
12 engineering instrument.

13                                 So, again, sort of embedded in  
14 this finding, I think, is that begged question  
15 whether that is fundamentally the purpose of  
16 Title IX. I do think this finding does bear  
17 some discussion. I do see what Julie is getting  
18 at. I mean, I agree that Title IX is not about  
19 promoting opportunity, but I think it's about  
20 nondiscrimination and I'm not sure that  
21 nondiscrimination is the same thing as equal  
22 access. So I'll leave it at that.

23                                 MR. SPANIER: I'd agree that this  
24 statement may be technically correct, but one

1 of the reasons we had these four hearings was  
2 to listen to 200 or 300 people and what they  
3 had to say and I heard a very clear message  
4 from clearly the majority -- probably the  
5 overwhelming majority of the people speaking  
6 for what Title IX has done for girls and women  
7 in this country and they talked about their  
8 view of Title IX being to promote women's  
9 opportunities.

10 I'm just a little concerned  
11 that to make a statement like this ignores all  
12 of the very strong statements we have heard  
13 from scores of people.

14 MS. FOU DY: Well, the reason,  
15 Graham, if I could just interrupt real quick, the  
16 word promote, I bring into this is because if you  
17 look at the question, it's phrased as are Title IX  
18 standards for assessing equal opportunity in  
19 athletics for working to promote opportunities for  
20 male and female athletes. So that's where the  
21 promote comes in.

22 When I talk about equal access  
23 and equal treatment, that's the two parts of  
24 Title IX, the first equal access being the

1 three-prong test and equal treatment, then, being a  
2 second tier of that, being that laundry list of  
3 equal training facilities, equal equipment, equal --  
4 all of that laundry list of standards that come  
5 under that.

6                   What I think we need to refer  
7 to when we are talking about this is the purpose  
8 of Title IX is to -- when you talk about  
9 discrimination -- when Brian talks about  
10 discrimination, you're talking about discrimination,  
11 as I understand it, as the under-represented  
12 gender. The purpose is to provide equal access.

13                   MR. SPANIER: Then, I think, in that  
14 context you've just described, it comes across more  
15 as a strident statement. It almost reads as if  
16 don't ask me if Title IX is promoting opportunities  
17 for women in athletics, that's not what Title IX is.  
18 It's sort of like saying don't even ask that  
19 question. I want to talk about something else.  
20 The question is is it promoting opportunities for  
21 male and female athletes and --

22                   MS. FOU DY: But like you said  
23 originally, maybe it is technical, but it's a  
24 finding. It's not a recommendation. This is

1 what Title IX's purpose is.

2 MR. SPANIER: Well, as I said, it's  
3 probably technically correct. It just seems to  
4 ignore what we heard from a lot of witnesses,  
5 particularly women who were saying this is what  
6 we saw Title IX being all about. Yes, it has  
7 promoted opportunities, not enough, still in  
8 transition.

9 MS. FOUDY: Right. I think I address  
10 that in the next finding, which we can move on to  
11 because I talked about it in the next one.

12 MR. LELAND: And we'll have an  
13 opportunity to, I guess, yea or nay on this one  
14 when I get back in January.

15 The next one, Julie?

16 MS. FOUDY: Current Title IX policies  
17 are working to move toward equal opportunities for  
18 the under-represented gender female athletes in  
19 athletics. However, while women's and girls'  
20 athletics opportunities have steadily increased  
21 since 1972, female student athletes continue to lag  
22 behind their male counterparts in participation  
23 opportunities. Discrepancies are also apparent in  
24 the share of scholarships and budgets and the equal

1 treatment of female athletes.

2 MR. LELAND: Okay. Questions? I was  
3 a little -- as I looked at this one, I really liked  
4 the last sentence as opposed to what we call for up  
5 above. I think that, just for me, for my comfort  
6 level, I was never completely convinced that I  
7 understood all of the statistics that were being  
8 given to us even in the GAO record or from the NCAA  
9 or from any other group.

10 So I'm very comfortable saying  
11 there is still a significant gap. I'm not sure I'm  
12 going to, you know, be real comfortable voting for  
13 the GAO report statistics as they are out as a true  
14 representation of what's happening out there. I'm  
15 just not in that position yet. Other people might  
16 be, but that's sort of where I am.

17 Any other comments or thoughts on  
18 this?

19 MR. GRIFFITH: I understand the 1972  
20 reference. That's Title IX, but, I mean, didn't we  
21 hear statistics that opportunities for women in  
22 athletics had been increasing since before 1972?

23 MR. LELAND: I don't remember that.

24 MS. de VARONA: I don't --

1 MR. GRIFFITH: It's in some of the  
2 stuff that I've --

3 MS. de VARONA: There was one in 1972  
4 and I don't recall statistics before that.

5 MR. GRIFFITH: I thought we saw some  
6 that -- anyway...

7 DR. YOW: You did. There was a person  
8 and I can't remember who it was.

9 MS. de VARONA: There were cultural  
10 shifts and things were changing.

11 MR. GRIFFITH: That's the point, yeah.

12 MS. de VARONA: But I don't think  
13 those statistics were really significant in relation  
14 to what happened after 1972. That's a personal  
15 opinion.

16 MR. REYNOLDS: I guess after reading  
17 this, I think that an important question is if  
18 female athletes are lagging behind their male  
19 counterparts and if there disparities, the question  
20 becomes are they related to discriminatory conduct  
21 or nondiscriminatory actions.

22 If it's discriminatory, then,  
23 that implicates the whole panoply of civil rights  
24 protection. If not, then, those disparities don't

1 implicate civil rights. I think that that was  
2 recognized in the statute.

3                   There is a provision in the  
4 statute that deals with statistical imbalances  
5 and Congress, in enacting Title IX, you know,  
6 I'll read some of the language, nothing contained  
7 in Subsection A of this section shall be interpreted  
8 to require any educational institution to grant  
9 preferential or despaired treatment to members of  
10 one sex on account of an imbalance, which may  
11 exist with respect to the total number or percentage  
12 of persons of that sex participating in or receiving  
13 the benefit of any federally supported program or  
14 activity.

15                   When I read that, what I get  
16 from that is that statistical disparity, a  
17 discrepancy, in and of itself doesn't tell us  
18 whether a discrimination has occurred. So I  
19 think that it's important that we get underneath  
20 the numbers if there is a disparity. If there  
21 is a discrepancy, we need to find out whether  
22 it's due to discrimination or other factors.

23                   MR. LELAND: That's a new challenge.

24                   MS. de VARONA: Jerry, let's not open

1 up Pandora's box.

2 MR. LELAND: Yes.

3 MS. de VARONA: When we get into this  
4 interest versus opportunities, it's opening  
5 Pandora's box.

6 MR. LELAND: When you say "we," if  
7 you mean the government, I agree. If you say "we,"  
8 and you mean this Commission, I'm going to have  
9 trouble with that because I'm not sure we're in  
10 any way prepared to answer that question. I don't  
11 think we've heard any testimony regarding that  
12 question. I just don't know how --

13 MR. REYNOLDS: Well, I guess it  
14 goes -- as a fundamental question, the  
15 protections -- the main thrust, at least according  
16 to some folks, is to prevent discrimination based  
17 on sex.

18 Now, if there is a disparity that  
19 flows from discrimination based on sex, then, we  
20 have a problem and we have a statute to deal with  
21 it. But if this disparity or discrepancy occurs  
22 because of other reasons, then, we don't have a  
23 problem.

24 The only point that I'm trying

1 to make is that it's important that we find out  
2 whether the disparity is caused by discriminatory  
3 conduct or for nondiscriminatory reasons.

4 MS. FOU DY: And that's the beauty of  
5 the three-prong test. That's the purpose of it, is  
6 to figure out. If it's not caused by discriminatory  
7 practices, you're going to be able to find that out  
8 in prongs two and three and that's why we need  
9 to --

10 MS. de VARONA: On a case-by-case  
11 basis.

12 MR. LELAND: And I just -- again, it  
13 depends on how we define "we." "We," in terms of  
14 this Commission, we need to answer question number  
15 one, which is does Title IX standards assess and  
16 promote. So I don't think we can get into  
17 answering -- and Julie has suggested that she  
18 has a finding here. So I think we ought --

19 MS. COOPER: Keep going.

20 MR. LELAND: -- to stick with that.

21 Donna?

22 MS. de VARONA: I'm going to be quiet.  
23 I'm fine.

24 MR. LELAND: Anybody else?

1 Yes, Debbie?

2 DR. YOW: You knew I was coming. I  
3 think whether you use this as a caveat or something  
4 to what Julie is saying is accurate, but what Jerry  
5 is saying is accurate at least in some institutions  
6 in some ways. We have to acknowledge that.

7 As an example, we have a men's  
8 Lacrosse team and a women's Lacrosse team. The  
9 cost for equipment varies because of the nature  
10 of the sport and what's required. To just ignore  
11 that as a possibility and as a factor in looking  
12 at the disparities between equipment costs, one  
13 of the three -- one of the 11 programmatic areas  
14 to be considered, I mean, we know that that exists.

15 Somehow, if you can take Julie's  
16 statement and somehow acknowledge the other as a  
17 possibility and you kind of get the full picture  
18 or possible full picture.

19 MR. LELAND: Do you take that as a  
20 friendly --

21 MS. FOU DY: Always.

22 MR. LELAND: Any other thoughts or  
23 concerns about Julie's second one?

24 Third one now?

1 MS. FOU DY: We're still with question  
2 one. Current Title IX athletic policies do not  
3 require the cutting or capping of men's teams.

4 MR. LELAND: We sort of said we'd keep  
5 that under number five. So I put this in here out  
6 of order. I apologize.

7 MS. FOU DY: Okay.

8 MR. LELAND: So let's remember to go  
9 back to number five.

10 MS. FOU DY: We'll move that to five?

11 MR. LELAND: Number five, we said we'd  
12 keep walk-ons there.

13 MS. FOU DY: All right. The three-part  
14 test adopted by the Department of Education is  
15 flexible and gives schools three independent ways  
16 to comply with Title IX's requirements for equal  
17 participation opportunities. All three prongs of  
18 the test have been used successfully by schools  
19 to comply with Title IX and each is necessary to  
20 give schools flexibility and structure in their  
21 athletic programs while guarding against freezing  
22 discrimination into place.

23 MR. LELAND: Now, this is a  
24 validation, I guess, of the appropriateness of

1 the three-prong test. Let's spend a little bit  
2 of time talking about it now.

3 DR. YOW: Ted?

4 MR. LELAND: Yes.

5 DR. YOW: I think, Julie, the  
6 effect -- if that read just slightly differently,  
7 the three-prong test adopted by the Department of  
8 Education -- I don't know how to say this exactly,  
9 but was intended to be or was designed to be because  
10 it ain't in several institutions as we have  
11 discussed. So, I mean, maybe that was the original  
12 intent, I -- you know, I don't know, but I know it  
13 is flexible in loads of -- you know, numbers of  
14 institutions across the country. You don't regard  
15 it as being flexible?

16 MS. FOU DY: Right.

17 DR. YOW: You're just saying it is?

18 MS. FOU DY: Yeah, but I think my point  
19 is that the finding, as it is -- the question is is  
20 it not flexible because we haven't educated schools  
21 enough on how to use prongs two and three?

22 DR. YOW: Well, I think our attorneys  
23 would take exception to that given they -- with  
24 their legal degrees. Maybe it's just -- I know

1 it's a difference, but the nuance, I think, is  
2 important, the difference between is flexible  
3 versus was designed or was intended.

4 MR. GRIFFITH: How about it could be?

5 DR. YOW: Could be. Thank you.

6 Going to an attorney here, Julie,  
7 to your left, we need --

8 MR. GRIFFITH: Could be if it was very  
9 different! No, I'm just kidding! That was a joke!  
10 That was a joke!

11 MS. FOU DY: Tom, don't make me give  
12 you --

13 MR. GRIFFITH: I was only kidding!

14 MS. GROTH: Just to follow up with  
15 what Debbie was saying, I think it is flexible,  
16 but I think the education has not allowed for  
17 it to be flexible and I think that's what you  
18 are trying to say or at least that's how I read it.

19 MS. FOU DY: Uh-huh.

20 MS. GROTH: That the laws in the  
21 three-prong test are flexible. It's just that  
22 they're not being enforced as flexible as they were,  
23 as Debbie said, intended to be.

24 MS. FOU DY: And again, these are

1 findings. These aren't recommendations and I  
2 think we need to distinguish between the two.

3 MR. GRIFFITH: I just want to --  
4 actually, now, I'm not kidding. I'm not certain  
5 that I know enough about the intent of the '79  
6 policy interpretation to know if they intended  
7 it to be flexible. I don't know. Maybe they did.  
8 I think there is some disputed evidence about that.

9 My point is actually couldn't  
10 you make the argument that the existing three-prong  
11 test could be more flexible than it has been applied  
12 in some cases or something like that.

13 MS. FOU DY: I mean, but isn't it a  
14 case you've heard from people talking especially  
15 in San Diego that the problem arises because it's  
16 almost too flexible, in some situations it gives  
17 too much leeway. They didn't want to put  
18 necessarily requirements in that were numbers and  
19 you had to get to this, but we heard Val and I've  
20 read Val's briefing book talk about it. She's a  
21 civil rights expert and she talked about, you know,  
22 part of the flexibility designed for this  
23 three-prong test is what causes some confusion.

24 MR. SPANIER: I just think you have

1 to be careful characterizing the flexibility. I  
2 think if you've got the two uses of the word  
3 flexibility out there, I think it would be all  
4 right, but many of our witnesses described were  
5 having discussions with OCR and they were pulling  
6 back on flexibility saying no, no that's -- we're  
7 not going to go that way with you and we have court  
8 precedence we have been briefed on where there were  
9 attempts -- the schools have attempted to use prongs  
10 two and three in a more flexible way and the court  
11 said no.

12                   So I think to characterize it as  
13 being flexible, maybe it was -- I like the intent  
14 thing except it's also true we can't judge what was  
15 intended. So I think you almost, in light of that,  
16 have to when we get to the recommendations, that's  
17 where we have to talk about flexibility, but I don't  
18 think it's a finding, per se.

19                   The finding is that there is a  
20 three-part test that it gives schools three ways  
21 to comply. All three prongs have been used at one  
22 time or another. I mean, those aspects of what  
23 we are seeing are findings, I would say.

24                   MS. FOU DY: I think also we have to

1 look at the bigger picture. We're talking about  
2 Division I-A schools a lot of the times that the  
3 court cases are happening because prong two is --  
4 there is not a history of continued expansion and  
5 prong three is there is interest.

6 I think if you look at the  
7 greater picture when we look at the OCR cases,  
8 you will see almost 70 percent have complied  
9 with two and three and a lot of those aren't  
10 maybe happening at Division 1-A schools, but  
11 it's still showing others flexibility. I think  
12 if we look at the big picture, we can't forget  
13 that -- that the purpose of it was to create  
14 some flexibility.

15 MR. LELAND: You know what, this  
16 gets a little bit to what I was talking about  
17 on the first question because I am more comfortable  
18 with the three-part test adopted by the Department  
19 of Education, could be flexible and give school --  
20 but I just think on an operational basis on a  
21 day-to-day basis schools -- schools don't feel  
22 there is flexibility.

23 There may be in the minds of  
24 civil rights advocates who you can hire to come in

1 after you've been sued and they can figure out a  
2 way to solve this for you, but in terms of reducing  
3 acrimony on your campus and explaining things to  
4 students, I think could have flexibility is  
5 more -- I think the three-prong -- my opinion is  
6 the three-prong test is sort of elegant. The  
7 problem is it's not operational. It doesn't  
8 work. People don't understand it and they can't  
9 use it.

10 MR. DeFILIPPO: And it needs more  
11 clarity.

12 MR. LELAND: It needs more clarity.

13 MS. de VARONA: That's right. No  
14 question.

15 MR. LELAND: That's the thing we're  
16 looking for, more clarity for now.

17 MS. FOUDY: No question about it. But  
18 that's not in the findings. So, I mean, that's a  
19 different point we have to make.

20 MR. DeFILIPPO: If I asked you to  
21 define proportionality for me, you could do that  
22 very easily. If I asked you to define what's a  
23 history of supporting and adding to women's  
24 athletics, I'm not sure that anybody could define

1 what that is.

2 MS. FOU DY: Right, but that's  
3 something I think we need to address in the  
4 recommendations, not -- I mean, we're still  
5 in the findings.

6 MR. LELAND: Right, but I think  
7 a finding could be that it is flexible and another  
8 finding could be that it could be flexible. I  
9 mean, there's -- I still think we're in the  
10 findings. We're not making recommendations of  
11 any change. I think we're just pointing that  
12 out.

13 Are we -- I mean, this is going  
14 to go to -- there is no change in what -- right  
15 now in what Julie's suggested. Does anyone offer  
16 sort of a friendly amendment?

17 MR. BATES: The only question I have,  
18 Julie, is if you took flexible out at the top, we  
19 still have it at the bottom. I think it makes it  
20 a more straightforward statement that we do have  
21 three prongs, that it gives the schools three  
22 independent ways to do it.

23 Then, at the bottom, we talk about  
24 it's necessary to give flexibility in structuring

1 the athletic programs. I mean, that -- I don't know  
2 that we lose much in that unless you feel that it  
3 changes what you are trying to say.

4 MS. FOU DY: I'm fine with that.

5 MS. de VARONA: Yes.

6 MR. LELAND: Okay. Could we put that  
7 in, our two recorders there?

8 Good. Any other thoughts on  
9 this one?

10 MS. FOU DY: Way to go, Percy.

11 MR. BATES: Thank you.

12 MR. LELAND: The next one, which is  
13 Q1-F5, question one, finding five.

14 MS. FOU DY: There's no evidence that  
15 given equal opportunities to play, women are less  
16 interested in sports than men. In fact, the history  
17 of Title IX demonstrates just the opposite.  
18 Moreover, while the Department of Education permits  
19 the use of surveys to help determine which sports an  
20 institution should add, survey results alone cannot  
21 be accepted as evidence of insufficient interest in  
22 participation in sports.

23 MR. REYNOLDS: Well, it seems that  
24 whether men and women have equal interest in

1 participating intercollegiate athletics, that  
2 that's an empirical question. It will probably  
3 vary from campus to campus and from region to  
4 region.

5 I agree with the fact that we  
6 had no evidence on this point and that's why I  
7 think that it would be useful to try to gather  
8 some information and one way to do it is to use  
9 a survey. I also agree that the decision -- the  
10 ultimate decision should not turn on -- solely  
11 on a survey.

12 There would have to be additional  
13 analysis and information, but I just find it -- I  
14 think that this is important especially for the  
15 first prong. Right now, it's tied to enrollment.  
16 Proportionality is tied to enrollment and if the  
17 presumption that the interest between men and women  
18 is equal, if that presumption is accurate, then,  
19 we don't have a problem and the first prong is  
20 a -- it's good. It's a good proxy for interest.

21 If we are wrong, then, this --  
22 then, the first prong makes absolutely no sense.  
23 So I think that this is an empirical question  
24 that should be answered.

1                   MR. LELAND: As opposed to including  
2 it in the finding?

3                   Donna?

4                   MS. de VARONA: But it's an empirical  
5 question that you ask when; in grammar schools, high  
6 schools, colleges, universities? When do you ask  
7 the question? I think that's when we get back to  
8 the interest versus opportunity debate.

9                   MR. REYNOLDS: Oh, no. I think  
10 that there is -- this whole thing is problematic.  
11 I think any approach that we take is going to  
12 have some shortcomings and I think that the answer  
13 to your question probably will vary depending on  
14 if you are talking about grammar school, junior  
15 high, high school or college.

16                   If we talk about interest and  
17 abilities, if that phrase is throughout our  
18 documents, policy interpretation, the court  
19 decisions, the '96 clarification, if we talk  
20 about interest and ability, then, I think that  
21 we have some responsibility to accurately  
22 measure interest and ability to try to quantify  
23 these concepts as opposed to just picking  
24 something out of a hat that may or may not

1 be a close proxy.

2 MS. GROTH: Jerry, I remember -- I  
3 recall in Chicago, I believe it was the executive  
4 director of the Illinois high school state  
5 association, and he made the comment or stated  
6 the fact that they offered girls high school  
7 volleyball for the first time, and I think it  
8 was back in the early '80s or -- excuse me --  
9 the late '80s. At that point in time, very few  
10 high schools offered girls' volleyball, but once  
11 they announced that it was going to become a  
12 state championship sport, 400 and some schools  
13 added that sport.

14 I thought that comment that was  
15 made, that fact, was very stark to the discussion  
16 that we are having right now. I'm not sure that  
17 if you had surveyed those young girls prior to  
18 that championship being offered that they would  
19 have said they would have had an interest in  
20 playing volleyball.

21 MR. LELAND: Let me do this.  
22 Let me let Jerry respond and then we will --  
23 this is again a change we made this morning in  
24 a meeting between Cynthia and myself. I would

1 like to push this finding off to question number  
2 two because it's more appropriate there.

3 MS. GROTH: Okay.

4 MR. LELAND: Because we said we  
5 would do interest surveys in number two and  
6 this really has to do with interest surveys.

7 Okay. But go ahead and  
8 respond while it's on your mind and then we'll --

9 MR. REYNOLDS: I'll make it quick.  
10 I share your concern. If a survey instrument  
11 was going to be used to capture the interest  
12 at a particular point in time and that was it,  
13 then, I don't think it would -- I don't think  
14 that's a good way to go because we -- as you  
15 demonstrated with your example, the interest  
16 level of women, and the same is true for men,  
17 it changes over time.

18 So the idea of having a single  
19 survey to quantify at one time and not going back,  
20 for me, it makes no sense because it doesn't  
21 capture the changes that occur over time. That's  
22 not to say that it couldn't be done on an every  
23 three-year basis. You pick the appropriate amount  
24 of time.

1                   Anyway, I guess we'll just reserve  
2 the rest of this conversation for the appropriate  
3 time.

4                   MR. LELAND: Thank you.

5                   Bob?

6                   MR. BOWLSBY: Ted, I do have one  
7 comment that I don't think goes to the issue of  
8 interest surveys and that is simply the repeated  
9 anecdotal information that we have received, that  
10 we all see it on our campuses and I think that --  
11 I would suggest to you that it's present throughout  
12 college athletics and perhaps high school as well,  
13 if you're not talking about the addition of sports,  
14 I think any one of us involved in this profession  
15 see repeatedly on existing teams, you have more  
16 scholarships for women in track and field than you  
17 do for men, but the men's school is half again as  
18 large.

19                   The same is true in golf. The  
20 same is true in softball and baseball. The same  
21 is true in tennis. There is something going on  
22 there. I think the essence of this question is  
23 that we need to try and get to the bottom of that.  
24 It isn't a lack of scholarship support. It isn't

1 a lack of opportunity.

2                               It's a phenomenon I've seen in  
3 my own children. I have two boys and two girls  
4 and the boys hung out until the very end when  
5 they weren't making a contribution and the girls,  
6 when it became apparent they weren't going to  
7 get a chance to participate and actually play  
8 got out. There is something going on there  
9 that's nondiscriminatory that we need to talk  
10 about at some point during this meeting. I  
11 think it goes to the heart of this question.

12                           MR. LELAND: I agree. Bob, when  
13 you were on your phone call, we made the  
14 arbitrate decision to try to cover the walk-on  
15 capping of men's sports issue on number -- in  
16 number five.

17                           MR. BOWLSBY: Okay. I'm sorry.

18                           MR. LELAND: No, that's fine.

19                           MR. BATES: Ted, could I just, I  
20 guess, make one comment on this?

21                           MR. LELAND: Yes, sir.

22                           MR. BATES: I know we're putting it  
23 in another place, but if we rely upon the data and  
24 the testimony that we have heard, I guess I don't

1 see anything wrong with this -- with this as a  
2 finding.

3 MR. LELAND: Which one?

4 MR. BATES: Q1-F5. There is no  
5 evidence that gives equal opportunities to play  
6 that women are less interested in sports than  
7 men.

8 I mean, I think we heard lots  
9 of stuff on lots of sides, but as I tried to  
10 weigh the evidence, it seems to me I haven't  
11 heard anything that convinced me that there  
12 was anything wrong with this statement as indicated  
13 as a finding.

14 I mean, there is a lot of  
15 evidence and, Bob, I don't know that we're ever  
16 going to be able to go back and do something  
17 that may be outside the purview of this Commission,  
18 but I think if we try to look at just on the  
19 data that was presented, it seems to me that  
20 at least I didn't hear anything that would  
21 convince me that there was that difference in  
22 interest.

23 MR. BOWLSBY: Well, I don't think  
24 if you characterize it as interest or not, but

1 there is a difference in demonstrated participation  
2 in each of our programs.

3 MR. BATES: Right, but I'm just  
4 going on this one.

5 MR. BOWLSBY: Maybe it's attributable  
6 to interest and maybe it's attributable to something  
7 else. I would suggest that it's not necessarily  
8 attributable to discrimination.

9 MR. BATES: Right.

10 MR. BOWLSBY: So, you know, that first  
11 five words of this, I think there is some evidence  
12 that exists and it's present on all campuses. We  
13 see it every day going back to Debbie's example at  
14 the last meeting.

15 MR. LELAND: Okay. One more thought  
16 on this and then we'll postpone this -- the rest of  
17 this conversation until it's framed correctly.

18 DR. YOW: Okay. Ditto to what Bob  
19 said.

20 Julie, a question for you in  
21 that last part. I'm just not sure why that's in  
22 there. I know there must be some strategy behind  
23 this. When you say the survey results alone cannot  
24 be accepted as evidence of insufficient interest

1 in participation of sports, now, dear, why is that  
2 in there?

3 MS. FOU DY: Well, you heard  
4 Mr. Reynolds next to me talk about having your  
5 surveys. Every court has rejected their use to  
6 decide if a person is interested in sports. You can  
7 only use surveys in the court of law if they decide  
8 what they are interested in.

9 MR. REYNOLDS: Well --

10 MS. COOPER: And once you've  
11 determined what they are interested in, then what?

12 MS. FOU DY: But Jerry is suggesting  
13 that we use surveys to determine if the person  
14 is interested and every court is saying you are  
15 freezing discrimination into place by doing that.

16 MR. REYNOLDS: Well, first of all,  
17 the court decisions -- we've heard a lot about  
18 the circuit court cases. Those courts in those  
19 cases applied what's called Chevron deference.  
20 Basically, a court will defer to a reasonable  
21 interpretation of an agency. It doesn't lock  
22 us into any policy position. We can change.

23 Subsequent courts, if what we  
24 do is reasonable, will defer to that new policy.

1 So I just want to make sure that we understand  
2 that those court decisions don't lock us in if  
3 we come up with a reasonable survey instrument,  
4 then, I think that a Court would bless it.

5 I do agree with Julie. If the  
6 instrument is limited, if it's used once and for  
7 the rest of eternity, those numbers are the numbers  
8 that guide us, then, I think that it is fatally  
9 flawed. That's why I think that if we go down  
10 that road, the document has to -- the survey  
11 would have to be done on a regular basis.

12 MR. SPANIER: I think there is an  
13 important general point here that we have to be  
14 careful about in all of these findings. The  
15 1979 policy interpretation and the 1996 letter  
16 of clarification that have become the basis for  
17 many of the court decisions. That is not the  
18 Title IX law.

19 Those are clarifications and  
20 interpretations and those are changeable and  
21 so we have to be careful in making a finding that  
22 we're saying this is the way it is. This is the  
23 way it is only in relation to things we have yet  
24 to talk about that are on the table for tomorrow.

1 So I think we have to be very sensitive to that  
2 interplay in what some of these words mean.  
3 Something cannot be so or can't be done or should  
4 be done while the answer is it depends.

5 MR. LELAND: I really saw that  
6 second sentence is a little bit of a suggestion  
7 or a recommendation, since I got the last word,  
8 let's put that off to question number two as we  
9 said we would do.

10 Julie, as we are going to the  
11 next one, I thought your next one, which was  
12 Q5-F6, was better off in number five because it  
13 talks about the arm's race.

14 MS. FOU DY: Right.

15 MR. LELAND: Okay. So that -- and  
16 thank you for doing all of that work, Julie. That  
17 exhausts Julie's question number one findings.  
18 We've got Gene's done. Let's go to -- Cary, are  
19 you ready?

20 MS. GROTH: Sure.

21 MR. LELAND: Now, with Cary, do we  
22 need to use -- let me ask the staff, do we need to  
23 use this handout we've been given?

24 Okay. Well, I'm going to read--

1 Cary, why don't you go ahead.

2 MS. GROTH: Sure.

3 MR. LELAND: Does everybody have  
4 this?

5 MS. GROTH: It's titled Commission  
6 findings.

7 MR. LELAND: This is just because of  
8 a clerical faux pas.

9 Go ahead, Cary.

10 MS. GROTH: And there are many that  
11 are ditto. So I'm going to start with number two,  
12 the second bullet. After 30 years of Title IX,  
13 progress has been made, but there is much more that  
14 needs to be done to create opportunities for women  
15 and girls and I would like to add and retain men's  
16 Olympic sports, if I may give myself a friendly  
17 amendment.

18 MR. LELAND: Okay. Any comments or  
19 questions on that one?

20 Okay. Next one?

21 MS. GROTH: That would be number  
22 three of the third bullet. There are three tests  
23 that institutions can select from to determine  
24 compliance with Title IX. According to the most

1 recent GAO reporter, OCR has found over 66 percent  
2 of institutions they reviewed to be in compliance  
3 with Title IX based on prongs two or three.

4 MR. LELAND: Comments on that?

5 MS. GROTH: Julie, I'm two for two.  
6 No comments!

7 MR. LELAND: Jerry?

8 MR. REYNOLDS: I would just only --  
9 just make the comment that again, you can draw  
10 that inference only if they use the cross section  
11 and it's not clear to me that that was done.

12 MR. BATES: Which inference are you  
13 referring to, Jerry?

14 MR. REYNOLDS: The GAO report. I  
15 looked at a -- I believe it was 70 some odd cases  
16 and in 66 percent of those cases, the institutions  
17 came into compliance by using prongs two and three.  
18 You can draw an inference that this is the case  
19 nationwide if there is -- if those 70 some odd  
20 cases constitute a cross section. If that's not  
21 the case, then, you can draw no inference.

22 MS. GROTH: I guess what I was  
23 getting at is, you know, over and over again,  
24 like I indicated earlier when we first started

1 this morning, it seems like there's so much  
2 confusion or not good enough education on the  
3 three prongs.

4                   It came back to this fact that  
5 was stated to us and it's also in the GAO report  
6 that clearly some institutions are using prongs  
7 two and three, but I would agree with you.

8                   MR. REYNOLDS: That's not a dispute.  
9 That is true.

10                   MR. SPANIER: It does say that.

11                   MR. JONES: That's a friendly  
12 amendment. Then, why don't you just make that  
13 a friendly amendment to say that OCR has found  
14 many institutions comply with Title IX based on  
15 prongs two or three.

16                   So I think Jerry's point  
17 is just that that's -- just that that 66 percent  
18 statistic is simply not accurate because it's simply  
19 based on a small sample that we don't know to be  
20 a representative sample of the universe cases of  
21 OCR --

22                   MS. GROTH: Those were only the  
23 institutions they reviewed?

24                   MR. JONES: Well, that's right.

1 That's what I'm trying. I'm not saying they reviewed  
2 all of the cases. Sixty-six percent of the sample  
3 that GAO uses is not representative of a full  
4 sample. So it's misleading.

5 MS. GROTH: That's okay. I'm  
6 comfortable with that.

7 All right. Go down to bullet  
8 number five. If I would have known we were going  
9 to go like this, I would have numbered them. I'm  
10 sorry, Ted and Cynthia.

11 Title IX does not require  
12 institutions to achieve proportionality in order  
13 to be in compliance with the law.

14 MR. REYNOLDS: Did you skip one?

15 MS. GROTH: I skipped some that  
16 were dittos or that I've taken -- I've removed.

17 MR. LELAND: Well, I -- okay.  
18 Let's do -- we'll do five and then I would like  
19 to go back to four for a second.

20 MS. GROTH: Well, I didn't say four  
21 because I thought you wanted to hold dropping of  
22 men's sports to another question.

23 MR. LELAND: No. That's in question  
24 one.

1 MS. GROTH: Okay.

2 MR. LELAND: I apologize. I was not  
3 being clear.

4 MS. GROTH: Do you want me to go back  
5 to number four?

6 MR. LELAND: Yes.

7 MS. GROTH: Title IX does not require  
8 institutions to drop men's sports if attempting to  
9 meet proportionality.

10 MR. LELAND: Okay. Let's have a  
11 discussion on that. It seems to me that's one  
12 of the -- this is one of the hot button issues.  
13 We've heard a lot of testimony from people who  
14 told us that their opportunities were eliminated  
15 or dropped simply because of proportionality,  
16 Title IX.

17 MR. SPANIER: Nobody ever said it  
18 was a requirement. This is quite accurate.

19 MS. GROTH: It's a finding.

20 MR. JONES: Yes. I would just make a  
21 point of clarification here that, you know, for  
22 example the first bullet says Title IX policy should  
23 not be changed and that, I think, for the sake of  
24 accuracy for these two bullets, this one and the

1 next one, we just need to clarify what we are  
2 talking about is -- is, you know, the enforcement  
3 policies. We're not talking about Title IX or  
4 we're not talking about the underlying statute.

5 MS. de VARONA: Well, maybe if we  
6 added Title IX does not require institutions to  
7 drop men's sports attempting to meet  
8 proportionality, but many institutions have chosen  
9 this path.

10 MR. JONES: Right. But I think for  
11 the sake of accuracy, Title IX doesn't require you  
12 to meet proportionality. The policy interpretation  
13 does.

14 MS. GROTH: I see.

15 MS. de VARONA: Right.

16 MR. JONES: That's what I am  
17 suggesting is that we need to be clear that we're  
18 not talking about statute here, that we're talking  
19 about policy.

20 MS. de VARONA: Right.

21 MR. LELAND: I think that's a friendly  
22 amendment, right?

23 MS. de VARONA: Right.

24 Debbie?

1 DR. YOW: I'm not sure how to get at  
2 this. I just, I mean, I want to think -- these are  
3 very well done, by the way. I'm very impressed. It  
4 took a lot of time.

5 MS. FOU DY: Where's yours, Debbie?

6 DR. YOW: In my head.

7 I just -- I'm concerned as an  
8 AD when I read these, that Title IX does not  
9 require institutions to drop men's sports if  
10 attempting to meet proportionality. It's just --  
11 it just feels so much like half a story. It's  
12 an interesting dynamic. It's, like, no, you're  
13 not required to do that. You know, what else  
14 could we do? You know, rename the institution?

15 I mean, there -- there is a  
16 limit to what can be done from a commercial  
17 perspective and from a sales perspective and  
18 for those institutions that are -- those athletic  
19 programs that are self supporting, it may very well  
20 and has, in fact, come down to in order to meet  
21 Title IX guidelines, as described -- as described  
22 by their own university attorneys, they would  
23 have to drop a sport because they could no longer  
24 afford to continue to add additional women's

1 sports.

2                               That's part of the rub in all  
3 of this and why it feels so horrific to everybody  
4 is because there is some truth in what most people  
5 say about it. I think to just ignore that, Cary,  
6 I mean, and I think you're addressing that somewhere  
7 else on here, too, about generating revenue  
8 resources, I mean, at the same time the Commission  
9 is publishing reports saying that intercollegiate  
10 athletics is over commercialized.

11                              I mean, we're back to that damned  
12 if you do and damned if you don't kind of scenario.  
13 I just wish somehow as you try to make your best  
14 case, and I appreciate that and respect it, that  
15 you could at least somewhere, somehow acknowledge  
16 the issues related to finance for programs that  
17 are self supportive.

18                              MR. REYNOLDS: Well, and just to  
19 piggyback, I think that the statement for bullet  
20 four is somewhat deceptive because it doesn't  
21 fully flesh out the issue. No, Title IX does  
22 not require institutions to drop men's sports  
23 in order to meet a proportionality prong, but  
24 another way to look at it is to say what are

1 the incentives that are attached to each of  
2 the prongs?

3                   It's sort of like saying you  
4 can walk through any door that you want to walk  
5 through. Pick door number one, two or three,  
6 but somebody tells you that doors two and  
7 three, there's a guy with a gun on the other  
8 side of the door. You decide to go through  
9 door one. You did it freewill. No one required  
10 you to do it. You looked at the consequences  
11 or the potential consequences associated with  
12 each action and you chose.

13                   So to say that the law didn't  
14 require you to do this, while on the surface,  
15 that's true, but there are consequences associated  
16 with picking -- with your decision-making process.

17                   MS. FOU DY: But the law itself does  
18 not require you to cut men's teams. That's all  
19 we're saying in the finding, right, Cary? That's  
20 all you're saying?

21                   MS. GROTH: Yes. I think, you  
22 know, when putting these together, I think for  
23 all of us, maybe we approach them a little  
24 differently. I think we're finding that out.

1 I took what you had said, Ted and Cynthia, that  
2 we take what emerged through the public findings  
3 that we thought were relevant for today's meeting.

4                   Going along with what Debbie  
5 had said, I agree. I think there's much more  
6 that needs to be added to some of these, but  
7 at what point do we add that? I just didn't  
8 know if it was appropriate for me to add my own  
9 comments as a Division I athletic director  
10 regarding the finances.

11                   So what I tried to do, maybe  
12 it would be helpful, the way I approached this  
13 was I took significant comments or comments that  
14 I believed to be true or factual or important  
15 for the discussion today from our open hearings.  
16 There may be some that I may not agree with in  
17 totality, however, I thought they were important  
18 for us to have on the discussion table today  
19 regarding these questions.

20                   MR. LELAND: I mean, I thought  
21 you did a great job with these, by the way, and  
22 I have taken numbering, but four, six, nine, ten  
23 and 11 of yours all deal with the same issue of  
24 the dropping of men's sports as it relates to

1 decisions institutions make, but I see a consensus.  
2 I mean, I hear a consensus that says sort of  
3 in a strict sense that, you know, blaming the  
4 women for the dropping of men's sports is  
5 inappropriate, yet at the same time, it is part  
6 of the mix that institutions have to -- mix of  
7 decisions institutions have to make.

8 I don't know what more you can  
9 say than that. You know, it's part of what --  
10 I mean, our friend from San Diego State, Rick Bay,  
11 basically said, no, Title IX had nothing to do  
12 with it, but I had to half out of the men's side  
13 and half out of the women's side. Well, it didn't,  
14 but it did. Yes?

15 MR. BOWLSBY: Excuse me. I think  
16 there is perhaps one -- well, I'll call it a  
17 clarification. It may not be a friendly amendment,  
18 but I think while it -- the law and the policy  
19 and enactments do not specifically mandate that  
20 sports be dropped in order to comply, I think  
21 at a practical level, and this goes to Debbie's  
22 point, at a practical level, it has not -- it  
23 has not mandated that sports be discontinued to  
24 comply, but if a decision that sports needed to

1 be discontinued for financial reasons, it  
2 definitely dictated what sports -- what gender  
3 those sports were going to come from because  
4 athletics administrators and university  
5 administrators didn't have the flexibility  
6 to say, okay, we've got a lousy tennis facility.  
7 What we really ought to do with, you know,  
8 bitter cold weather and a lousy tennis facility  
9 is really ought to discontinue men's and women's  
10 tennis.

11                   Because we've got to drop two  
12 sports, it ends up being men's tennis and men's  
13 swimming. It doesn't necessitate that sports be  
14 dropped. It dictates what gender those sports  
15 are going to come from if they're dropped. Granted,  
16 it's for financial reasons. Those things are taking  
17 place for financial reasons, but the law, as it's  
18 structured, dictates that those cuts come only out  
19 of the men's side where it involves discontinuation  
20 of programs.

21                   MR. SPANIER: It seems to me we may  
22 be -- you know, I don't have any problems with  
23 anything you have here, but I think we may be  
24 overly sensitive to some of these points because

1 nobody was assigned to go out and collectively  
2 capture all of the findings.

3                   So, you know, none of us  
4 prepared a finding saying so many -- that 160  
5 people testified before us that they were in  
6 a sport that was cut or that so many athletic  
7 directors showed up and said I cut that sport  
8 for this reason.

9                   I think what you were saying  
10 is that with some of the points, we're only  
11 telling part of the story that's out there and  
12 so it feels a little uncomfortable to accept  
13 one finding when it seems like there are some  
14 words missing.

15                   I mean, nobody has given a  
16 finding that says something like many university  
17 presidents require their athletic directors to  
18 run their intercollegiate athletics program on  
19 a self supporting basis.

20                   So many intercollegiate  
21 athletics programs have these constraints around  
22 them financially and, therefore, the athletic  
23 directors have been asked to do X, Y and Z  
24 while complying with the mandates surrounding

1 Title IX. We don't have any findings like that.

2                                 So when we have some others  
3 that state very clearly nobody is forcing you  
4 to cut a sport, nobody is forcing you do that,  
5 blah, blah. It doesn't say that. We don't  
6 have another finding that says, but there is  
7 another part to the story.

8                                 Again, it's a comment I made  
9 earlier. It's a little bit disingenuous of us  
10 as a Commission to ignore the testimony of scores  
11 of people who have told us their stories. We  
12 may think they are wrong, but we did hear it  
13 and something of what we heard from everybody  
14 has an element of truth to it.

15                                 So I think that's -- that's  
16 a little bit of the problem here is, you know,  
17 we're spending a lot of time on the findings  
18 that each of us thought to come up with, but  
19 it's not the whole set of findings probably.

20                                 MR. GRIFFITH: Right. I don't  
21 know what we do about it.

22                                 MR. LELAND: We have to finish  
23 with question one soon. So are we comfortable  
24 with -- are you guys that are writing this thing

1 up comfortable? Do you have enough of the  
2 gist of the conversation and the points that  
3 Cary has?

4 MR. GRIFFITH: Just to make this  
5 clear, when you say are we comfortable with,  
6 you're not asking whether we agree with everything  
7 that's said in here, but that we understand --

8 MR. LELAND: No. Eventually, we're  
9 going to come back and wordsmith this thing and  
10 vote. What we're trying to do is get it in a --

11 MR. GRIFFITH: So that we understand  
12 it?

13 MR. LELAND: So that we understand  
14 what we're voting on and then also, just to remind  
15 you guys, we have a committee that's going to help  
16 these guys wordsmith this thing so when we meet in  
17 January, we'll be able to go down at -- you'll have  
18 it in advance. You can down it line by line and  
19 we'll have a way to make sure everybody's thoughts  
20 are taken and we will take votes on it.

21 I'm just trying to get it all --  
22 we've got about eight or ten different documents  
23 and some of it is in our heads. We're trying to  
24 get it all in one spot. It seems to me there's a

1 little bit of a consensus here about the dropping  
2 of men's sports as it relates to Title IX.

3 Maybe I'm wrong, but I see one.

4 MR. DUNCAN: For my sake, could you  
5 express the consensus?

6 MR. LELAND: Title IX does not  
7 require institutions to drop men's sports. Some  
8 institutions have chosen to eliminate men's sports,  
9 but that's an institutional decision. Certainly,  
10 you know, issues surrounding equal opportunity  
11 played a role. You know, each institution -- to  
12 me, schools are all so different that you can't --

13 MR. DeFILIPPO: Facilities and  
14 finances have also had an impact at different  
15 institutions.

16 MR. LELAND: Yes.

17 MR. GRIFFITH: But don't you have to  
18 acknowledge that some institutions have felt that  
19 Title IX -- that to comply with Title IX, they have  
20 had to cut men's sports? I mean, some have felt  
21 that way. Maybe they felt that way -- maybe they  
22 were wrong to feel that way, but we heard plenty  
23 of people who said, yeah, Title IX made us do it.  
24 There may be other reasons, but maybe that could

1 be one of the roles the Commission is to point out.

2 MS. de VARONA: That goes to the heart  
3 of the whole --

4 MS. GROTH: Yeah. How -- Tom, maybe  
5 what we can do on that -- on that statement is  
6 Title IX does not require -- excuse me -- Title IX  
7 does not require institutions to drop men's sports.  
8 However, many institutions have felt they have had  
9 to drop men's programs in order to comply with  
10 proportionality. I mean, that states the law, but  
11 it does not --

12 MR. GRIFFITH: The language in Title  
13 IX is not required.

14 MS. de VARONA: I think they have made  
15 the choice.

16 MS. GROTH: Made the choice.

17 MS. de VARONA: You said not felt.

18 MS. GROTH: Okay.

19 MS. de VARONA: Had made the choice.

20 MS. GROTH: Better use of words. Made  
21 the choice.

22 MS. de VARONA: Because that's true.

23 MR. GROTH: And quite frankly, we  
24 could wordsmith all of these.

1 MR. LELAND: Yes. This is critically  
2 important, though, this little nuance we're talking  
3 about.

4 MS. de VARONA: Yes, it is.

5 MR. LELAND: I don't think we could  
6 settle it today, but we've got to get it in.

7 MR. GRIFFITH: I just want to allow  
8 that there may be some and you may think they were  
9 wrong, but there may be some who thought that they  
10 were doing it because Title IX required them to do  
11 it.

12 MS. de VARONA: Right. I think they  
13 did.

14 MS. FOU DY: I mean, if you look at --

15 MR. JONES: It does seem -- it does  
16 seem slightly disingenuous, I guess, is the word  
17 I would use, to use the word choice in this case  
18 because I do think you can't ignore what Bob is  
19 saying. There seems to be this tendency to want  
20 to create this distinction between the elimination  
21 of teams either because of budgetary reasons or  
22 because of Title IX.

23 I think what Bob is suggesting  
24 is, yeah, there are very real financial and

1 budgetary issues that face athletic directors,  
2 but when they have to look at the where to make  
3 the cuts in the budget, you know, because of many  
4 of the views that have been expressed to us about,  
5 you know, what Title IX -- what the policy  
6 interpretation requires, you know, in terms of  
7 deciding what goes on the chopping block, that's  
8 how men's sports end up on the chopping block.

9                   So, you know, they are so tied  
10 in together, Title IX and the budgetary reasons,  
11 so, I think, to say that they have made the choice,  
12 I think that Cary's language was actually better,  
13 that many institutions have felt that Title IX has  
14 played a part. So to sort of characterize it as  
15 simply a choice that institutions have made, I  
16 think ignores the pressure that Bob has felt.

17                   MS. de VARONA: Then we're ignoring  
18 the elephant in the room because they don't choose  
19 to cut football players. They don't make that  
20 choice. They could make that choice, but they  
21 don't make that choice. So I think it's a choice.

22                   I think that's fair unless you  
23 want to say that you could put the football language  
24 in there because they choose to cut men's minor

1 sports instead of choosing to cut -- I'm talking  
2 Division I-A football players and that's a choice.  
3 They make that choice and we are in a box. You  
4 know, there is a box. There is a resource box  
5 and there is a numbers game and that's what we  
6 are looking at.

7 MR. BOWLSBY: Well, but that denies  
8 the management realities that all of us deal with  
9 on a day to day basis. We make just as many cuts.  
10 In fact, the dollars may be larger in the reductions  
11 we make in football and men's basketball than --  
12 we sometimes cut enough from those budgets to wipe  
13 out entire sports programs.

14 That isn't -- just because an  
15 institution discontinues sports, it is always the  
16 last resort for any institution regardless what  
17 the reason is, whether it's purely financial,  
18 whether it's part financial and part compliance  
19 or whether it's all tied to compliance or what  
20 their opinions may be on why they are actually  
21 doing it.

22 I can tell you, and I know I  
23 spoke for every athletics administrator in the  
24 country when I say that dropping sports is the

1 last resort and there are broad reductions in  
2 every part of the program before that is ever  
3 considered and, you know, to have football  
4 repeatedly characterized as this pig at the  
5 trough is offensive to me and it's offensive  
6 to others in the room.

7 MS. de VARONA: I'm not saying that.  
8 I'm saying it's a choice.

9 MR. BOWLSBY: You know, we don't --  
10 this Commission doesn't have the purview or the  
11 time to deal with all of the cost reductions  
12 issues that are present in college athletics.

13 MS. de VARONA: I think they are  
14 important.

15 MR. BOWLSBY: There is a need to do  
16 that and --

17 MS. de VARONA: There is.

18 MR. BOWLSBY: -- I think all of us  
19 are about that task every day. The discontinuation  
20 of sports doesn't come with no reductions in any  
21 other part of the program. It comes after those  
22 reductions are implemented and when reductions  
23 of sport offerings are a last resort. I am quite  
24 comfortable in saying that that's the way it's done

1 on every campus.

2 MR. JONES: And in further response  
3 to Donna's point, too, I think it's worth noting,  
4 though, that even if you were to include football,  
5 you know, Bob's point still, I think, has some,  
6 you know, some credibility here because still,  
7 your cuts would still be on sort of -- for the  
8 Title IX analysis purposes. All of your cuts  
9 would still be on the male side of the ledger,  
10 which I think again bears, you know, some  
11 recognition.

12 MS. de VARONA: Oh, I agree with  
13 you, but I still think it's important, but I --

14 MR. LELAND: Okay. Let's do this.  
15 Let's have one more -- Julie, did you want to  
16 make a comment?

17 MS. FOUDY: Go ahead.

18 MR. LELAND: Let's -- we have to,  
19 I'm afraid, for times sake, forego the rest of  
20 the conversation regarding question number one.

21 Are you guys keeping up with  
22 us? Are we doing what we need to do for you  
23 guys?

24 So let's go on to -- and we'll

1 try, if we have time, we'll go back to get the  
2 other findings that people submitted and findings  
3 that people didn't submit, but have on their  
4 minds. In order to keep our time frame, let's  
5 try to go onto question two.

6                               Is there accurate Title IX  
7 guidance that enables colleges and school districts  
8 to know what is expected of them and to plan for an  
9 athletic program that effectively meets the needs  
10 the needs and interests of their students?

11                              I don't know. I hate to do Julie  
12 again.

13                              MR. SPANIER: There is a one word  
14 answer to that. No.

15                              MR. LELAND: Let me see if there's any  
16 answers to --

17                              MR. SPANIER: I think we've all -- I  
18 think we've all dealt with that one.

19                              MR. DeFILIPPO: That's right.

20                              MR. BATES: We could probably agree on  
21 that.

22                              MR. DeFILIPPO: We agree on that.

23                              MR. LELAND: Gene, do you want to do  
24 yours first? Gene has got two for this one.

1                   MR. DeFILIPPO: I didn't understand  
2 what Ted wanted me to do. His instructions were,  
3 I'm sure, clear, but I didn't understand them.  
4 But now I do, Ted.

5                   MR. LELAND: Thank you, Gene.

6                   MR. DeFILIPPO: Okay. Question two,  
7 finding one, OCR has not provided enough clarity  
8 to help institutions to use prong two and prong  
9 three.

10                  MS. de VARONA: We agree.

11                  MR. REYNOLDS: As the head of OCR,  
12 I concur.

13                  MR. DeFILIPPO: Do we all agree on  
14 something?

15                  MS. COOPER: Yes.

16                  MS. GROTH: Yes.

17                  MS. de VARONA: Yes.

18                  MR. LELAND: Okay. Anybody else have  
19 a comment on the -- good. They even used Roman  
20 numerals. Okay. You have the next one.

21                  MR. DeFILIPPO: I don't mean to pick  
22 on OCR, but it is a finding that there has been  
23 inconsistent interpretations of Title IX at  
24 different regional OCR offices.

1 DR. YOW: Ditto.

2 MR. LELAND: Okay. Any other -- any  
3 disagreement? I hear no waive of support. I'll  
4 do mine since I have a couple and I'm searching  
5 for others. If you'll turn to Q2-R2, clarify prong  
6 one, clarify and institutionalize prong three.  
7 I did like the specific LSU model because when  
8 they tried -- I thought the compelling part about  
9 that was working with the court on the front end  
10 and also the use of -- if they did use interest  
11 surveys, they used interest surveys that dealt  
12 specifically with the sport as opposed to  
13 generically are you interested in playing  
14 sports.

15 MS. FOU DY: Where are you, Ted?  
16 Sorry.

17 MR. LELAND: I'm on Q2-R2.

18 MS. FOU DY: Oh, you're on  
19 recommendations?

20 MR. LELAND: I already went through  
21 R1 because it was a ditto.

22 MR. DeFILIPPO: You're talking about  
23 F, aren't you?

24 MS. COOPER: Q2-F1.

1                   MR. LELAND: Oh, yeah. I'm sorry.  
2 No wonder I screwed this thing up. This is the  
3 most confusing thing I've ever done in my life.

4                   Prong three, as a concept, is  
5 great. Prongs two and three are not clear.  
6 Prongs two and three are only used in an OCR  
7 complaint as filed. I think that's when -- a  
8 little bit of what Jerry was talking about with  
9 the numbers from the OCR report. The problem  
10 you have with those only when you can only  
11 comply under prongs two and three and you can  
12 only convince your president you comply under  
13 prong two and prong three if you get a complaint  
14 by the OCR and you go through all of that problem  
15 and you hire all of the consultants and lawyers  
16 and everything.

17                   I do think there is some issue  
18 of the quota systems if prongs two and three aren't  
19 usable, aren't what I'd call operational. I don't  
20 know if that needs to be in the findings. That's  
21 probably -- let me withdraw that. That's probably  
22 too strong.

23                   But I do think that it is --  
24 when I hear people say it's not a quota system,

1 they are always saying, well, that's because  
2 you use prong two and prong three and, well,  
3 if you can't use prong two and prong three,  
4 then, you know, maybe it is. So that's just  
5 my simple way of looking at it. I think I  
6 did that finally right, didn't I, Gene?

7 MR. DeFILIPPO: Yes.

8 MS. FOU DY: Was the prong two and  
9 three only used after the OCR complaint has been  
10 filed?

11 MR. LELAND: Well, I guess my  
12 understanding from what we've talked to everybody  
13 is is that almost no one -- we heard no testimony  
14 from anyone who used prong two and prong three to  
15 meet Title IX who hadn't -- and felt that they  
16 were in a safe place, a safe harbor, unless they  
17 had been adjudicated, their compliance with two  
18 and three had been adjudicated by the OCR.

19 MS. FOU DY: Are you talking about  
20 Division I again or what are we talking about  
21 because I remember the --

22 MR. LELAND: I'm talking about the  
23 testimony that I heard.

24 MS. FOU DY: Because I remember the

1 panelist from the junior college, and I can't  
2 remember where it was, talking about, you know,  
3 his junior college having -- it was the one on  
4 the far right. I just remember visually, the  
5 man. He was talking about his having so many  
6 non-traditional students that were single mothers  
7 coming back who weren't participating in sports.  
8 He was going off the interest issue -- the interest  
9 prong to be in compliance.

10                               That is what he talked about  
11 because of -- he would never have been able to  
12 meet the proportionality prong based on the number  
13 of women that were coming to school. I wish I  
14 knew his name. I don't have that in front of me.  
15 I remember the --

16                               MR. LELAND: I thought it was a she,  
17 but I remember the discussion. I don't know whether  
18 that had been adjudicated by OCR or not. What I'm  
19 saying is, and I think we had some testimony about  
20 the EADA report, basically the EADA report you had  
21 is about proportionality. That's what it talks  
22 about. It doesn't talk about prong two and prong  
23 three.

24                               I'd like to see a way to

1 operationalize prong two and prong three so that  
2 people could say, you know, I meet prong two and  
3 I didn't get sued and I don't have to deal with  
4 the OCR. I just feel I've done this internal  
5 study and we feel like we've added enough  
6 opportunities in the last five years that we  
7 meet it.

8                               The problem is is that's not --  
9 that's not a viable option for most of us to say  
10 that because if you get sued you don't have a  
11 safe harbor.

12                           MR. JONES: You just stumbled back  
13 into the safe harbor discussion.

14                           MR. LELAND: Yes. I apologize.

15                           MR. JONES: That's what it means.  
16 That's why the safe harbor discussion we had  
17 before is significant because what it means to  
18 be a safe harbor is that that's the way that  
19 you get into compliance without having to go  
20 through all the fact-finding and the OCR  
21 investigation and all that sort of thing.

22                           So the reason why, you know,  
23 operationally they are different is because  
24 to show compliance with prongs two and three,

1 there is a great deal of more fact-finding.  
2 You know, there is -- the investigatory approach  
3 that's taken in prong two because they are not,  
4 in fact, safe harbors. That's the distinction.  
5 That's why that earlier discussion that we had  
6 is a significant one.

7 MR. LELAND: All right. Now, I  
8 had another one. It seems like I have another  
9 one.

10 MS. FOU DY: I guess I'm just saying  
11 that I don't know if it's necessarily that prongs  
12 two and three were only used after the complaint  
13 has been filed. I think more people are using it  
14 and we're just not hearing from them.

15 MR. LELAND: Okay. The next one  
16 is -- I said it's Q1-F3, in the past 20 to 30  
17 years, there has been a small drop off in men's  
18 opportunities; a drop in the number of teams,  
19 squad caps elimination of walk-ons. It is not  
20 accurate to blame Title IX for the dropped  
21 teams and squad caps, although it was probably  
22 a contributing factor in some cases.

23 MS. COOPER: Sounds good.

24 MR. REYNOLDS: Does that take

1 into account roster management -- the missed  
2 opportunities associated with roster management?

3 MR. LELAND: I took roster management  
4 to be squad caps and walk-ons.

5 MR. JONES: The question about the  
6 facts on this, didn't the -- again, I'm not clear  
7 on this. This is just a genuine question, but  
8 didn't the NCAA numbers, haven't they shown  
9 something like 1,800 men's teams eliminated  
10 between, what, 1973 or 1972 and today?

11 Isn't that the number?  
12 Is that what we're calling insignificant? I  
13 mean, I think here it would be helpful rather  
14 than characterizing the number of eliminated teams  
15 as insignificant. I think it might be better  
16 to just put the number out there if there is  
17 one everybody agrees on.

18 MS. FOU DY: But isn't it more  
19 that it wasn't necessarily the teams, it was  
20 the participation slots and didn't that same  
21 study show that the actual number -- and I know  
22 that there was debate about this, the actual  
23 number of participation slots for men, although  
24 it has not grown much, it has increased.

1 MR. JONES: Yeah. Maybe I didn't  
2 know what he was talking about either.

3 MS. FOU DY: That's what I remember.

4 MR. REYNOLDS: No.

5 MS. FOU DY: And that we've dropped  
6 teams, but we've added participation slots because  
7 they've made football teams bigger and they've  
8 made other teams bigger so it's not that -- I think  
9 that's an important distinction.

10 MR. JONES: Yes. I just thought I  
11 would just be interested in making sure that we  
12 clarified it. I wasn't clear what you were talking  
13 about here.

14 MR. BOWLSBY: Yes. That was really  
15 my point too. I think there has been a substantial  
16 migration from other organizations into the NCAA.  
17 I think there has been a substantial transition  
18 from some sports to other sports and I think that  
19 we would be less than responsible if we went by  
20 this -- went past this issue without identifying  
21 that literally hundreds of wrestling programs,  
22 gymnastics programs, swimming programs and others  
23 have fallen by the wayside during the time this  
24 was all taking place. I don't think we have any

1 intention to hanging that all on the shoulders of  
2 Title IX. I don't think it resides there, but I  
3 think we're less than frank if we don't identify  
4 that that has occurred and I think as we prepared to  
5 make recommendations, we need to be mindful of it  
6 and it needs to be included in what we are doing  
7 because it's a fact and it's a lot more than  
8 comparing participation opportunities. It's the  
9 real extinction of some very significant sports  
10 opportunities.

11 MR. SPANIER: Can I ask a question?  
12 I wasn't there in San Diego because I got all of  
13 the materials in the mail and looked through them.  
14 There is a presentation and a set of data by an  
15 independent statistician that the Department of  
16 Education engaged that analyzed all of these data,  
17 took the NCAA data and the other data and reanalyzed  
18 them, was that actually presented before the  
19 commission or was it included in the packet of  
20 materials?

21 MS. GROTH: He presented.

22 MR. LELAND: He did the best he could  
23 to present it.

24 MR. SPANIER: There you have numbers

1 corrected, so to speak, for new schools coming into  
2 the NCAA, reductions in opportunities, increase in  
3 opportunities as well as some estimates of how many  
4 years it would take for certain things to happen.

5 MS. GROTH: He did present, Graham,  
6 but then the NCAA representative corrected him  
7 so it went back to two different opinions or  
8 facts.

9 MR. SPANIER: Uh-huh.

10 MR. LELAND: And I apologize again.

11 I don't know where my brain is today. Maybe I  
12 never had one and I just thought I did.

13 This is back on question one.  
14 I don't know why I brought this thing up so,  
15 Sally, could you just kick me under the table?  
16 Come over here and hit me on the head when I  
17 do something wrong.

18 So if you could turn the page,  
19 I apologize. We will try to come back to that  
20 later. Question two, finding two, there is great  
21 misunderstanding about the law among practitioners.  
22 This is a lack of education from OCR, a lack of  
23 clarity on prong two and prong three and EADA  
24 reports only proportionality. Those were my

1 concerns and I think I've got the right question  
2 this time.

3                   Then if you turn it to question  
4 two, finding three, I do think there needs to be  
5 a stronger enforcement program, more open. The  
6 process shouldn't always require a complaint to  
7 be kicked in and enforcement should be forceful,  
8 which I thought sort of captured what the people  
9 said the last time.

10                   MS. GROTH: Ted?

11                   MR. LELAND: Yes.

12                   MS. GROTH: I know you went by  
13 question two, finding two rather quickly, but  
14 I think C. is worthy of some discussion at  
15 some point, EADA report, so that it accurately  
16 reflects the institution's compliance with  
17 Title IX and I think that needs some work.

18                   MR. LELAND: That's more on the  
19 recommendation end, I think, but, yeah, I think  
20 that's a -- are we all done with my little  
21 faux pas here? Thank you for liking me and looking  
22 the other way. As a matter of fact, I was surprised  
23 somebody didn't say ooh!

24                   DR. YOW: Just don't let it happen

1 again.

2 MR. LELAND: I'll try. Julie, have we  
3 gone through yours for question two yet, your  
4 findings?

5 MS. FOU DY: No.

6 MR. LELAND: Do you want to see if  
7 you have any? I know we got put over there, didn't  
8 we?

9 MS. FOU DY: Yes. We --

10 MR. LELAND: The one that you -- it  
11 was originally question one, finding five.

12 MR. FOU DY: Right.

13 MR. LELAND: Now, it's question two.

14 MS. FOU DY: The interest one.

15 MR. LELAND: Yes.

16 MS. FOU DY: Do you want me to read  
17 it again?

18 MR. LELAND: Yes. Why don't you go  
19 ahead?

20 MS. FOU DY: There is no evidence  
21 that, given equal opportunities to play, women are  
22 less interested in sports than men. In fact, the  
23 history of Title IX demonstrates just the opposite.  
24 Moreover, while the Department of Education permits

1 the use of surveys to help determine which sport  
2 an institution should add, survey results alone  
3 cannot be accepted as evidence of insufficient  
4 interest in participation in sports.

5 MR. LELAND: Okay. Discussion?  
6 We've had a pretty good discussion so far today.

7 DR. YOW: Julie, are you addressing --  
8 are you including the walk-on concern in this -- in  
9 your finding here?

10 MS. FOU DY: No.

11 DR. YOW: Are you suggesting that  
12 there is -- this is not part of the walk-on issue?

13 MS. FOU DY: No. We talk about that  
14 later.

15 DR. YOW: Okay.

16 MS. FOU DY: I was trying to stick  
17 to the first question, which is not the second  
18 question.

19 MR. SPANIER: Is this a prescriptive  
20 statement? Do you mean by cannot, will not, should  
21 not, must be not, must not or...

22 MS. FOU DY: Where are you?

23 MS. GROTH: Survey.

24 MS. STROUP: Survey.

1 DR. YOW: Survey.

2 MR. SPANIER: Survey results alone  
3 can't be accepted meaning we should not allow them  
4 to be accepted.

5 MS. FOU DY: I just have a really  
6 hard time with trying to -- trying to look at a  
7 population of people. First of all, what population  
8 are you looking at? Would you survey the entire  
9 world because that's where you recruit from? I  
10 mean, I would look at -- who would you recruit?  
11 Who would you look at in determining interest?

12 Maybe someone meets Cynthia Cooper  
13 tomorrow, a young girl meets her the next day and  
14 her interest changes the day after she's done the  
15 survey. I just think there are too many factors  
16 involved and cultural bias that come into play  
17 that surveys freeze into place and that to try  
18 and attempt to even bring that into play with  
19 this Commission is way beyond anything I think we  
20 have been asked to do and I think it opens a huge  
21 Pandora's box.

22 MR. SPANIER: So you're really  
23 saying, I think, survey results may not always  
24 tell us the whole story, that while surveys

1 present certain evidence, there may also be  
2 other evidence that reflects women's interests  
3 in sports?

4 MS. FOU DY: Uh-huh.

5 MR. SPANIER: I don't think we  
6 should -- I mean, I'm a survey researcher. I  
7 hate to be party to a statement that kind of  
8 sounds like it doesn't believe in survey research,  
9 it doesn't tell us anything, it can't be used  
10 and shouldn't be used.

11 It is probably a single  
12 best indicator that we would have in our  
13 society for gauging interest among broad  
14 groups of folks, but I would be the first  
15 to say that survey research is based on  
16 probabilistic models, not Stochastic models.  
17 They tell you sort of what's out there in  
18 the general population.

19 You make inferences, you  
20 can give probability levels, but you find  
21 a particular individual for which the survey  
22 doesn't tell you what's going on. I'm just  
23 concerned we don't throw the baby out of  
24 the bath water on this and denounce surveys.

1 MS. FOU DY: What if we said  
2 something like surveys can be subject to tell  
3 you what sport rather than if?

4 MR. REYNOLDS: Why limit it  
5 if there is some value to be had from using  
6 a survey instrument to determine levels of  
7 interest?

8 DR. YOW: Julie, I -- I'm sorry,  
9 Jerry.

10 MR. REYNOLDS: It's just that there  
11 seems to be a visceral fundamental opposition to the  
12 use of surveys and I'm just trying to get at why.  
13 If it can be constructed in a fair manner,  
14 we use surveys all the time. We use, you know,  
15 polling data to predict presidential races. We  
16 use polling data for a whole host of items. Why  
17 is this issue special?

18 MR. SPANIER: I could speculate  
19 that, you know, a survey, if it's done well is a  
20 snapshot of what is. It doesn't tell you what  
21 could be. If you believe that --

22 MR. REYNOLDS: And that's why you  
23 don't --

24 MR. SPANIER: There could be more.

1 There could be better. There could be a different  
2 direction. You don't want a survey to lock you  
3 in place and say this is --

4 MR. REYNOLDS: That's right.  
5 That's exactly right. That's why that picture  
6 of Dewey defeating Truman, they didn't continue  
7 to count the noses. It's a moving target.  
8 That's why it's important that it has to be  
9 done on a regular basis.

10 MR. SPANIER: I think this can just  
11 be dealt with some wordsmithing. I think there  
12 is a point behind this that has some merit, but  
13 it's kind of written in a way as if surveys are  
14 bad, don't ever use them. We just need the right  
15 words in there.

16 MR. LELAND: Go ahead, Gene.

17 MR. DeFILIPPO: I just want to say  
18 that we have an excerpt here on surveys and I  
19 think this tells us about the lack of clarity  
20 in prong three measuring the interest that even  
21 an expert on surveys says that we can't predict  
22 in the future. I think what we are adding to is  
23 the lack of clarity in prong two and prong three.  
24 I think it's coming at it from a different way.

1 DR. YOW: I agree with what Gene  
2 is saying. In fact, that's similar to what I  
3 was going to suggest is we have an expert here.  
4 We can say on the one hand, we have flexibility  
5 prongs one, two and three. Then, the moment we  
6 start talking about one of the prongs, we can't  
7 even agree on its value.

8 That kind of points out what  
9 it feels like, Julie, day-to-day, in the office,  
10 when we are trying to decide how to best ensure  
11 that we are in compliance. It's a real interesting  
12 dilemma.

13 MS. FOU DY: And, you know, I don't  
14 doubt that at all, but one of the things, you know,  
15 that I constantly come back to is you look at --  
16 I mean, Graham, I'll read to you in court cases  
17 that I found was really interesting in the U.S.  
18 Court of Appeals for the First Circuit in regards  
19 to surveys about interests.

20 It says, the premise that women  
21 are less interested in sports than men ignores the  
22 fact that Title IX was enacted in order to remedy  
23 discrimination that results from stereotype notions  
24 of women's interests and abilities. Interest and

1 ability rarely develop in a vacuum. They evolve  
2 as a function of opportunity and experience.

3 I just think that we're --  
4 by doing surveys, we're freezing into place this  
5 discrimination.

6 MR. SPANIER: Only if you misuse  
7 the survey.

8 MR. REYNOLDS: Yes.

9 MR. SPANIER: Only if you misuse  
10 the survey by assuming that because right now,  
11 it's 60/40 or 70/30 or the interest level is  
12 whatever number you find that it means we believe  
13 that's right or we shouldn't try to change it.  
14 I think you know we have to face up to the question  
15 of if -- for example, we've all said in the  
16 discussion of an earlier finding there is not  
17 clarity in the three prongs. There isn't sufficient  
18 guidance.

19 We have one prong that's been  
20 identified as a safe harbor. We should be asking  
21 questions should there be more than three prongs?  
22 Should any one prong be a safe harbor? If there  
23 is to be three or more prongs, what kind of meat  
24 do we put behind the other prongs and if one of

1 them is surveying interest and abilities, we  
2 really have to ask questions and maybe make some  
3 recommendations about what the population is.

4                   The only population that we  
5 look at now is undergraduate students and the  
6 question is should your pool be enrolling  
7 undergraduate students, should it be those  
8 who apply to your institution, should it be  
9 a local, regional or national pool of  
10 perspective students?

11                   I mean, there are a whole  
12 bunch of questions to be asked about what the  
13 relevant group is to survey to determine interests  
14 and abilities. It's not that there was anything  
15 wrong with surveys. It's about the population.  
16 It's about your sampling technique. It's about  
17 the questions you are asking. I think all of  
18 that has got to be clarified along the way so  
19 when we get to that part of the discussion, I  
20 think it's important that we not have categorically  
21 said something about a finding that almost makes  
22 it impossible for us to have that discussion.

23                   I think it just needs a little  
24 wordsmithing to suggest that surveys alone may

1 not tell us the whole story, that there may be  
2 other evidence out there, other things to look  
3 at beyond surveys. We just have to -- have to  
4 get the right words. I really don't think it's  
5 a big problem.

6 MR. JONES: Yes. I think, too,  
7 what the courts are talking about there, as you  
8 know, Graham, is about the idea -- the recognition  
9 that a survey is fundamentally a snapshot in time  
10 and you don't want to allow an institution to  
11 allow a particular survey from a particular  
12 point in time to continue over the course of  
13 time to be a defense against an allegation of  
14 discrimination.

15 Again, at the bottom, I go  
16 back to what I said sort of at the very beginning  
17 of this, we have to keep in mind, you know,  
18 that ultimately what this whole effort is  
19 about -- what the whole three-part test effort  
20 is about is trying to discern whether a covered  
21 institution, a recipient of federal funds is  
22 engaged in discrimination on the basis of sex.

23 So, you know, again, I think  
24 we have to recognize that in some sense an

1 institution -- you've got to acknowledge that  
2 institutions in some sense operate in, you know,  
3 in the world as they -- as it is.

4                   Obviously, there is a delicate --  
5 a very delicate balance that has to be struck,  
6 but I think that the balance is struck by doing  
7 what Graham talks about and just making sure  
8 that surveys are never the beginning and the  
9 end of the question and that we always make  
10 sure that we are looking for the best possible  
11 survey instruments, to get the best possible  
12 measurement, and that we also acknowledge that,  
13 you know, as the courts have said that interest  
14 is not static.

15                   It's not in a vacuum. It's  
16 constantly evolving and that we ought to have  
17 a burden on institutions to continue to measure  
18 that interest, but fundamentally, we've got to  
19 remember what the role of this whole three-part  
20 test enterprise is and that is to find out whether  
21 an institution receiving federal funds is engaged  
22 in discrimination.

23                   MR. BATES: Ted, I have a question  
24 for clarification.

1 MR. LELAND: Yes, sir.

2 MR. BATES: Are we -- I mean, is this  
3 something we can handle by words? Julie, do you --  
4 I didn't read this in that -- I meant that surveys  
5 should never be used alone. Is that -- I mean, to  
6 me, that's a different concept than trying to  
7 clarify it with words.

8 Is that what you had in mind,  
9 that it should be surveyed and something or do  
10 you think there are situations, as Graham is  
11 pointing out, when, if done properly, survey  
12 data could be used? Because if we're going to  
13 wordsmith this, we have to understand what  
14 our intent is here.

15 MS. FOU DY: Well, I know that the  
16 Department of Education allows surveys for prong  
17 three to be done. You know, I think -- what I  
18 talk about in this finding is the use of it overall  
19 in trying to say that women aren't as interested in  
20 men in sports as a general principal, I have  
21 problems with.

22 MR. BATES: Okay. Okay. I think we  
23 can do it with words then. Okay. I just wanted  
24 you -- it needed to be clarified.

1                   MR. LELAND: It seems to me, Julie,  
2 the first sentence might be wordsmithed into some  
3 way as a finding, but the second sentence, moreover,  
4 while the department permits use of surveys, surveys  
5 alone cannot be accepted.

6                   Isn't that sort of a  
7 recommendation? I mean, I don't know if that's  
8 a finding, is it? I mean, I don't know.

9                   MS. FOUDY: I put it as a finding  
10 simply because of the court cases and what  
11 everything has --

12                  MR. LELAND: Okay. So you're  
13 comfortable calling it a finding?

14                  MS. FOUDY: -- been said about it.  
15 Every court has said you cannot use surveys alone.  
16 We've talked about that in some of the testimony.  
17 That's why I put it in there.

18                  MR. LELAND: Okay. Let me ask  
19 you one question. Wasn't there -- wasn't  
20 Brown's attempt to use survey instruments --  
21 their sort of general survey instruments  
22 taken before the student enrolled or during  
23 while they, you know, the first week of  
24 enrollment?

1                   Those were sort of general  
2 interest surveys and weren't -- they tried  
3 to tie that with proportionality? Isn't that  
4 what they tried to do or correct me? I thought  
5 they tried to say -- not that this is meeting  
6 prong three, this is really we're meeting  
7 prong one, is that correct? Okay.

8                   MS. FOU DY: I lumped questions two  
9 and three kind of together, the guidance questions.  
10 So I don't know if you want me to go over the --  
11 I think they go more towards two.

12                   MR. LELAND: I agree. Do you  
13 mean Q? What's labeled as Q3, item one?

14                   MS. FOU DY: Yes. It's labeled as Q3,  
15 but I put them under Q2, I think.

16                   MR. LELAND: Okay.

17                   MR. FOU DY: I don't know if you want  
18 me to do it now.

19                   MR. LELAND: Please go ahead. Thanks,  
20 Julie.

21                   MS. FOU DY: The question was is  
22 further guidance -- is there adequate Title IX  
23 guidance that enables colleges and school  
24 districts to know what is expected of them in

1 planning for an athletic program that effectively  
2 meets the needs and interests of their students  
3 and I put ample written guidance already exists.

4                   However, some schools need  
5 additional technical assistance in understanding  
6 the flexibility of the three-part test, the  
7 independence of each prong of the test and the  
8 practical examples of the ways in which they  
9 comply. Then I list, you know, what the written  
10 guidance that exists already.

11                   MR. LELAND: Are there questions  
12 for Julie on this?

13                   Debbie?

14                   DR. YOW: Not a question.

15                   Julie, I appreciate everything  
16 about this except that first sentence, ample  
17 written guidance already exists. We're just not --  
18 we're not -- the problem is we're living this,  
19 some of us, for me, 26 years, so literally every  
20 day. So we're going to have a different perspective  
21 because we actually do this for a living.

22                   MS. FOU DY: Right.

23                   DR. YOW: Ample written guidance  
24 does not already exist. That's why we are all

1 here.

2 MS. FOU DY: Uh-huh.

3 MR. DeFILIPPO: Ditto to what Debbie  
4 said.

5 MR. REYNOLDS: Well, I would go  
6 one step further. I'm looking at the 1990 Athletic  
7 Investigators Manual. That document preceded the  
8 clarification issued in 1996, which substantially  
9 altered portions of the manual. For instance, the  
10 manual contains the Z test with respect to financial  
11 assistance.

12 Brian just asked, well, what  
13 is that? It's a statistical method of determining  
14 when nondiscriminatory factors explain a disparity  
15 as opposed to discrimination. That methodology  
16 was used and it's laid out in the 1990 manual,  
17 but that has been superseded in the 1996 letter.  
18 Actually, it's not the 1996 letter. It's the '98  
19 Bowling Green letter.

20 In any event, someone relying  
21 on that document is going to be bushwhacked because  
22 at least that portion is not up to date. Also,  
23 conceptually, a history of continuing program  
24 expansion, what does that mean? If you have a

1 gap, does that disqualify you from using prong  
2 two?

3                               Substantial proportionality,  
4 what does that mean? What variance is okay?  
5 Is three percent variance okay? Is five percent  
6 variance okay? There is no written policy document  
7 that clarifies these issues.

8                               MR. SPANIER: Well, everything  
9 cited here predates the 1996 letter, which so  
10 substantially changed things, in fact, it doesn't  
11 matter about all these other things. So in  
12 affect no guidance currently exists other than  
13 a lot of still some guessing going on about  
14 the 1996 letter.

15                               MR. REYNOLDS: Well, and a part  
16 of the problem is you have a statute and then  
17 you have gloss upon gloss upon gloss. You have  
18 a statute and then you have the regulation and  
19 then you have policy interpretation and then  
20 you have the '96 letter and then you add the  
21 Bowling Green letter onto that and then you have  
22 multiple letters of findings that are floating  
23 out there. You have manuals and it's a tough  
24 job trying to find out what the standard is

1 sometimes.

2 MR. LELAND: Well, how should we  
3 handle that? I mean, there's not -- it doesn't  
4 sound to me --

5 MS. FOU DY: I think -- I think I  
6 probably didn't write this that well. I totally  
7 agree that we need more examples of compliance  
8 and ways to comply.

9 I think my reservation is  
10 that we don't tamper too much with the guidance  
11 out there in terms of changing civil rights  
12 laws, which we are not experts on and that we  
13 maybe figure out some way of clarifying those  
14 rules that can provide more guidance.

15 MR. LELAND: So we're in effect  
16 changing at least your first sentence?

17 MS. FOU DY: Yes. How we change  
18 that, I don't know. Can you put all of that  
19 in there? Just kidding!

20 MR. LELAND: Gene?

21 MR. DeFLIPP IO: Go ahead, Graham.

22 MR. SPANIER: I think you need to  
23 eliminate the first sentence and you add a new  
24 last sentence, which says all of these things

1 have been done. Nevertheless, in 2003, which  
2 is the date that will be on this, clearly, new --  
3 a new clarification is needed and further  
4 guidance is needed for educational institutions.  
5 I mean, that -- that's what needs to happen, I  
6 think. You know, this --

7 MS. FOU DY: How about we just  
8 leave the first sentence with however out  
9 and just put in some schools need or even many  
10 schools need.

11 MR. DeFILIPPO: Many would be  
12 closer.

13 MS. de VARONA: Yes, educational  
14 institutions.

15 MS. FOU DY: What's that? Many  
16 educational institutions?

17 MS. de VARONA: Educational  
18 institutions.

19 MS. FOU DY: Yeah, that's fine.

20 MR. LELAND: Okay. Julie, do any  
21 of your others, do you think, fit in that question  
22 number two? Maybe the next one does.

23 MS. FOU DY: Where did we talk about  
24 the EADA? Was that in this one?

1 MS. COOPER: It's Q3-F3.

2 MS. FOU DY: That was kind of two  
3 of Cary's issues. It's similar to that because  
4 it does not request information about a school's  
5 history of expanding opportunities for women  
6 or its accommodation of women's interests and  
7 abilities, the Equity in Athletics Disclosure  
8 Act report may contribute to the misleading  
9 impression that prong one is the only viable  
10 Title IX compliance option.

11 MR. LELAND: Good. That sort of  
12 agrees with one.

13 MS. FOU DY: Uh-huh. And the same  
14 thing for the next one, The Equity in Athletics  
15 Disclosure Act does not apply to secondary schools,  
16 which limits the Department of Education's ability  
17 to systematically monitor compliance with Title IX  
18 at this educational level.

19 MR. LELAND: That is more for three,  
20 though. Let's leave that for question three.

21 MS. FOU DY: Oh, yeah, right. Sorry.

22 MR. LELAND: That's more high school.

23 Any other findings and thoughts  
24 on question number two? Is there adequate Title IX

1 guidance that enables colleges and school districts  
2 to know what is expected of them and to plan for the  
3 athletic program that effectively meets the needs  
4 and interests of other students?

5                                 We talked about enforcement  
6 interest issues and interest surveys. Anything  
7 about the non-traditional students? Is this the  
8 right place to talk about them?

9                                 MR. SPANIER: Can I just back up one  
10 second?

11                                 MR. LELAND: Yes.

12                                 MR. SPANIER: On the Equity in  
13 Athletics Disclosure Act, maybe somebody in the  
14 department could tell us, but my understanding  
15 is that the principal use of that act is not  
16 actually for the Department of Education. It's  
17 to make public to perspective student athletes  
18 what the data showed so they could presumably  
19 make informed decisions about various things.

20                                 It's put up on a web site  
21 and we're required to tell perspective student  
22 athletes go check our data out, make sure what  
23 we are telling you is so. Does the department  
24 actually systematically review these tens of

1 thousands of pages of data and check us out in  
2 some way?

3 I'm just not aware that  
4 there was any systematic -- I mean, it seems  
5 to me like it's most -- like most every other  
6 fund-fund-funded mandate, we have from the  
7 federal government -- we send in a big report.  
8 I'm signing them every day and people bring  
9 them in to me because a lot of them say the  
10 president must personally sign this. It's,  
11 like, 50 pages long and I have people standing  
12 on either side saying, believe us, it's true,  
13 it's true, you don't have to recalculate the  
14 numbers. Graham, just put your signature on  
15 there because it's due at 5:00 o'clock today.

16 I know there can't be --  
17 you don't have the staffing for people to be  
18 reading all of this stuff. If my impression  
19 is correct, it leads me to wonder about whether  
20 we should be party to imposing on the whole  
21 K through 12 system in this country another  
22 unfunded mandate that suggests you ought to  
23 be doing it, too, because for us, it does at  
24 least serve the purpose, at least presumably

1 perspective student athletes looking at our  
2 data decide where to go to college.

3                   The kids in the schools  
4 don't really -- they're not, we hope, choosing  
5 up schools based on an act like that. I'm just  
6 curious. What's it like from your end with  
7 all of this stuff?

8                   MR. REYNOLDS: Well, I missed  
9 the first part of your question. I was being  
10 distracted by Mr. Jones here.

11                   If I piece this together,  
12 are we talking about the --

13                   MR. SPANIER: The Equity in Athletics  
14 Disclosure Act, the data that we provide, put upon  
15 the web site, and so on, do you really  
16 systematically review these things?

17                   MR. REYNOLDS: Well, first off,  
18 that's not in my shop.

19                   Sally, is that your shop?

20                   MS. STROUP: No, but you would be  
21 the one who uses it.

22                   MR. REYNOLDS: Yes.

23                   MS. STROUP: We collect it in my  
24 office. We post it on the web. We ensure that

1 everyone reports in order to meet the compliance  
2 requirements of the Higher Education Act. That's  
3 literally what our office does with it.

4                   We do not sit there and check  
5 all the numbers and see how the numbers look or  
6 what they say. It was designed as a consumer  
7 disclosure process much like all the other  
8 consumer disclosure processes. That's what it  
9 was for.

10                   Now, whether or not the Office  
11 of Civil Rights actually looks at it and uses it,  
12 I actually don't have the answer to that question.

13                   MR. REYNOLDS: The problem is the  
14 data is incomplete. There are three methods of  
15 coming into compliance. If any institution whose  
16 numbers don't match up, that doesn't necessarily  
17 mean that they are not in compliance because there  
18 are two other avenues.

19                   As for trying to somehow get  
20 prong two -- to put data falling from prongs two  
21 and three on the web, that's problematic. Problem  
22 one works because it's a number. The other two  
23 prongs, that's a narrative. We investigate, we  
24 collect data, interviews, I don't see any viable

1 way of putting the information connected with  
2 prongs two and three out for public consumption  
3 on the thousands -- tens of thousands of colleges  
4 and universities that are out there let alone K  
5 through 12.

6 MS. GROTH: But see, the EADA report  
7 then encourages the public to view Title IX as only  
8 having one viable prong.

9 MR. REYNOLDS: That's right.

10 MS. GROTH: Because the Chronicle,  
11 Higher Education, USA Today and various local  
12 media pick it and twist and turn those numbers  
13 and use the proportionality numbers and, hence,  
14 is the only way to comply with Title IX and I  
15 think that's yet another reason why the public  
16 is misinformed about Title IX is the publication  
17 of that report. So perhaps there is a way  
18 that we can modify that.

19 MS. FOU DY: Even if they just  
20 had to indicate which of the three prongs they  
21 are using. They didn't -- I mean, I know two  
22 and three are more of a narrative, like you  
23 said, but they could still indicate that it's  
24 not just prong one that's the issue.

1                   MR. REYNOLDS: But a school for  
2 two and three -- a school doesn't know if it's  
3 truly in compliance until -- as the test is  
4 performed. That means we roll in and we do an  
5 investigation.

6                   MR. LELAND: Jerry, I think people  
7 are saying they would like that to change.

8                   MS. COOPER: Jerry --

9                   MR. BOLSBY: We agree with you.  
10 Right now, the only way you guys roll in and  
11 investigate us and we hire lawyers and away  
12 we go and six months later or 18 months later  
13 or two years later or three years later, a  
14 report comes out and says we complied, but I  
15 think a lot of us are saying, well, to make  
16 prong two and prong three viable, you put on  
17 the EADA report in some fashion you have an  
18 operational definition of what compliance to  
19 two and three means and then have some way to  
20 respond on the AD and then you can say, gosh,  
21 the institutions are trying to comply with  
22 number two. That's what they think they --

23                   MR. GRIFFITH: You know what, you  
24 could end up with surveys. Right. I mean,

1 that's what you're going to show for one of  
2 those. You're going to require institutions  
3 to take surveys and what the results are and  
4 I don't think you want that, do you? I just  
5 wanted to state maybe the obvious.

6 MS. FOU DY: I just don't want a  
7 survey to tell me that I'm not interested in playing  
8 sports.

9 MR. GRIFFITH: I know that. I mean,  
10 I think -- but I think if you expand the EADA,  
11 as, I think, the suggestion here is that it be  
12 done, I think that's how it's likely to expand  
13 because the narrative isn't going to be -- we  
14 create a narrative for poor old President Spanier,  
15 that's going to be difficult to do, right? I  
16 mean, you're going to have to certify that this  
17 long, written history is accurate and all the  
18 incentives will be is to not to do that, instead  
19 to go to something simpler and it's going to be  
20 interests.

21 MS. FOU DY: Why couldn't you just  
22 say indicate which prong? Why do you have to give  
23 the story? Why couldn't you just say prong two?

24 MR. GRIFFITH: Because it is for OCR.

1 MR. REYNOLDS: OCR may disagree.

2 MR. GRIFFITH: Students are supposed  
3 to know.

4 MS. FOU DY: But it's just for the  
5 EADA report. It's not for OCR. It's for the  
6 students to look at, right? So couldn't you just  
7 say it's for -- we're trying to comply right now  
8 with prong two or with prong three? Does it have  
9 to be that detailed?

10 MR. LELAND: I don't think so, but  
11 I would prefer it being a little more detailed,  
12 but I don't think it has to be 35 pages long.

13 Let me add one other thing.  
14 We certainly -- if you added a prong -- having  
15 filled out those EADA forms, I'd add prong two  
16 and prong three, if you could take away all of  
17 the financial data you have to put in there,  
18 which is totally ludicrous because that financial  
19 data, you can't use. It's useless because it's  
20 different from year-to-year and people compute  
21 it differently.

22 So we go to our staff and  
23 say let's take the EADA reports and look at our  
24 salaries for the last eight years to see how the

1 trends have gone and I said we can't use those  
2 numbers because those numbers are all funny and  
3 they are all different. I said, well, let's  
4 compare ours to another school. Well, we can't  
5 do that because they do theirs different. It's --  
6 I mean, it's -- the thing is 30 something pages  
7 long. It's a huge amount of work.

8                   The proportionality numbers  
9 you get in there, they are reasonable numbers.  
10 The other numbers and why we collect those  
11 numbers, I mean, why it's a consumer issue how  
12 much we pay an assistant tennis coach really  
13 is hard for me to understand.

14                   MR. REYNOLDS: Ted, I would like  
15 to address one of your points. Two and three,  
16 in order to list it, we need a metric. I think  
17 that we should be mindful of the fact that while  
18 we need something that's practical and it would  
19 be nice to have a metric for two and three that  
20 we put on the internet, trying to simplify  
21 two and three to that point, it may be problematic  
22 because we could lose nuances if it's totally  
23 number driven.

24                   We already have that with prong

1 one. One concern I have about that is that over  
2 reliance on numbers can -- on metrics can actually  
3 hide discrimination. Just because you hit a number  
4 does not mean that you're not discriminating.

5                   As a matter of fact, it doesn't  
6 mean that you're not systematically discriminating.  
7 So I just throw that out there as an item that we  
8 should be mindful of as we think about trying to  
9 come up with a metric for two and three.

10                   MR. LELAND: I understand. It may  
11 not need to be a metric. I mean, I just think  
12 there is some way to sort of, you know, post hoc,  
13 before it happens, be able to -- or pre hoc, I  
14 guess that is -- do it -- do it before you get  
15 sued to be able to say that I'm complying under  
16 prong two and prong three. Right now, that's  
17 very, very difficult to do.

18                   MR. SPANIER: But certifying that  
19 you are in compliance doesn't have anything to  
20 do with being sued and it's not a defense to a  
21 lawsuit.

22                   In fact, the only thing that  
23 can happen by certifying that you are using prongs  
24 two, three, four or whatever you end up is someone

1 says, well, now, wait a minute, you said you  
2 complied there and you didn't so now I'm really  
3 going to get you.

4 I mean, you know, the intent  
5 of all of this is very debatable, but in reality  
6 I'm not sure we -- we get very far with it. I  
7 mean, we're spending a lot of time -- I mean,  
8 if you totaled up the bill of what we are all  
9 spending on these reports that go to the Department  
10 of Education, it's probably a couple hundred  
11 thousand dollars per institution.

12 If we did away with all of the  
13 reports, we could add another woman's sport. I'm  
14 dead serious about that. I mean, think of the  
15 staff time we put into sending in those reports  
16 and I know you've just got -- you've got a small  
17 staff. They're not even looking at it. You've  
18 got some technical person who is quick getting  
19 it up on the web and that is the end of it.

20 Meanwhile, we have spent  
21 hundreds of hours of staff time trying to figure  
22 out which box to put in the medical expenses of  
23 our student athletes, what our cost center is  
24 on that, how we do it and it's different for

1 every institution. So I don't want to belabor  
2 it.

3 MR. LELAND: Okay. We've got about  
4 three more or four more minutes on question number  
5 two.

6 Are there any other findings  
7 or comments people have? We've talked about  
8 enforcement issues. We've talked about interest  
9 surveys. Is this the place to take on  
10 non-traditional students? Yes?

11 MR. REYNOLDS: Well, I have two --  
12 what I have are quick points to make.

13 First, I think that it's  
14 imperative that OCR provides clear and consistent  
15 policy guidance in written form. One big problem  
16 that we have is that there is no central repository  
17 where someone can go and look up what the policy  
18 is on a given issue. That project is underway at  
19 OCR now. That way, at the end of the day, it's  
20 going to be on the web site. That's one issue.

21 Another is -- okay. I'll stop  
22 there.

23 MS. COOPER: Nine, ten?

24 MR. LELAND: Yeah, but I think they're

1 already through going over those.

2 MS. COOPER: We already did those?

3 MR. LELAND: I think so.

4 Okay. Any other thoughts on  
5 question two? Well, why don't we go ahead and --  
6 we said we'd break at 3:30. My clock is three  
7 hours off, but it's -- it says 12:30 so that means  
8 3:30. So let's -- I think we said we would get  
9 back in 15 minutes. Thank you.

10 (Whereupon, after a short  
11 break was had, the  
12 following proceedings  
13 were held accordingly.)

14 MS. COOPER: Would the Commission  
15 begin making their way back to their seats?

16 MR. LELAND: Okay. Members plus  
17 ex officio, I should say that -- you guys, I  
18 was slightly harkened by the news that our staff  
19 is telling us they got a lot out of the conversation  
20 that we had and they think they can work towards  
21 taking that somewhat muddled conversation and  
22 making it into elegant pros. We do appreciate  
23 that and --

24 MR. BATES: So there is hope?

1                   MR. LELAND: Yes. There is hope,  
2 there is hope despite our efforts to dampen it.

3                   Let's go on. We have three  
4 questions, questions three, four and five, which  
5 we are committed, according to Cynthia's and my  
6 time line, to get done by 6:00 o'clock. If we  
7 have any time -- if we can get them done more  
8 quickly than that, we need to go back and review  
9 a couple of issues with question number one.

10                   Okay. I thought we got through  
11 most of the issues with question number two and  
12 we certainly got through the recommendations or  
13 the findings that people gave us.

14                   So let's go on to three. Is  
15 there further or other steps needed at the  
16 junior and senior high school levels where the  
17 availability or absence of opportunities will  
18 critically affect the prospective interests and  
19 abilities of student athletes when they reach  
20 college age?

21                   Okay. We just have one suggestion  
22 here and that's from Julie and that's the Equity in  
23 Athletics Disclosure Act does not apply to secondary  
24 schools, which limits the Department of Education's

1 ability to systematically monitor compliance with  
2 Title IX at this educational level. That's the only  
3 one that we -- that I can see has direct relevance  
4 to this question. Okay.

5 MS. GROTH: You know, Ted, in  
6 Chicago, we talked about some of the school  
7 systems dropping their physical education and  
8 dropping athletics and paid for sport. I don't  
9 know where that belongs and I don't really know  
10 what needs to be said, but perhaps it's worthy  
11 of mentioning because that affects all of the  
12 levels particularly in the Chicago Public  
13 League or Chicago Public Schools that was  
14 brought up.

15 MR. LELAND: Yeah. I remember a  
16 conversation that we had at the Chicago meeting  
17 in effect talking about the funding issues  
18 across the country in the junior high schools  
19 and secondary schools as it relates to women's  
20 opportunities.

21 I think there were a number  
22 of commissioners who wanted to make some kind  
23 of a statement. I'm not sure that directly --  
24 but I thought -- let me just jump in here and

1 we'll deal with Julie's in a second, but I  
2 thought the testimony that we heard in Chicago  
3 went like this.

4                               It seemed to me we meet the  
5 needs -- we're so in tuned with our community  
6 that we tend to meet the needs and interests  
7 of our students without government interference.  
8 I mean, am I wrong on that?

9                               MS. GROTH: I think we need to be  
10 careful geographically though. That may be what  
11 we heard in Illinois, but that may not be true  
12 in some different, you know, parts of the country,  
13 maybe such as the southern states or whatever the  
14 case may be because we only heard it from a select  
15 few representing only Illinois, didn't we? We  
16 heard from the Illinois high school state  
17 association. We heard from the national federation.

18                               MS. de VARONA: I think Georgia.

19                               MS. GROTH: We heard from Georgia  
20 down in Atlanta.

21                               MS. de VARONA: Because they had their  
22 own Title IX.

23                               MS. FOU DY: I recall the issue being  
24 that the only means of collecting information was

1 through the National Federation of High Schools  
2 and that data is only about numbers -- participation  
3 numbers and it's by state. It's not even by school.

4                               So just another means of  
5 collecting information for these kids to be able  
6 to look to you and to point to and say, you know,  
7 this is happening here and this is happening here  
8 because right now, there is no system in place  
9 for collection of that information.

10                              MR. LELAND: Right.

11                              MR. BATES: Ted, I guess what I heard  
12 by way of finding, it seems to me that there was --  
13 there is a clear disconnect between the K-12 system  
14 and higher education. I see that as a finding and  
15 at some point we may need to think about -- how to  
16 think about bringing that a little closer together.

17                              That's a feeder system and  
18 we're talking about issues of interest, et cetera.  
19 We've got to have these two systems much closer  
20 together and I clearly heard that they are not  
21 collected.

22                              MS. de VARONA: Well, in that regard,  
23 if sports are being dropped and physical education  
24 has clearly been dropped in almost every state, a

1 mandate for that, can we come up with some language  
2 as to how to promote these opportunities?

3 MR. BATES: That would be my --  
4 that would be my guess because we need to do  
5 something. If that's where we're going to get --  
6 I mean, that's our feeder system. So we've got  
7 to connect them and hook them up in some way  
8 and maybe we should save it when we get to talking  
9 about issues of recommendations, we need to think  
10 along that line, but I guess as a finding, it  
11 just seems to me that I heard very clearly that  
12 these are two separate systems operating.

13 MS. de VARONA: Right.

14 MR. BATES: With no real connection  
15 between them.

16 MR. LELAND: That's one finding.  
17 I think what Donna said might be another one as  
18 it relates to the lack of opportunities sort of  
19 generally at that level as it relates to us. I  
20 think in terms of the guidance or other steps  
21 needed in the junior and senior high schools,  
22 I'm assuming this means to comply with Title IX.

23 Do we have a finding related  
24 to that? I mean, I didn't -- I mean, I heard

1 there is the issue of the collection of data  
2 and that certainly might be -- go ahead.

3 MS. de VARONA: Also, there was  
4 a mention -- a finding that some sports still  
5 are club sports and if we're looking for numbers,  
6 they are not going to be included if we only get  
7 those numbers from the educational institutions  
8 if we're looking at interest and participation.  
9 So that falls outside the purview, but  
10 still, if we are looking at interests and  
11 opportunity, there are those that are created  
12 through the club systems such as soccer and  
13 gymnastics and track and field and other  
14 sports.

15 MR. LELAND: Julie?

16 MS. FOUDY: I haven't put it in as  
17 a finding, but I just know that the issue of just  
18 educating schools at the high school and junior  
19 high school level on the requirements of Title IX  
20 and just simply the policies as a whole seems to  
21 be lacking. I don't think we have put that  
22 anywhere, have we?

23 MR. LELAND: No.

24 MS. FOUDY: When we talk about the

1 three-prong test, but that doesn't apply to them.  
2 So I -- I mean, maybe we add as a finding also  
3 that there needs to be more clarification at the  
4 high school level as well or education.

5 MR. LELAND: I got the feeling, Jerry,  
6 and you can tell me if I'm wrong, but I got the  
7 feeling that there is no guidance to the junior  
8 highs and high schools. If they get a complaint,  
9 it's taken to the OCR and it's put through the  
10 adjudication process and there is some kind of  
11 result.

12 Is that what happens?

13 MR. REYNOLDS: Oh, there is some  
14 guidance. The three-part test was developed with  
15 colleges in mind, although many of the principles  
16 that are contained in the three-part test are used  
17 in high schools, but it's an interesting question  
18 whether that is the most appropriate vehicle.

19 I mean, it's something designed  
20 for the dynamics of a college. I'm sure that would  
21 be applied to high schools. I don't know the answer  
22 yet.

23 MS. FOU DY: Wasn't it that they had  
24 different states kind of instituted different

1 programs, like, Florida had a program, Georgia?  
2 I remember the people from Georgia came and spoke.  
3 So it was kind of state by state, but there was  
4 no national guidance on educational -- an  
5 educational process for Title IX.

6 MR. REYNOLDS: At the high school  
7 level, a lot of the controversy centers on things  
8 like the quality of the athletic field and seasons.  
9 There is a different focus.

10 MR. LELAND: Yeah. I mean, I got  
11 the impression at least -- and I don't know why  
12 this sticks in my mind -- that the high school  
13 field test by force uses a laundry list of  
14 support services, the facilities, you know,  
15 uniforms, travel, coaching, that laundry list,  
16 but they felt they were in close enough touch  
17 with their community that the interest issue  
18 wasn't a problem because there was interest  
19 to create a team. As a matter of fact, I can  
20 remember one guy saying that we don't want  
21 you to get involved in our business because  
22 we're doing okay. "We" meaning the federal  
23 government.

24 MS. FOU DY: Should this fall

1 under findings or recommendations? I think  
2 I listed -- I'm trying to find my recommendation  
3 about it because I think it is a real problem  
4 that we need to address somewhere.

5 MR. LELAND: I put it under findings.  
6 Yours is the Equity in Athletics Disclosure Act does  
7 not apply to secondary schools, which limits the  
8 Department of Education's ability to systematically  
9 monitor compliance with Title IX at this educational  
10 level. We put that under a finding, Julie. We had  
11 that --

12 MR. FOU DY: Right.

13 MR. LELAND: Any other -- you know,  
14 we don't need to prolong this if we're -- I feel  
15 a little hesitant to get overly involved in this  
16 one because of our lack of knowledge. I mean,  
17 I want to make sure we don't create a problem  
18 where there is none, you know.

19 MR. BOWLSBY: Knowledge and  
20 representation.

21 MR. LELAND: In knowledge and  
22 representation. Yeah.

23 THE COURT REPORTER: Bob, could you  
24 speak into your microphone? I couldn't hear what

1 you said.

2 MR. BOWLSBY: I said and  
3 representation.

4 THE COURT REPORTER: Thank you.

5 MR. LELAND: Okay. Any other --  
6 we can conclude this one quickly and efficiently.

7 Are you okay? Can we go onto the  
8 next one?

9 MS. FOU DY: So do we agree that  
10 we're going to put a finding in there that  
11 educational assistance is needed on a national  
12 level for high schools and junior high?

13 MR. LELAND: Yes. I think we'll ask  
14 the staff to write something up and then we can all  
15 vote on it --

16 MS. FOU DY: Okay.

17 MS. LELAND: -- sort of when we get  
18 back.

19 MS. FOU DY: Okay. Gotcha.

20 MS. GROTH: And I think the  
21 information is there and it's available to all the  
22 junior high schools and the high schools. It goes  
23 back to what the recommendation or the finding was  
24 for higher education and that is to send out

1 clarification again -- another clarification and  
2 provide educational opportunities to those Title IX  
3 coordinators and whoever are working within those  
4 high school districts or state agencies. So I  
5 think it can coincide with what we already have  
6 recommended.

7 MR. BATES: Ted, let me just say,  
8 to go back to what I was saying earlier, I hope  
9 that we will say something fairly strong about  
10 the high schools.

11 While I agree with Bob that  
12 we don't have the people around the table, but  
13 again I go back to what I said before. That's  
14 where we are looking for students to come back  
15 from and if we don't pay attention, it seems  
16 to me, to that system, they're not coming from  
17 anyplace and so I just think we've got to be  
18 fairly strong in talking about what might be  
19 done there in order to assist us because it  
20 doesn't start at higher ed.

21 It has to start someplace else.  
22 I think we need to -- I'm hoping that at least  
23 when we talk about recommendations that we can  
24 be fairly strong about trying to get something

1 in place that will bring these systems, I think,  
2 a little closer together.

3 MR. BOWLSBY: Percy, I was really  
4 referring to applicability EADA --

5 MR. BATES: Okay.

6 MR. BOWLSBY: -- rather than anything  
7 else that would be in the way of advice.

8 MR. LELAND: Okay. Any other  
9 thoughts or concerns about question number three?

10 All right. Let's go on to number  
11 four. How should activities such as cheerleading  
12 or bowling factor into the analysis of equitable  
13 opportunities?

14 Again, we can -- I think I have  
15 one suggestion here. Julie, do you want to do --  
16 I've got yours down as Q4-F1.

17 MS. FOU DY: Sure. The OCR does not  
18 rely on a specific definition of a sport. It  
19 instead makes case-by-case determinations based  
20 on criteria, which effectively assess whether the  
21 activity should be considered a sport. If the  
22 purpose of the activity is primarily to support  
23 and promote other athletes, then the team would  
24 not be considered to be engaged in a sport for

1 the purpose of compliance under Title IX. This  
2 guidance and process has received the support  
3 of the Universal Cheerleaders Association and  
4 the American Association of Cheerleading Coaches  
5 and Advisors. Similarly, bowling is following  
6 the same guidance and has met the requirements  
7 for the establishment of an NCAA championship.

8 MR. LELAND: Questions or comments  
9 on that? Yes?

10 DR. YOW: I have a comment. I  
11 have a comment/question.

12 Jerry, cheerleading could  
13 possibly already be considered a sport, correct?

14 MR. REYNOLDS: Yes. There are, I  
15 believe, about five factors that we look at. If  
16 you satisfied most of those factors, there is a  
17 presumption that it is a sport.

18 DR. YOW: Okay. Well, if that's  
19 accurate, and I presume that it is, in relationship  
20 to this -- to this question how we should factor  
21 in, I wish we could somehow suggest that there  
22 needs to be some education done. We can't factor  
23 them in because we don't know what -- I don't  
24 understand the facts about how -- what that is,

1 what those five questions are.

2 MR. REYNOLDS: Uh-huh.

3 DR. YOW: I have a feeling that  
4 if we -- if those of us in higher education know  
5 about the form and that there were five questions,  
6 we'll be asking that, especially those of who  
7 have won national cheerleading championships.

8 MR. REYNOLDS: Well, I think you  
9 are right. This is a part of the problem that  
10 I have discussed earlier, the fact that we need  
11 written policy statements that are accessible  
12 to the public.

13 I know of the existence of  
14 the criteria, but if you have worked at OCR or  
15 if you are involved in this issue, you'll know  
16 what that criteria is, but it would be nice  
17 if you could go to OCR's web site and just look  
18 it up. Today, we don't have that capability.

19 DR. YOW: Right.

20 MS. FOU DY: That was my recommendation  
21 following it. It was to disseminate -- I said to  
22 disseminate the existing OCR support determination  
23 methodology as administrative guidance.

24 MR. SPANIER: This particular finding

1 says if the purpose of the activity is primarily  
2 to support and promote other athletes, then, the  
3 team would not be considered engaged in the sport,  
4 now, I would just like some thinking on that  
5 primarily engaged phrase because I was at one  
6 of our -- at a luncheon event. We had the head  
7 cheerleader there and they were -- what she was  
8 talking about is they were getting ready to go  
9 to the national championships and they, you know,  
10 thought they would be in contention for something  
11 there and this is what they had been focused on  
12 all year in practicing and getting ready for their  
13 routine.

14                               So, I mean, that sounds  
15 sport-like, but I don't think that would meet  
16 the criteria of what they are primarily in  
17 existence for because they probably -- the  
18 reason they exist is because we have this  
19 cheerleading program where they support other  
20 athletes, but they are on a separate track  
21 that I never even knew about until recently  
22 when I heard they are, you know, on the side  
23 and all season long, they are getting ready  
24 for this other thing.

1                   How intentional is it that  
2 somebody wrote this? I don't know if you wrote  
3 it or if someone wrote it for you. Is this  
4 primarily to support and promote?

5                   MS. FOUDY: That's taken from  
6 definitions provided by, like, the OCR and  
7 OCR and other NCAA guidelines.

8                   MR. SPANIER: Uh-huh. And so how  
9 do we operationalize that?

10                  MR. REYNOLDS: It seems to me that --  
11 well, there are some cases that are easy. If  
12 cheerleading is primarily -- well, if it's solely  
13 a -- if it's just sideline cheerleading where they  
14 are engaged in providing support to a team, then,  
15 the answer is no, it's not a sport, but you've  
16 got me to think about those situations where a  
17 team may do sideline cheerleading and also engage  
18 in competitive cheerleading and I think in those  
19 cases, we wouldn't have a right line rule. We would  
20 have to look at the percentage of time that the team  
21 was engaged in competitive cheerleading  
22 as opposed to sideline cheerleading and also look  
23 at the remaining factors.

24                  MR. SPANIER: I also suspect what

1 we have happening here is we may have -- I know  
2 we have a couple -- you know, the A squad and  
3 the B squad. We may have a pool of 30 or 40 male  
4 and female cheerleaders who do sideline  
5 cheerleading, but from that group, whatever the  
6 number is, ten or something, go to the national  
7 competition. Isn't it about ten?

8 DR. YOW: Yes, the best you have.

9 MR. SPANIER: You take the best  
10 out of a larger group and so I don't know how --  
11 maybe there is no clear definition of it.

12 MR. REYNOLDS: Well, I think that  
13 the sideline cheerleaders that don't go and compete,  
14 they are not -- they would not be considered -- it  
15 would not be considered a sport, that portion.  
16 This also comes into play in terms of counting  
17 the number of athletes you have. You could  
18 desegregate those students that compete  
19 competitively versus the students that merely engage  
20 in sideline cheerleading.

21 MR. LELAND: Well, let me get back to  
22 this. How should activities such as cheerleading  
23 and bowling factor into the analysis of equitable  
24 opportunities?

1                   There is already a mechanism to  
2 do this, is there not?

3                   MR. REYNOLDS: That's correct.

4                   MR. LELAND: You know, and so I  
5 think our finding just needs to say there is  
6 already a mechanism -- I mean, there are a lot  
7 of misunderstandings. A lot of people think  
8 that there is no way to do this. There is a  
9 way to do this. People don't know about it,  
10 but --

11                   DR. YOW: It's educational. It's  
12 the educational part of this needs -- no one --  
13 that people don't know.

14                   MS. FOU DY: Right.

15                   DR. YOW: They don't know the  
16 difference between the ones that are sideline  
17 only and the ones that are sideline plus  
18 competitive.

19                   MR. SPANIER: But okay, you've  
20 got a competitive cheerleading team. Do you  
21 count them in your numbers?

22                   DR. YOW: Right now, I do not.  
23 In fact, I was unaware until recently that they  
24 could be counted if they meet certain criteria.

1 Of course, let me say this, you know, those  
2 squads, a lot of times, have men so you're going  
3 to have to count male participants if you decide  
4 to count them.

5 MR. SPANIER: Oh, yeah.

6 DR. YOW: In our case, we have a  
7 male and female squad and an all female squad.  
8 So some of us have more than one cheerleading group.

9 MR. LELAND: Okay. Any other thoughts  
10 on question number four?

11 MR. BOWLSBY: Ted, is the first line  
12 of the statement correct then? If we have the  
13 five questions that are applied relative to the  
14 definition of a sport, doesn't that render that  
15 first line incorrect?

16 MR. LELAND: You might say instead  
17 OCR has a set of guidelines.

18 MS. FOUDY: Yeah. It's not a specific  
19 definition. It's criteria, correct, Jerry?

20 MR. REYNOLDS: Well, I was chastised  
21 about this the last time I spoke about this so I  
22 want to take this opportunity to clear this up.  
23 The NCAA, whatever sport that organization --  
24 whatever activity the NCAA says is a sport, then,

1 by God, it's a sport.

2                   If the NCAA concludes that a  
3 certain activity is an emerging sport, then, we  
4 presume that it's a sport.

5                   Any activity that the NCAA has  
6 not addressed, those -- it falls within this gray  
7 zone. Then OCR will come in and apply the -- apply  
8 it's criteria to determine if it's a sport. In  
9 some cases we do have a specific definition of a  
10 sport and that's whatever the NCAA says it is.

11                   MR. BATES: They don't say so now.

12                   MR. LELAND: Can we write this in  
13 a way that takes care -- I mean, sort of takes  
14 what Julie has down here and adds what Jerry just  
15 said to make this thing sensible?

16                   MS. GROTH: And, Ted, the information  
17 we received, I think, in San Diego -- Debbie, I  
18 don't know if you put this together, but it lists  
19 what the NCAA, NJCAA, AIA, FHS, USOC and OCR  
20 determine is what is a sport. I mean, it's very  
21 clear. OCR refers back to interscholastic or  
22 intercollegiate participation.

23                   There is one criteria that  
24 says whether primarily the purpose of the activity

1 is athletic competition and not the support or  
2 promotion of other athletes. I know that our  
3 cheerleading programs compete as well in the  
4 national championship, but that's a one-time  
5 activity for competition.

6                               It's not as if we compete  
7 against other schools. I think a whole lot  
8 needs to change with cheerleading for it to  
9 be considered a sport at least from my perception  
10 based on all the definitions by these associations  
11 that we received, which is very important  
12 information.

13                           DR. YOW: I have a question to Jerry.

14                               Your guidelines used by OCR  
15 can change, can they not, if you determine that's  
16 appropriate? Cary, I admit, I mean, it doesn't  
17 sound like on the surface that competing once per  
18 year in a national championship is -- I mean, that  
19 sounds odd because we're all raised in athletics  
20 and we compete and compete and compete, but I do  
21 know they train toward that goal of that  
22 competition.

23                               In fact, I know they do that --  
24 I know that so well that we have people who

1 complain about the way they cheer because they  
2 say what happened to cheerleading? These people are  
3 gymnasts. They are performers. They don't  
4 do for the crowd what we want them to do. The  
5 reason that comment continuously comes up is  
6 because they consider the use of the event as  
7 a training opportunity for the national  
8 championship. So I know somewhere it is a  
9 gray area, I think.

10 Do the guidelines -- I mean,  
11 Cary just read that right off the sheet.

12 MR. REYNOLDS: The answer to your  
13 question is yes, we can change any policy.

14 MR. LELAND: Let's just get back  
15 to answering this question. Are we okay on  
16 answering this question at least as to the first  
17 set of findings?

18 MR. DISKEY: Ted, I think we have  
19 it.

20 MR. LELAND: At least as to the first  
21 set of findings.

22 MR. BATES: Ted, I have a question  
23 for clarification now. It would seem to me that  
24 we don't have any other sport that has a once a

1 year activity. It seems to me if we're going to  
2 have cheerleading as a sport, the issue of  
3 competition somehow intercollegiately would have  
4 to be included rather than just saying it ought  
5 to be a sport and that you have this thing once  
6 a year because that puts it in a different kind  
7 of category. I don't know how many contests you  
8 would need, but it would seem to me that you need to  
9 do it more than getting ready for ESPN, which is  
10 where I see it every year.

11 MR. REYNOLDS: Interesting issues.  
12 I mean, basketball has X-number of games and  
13 football has fewer. Should one be considered --  
14 should we consider one of them not a sport because  
15 the number of games are different?

16 MR. BATES: Oh, no, no, no, no, no,  
17 but at least they are set in a number --

18 MS. COOPER: They have seasons.

19 MR. BATES: -- of competition.

20 MS. COOPER: They have seasons.

21 MR. BATES: That's different than  
22 saying we're just getting ready for the final four.  
23 I mean, you do a lot more before that. Sorry.

24 MR. LELAND: No, I'm -- I think the

1 OCR has criteria. So there is already a mechanism  
2 to handle this problem.

3 MS. GROTH: Right.

4 MS. FOU DY: It's not our job to mess  
5 with that.

6 MR. LELAND: Let's not get into a  
7 discussion about how many cheerleading competitions  
8 are required to be a sport. I mean, we will have --  
9 you can make your own determination on your campus  
10 or the OCR can make it, but I think there is -- to  
11 answer the question, there is a mechanism in place.  
12 Maybe it needs to be better publicized so people  
13 understand it better.

14 MR. BATES: Okay.

15 MR. SPANIER: The question we have  
16 been presented with is really not about cheerleading  
17 and bowling, per se. It's really a larger question.  
18 We got stuck on those two because it says, for  
19 example -- I forgot the exact wording.

20 MR. JONES: It's for example.

21 MR. SPANIER: We could be talking  
22 about 10 or 20 sports.

23 MR. LELAND: Right. But there is  
24 a mechanism in place for all of those. The

1 mechanism is not just for -- the OCR has a way  
2 of determining how should activities such as  
3 bowling or cheerleading, such as, factor into  
4 the analysis of equitable opportunities. The  
5 OCR as a system, a way or a criteria of declaring  
6 a sport a sport. So there is already a system  
7 to handle this.

8 MR. SPANIER: But I think also this  
9 gets a little muddled because of club sports. I  
10 don't know if we all have club sports, but we have  
11 right now 51, 52, something like that, men and  
12 women. They all compete against other universities.  
13 So what -- at what point, you know -- and bowling  
14 is a club support. We could now say, okay, we're  
15 calling it a different type of sport, but then are  
16 we talking about scholarships or what? I think it's  
17 not as simple --

18 MR. LELAND: One of the criteria is  
19 they have to declare it a varsity sport. Isn't that  
20 the case? It used to be.

21 MR. REYNOLDS: Don't press me on the  
22 details.

23 MR. LELAND: It was at one time.  
24 You had to declare it varsity. Club sports do not

1 count.

2 MR. SPANIER: I'm saying we could  
3 declare club sport a varsity sport, but what  
4 does that mean? If we took a half a dozen of our  
5 women's club sports and say we now clarify them  
6 to be varsity sports, what does that mean?

7 MR. REYNOLDS: Well, if the club sport  
8 is basketball --

9 MR. SPANIER: We already have  
10 basketball, but some club sports duplicate others  
11 and many of our club sports are not -- we don't  
12 have them declared -- there is nothing that's  
13 a varsity sport.

14 MR. DeFILIPPO: There is one thing  
15 about that though. On our campus, once you are  
16 declared a sport, then, you have use of the training  
17 room, you have use of the weight room, you have --  
18 you know, there's a lot of benefits that go with  
19 being a varsity athlete that don't go with the club  
20 sports and the intramural sports. That's -- that  
21 would be one differentiation.

22 I see where you are getting to  
23 though. One competition, I mean, our intramural  
24 champion might play venues in women's basketball

1 and men's basketball. Is that a sport? I think  
2 it goes back to the declaration that we're not  
3 ready to give them the other benefits that go  
4 with it.

5 MR. REYNOLDS: Well, this raises  
6 another interesting issue. Our universe right  
7 now is limited to varsity sports for assessing  
8 interests and abilities. In terms of compliance,  
9 we just look at varsity. One question that's  
10 always -- one issue that's always puzzling me  
11 is why such a limited universe when you have  
12 this other universe out there of male and female  
13 athletes participating at the club and intramural  
14 level?

15 MS. de VARONA: That's a good point.

16 MR. LELAND: Do you want to make part  
17 of our answer to question four? I almost ran  
18 through a door. I almost had question four slammed  
19 shut. Now, we're worried how many times the  
20 cheerleaders compete.

21 MS. FOU DY: What was the part that you  
22 wanted to add? Say that again.

23 MR. LELAND: The whole issue of club  
24 sports and what's defined -- I mean, you know, right

1 now you look at the AD report, fairly clear what's a  
2 varsity, what's not a varsity. There are guidelines  
3 that are pretty easy to figure out. We're calling  
4 that into question. Do we want to call that into  
5 the question?

6 MS. FOU DY: Is that our purpose?

7 MR. LELAND: I'm asking the question.

8 MS. FOU DY: I'm asking it back,  
9 though. Is that our purpose to do that here?

10 MR. LELAND: I thought our purpose  
11 was to answer this question.

12 MS. FOU DY: I mean, I think that goes  
13 into an arena that --

14 MR. LELAND: If club sports is part  
15 of this question, then, let's expand it. We didn't  
16 take any testimony regarding club sports. I was a  
17 little uncomfortable seeing that's the direction  
18 we're headed here.

19 MS. FOU DY: Yeah. I don't think  
20 it's --

21 MR. REYNOLDS: How about this, I'll  
22 withdraw the statement. It's an aside.

23 MR. LELAND: I mean, people are  
24 concerned about it. We just didn't get into that

1 very much. We didn't have any club sport people  
2 come and talk to us. We didn't have anybody discuss  
3 the parameters of club sports. It may be one way to  
4 get out of the log jam to get through the door that  
5 I thought we had run through is to ask, Jerry, if  
6 maybe you could get the five criteria in writing and  
7 print for us something like that.

8 MS. FOU DY: We have them. We already  
9 have that.

10 MR. REYNOLDS: We handed them out once  
11 before.

12 MR. LELAND: Why don't everybody  
13 look at those and if they don't like those or don't  
14 understand them, we can --

15 MS. FOU DY: Why don't we suggest that  
16 we work on recommending educational materials to  
17 people and educating them more on what the criteria  
18 are rather than changing them?

19 MR. LELAND: That's a recommendation.  
20 What I want is a finding on, you know, how should  
21 such activities such as bowling fit into the  
22 analysis of equitable opportunities. We sort of  
23 had a finding for a minute.

24 MS. FOU DY: Did we change mine?

1                   MR. LELAND: I think we only changed  
2 does OCR rely on a definition. It has their  
3 definition of sport. It's not specific. It doesn't  
4 say this is a sport, that's -- bowling is a sport  
5 and cheerleading isn't, but it has had a set of  
6 criteria, which we are in possession of.

7                   MS. FOU DY: Right.

8                   MR. LELAND: So I think that's  
9 where we are. Now, there's a whole other question  
10 of how many times cheerleaders compete and then  
11 there's the question of club sports. Do we want  
12 to expand our findings to this question into those  
13 two areas because that's where the conversation  
14 has taken us?

15                   MS. GROTH: I think we answered  
16 the cheerleading issue when we went back with  
17 the five criteria, that OCR has defined that  
18 for us unless we want to go in and redefine  
19 those five criteria and in my own personal  
20 opinion about the club sports is I think we  
21 keep that out of the answer to this question.  
22 Again, we havenot heard testimony regarding  
23 club sports and I just don't think we are in  
24 a position to -- to go down that road.

1                   MR. LELAND: Okay. Other -- I'm  
2 not trying to cut off debate. I just thought we'd  
3 get a little bit --

4                   MS. FOU DY: I second Jerry.

5                   MR. LELAND: Okay. Any other thoughts  
6 on number four?

7                   Let's go to number five. How  
8 do revenue-producing and large-roster teams affect  
9 the provision of equal athletic opportunities?  
10 The Department has heard from some parties that  
11 whereas some men athletes will walk-on to  
12 intercollegiate teams without athletic financial  
13 aid and without having been recruited, women  
14 rarely do this. Is this accurate and, if so,  
15 what are its implications for Title IX analysis?

16                   We also said that this was the  
17 area under which we take on issues regarding  
18 walk-ons and capping of sports in the athletics  
19 arm's race, which we have heard a lot of about.  
20 I'm trying to find if we have any -- Gene has  
21 one. We'll take yours first, Gene. It's either you  
22 or Julie.

23                   MR. DeFILIPPO: Question four,  
24 finding one, males tend to walk-on at a higher

1 rate. I'm just going to ditto what Bob Bowsby  
2 said earlier. I don't know what the facts --  
3 what the findings are. You know, we hear that  
4 other people have said -- other speakers have  
5 said that that's not necessarily the case. I'm  
6 not going to repeat, but I found throughout  
7 intercollegiate athletics the same thing that  
8 Bob Bowsby spoke about earlier.

9 MR. LELAND: Okay. Comments? Yes?

10 MR. SPANIER: Well, we know that's --  
11 we know that's the case or we wouldn't have roster  
12 management. I mean, every -- all of our schools  
13 are heavily engaged in controlling men's rosters.  
14 We have literally several dozen male athletes who  
15 we have closed out. So that's not any kind of  
16 statement about whether it's right or wrong, but  
17 I think it is factual.

18 MR. LELAND: Cary?

19 MS. GROTH: If we go back to the  
20 three-prong test, the number question, and if  
21 we are successful in getting to a place where  
22 all three prongs are safe for institutions,  
23 then, there is no need to cap men's programs  
24 anymore because we can have unlimited walk-ons

1 under prongs two and three; if we can get to  
2 that place.

3 DR. YOW: The problem with that,  
4 Cary, is that there's a difference in allowing  
5 additional opportunities into an existing sport  
6 versus continuing to add sport after sport after  
7 sport after sport for women just so that men,  
8 in a traditional men's sport like wrestling,  
9 can walk-on to the team.

10 I don't know how you decide,  
11 as an example, what adequate -- what is adequate  
12 interest before you have to add that, you know,  
13 for me, the 15th, 16th women's sport so that the  
14 wrestlers can walk-on.

15 The disconnect is that those  
16 wrestlers are walking on knowing they are not  
17 going to be part of the big picture in the sense  
18 that they are not going to start, they may never  
19 get in a match, but they get to go to practice.

20 What we are saying is, okay,  
21 you can do that, but before you do that, go over  
22 and add women's bowling and there might be some  
23 women on campus who are interested in women's  
24 bowling because they are going to start on the

1 women's bowling team.

2                               You know, the question is how  
3 much of that do you have to do just to make a  
4 place for those walk-ons in that traditional  
5 sport and that's a disconnect for people --  
6 from a logic-flow perspective that you have  
7 to put yourself continually in that position  
8 just so those other guys can show up at that  
9 practice because the cost implications are  
10 extraordinary as you continue to have to add  
11 those sports.

12                              I will tell you in terms of  
13 club sports, there would be no end to women's  
14 club teams who would like to be considered  
15 varsity and use the training table, the academic  
16 support services, et cetera. I personally don't  
17 think that's a legitimate means of judging  
18 fairness to women.

19                              MR. DeFILIPPO: Ditto to that and  
20 it also depends in what area of the country you  
21 live in. I'm not familiar at all with the Midwest  
22 so I couldn't begin to speak about it, but in our  
23 area, we are in with the ivy leagues and you talk  
24 about institutions that have 35, 40 and 42 sports.

1 I mean, there are people for us to play and there  
2 would be a continual adding of sports if that's  
3 what we have to do on the women's side. We don't  
4 have the facilities or the revenue to be able to  
5 do that.

6 MR. REYNOLDS: Well, one possible  
7 way out is not to count walk-ons, both male and  
8 female, so that would get around the necessity  
9 of adding teams.

10 MS. FOUDY: I think we are locked  
11 into this picture of Division I-A. You know,  
12 how do you define walk-on? I mean, we're looking  
13 at it from our experiences and my experience at  
14 Stanford, but we're just a small picture of what  
15 is happening to all of Title IX. I mean, look at  
16 Division II and Division III. How do you define  
17 walk-on? All of their athletes are walk-ons.

18 MR. BOWLSBY: None of their athletes  
19 are walk-ons. I would suggest to you that 95  
20 percent of every student athlete that competes in  
21 this country on a college campus is recruited in  
22 one form or another and that includes --

23 MS. FOUDY: It defines it as a  
24 scholarship athlete.

1 MR. BOWLSBY: -- Division II and  
2 Division III.

3 MS. FOUDY: It also defines it as a  
4 scholarship athlete.

5 MR. BOWLSBY: No. It doesn't  
6 have anything to do with a scholarship athlete.  
7 There are a lot of invitations made at the  
8 Division III level. People don't just end up  
9 at Cornell College and Iowa. They are invited  
10 to that campus.

11 Sometimes there is an aid  
12 package involved because those institutions  
13 typically have lots of need-based aid and  
14 even some grant aid under certain circumstances,  
15 but there are very few student athletes engaged  
16 in college athletics in that country that aren't  
17 invited at one level or another or recruited  
18 at one level or another to participate in those  
19 programs. It is -- there are very few pure  
20 walk-ons.

21 MR. LELAND: Well, let me just  
22 focus this a little bit. The department heard  
23 from some parties whereas men athletes will  
24 walk-on intercollegiate teams without financial

1 aid and without being recruited. Women rarely  
2 do this. Is this accurate? If so, what are  
3 some implications for Title IX analysis?

4                   We've got one finding here  
5 that says that male athletes walk-on at a higher  
6 rate. I feel a little more comfortable if it  
7 said many cases, male athletes walk-on at a higher  
8 rate because I think there are some instances  
9 where they don't.

10                   I think that what Bob was  
11 suggesting is maybe the whole idea of walk-on  
12 needs to be talked about or thought about  
13 because -- and I know that was the case at  
14 least in part of the Brown decision was, gee,  
15 these aren't really walk-ons you're talking  
16 about, they are recruited through the whole  
17 recruitment process at the university.

18                   MR. BOWLSBY: To go back to the  
19 example that Debbie used at our -- I think it  
20 was San Diego or maybe it was Colorado Springs,  
21 with regard to your Lacrosse program, you know,  
22 I'm sure that some sports lend themselves to  
23 walk-ons more than others.

24                   Team sports are probably a

1 little tougher than individual sports in some  
2 ways, but if a program with that level of  
3 tradition and that level of profile, you'd  
4 think it would be natural for people to want  
5 to affiliate themselves with that program  
6 yet you identified your frustration, vis-a-vis,  
7 the wrestling program and I think it's entirely  
8 emblematic of what we see in other places. It isn't  
9 universal, but it certainly is an enormously strong  
10 trend in that direction. To ignore it, I think, is  
11 to be irresponsible in our process.

12 MR. SPANIER: I'm not sure it's  
13 of great consequence to precisely figure out  
14 what the walk-on imbalance is. I think most  
15 of us would acknowledge that it's there, but  
16 I think the heart of the issue here is if we're  
17 trying to create maximum opportunities for men  
18 and women to participate and if our goal is to  
19 create maximum opportunities for women without  
20 denying opportunities to men, then, we have to  
21 be concerned about the phenomenon of roster  
22 management.

23 It's really a little more about  
24 the roster management part of this, I think, than

1 settling the walk-on issue, per se. I mean, they  
2 are conceptually linked, but I think you could have  
3 a school with ten men sports and ten women sports  
4 and we are tinkering with the numbers in some cases,  
5 even with normal roster sizes, to force ourselves  
6 into a particular box.

7                                 We all know that with football  
8 in its big numbers that that accounts for some  
9 of it at the scholarship and participation level,  
10 but it does -- I think it probably concerns all  
11 of us when we get into the zone where we are closing  
12 out opportunities for men who are not necessarily  
13 taking up huge resources as part of all of this.

14                                 If that's happening as an  
15 excuse for not properly treating women's athletics,  
16 then, that's a problem at the same time. But I  
17 think you have to tie the -- you know, so we could  
18 spend all of our time talking about the sociology  
19 of men walking on more. It's an interesting  
20 sociological question, but it's not really what  
21 I care about most in this discussion.

22                                 It's really about a lot of the  
23 people we heard from and a lot of the people at  
24 institutions that we know we are closing the

1 doors on and I think that's what we have to talk  
2 about. I don't imagine that there was a big  
3 difference between the coach of a men's soccer  
4 team or women's soccer team or a men's volleyball  
5 team and a women's volleyball team, how many  
6 people they would like to have at practice and  
7 they need to fill a team, but we have different  
8 limits for all of those sports at our school  
9 and I suspect some of you do.

10                                 We -- the men are only  
11 allowed to have so many people come out and the  
12 women have a different number. I think that's a  
13 phenomenon we just need to face up to here and  
14 decide what to do about it.

15                                 Again, that's on the other  
16 side of our discussion, but I would rather spend  
17 our time on that than the nuances of the finding  
18 of the sociology of the walk-on.

19                                 MR. REYNOLDS: It seems to me  
20 that if we dig a little deeper, I mean, there  
21 is something more important involved in this issue,  
22 especially if you face a circumstance where the  
23 marginal expense associated with the walk-on is  
24 nominal and no benefit is being taken away from

1 women. If that is the case, then, what's the point  
2 other than to get your numbers right.

3                   If there is no corresponding  
4 benefit that flows to women or money not being  
5 taken away from the women's program, then, what  
6 are we doing by telling a male walk-on, I'm sorry,  
7 we hit our cap. No, it's not going to cost any  
8 money, but we can't do it because you would throw  
9 numbers out.

10                   MS. GROTH: Jerry, with walk-ons,  
11 at least at our institutions, it's probably true  
12 for the others sitting around the table, the  
13 walk-ons receive the same type of benefits as  
14 the non-walk-ons. They get the academic support,  
15 they use the weight room, they get the practice  
16 gear, they get the coaches. I mean, so --

17                   MR. REYNOLDS: Does that take away --  
18 I mean, does that take away a benefit from women?  
19 I mean, because the coach is there, the weight  
20 room, these were all fixed costs, you have to  
21 make your monthly debt service payments whether  
22 it's ten people using equipment or 15 people using  
23 the equipment.

24                   For me, if a school has sinned

1 and discriminated against women, the -- I would  
2 hope that the primary goal is to help women, not  
3 to say that we're going to fix this problem and  
4 the problem is discrimination by saying we're  
5 going to make an accounting adjustment in terms  
6 of numbers and that adjustment basically is roster  
7 management or the elimination of teams.

8 MS. GROTH: You know, I'm going  
9 to throw something else out here that's not  
10 directly related to the participation numbers  
11 with roster management, but we have to get a handle  
12 on the number of student athletes per institution,  
13 and it differs, on how much we can afford, how many  
14 student athletes can we afford to have on our  
15 rosters.

16 Not all of the institutions  
17 around the country can afford a full compliment  
18 of staff and when is it safe or not safe to have  
19 a certain number of wrestlers or women's gymnasts,  
20 men or women student athletes in the gyms practicing  
21 or when does it get to a point where we can afford  
22 to spend an extra couple thousand dollars for the  
23 tennis team for men's or women's walk-ons.

24 I mean, I think roster management

1 is something real we need to face whether it has to  
2 do with men's versus women's participation numbers  
3 or not. We roster -- we do roster management at  
4 Northern Illinois University, but we have approached  
5 it in a manner that we cannot afford to have that  
6 many student athletes or this many student athletes  
7 in our particular program.

8 MR. REYNOLDS: Well, as a financial  
9 matter, I think that there is a limit and you have  
10 to decide when -- you know, when you can't afford  
11 to add anymore. I'm not saying that a school  
12 shouldn't have that prerogative. I mean, it just  
13 wouldn't work if there was just a blank check that  
14 students could sign.

15 What I am saying, though, is  
16 if this limit -- if this limit is not due to  
17 financial concerns, but due to Title IX compliance  
18 concerns specifically with the first prong, then,  
19 again, if no benefit is being taken away from  
20 women, I just don't -- it just doesn't make sense.

21 MS. COOPER: I think we've kind of  
22 gotten in the recommendation part of it.

23 MR. LELAND: Yeah. I think we're  
24 a little bit into the recommendation area. It

1 seems to me we might have a consensus here that  
2 there is a -- you know, many times or in many  
3 cases, males tend to walk-on at a higher rate  
4 than females and that this has caused institutions  
5 to engage in various forms of roster management,  
6 which many times disadvantages opportunities. I  
7 don't know. Maybe you could even say male  
8 opportunities.

9                                 Would everybody be comfortable  
10 with something a lot brighter than that, but  
11 something that said something like that?

12                                 MS. FOU DY: I'm sorry. Say that  
13 again, Ted. I wasn't listening. Tom was  
14 distracting me again.

15                                 MR. LELAND: It's Tom's fault!

16                                 In many cases, many times,  
17 males tend to walk-on at a higher rate than  
18 females. I mean, we are answering specifically  
19 this question.

20                                 And it seems to us that  
21 this has caused a number of institutions to  
22 roster manage and that roster management is --  
23 has disadvantaged some male athletes without  
24 a corresponding advantage to females or something

1 like that. I mean, it seems to me there's a --  
2 MS. FOU DY: I know Graham doesn't  
3 want to bring in the sociology of it, but I  
4 think we would be remiss if we didn't mention  
5 that there is a lot of other intangible benefits  
6 associated in men's sports that foster walk-ons  
7 coming to the men and that, I mean, it's much  
8 more attractive, there's much more publicity  
9 with football teams, with basketball teams, to  
10 be a part of that group than you see on the  
11 women's side. There are better facilities,  
12 better coaching. I mean, the list, you can go  
13 on and on. I think that we have to bring that  
14 into play to understand the big picture of it  
15 as well.

16 MR. SPANIER: Right. Can't we --  
17 I mean, certainly we could have a recommendation  
18 that acknowledges -- I mean, I -- what you are  
19 saying is fine, although it seems much too slippery  
20 to me. Maybe -- no, maybe sometimes in most cases,  
21 I mean, okay, it's a phenomenon.

22 But in our recommendation --  
23 we should acknowledge it is and, then, in our  
24 recommendation say whatever -- there should be

1 further study of why this phenomenon exists  
2 and in the spirit of encouraging more opportunities  
3 for women, let's encourage -- let's change whatever  
4 needs to be changed to encourage more women to  
5 walk-on.

6 MS. FOU DY: And I think that those --

7 MR. SPANIER: I think in time that  
8 we won't see any differences like that. I don't  
9 know how long it will --

10 MS. FOU DY: Yeah.

11 MR. SPANIER: -- take, but at some  
12 point, women will walk-on like men are now walking  
13 on and we should encourage that. In the meantime,  
14 let's not artificially close off opportunities or  
15 force schools to close certain sports down because  
16 that imbalance exists at this point in time.

17 MR. LELAND: Does that make you more  
18 comfortable?

19 MS. FOU DY: I mean, I think -- but  
20 I think it goes to the heart of what Percy was  
21 talking about, too, is that, you know, with the  
22 grass roots level and having a strong presence  
23 there because that's what I think brings this  
24 about in that men are taught from a young age

1 that it's the manly thing to do, to play sports,  
2 and we come back again to the sociology of it,  
3 which I think affects your numbers, which we have  
4 to somehow bring out.

5 DR. YOW: Ted, I agree with that,  
6 Julie. I know you are shocked, but I do.

7 MS. FOU DY: Thanks, Debbie.

8 DR. YOW: Any time!

9 I think that it's all about  
10 the foundation. I don't -- I think, though,  
11 that we might be mischaracterizing it to talk  
12 maybe about the football and basketball being  
13 higher profile. I'm really talking wrestling.  
14 There's not much of a profile, God bless them,  
15 at least at our institution. I know they are  
16 there. I see them occasionally. That's about  
17 it. There is certainly no one there watching  
18 them compete in any significant numbers.

19 Those are the people that  
20 we're concerned about and part of the reason  
21 I think there's a little bit of a disconnect  
22 is because of the trust factor again. I don't  
23 think there is -- I don't think there is any  
24 way it could ever fly that we just say we don't

1 count walk-ons because there really is a trust  
2 issue there of significance in terms of what  
3 that might mean.

4                   But whether or not when we  
5 get to recommendations there might be some way --  
6 some wiggle room to allow some percentage or  
7 some number of walk-ons that wouldn't be  
8 countable, it would seem to be healthy to  
9 just consider because that is the single most  
10 disenfranchised population related to this  
11 and if there's a way to help them, if we don't  
12 get anything else done for them, I believe that  
13 they would acknowledge and appreciate that.

14                   I know that there have to be  
15 safeguards in place or there would be a fear of  
16 abuse. In other words, walk-ons for football  
17 versus walk-ons for wrestling, none of us, as  
18 athletic administrators, believe we can afford  
19 to go to football programs again that had 150,  
20 170 people on the roster. I don't think we want  
21 that, but we do want to try to help the wrestlers  
22 somehow.

23                   MS. FOU DY: How do you bring into  
24 the issue -- I mean, my experience -- and I know

1 Bob and Gene have different anecdotal experiences  
2 with it at their schools, but my experience at  
3 Stanford was there were a ton of walk-ons for  
4 the women's soccer team that didn't make the team,  
5 you know? I feel awful for them, but there is  
6 only a number you can take and how do you address  
7 that issue, then, because it's not just -- I mean,  
8 I know we have heard a lot of the men talking  
9 about it, but there are -- I'm sure Cynthia has  
10 similar experiences where there were a lot of  
11 walk-ons with her sport.

12 I know Stanford programs -- I  
13 mean, soccer programs across the country, that's  
14 the case. Maybe that's the consequence of the  
15 grass roots being so strong, but I think we need  
16 to consider that as well because it's not just a  
17 one-sided issue.

18 DR. YOW: Absolutely. I am making  
19 that assumption that if they are there for the  
20 women or if they are there for the men, that  
21 something needs to be done to better ensure that  
22 they are able to do that.

23 MS. FOU DY: Right.

24 DR. YOW: I'm really not -- it's

1 not just the men's issue, although I always use  
2 the example that's in my world, but I hear what  
3 you are saying.

4 MS. FOU DY: Uh-huh.

5 MR. GRIFFITH: Yes. At least the  
6 experience on our campus leads me to believe  
7 that if we don't fix this walk-on issue for  
8 the men's side, eventually we have it on the  
9 women's side too.

10 Eventually, when all the  
11 sociological things change and everything, I  
12 think we're going to have it on the women's  
13 side if we started roster managing both sides.  
14 So it would disadvantage the people we really  
15 meant to advantage when we started this thing.  
16 I would like to see some way to solve that,  
17 Ted.

18 MR. BOWLSBY: Let me --

19 MR. LELAND: Yes?

20 MR. BOWLSBY: One other item on  
21 that, just as a frame of reference, maybe this  
22 program exists someplace, but I'm not aware of  
23 programs that allow anybody that wants to be  
24 a part of a program to be a part of a program.

1 That just isn't the way it works out.

2 I mean, there are more football  
3 players that want to be walk-ons than the football  
4 coach is willing to keep around and there are more  
5 wrestlers that want to be a part of the program  
6 than the wrestling coach is going to want to  
7 keep around. So your Stanford soccer example,  
8 I think, is everywhere at the upper end of  
9 collegiate athletics. There are always more  
10 people that aspire to be Rudy than there are  
11 opportunities to be Rudy.

12 I think the artificial  
13 predesignation of who can be involved and in  
14 what numbers is a real flash point on this  
15 issue. I agree with Ted that, you know, if  
16 we continue down the path we are with men's  
17 sports, I think it won't be long before we  
18 have it in women's sports as well and I don't  
19 think we've gained anything. As an enterprise,  
20 we have lost by taking those opportunities  
21 away from them.

22 MR. LELAND: Okay. That's the  
23 walk-on area.

24 We've got another part to

1 this question we've got to take on. Any other  
2 thoughts on roster management and walk-on issues?

3                   Okay. Let's talk about do  
4 revenue-producing -- how do revenue-producing  
5 and large-roster teams affect the provision  
6 of equal athletic opportunities?

7                   Judy, would you -- Julie, would  
8 you do your Q5-F1?

9                   MS. FOU DY: Q5, which one?

10                  MR. LELAND: F1, the one about  
11 football.

12                  MS. FOU DY: Right. On numerous  
13 occasions, Congress has considered and rejected  
14 proposals to exempt football, men's basketball  
15 and other revenue-producing sports. This is  
16 consistent with the interpretation of all civil  
17 rights laws that there is no financial justification  
18 for discrimination.

19                  MR. LELAND: Okay. Let's talk  
20 about this. Any other -- anybody still hoping  
21 to be able to push our way into exempting  
22 revenue-producing sports from the calculations?  
23 I shouldn't say that. That's cut off all  
24 debate because nobody is going to jump on

1 that band wagon right here. Let's discuss  
2 what Julie put on here and let's see where  
3 that goes.

4 MR. SPANIER: Is this the only  
5 finding on this question that anyone has  
6 submitted?

7 MR. LELAND: No. Julie has  
8 about five more and you have a couple and  
9 we've got some others, but we have to do  
10 them sort of one at a time, I think.

11 MR. SPANIER: Yes. I just have  
12 to say that there is a problem with this finding  
13 approach because everybody went off and wrote  
14 between zero and however many they wanted. We  
15 only scratched the surface of the potential  
16 findings.

17 Somebody on the staff has to  
18 sit down and fill in all the gaps. We have to  
19 have a comprehensive set of findings. You  
20 have a couple of findings here and there that  
21 talk about one tiny little part of the picture.  
22 I mean, this is the big question with a lot of  
23 things you could say about it. We spend our  
24 time talking about what somebody has to propose.

1                   MR. LELAND: Well, I also think  
2 it gets to the heart of one of the controversies  
3 you hear consistently. People are saying football  
4 should be exempt. We heard testimony to that  
5 extent so I think it's important -- there may  
6 be other findings that we have under this  
7 question, but I think this is an appropriate  
8 one for us to discuss comfortably.

9                   MR. SPANIER: I think it would  
10 be inappropriate to exempt football or any other  
11 sport. The question is what about sports that  
12 carry -- that require carrying so many people  
13 on the roster that they greatly affect the  
14 overall balance of numbers and, I mean, it  
15 seems like that is what the question is designed  
16 to get at.

17                               Is large roster -- how do  
18 they affect the provision as well? There ought  
19 to be some -- whether we -- wherever we end  
20 up with it, I mean, we may say too bad, football  
21 has got that many sports, you're going to need  
22 six women's sports to equal it out. That may  
23 be what we believe in the end, but we really  
24 have to face up to the finding that acknowledges

1 that this is a phenomenon. We're going to have  
2 some findings that spell out those facts.

3 MR. LELAND: Well, let's get to  
4 those.

5 MR. SPANIER: Yeah.

6 MR. LELAND: Okay. Let's --  
7 let's talk about this one in terms of the  
8 question that's been asked how do net -- how  
9 do revenue-producing large-roster teams -- so  
10 let's go on the revenue-producing first and  
11 that's what I saw as Julie's taking the bold  
12 step of putting something down for us. So  
13 does anybody --

14 DR. YOW: Yeah. This  
15 disproportionately impacts the numbers of  
16 student athletes.

17 MR. LELAND: Right. But let's  
18 stick on the revenue --

19 DR. YOW: That's a finding.

20 MR. LELAND: Let's stick on the  
21 revenue-producing issue first because I --

22 DR. YOW: All right. Football.

23 MR. LELAND: Right. Or basketball.

24 DR. YOW: Or basketball.

1 MR. LELAND: This is -- this is  
2 revenue-producing, which I --

3 DR. YOW: But basketball doesn't  
4 produce the finding that I just suggested. I  
5 mean, you just asked a very basic question, right?  
6 What does it do?

7 MR. LELAND: How do revenue-producing  
8 teams affect the provision of equal athletic  
9 opportunities? Julie has written a finding that  
10 addresses that question. So I think we should  
11 talk about this finding.

12 It doesn't really relate to  
13 large roster teams at the moment. So can we  
14 just -- let's try to take Julie's, which she  
15 has taken the time to write down. I think this  
16 is an important question. People are going to  
17 want to know, you know, is football still counted  
18 and what if basketball makes a lot of money, can't  
19 you exempt them?

20 DR. YOW: Okay. Now, Julie's  
21 going to think you can't tell what side I'm on  
22 here, Julie, but this is -- this is -- I don't  
23 think it should ever be how it impacts it. It  
24 deals with the numbers in a very peculiar way

1 because we have no other sport for women that  
2 carries 110 people on the roster.

3                   With that being said, I  
4 personally don't believe that it should be  
5 exempted. I know you're shocked. Aren't  
6 you shocked that I said that? I don't believe  
7 it should be exempted. It is -- and the reason  
8 again, there is such an emotion about it is  
9 because it's a cultural phenomenon. We've had  
10 this sport quite awhile and it's dear to us  
11 and we want to keep it. We want it to be healthy.

12                   Because of the proportionality  
13 situation, we find that to keep that sport and  
14 to also meet prong one's safe harbor that all of --  
15 that many of us as ADs are told to focus on, we  
16 now have to add what Graham said. Five sports  
17 for women and all the operational expenses that  
18 go with it.

19                   MR. LELAND: I'm hearing no one  
20 who is wanting to bring up the revenue-producing  
21 issue. So we'll -- we can dispatch with almost  
22 unanimous consent with Julie's -- yes?

23                   MS. FOU DY: Go ahead. I don't  
24 understand how that relates. I mean, are we okay

1 with the finding?

2 MR. LELAND: I think that's what I'm  
3 trying to get to.

4 MS. FOUDY: Oh, okay.

5 MR. LELAND: I've heard no one object  
6 to it. That's what I just said.

7 MR. GRIFFITH: I have a question as to  
8 its accuracy. Isn't it, in fact, true that on  
9 numerous occasions --

10 MS. COOPER: Get your microphone.

11 MR. GRIFFITH: Oh, I'm sorry.

12 Educate me.

13 Is it, in fact, true that on  
14 numerous occasions, Congress has considered an  
15 objective?

16 MS. de VARONA: Yes.

17 MR. GRIFFITH: What does that mean?  
18 Bills have been introduced?

19 MS. de VARONA: Yes.

20 MR. GRIFFITH: Hearing held?

21 MS. de VARONA: Yes.

22 MR. GRIFFITH: I mean, I'm aware of  
23 one, the --

24 MS. de VARONA: Yes.

1 MR. GRIFFITH: -- Tower.

2 MS. de VARONA: Yes, many times.

3 MR. GRIFFITH: Many times?

4 MS. de VARONA: Many times.

5 MR. GRIFFITH: Okay.

6 MR. SPANIER: Well, I think it depends  
7 on --

8 MS. de VARONA: And the Jarvis --

9 MR. GRIFFITH: Was it rejected --

10 MS. de VARONA: And the Jarvis --

11 MR. GRIFFITH: Was it rejected or have  
12 they actually had, like, a vote on it?

13 MS. de VARONA: The Jarvis amendment  
14 was passed to accommodate -- to compromise football.

15 MR. GRIFFITH: I see. I know that  
16 twice -- I don't know. I just --

17 MS. de VARONA: No. It's been more  
18 than --

19 MR. LELAND: There were -- there were  
20 a couple other sets of hearings on it. In almost  
21 every one of the hearings, it's come up.

22 MS. de VARONA: Right.

23 MR. LELAND: I don't know. Maybe we  
24 could ask this --

1                   MR. GRIFFITH: I'm being just  
2 technical. What does it mean that Congress has  
3 considered this thing anyway?

4                   MR. LELAND: -- whether this was  
5 enacted.

6                   MR. SPANIER: I would think to say  
7 Congress has considered and rejected means the  
8 bill introduced, there was debate on the floor and  
9 there was a vote.

10                  MS. FOU DY: Senator Hasser has a few  
11 times.

12                  MR. SPANIER: There was a vote on it  
13 and the vote went down. I think that's --

14                  MR. LELAND: Is it okay if we ask  
15 the staff to put this in the kind of verbiage and --

16                  MS. FOU DY: Just for that first  
17 sentence?

18                  MR. LELAND: Yeah.

19                  MS. FOU DY: Yeah.

20                  MS. de VARONA: Failure to act?

21                  MS. FOU DY: On numerous occasions.

22                  MR. LELAND: And this is consistent  
23 with all civil rights laws. There is no financial  
24 justification for discrimination. I mean, I don't

1 know if that needs to be part of our findings.  
2 I'd rather have -- I think we could say sort of  
3 the same thing without making such a sweeping --  
4 are you okay if we wordsmith this a little bit  
5 for you or do you want to stick with what you've  
6 got? It's okay if you want to stick with what  
7 we've got.

8 MS. FOU DY: I like what I have, but --

9 MR. LELAND: Okay.

10 MS. FOU DY: -- that's my personal  
11 bias. I mean, we could say this is consistent  
12 with interpretation of civil rights laws, that  
13 there is no financial justification for  
14 discrimination.

15 MR. JONES: I think you could also  
16 add here, though, too, is just the simple -- I  
17 mean, for our purposes in recommending to the  
18 secretary is just the simple authority point to --  
19 that we -- that the secretary does not have the  
20 authority to waive the application of the civil  
21 rights statute, you know, to --

22 MR. LELAND: Okay.

23 MR. JONES: -- a portion of an  
24 institution. So, I mean, this is -- I mean, if

1 we're going to make a recommendation like this,  
2 I mean, essentially what we are recommending is  
3 that the secretary, in turn, recommend to the  
4 Congress that this sort of change be made because  
5 he does not have that independent authority to  
6 waive the Civil Rights Act.

7 MR. LELAND: Are you going with that  
8 as a modifier?

9 MS. FOUDY: Uh-huh.

10 MR. LELAND: Any other thoughts on  
11 Q5-F1 from Julie? We've got to turn the page.  
12 I hate to put you on the spot, but you did all  
13 the work.

14 Do you want to do this one,  
15 F2?

16 MS. FOUDY: Revenue-producing  
17 and profit-generating are not equivalent terms.  
18 Many sports produce revenues, but few produce  
19 profits. Whether a team or athletic program  
20 produces revenues or profits does not remove  
21 the obligation of a school to comply with Title  
22 IX. In fact, often the heavy spending on  
23 revenue-producing sports causes the loss of  
24 opportunities for some men in other sports.

1                   MR. SPANIER:  Where did we find  
2   that out?  I mean, where did this Commission  
3   learn that?  It sounds like somebody's opinion  
4   rather than a finding of the Commission.

5                   MS. FOU DY:  When we looked at  
6   the different studies on the different football  
7   programs, when we talked about the two distinctions,  
8   revenue-producing and profit-generating, which  
9   was brought into play on this question, a lot of  
10  the statistics point to the fact that many are  
11  revenue-producing, but fewer are profit-generating  
12  and I think it goes back to the issue of the issue  
13  of resources, which we talked about initially.

14                  MR. LELAND:  Well, this is the  
15  arm's race issue, which is the other one we  
16  said we were going to discuss in number five.  
17  It's appropriate that we now -- Julie has put  
18  it out -- laid it out in front of us.  So we  
19  can now talk about it.

20                  MS. FOU DY:  I don't remember which  
21  hearing it was at, but --

22                  MR. LELAND:  An argument has been --  
23  I remember testimony.  An argument was made that  
24  there was a quicker and more significant increase

1 in spending on men's sports during a certain period  
2 of time than there was on women's sports during  
3 that same period of time. I don't remember the  
4 exact time frame, but I remember testimony. I  
5 don't know if I ever agreed with the numbers.

6 MS. FOU DY: I think it was Zim bolus  
7 in San Diego actually when I read his testimony,  
8 Andrew Zim bolus.

9 MS. de VARONA: We also talked about  
10 the train wreck --

11 MR. LELAND: Yeah.

12 MS. de VARONA: -- that we were headed  
13 for because of escalation.

14 MR. SPANIER: Well, I think there  
15 was far more testimony just to the contrary that,  
16 I guess, what's behind this point is that some  
17 people believed that men's sports had been closed  
18 down not because of Title IX, but because of  
19 financial problems in the athletic department  
20 and those financial problems developed to feed  
21 football and men's basketball. I guess that must  
22 be what's behind that.

23 MR. LELAND: Yeah.

24 MR. SPANIER: But we have heard

1 from a lot of athletic directors and other  
2 people saying that football brings in -- I  
3 can't remember the Penn State numbers now --  
4 but football brings in maybe \$30 million and  
5 costs us \$10 million and the other \$20 million  
6 is what supports our 14 women's sports.

7                               So I'm just very uneasy about  
8 a sweeping statement like that is sort of  
9 an accusation hurled at heavy spending. It's  
10 a pejorative term. It's an accusation hurled  
11 at revenue-producing sports.

12                              Thank goodness we have some  
13 revenue-producing sports to allow us to have  
14 intercollegiate athletics in this country at  
15 the Division I level. Division III level, a  
16 different phenomenon. Division II is somewhere  
17 in between.

18                              I just think it would be an  
19 embarrassment for us to make a couple of these  
20 statements and act like we support intercollegiate  
21 athletics.

22                              MS. FOU DY: I don't think I'm  
23 disputing -- this finding does dispute the fact  
24 that these football programs are great sources

1 of income for a lot of programs. What the  
2 finding says is that there often is the case  
3 of this arm's race where the expenditures are  
4 so high that even if they are profit-generating --  
5 if they are revenue-producing, they don't become  
6 profit-generating and it's more the question of  
7 the expenditure control and that --

8 MR. SPANIER: No question about  
9 that.

10 MS. FOU DY: -- and that resources  
11 are dwindling because of that.

12 MR. SPANIER: Any of us in university  
13 or athletic administration worries every day about  
14 the arm's race. That is a very big, important  
15 issue. It's just not --

16 MR. GRIFFITH: Is there another  
17 proposed finding somewhere setting forth what  
18 Graham stated about the role of revenue-producing  
19 sports and providing money for these programs?

20 MR. SPANIER: I think you just --  
21 if you're going to do this, you've got to have --  
22 you know, we've heard this, yet we've heard this  
23 and we found this. It's -- I think, you know,  
24 we're only about a third of the way through this

1 particular document and I'm just not sure how  
2 we are going to get from here to there.

3 MR. GRIFFITH: Graham, is there  
4 somewhere -- and I should know this, but I don't,  
5 but is there somewhere in a proposed finding  
6 what you just described to us, this -- the  
7 relationship between revenue-producing sports  
8 and women's sports? I think there ought to be.

9 MR. SPANIER: Not that I recall  
10 seeing.

11 MR. GRIFFITH: I think there ought  
12 to be, but I think you recognize there are some  
13 statements in here that are fairly important as  
14 well about the arm's race.

15 MR. DeFILIPPO: Graham makes a  
16 great point, too, because not only revenue that  
17 they produce, but all of our Olympic sports,  
18 both men's and women's, play in much better  
19 facilities and have better facilities and  
20 weight rooms and training rooms and all of  
21 that because of our revenue-producing sports.  
22 That's certainly not anything that's been  
23 put down here either.

24 MR. BOWLSBY: Ted?

1 MR. LELAND: Yes?

2 MR. BOWLSBY: This is part of  
3 what I sent in and if I may, I will just read  
4 it to the group. I know you don't have it  
5 in front of you.

6 There could be no question  
7 that the cost of operations in intercollegiate  
8 athletics has escalated rapidly and in some  
9 cases, has been the rationale for discontinuation  
10 of sports programs for men and women. While  
11 necessary, controlled expenses is well beyond  
12 the province of this Commission and neither the  
13 scope of the task nor the time available provide  
14 any hope of quality outcomes. Many, if not most,  
15 of those involved with the leadership of  
16 intercollegiate recognize the need for national  
17 action, which will slow the escalation. Some  
18 statement to that effect from the Commission  
19 could be helpful, particularly if it assisted  
20 in convincing Congress that form of antitrust  
21 relief might be well advised.

22 MS. de VARONA: I could -- I could  
23 go for that.

24 MR. LELAND: We're getting unanimity

1 here.

2 MS. de VARONA: I could go for that.

3 MS. FOU DY: I like that. I like  
4 that, but the reason this finding -- my particular  
5 finding talks about the question of complying  
6 whether football should be exempt from complying  
7 with Title IX and I address it.

8 MR. LELAND: Yeah. I think -- but  
9 that was the last finding we were working on.

10 MS. FOU DY: Right.

11 MR. LELAND: This one, we  
12 haven't. This, I like the revenue versus non  
13 profit-generating, the difference in the terms,  
14 the first two sentences.

15 MS. FOU DY: Uh-huh.

16 MR. LELAND: But I think the third  
17 sentence -- my opinion is that we have to have  
18 what Bob just said in here, but we have to have  
19 something maybe that says it a little softer than  
20 this. We have to have something in here that  
21 recognizes that the heavy spending on -- in some  
22 institutions on revenue-producing sports, I'm  
23 not sure it's cost opportunities, but it's a  
24 factor.

1                   I mean, it's hard to go to  
2 the general public to a school that has dropped  
3 two or three sports, indicate that it's Title  
4 IX, and then six months later gives the coach a  
5 \$400,000 raise. It's hard to go to the public  
6 and say that wasn't -- you know, this escalation  
7 in men's sports isn't at all a fact offer.  
8 So I -- I'm not sure I would state it in a  
9 heavy-handed way, and I love what Bob said, but  
10 I think we have to have something in there that says  
11 we recognize there is this set of trade-offs that  
12 people are making.

13                   MS. de VARONA: Right.

14                   MR. BOWLSBY: Except, Ted, it isn't  
15 just in revenue-producing sports. There are people  
16 paying baseball coaches and softball coaches  
17 enormous amounts of money.

18                   MR. LELAND: Right.

19                   MR. BOWLSBY: There are soccer  
20 coaches that are extremely well compensated.  
21 The whole Director's Cup thing that you have  
22 had such good success in, indeed, has driven  
23 a national escalation in compensation that  
24 is not limited to just football and basketball,

1 but to virtually every sport we sponsor.

2 MR. LELAND: I agree. I stand  
3 corrected.

4 MR. BOWLSBY: It's caused all of  
5 us to be national programs.

6 MR. LELAND: Yeah. We're spending  
7 more and more money per student athlete in our  
8 program all the time. Some people have to wonder  
9 is that costing -- is that hurting our ability  
10 to provide equal opportunity, you know, and I  
11 think that's a fair question.

12 MR. BOWLSBY: Especially as it  
13 pertains to program expansion.

14 MR. LELAND: Yeah, yeah. Because  
15 it makes it harder and harder to expand.

16 So are we okay with that, you  
17 guys?

18 MR. REYNOLDS: Well, I'd like to --

19 MR. LELAND: You told me we did all  
20 right this morning.

21 MR. REYNOLDS: -- pipe up briefly.  
22 Money is a factor, but there are instances where  
23 money is not and the example that comes to mind  
24 is Marquette. Sometimes your numbers are just

1 not right and money just has nothing to do with  
2 it whether we have a huge budget associated with  
3 football or not. If your numbers aren't right,  
4 you have to do something about it. That's just  
5 a commentary.

6 MR. LELAND: Okay.

7 MR. REYNOLDS: That's it.

8 MS. FOU DY: Something similar to that  
9 is -- I'm going back. You switched that question  
10 one to five.

11 MR. LELAND: Oh, yeah.

12 MS. FOU DY: Something similar, I  
13 think, to Bob's is the -- finding number six,  
14 Q1-F6.

15 Do you want to look at that?  
16 I just noticed that.

17 MR. LELAND: Yeah. We were -- we  
18 changed this, remember? We reorganized this one.  
19 That's -- it's a longer one. This states that  
20 second -- third sentence in the other one --

21 MS. FOU DY: Right.

22 MR. LELAND: -- in much better  
23 terminology.

24 MS. FOU DY: Right, right.

1 MR. LELAND: So let's talk about this  
2 one for a second, Q5 amended, I guess we would say  
3 it, F6.

4 MS. FOUDY: Q1-F6, which is now  
5 amended Q5-F6?

6 MR. LELAND: It used to be Q1.

7 MS. FOUDY: Okay.

8 MR. LELAND: Any objections or  
9 comments?

10 DR. YOW: Ted?

11 MR. LELAND: Yes.

12 DR. YOW: Just to play on what  
13 Jerry said earlier, Julie, where you use the  
14 terminology equal opportunities, I think that  
15 Jerry had indicated a desire or look at using  
16 the word nondiscriminatory versus equal  
17 opportunities. That's --

18 MS. FOUDY: In the second paragraph?

19 (Whereupon, Ms. de Varona  
20 exited the proceedings.)

21 DR. YOW: Yes, the second paragraph.  
22 Title IX requires that members of both sexes have  
23 nondiscriminatory opportunities to participate.

24 MR. LELAND: Does anybody have any --

1 are we doing okay?

2 Does anybody have any objection  
3 besides what we just heard to Q1?

4 MR. SPANIER: This is the one that  
5 includes the word curtailing bloated expenditures?

6 MS. FOU DY: Okay. Maybe that was a  
7 little bit of a recommendation.

8 MR. SPANIER: Yeah.

9 MS. FOU DY: But, Graham, you have  
10 to recognize somewhere that we have a problem  
11 with an arm's race. That's what it is. I mean,  
12 that's what we have heard.

13 MR. SPANIER: Yes. I believe that  
14 is correct.

15 MS. FOU DY: I mean, to not recognize  
16 that, I think, would be a mistake.

17 MR. SPANIER: But I think there  
18 is a difference between the fact that we are  
19 in a competitive environment. There's an arm's  
20 race going on and saying that there are bloated  
21 expenditures, I don't allow my athletic director  
22 to participate in bloated expenditures. So I  
23 will go on record saying that we don't do that  
24 at Penn State. I will acknowledge the national

1 phenomenon of their being an arm's race.

2 MS. FOU DY: So we can change that  
3 to savings can be realized by reigning in the  
4 athletics arm's race.

5 MR. SPANIER: Yes.

6 MS. FOU DY: That's fine.

7 MR. SPANIER: That doesn't contain  
8 any fighting words that way.

9 MS. COOPER: Do you want me to read  
10 Muffet's?

11 MR. LELAND: Yeah, why don't we?  
12 Let's get Julie off the spot here for a second.  
13 She's the one that did all the work.

14 MS. COOPER: I'm just going to read  
15 a finding from Muffet McGraw.

16 Large roster teams have no impact  
17 on the provision of equal opportunity for schools  
18 who choose to comply with Title IX through prongs  
19 two and three.

20 Do you guys have her comments?  
21 I'll repeat it. Large roster teams have no impact  
22 on the provision of equal opportunity for schools  
23 who choose to comply with Title IX through prongs  
24 two and three.

1                   MR. LELAND: We've sort of done --  
2 I mean, if you look at question number five, we've  
3 sort of done the revenue-producing. We have some  
4 findings there. We did the idea of walk-on and  
5 capping and now we have to deal with the large  
6 roster teams.

7                   Debbie? You wanted to see  
8 something, I know. I can see that gleam!

9                   DR. YOW: We've spent too much time  
10 together if you can tell that!

11                   It's just that it's an interesting  
12 statement, but it's half the story again. For those  
13 of us who have been told prongs two and three are  
14 not options, that statement says for those of us  
15 who have chosen to use prongs two or three, that  
16 the large roster teams don't matter.

17                   Well, what about those of us  
18 who have been told that prong one, the safe harbor  
19 prong, is all we can use? We didn't choose it.  
20 It chose us and the large roster teams do have  
21 an impact. So it's just got half a story.  
22 I'm uncomfortable with it.

23                   MR. LELAND: Are there any other  
24 comments on -- does anybody support that? Do

1 you want --

2 MS. GROTH: Support Muffet?

3 MR. LELAND: Support Muffet's  
4 finding. I don't know what that does for us.

5 MR. SPANIER: I'm not sure where  
6 it gets us.

7 MR. LELAND: I'm not sure what it  
8 does.

9 MS. COOPER: Don't look at me. I  
10 didn't write it.

11 MS. GROTH: After Julie's, did we  
12 support Julie's with that change at the end?

13 MR. LELAND: The F6?

14 MS. GROTH: Yeah, F6. On Julie's  
15 Q1-F6, did we -- are we all in consensus with  
16 that -- with the change reading the last sentence,  
17 savings can be realized by reining in the athletics  
18 arm's race?

19 DR. YOW: No, because we talked about  
20 the difference of terms of equal opportunity versus  
21 nondiscriminatory.

22 MR. LELAND: I would rather have  
23 savings maybe realized, but I'm fine with it.

24 Is there anybody else that wants

1 to stop the presses from rolling and the people  
2 from hedging, et cetera?

3 MR. JONES: I'm unclear. Are we  
4 accepting Debbie's suggested change or not?

5 MR. LELAND: I think so. It was  
6 your --

7 MR. REYNOLDS: Right, exactly.

8 MR. LELAND: Yes, I think we are.  
9 I see them all as friendly amendments, taking out  
10 the bloated and the whole --

11 MR. BOWLSBY: Where is this, Ted?

12 MR. LELAND: Pardon me?

13 MS. COOPER: This is --

14 MR. LELAND: It was originally Q1-F6.

15 MS. PRICE: It was Q1-F6 and we  
16 renumbered it.

17 MR. BOWLSBY: Q1 what?

18 MS. PRICE: F6.

19 MR. BOWLSBY: Q1-F6.

20 MS. GROTH: I mean, that addresses  
21 some of your concerns, Bob, but we are talking  
22 about that and we jumped to another one and I  
23 just wondered if we should question that.

24 MR. LELAND: Yeah. No, I think

1 we are okay on it now that we've amended them.

2 I'm glad you brought it up.

3 Which one are we on now,  
4 Muffet's?

5 MS. COOPER: Yes.

6 MR. LELAND: And we did -- are there  
7 any others on --

8 MS. COOPER: Bob, do you have any  
9 other recommendations -- I'm sorry -- findings  
10 under question five?

11 MR. BOWLSBY: Relative to this one?

12 MS. COOPER: Yes.

13 MR. BOWLSBY: Not other than what I  
14 read.

15 MS. GROTH: I think Bob Bowlsby's  
16 comment from Chicago is worthy of a finding.  
17 The arm's race in intercollegiate athletics  
18 is a train wreck waiting to happen, end of  
19 quote. I don't know if you are comfortable  
20 with it, but I think that goes hand and hand with  
21 that last comment. I think it's got bigger  
22 ramifications than just Title IX. If you're  
23 comfortable...

24 MR. BOWLSBY: Well, I don't

1 think that's inconsistent with what I just read.  
2 Perhaps the second one was a little more carefully  
3 stated. The fact is that is where we are. I  
4 don't think we can deny that, but I also don't  
5 know that it's entirely germane to this discussion.

6 MR. LELAND: All right. Any other  
7 questions on number five?

8 Julie has a couple more if you  
9 will turn to -- she did all the work so she gets to  
10 sort of control the agenda a little bit, but she  
11 deserves it.

12 We are now on Q5-F4. This is  
13 really going back over the walk-on issue. Julie,  
14 is there any part of this you would like -- I mean,  
15 we gave a lot of --

16 MS. FOUDY: Yeah. No, we've already  
17 talked about that a lot.

18 MR. LELAND: Are you okay with what  
19 we did before?

20 MS. FOUDY: Did we talk about the  
21 F3 one in terms of larger roster size?

22 MR. LELAND: Yes. I thought we --  
23 let's go back to Q5-F3.

24 MS. FOUDY: I don't know what we

1 decided on that.

2 MR. LELAND: It talks about the  
3 roster size. I thought it was pretty good. I'm  
4 not trying to butter you up.

5 MS. FOU DY: Thanks, Ted.

6 MR. LELAND: I mean, we had to deal  
7 with the roster size issue in some way and this  
8 looks like a pretty good shot at it.

9 Okay. Do you want to try F4  
10 now? I think we already did that one.

11 MS. FOU DY: Yes. We already did  
12 F4, I think. Yeah. I think we're good.

13 MR. LELAND: I think we're fine with  
14 that too.

15 MS. FOU DY: Yeah.

16 MR. LELAND: Anybody else on  
17 prong -- not prong -- whew -- on question number  
18 five? We said we would take care of the arm's  
19 race, the walk-on, and the capping of sports  
20 issues. I think we answered -- at least made  
21 a first shot at answering the other parts to  
22 this question.

23 DR. YOW: I just have a question.

24 MR. LELAND: Uh-huh.

1 DR. YOW: In Julie's document under  
2 Q5-F5, what happened to this finding?

3 MS. FOU DY: Q5-F5?

4 MR. LELAND: Where a school chooses  
5 to comply with prongs two and three of the  
6 three-part test, the number of male athletes  
7 is irrelevant. The only question is the school's  
8 accommodation of the interests and abilities of  
9 female athletes. As a result, a school need not  
10 count its number of male walk-ons under either  
11 prong two or prong three.

12 MS. FOU DY: That's the one that  
13 Cary brought up, right?

14 MR. REYNOLDS: Yes.

15 MS. FOU DY: So we've already addressed  
16 it?

17 MR. LELAND: Yes.

18 DR. YOW: What did we say? I mean,  
19 I'm looking at the last sentence. It says, as a  
20 result, a school need not count its number of male  
21 walk-ons under either prong two or prong three.  
22 So this stood?

23 MR. SPANIER: I don't see how we  
24 can have this finding.

1 DR. YOW: That hasn't been my  
2 experience. I'm just raising it as a question.  
3 I would have trouble, Graham, of supporting  
4 it given the reality of my world -- in my world.

5 MR. SPANIER: Well, it's just not  
6 so, is it? I mean, there is no such thing as  
7 not counting anything. We count everything.  
8 I mean, it's a whole different point if you  
9 are trying to say -- what you're really trying  
10 to say here is, okay, folks, don't tell us you  
11 are scared to death of proportionality because  
12 there is a way out. Your numbers could be way  
13 out of whack if you are complying with prong  
14 two or prong three. Then you could ignore your  
15 numbers.

16 How you got to not having  
17 proportionality and ignoring the numbers, you're  
18 not in a good situation. I mean, this is not --  
19 this is another one of these disingenuous kinds  
20 of comments.

21 MS. FOU DY: But it's -- I mean,  
22 it may not be true in your case, Graham, but  
23 there are people who can comply under prongs  
24 two and three and that would be the case.

1 That's just a finding. That's a fact. Maybe  
2 not for you.

3 MR. SPANIER: They can --

4 MR. BOWLSBY: I don't believe  
5 that is factual. I think --

6 MS. FOU DY: Why not?

7 MR. BOWLSBY: I think even under  
8 the new and improved prong three advice and  
9 guidance that we hope to have at the Commission,  
10 has completed its work, every athletics  
11 administrator and president in the country is  
12 going to be counting noses still. I don't  
13 think there is any doubt about it for all of  
14 the reasons that Graham noted.

15 MR. SPANIER: It's another --  
16 it just feels too slippery. The number of  
17 male athletes is irrelevant. I don't want  
18 to hear from any of you over there telling  
19 me you've got a numbers problem. You can  
20 comply this way. The numbers are irrelevant.  
21 That is just too far-fetched.

22 The numbers are highly  
23 relevant under any scenario. They are so  
24 relevant, we're spending \$100,000 or whatever

1 it is to send reports to Sally to put up on  
2 the web.

3 MR. LELAND: She's not bothered  
4 anybody and Sally just gets it!

5 MS. STROUP: It's not my fault.

6 MR. SPANIER: I know, but I'm  
7 just saying it's not -- I don't think it does  
8 our work credit to do that. A lot of the  
9 findings -- not just Julie's, but I see a lot  
10 of what all of us sent in and we have been  
11 bending over backwards, and maybe for good  
12 reason, to try to say there is a lot of good  
13 things about everything leading up to where  
14 we are with Title IX.

15 We're putting all of that  
16 stuff in there, but we don't have a good  
17 balance of these findings yet and some of them  
18 go just a little beyond credibility and I don't  
19 want us to do that. I think when we get in the  
20 direction where we're using fighting words or  
21 we're being pejorative or calling things irrelevant  
22 or we're missing the heart of an argument just  
23 so we can make a point that will make someone  
24 feel good, it's not a good zone for us to be in.

1                   MR. BATES: Ted, I guess I thought  
2 I heard us saying earlier that there are other  
3 reasons other than Title IX to watch our numbers  
4 that have nothing to do with Title IX.

5                   Earlier, I think Debbie said  
6 maybe we ought to think about a certain percentage.  
7 I don't think it will ever be open-ended, but I  
8 think the question has to do with pointing the  
9 finger that said we can't have these walk-ons.  
10 I'm losing opportunities. The article in the  
11 New York Times sort of highlighted this.

12                   That's what I think we're  
13 trying to get away from and to say there is  
14 nothing in this legislation that says you  
15 have to behave that way, that's how I interpret  
16 this. Now, we may want to put some parameters  
17 on it, but I think this deals with that question  
18 that simply says whatever the reasons are, they  
19 may go beyond Title IX, that's fine, but if  
20 you're looking at prongs two and three, you  
21 have some options to deal with.

22                   Again, to go back to what  
23 Debbie said, we may want to put some parameters,  
24 because, Graham, I agree with you. I don't

1 think we can't not count them. We're going to  
2 count them at some point, but we may want to  
3 give some guidelines as to how many, but we  
4 do not have to be locked in is how I read this.

5 MR. SPANIER: Yes. But it says  
6 where a school chooses to comply with -- no  
7 school chose to comply with prongs two or three.  
8 They -- that -- when one of the prongs is  
9 defined as a safe harbor, how many chose to  
10 do it that way?

11 MR. BATES: But aren't we trying to  
12 get out of that?

13 MR. SPANIER: They may have ended up  
14 there.

15 MR. BATES: But I guess that I'm  
16 suggesting we are trying to get out of that.  
17 I mean, I -- we're looking at where we have  
18 been and I think the real question is can we  
19 get out of this bind and can we help somehow?

20 MR. LELAND: Gene?

21 MR. DeFILIPPO: If we had clarity  
22 on prongs two and three, this would make sense,  
23 but there is no clarity. There is nothing  
24 substantive so we can't use it.

1                   MR. BATES: But that's what we're  
2 going to get when we -- who was it? There was  
3 somebody over here. I think Bob said when we're  
4 done with this, we're going to have that clarity.

5                   MR. DeFILIPPO: So it's unrealistic  
6 at this point? No, in the future, this could be  
7 something that could be factual.

8                   MR. BATES: But that's where we're  
9 trying to go and trying to get people there and  
10 hopefully to educate them.

11                   MR. BOWLSBY: That's where I said I  
12 think we're trying to go.

13                   MS. FOU DY: But we've heard -- we've  
14 heard testimony of people using prong two and prong  
15 three. I mean, we've heard them and, Graham, you  
16 say no one uses it, but that's where I think we  
17 are misguided. I think there are people that are  
18 using it that we haven't heard from and that we're  
19 not educated enough in those areas to encourage  
20 people to use it more often. It may not be the  
21 case at these big Division I-A schools, but there  
22 are other schools that are using it and Debbie  
23 Corum was the last panelist we heard talk about her  
24 using garbage stock about her using prong three.

1                   MR. SPANIER: But what's our objective  
2 on that, that it's irrelevant?

3                   MR. LELAND: Let me just --

4                   MS. COOPER: I have a question for  
5 you, Julie. Right here where it says that the  
6 male athletes, that the numbers are irrelevant,  
7 did we hear testimony to that effect?

8                   MS. FOU DY: When we're talking  
9 about a finding, we're talking about what the  
10 statute says. If you are using two and three,  
11 they're saying that then you don't have to use  
12 proportionality and that's what I'm referring  
13 to.

14                   MR. LELAND: Let me try to see  
15 if there is a common ground here.

16                   The question is how do large  
17 roster teams affect the provision of equal athletic  
18 opportunities. What -- it seems to me what Julie  
19 is saying here is if you use prong two and prong  
20 three, large roster teams don't make any difference  
21 because you don't have to count heads -- you don't  
22 necessarily have to count heads. If we worded this  
23 a little bit softer, Graham, would you be okay with  
24 it?

1 DR. YOW: Let me try this before  
2 Graham says no.

3 Julie, what if it said something  
4 like this, because actually of the rhetoric -- what  
5 happens is you do get hung up on the word. There  
6 are connotations associated with various words --  
7 different words and irrelevant is, you know, a bell  
8 ringer.

9 As an example, what if it  
10 just said something basic like this; a number  
11 of institutions have been successful in the  
12 utilization of prongs two or three in meeting  
13 Title IX requirements, period. In those cases,  
14 the respective institutions have not been held  
15 to proportionality. That is what you say we  
16 heard in the testimony. That has not been my  
17 personal set of -- that's not my experience,  
18 but you're trying to indicate it's been the  
19 experience of somebody that's testified to us,  
20 but take out all the words irrelevant and --

21 MS. FOU DY: That's fine.

22 DR. YOW: -- as a result, schools  
23 don't need to count. You know, that's not my --  
24 again, that's not my reality. I do have to count.

1 MS. FOU DY: Uh-huh.

2 DR. YOW: Because we were in prong  
3 one land and our attorneys have not let me out.  
4 I mean, that's where I live.

5 MS. FOU DY: And I know that, but  
6 I just think that we need to remember that not  
7 everyone is in prong one land even though the  
8 majority of us at this table are.

9 DR. YOW: That reflects that it  
10 says a number of institutions have been successful  
11 in the utilization of.

12 MR. LELAND: Can we use that as a  
13 friendly amendment?

14 MR. SPANIER: Well, no, no. It's  
15 fine with me because with every one of these,  
16 we can come up with a change in words that  
17 make it okay. But if you were a suspicious  
18 person, seeing a statement like this, I would  
19 probably be thinking what is the underlying  
20 message here?

21 The underlying message is  
22 when we come to the end of this, we're going  
23 to want to say under no circumstances should  
24 we back off from the concept of proportionality

1 or strict proportionality and this becomes an  
2 argument for supporting that conclusion and  
3 so what we're doing by talking through all  
4 of these findings is if I made the mistake  
5 that -- of reading the conclusion that you  
6 wrote first, which I don't know if you've  
7 all -- there is a concluding page and this  
8 whole document reads like a lawyer prepared  
9 a legal brief to support all of the points  
10 leading to that conclusion. So tinkering  
11 with the words here and there of one particular  
12 set of documents is, I mean, we have a format  
13 that, I guess, was agreed to, but I would have  
14 started with what are the ten or the 20 questions  
15 that we need to answer as a Commission and let's  
16 answer those questions.

17                               That's the way I wrote it up  
18 not knowing ahead of time that we would -- were  
19 to be in this findings format. That's why, you  
20 know, I hate being in the position of feeling  
21 like I'm in an adversarial mode with these things  
22 that are written, but I just don't think it's the  
23 right way to get from here to there.

24                               That's what I'm a little worried

1 about, that with each one, we're tinkering around  
2 the edges and we haven't gotten to the heart of  
3 the issues.

4 DR. YOW: I understand that. In  
5 fact, I would suggest that if we had this finding,  
6 I would like to add a finding that says a number  
7 of institutions have not been successful in the  
8 attempted utilization of prongs two and three  
9 and have been held to a strict prong one land.

10 MS. FOU DY: That's fine, but just  
11 put that out there. I mean, I've put out, you  
12 know, my version, but that doesn't prevent you  
13 from putting out findings as well.

14 MR. LELAND: That last finding  
15 probably belongs in question one.

16 MS. GROTH: Right. I think what  
17 Julie is getting at is going back to the  
18 flexibility of the three prongs and addressing  
19 the walk-on issue, which could go back to the  
20 first question, is that accurate?

21 MS. FOU DY: Uh-huh.

22 DR. YOW: It kind of goes back to  
23 it, but what it also points out is there isn't  
24 flexibility. If you have been held to prong one,

1 you have no flexibility, which is why if we have  
2 this finding, we really should have the other  
3 because a number of us are not experiencing any  
4 flexibility for many, many, many years on how  
5 this is dealt with.

6 MR. GRIFFITH: And it was my  
7 understanding that the purpose of the exercise  
8 today was simply to let those who have prepared  
9 findings present them here, make certain that  
10 the rest of us understand it, see if there are  
11 corrections so that we can better understand it  
12 and then it goes forward.

13 It wasn't my understanding  
14 that at this point in time, I'm supposed to  
15 say whether I agree or disagree with that  
16 finding.

17 MR. LELAND: You are correct. I  
18 think the process that we are -- and it's an  
19 imperfect process. We are inventing as we go  
20 along. We are to have this discussion today  
21 on the findings tomorrow on the recommendations,  
22 ask the staff to write an elegant document that  
23 will allow us in some way to come back in January  
24 and then if we need to, if there is not consensus,

1 actually sit down and vote on different things  
2 and wordsmith again.

3                   So I think that's where we  
4 are. I don't think by moving this forward we're  
5 not necessarily locking ourselves into --

6                   MR. GRIFFITH: All I'm looking at is  
7 I'm just trying to understand what the findings are.

8                   MR. LELAND: And I think that's what  
9 the purpose was of today. These are complicated  
10 things. I also think there has been a nice  
11 negotiation on many of the findings that have  
12 made them more palatable on the front end so  
13 we don't have to do that in January and we don't  
14 waste our time, you know, just writing them up  
15 and having people that can't agree with them  
16 dismiss them out of hand. It's been imperfect  
17 too.

18                   We've suffered, you guys,  
19 because we've -- there wasn't as much time between  
20 the San Diego meeting and now when you include  
21 football games and all the pressures we have on  
22 us and Thanksgiving. We didn't have a lot of  
23 time to get this stuff in advance.

24                   MR. GRIFFITH: There you go blaming

1 football again, Ted.

2 MR. LELAND: So it's been difficult  
3 for many of us to get this stuff in on time. I  
4 don't want to pillar the people that did. So any  
5 other thoughts on the question? It seems to me  
6 that we've talked about how revenue-producing  
7 teams affected opportunity, how large roster  
8 teams and then we've discussed the walk-on issue.

9 Are there any other thoughts?

10 Okay. Let's go down to question number six.  
11 In what ways do opportunities in other sports  
12 venues, such as the Olympics, professional  
13 leagues, and community recreation programs,  
14 interact with the obligations of colleges and  
15 school districts to provide equal athletic  
16 opportunity. What are the implications for  
17 Title IX?

18 MS. COOPER: Wait a second. We  
19 said we would go back to one before the break  
20 if we finished with these, you know, before we  
21 go to six and seven.

22 MR. LELAND: Our coach here thinks  
23 we should, which I agree with her -- as promised  
24 earlier, instead of jumping to six and seven,

1 which we said we would do after dinner, is go  
2 back to number one and try -- and try to finish  
3 it, which there is a lot of the big issues  
4 still there.

5 MS. COOPER: And Debbie wants me  
6 to hammer home the fact that dinner is a working  
7 dinner and we're going to eat right here so we  
8 all need to make space. They are coming in a  
9 box and they are going to be cold. Just kidding!

10 MR. GRIFFITH: What is dinner?

11 MS. PRICE: Salmon.

12 MS. COOPER: Dinner is salmon.

13 MS. PRICE: It's a very nice dinner.

14 MS. COOPER: It's a very nice dinner,  
15 says Debbie.

16 MR. GRIFFITH: Should I stop eating  
17 the candy, then?

18 MS. COOPER: And for the public,  
19 she's going to pay for your dinner!

20 MR. LELAND: Cary, did we already  
21 do your question one findings? We did, did we  
22 not?

23 MS. GROTH: Yes.

24 MR. BATES: What do we still need to

1 do on one? I don't remember what we left hanging.

2 MS. COOPER: Well, there is -- for  
3 example, Cary has some different points under one  
4 that we didn't get to. There were different  
5 findings that we didn't get to.

6 MR. BATES: Okay.

7 MS. COOPER: And if anyone else has  
8 any comments or findings under question number one,  
9 then, we want to get to those also.

10 MR. LELAND: You know. I thought --  
11 I think we have gone through the question one  
12 findings that have been submitted. We went  
13 through Cary's.

14 MS. GROTH: I think we covered this.  
15 I can't see any.

16 MR. LELAND: The one issue that I  
17 thought -- we will look through up there to see  
18 if there are any of the submitted findings on  
19 one that we need to deal with.

20 The one issue that we did say --  
21 there were three issues that we wanted to talk  
22 about and it ended up being four that weren't  
23 sort of part of the question. One is the issue  
24 of safe harbor, which we've talked about. There

1 is the issue of dropping men's sports, which we've  
2 talked about. There was the appropriateness of  
3 the three-prong test. The last one was how we  
4 defined and measured proportionality.

5                   In other words, it seems to me  
6 we heard testimony where people were concerned  
7 that we now measure proportionality by the number  
8 of student athletes on the team on the first day  
9 of competition and, in fact, we are measuring an  
10 outcome and what we should be measuring is an  
11 opportunity in some way. Go ahead.

12                   MS. GROTH: We talked, and I think  
13 it was brought up substantially at Chicago, but  
14 eliminating the proportionality prong does not  
15 guarantee that institutions will not continue  
16 to eliminate men's Olympic sports. I would  
17 also like to throw in women's Olympic sports.

18                   Unfortunately, we are in an  
19 institution where we dropped field hockey back  
20 in 1991, which is a very viable women's sport,  
21 but you see the numbers decreasing in women's  
22 field hockey. There was a trend. You see the  
23 numbers, and they are staggering, with women's  
24 gymnastics programs that have been dropped and

1 we hear about the unfortunate situation with  
2 wrestling, men's and women's swimming and men's  
3 gymnastics. It's not just wrestling and men's  
4 gymnastics. We have some trends that have  
5 happened over the years with some of these  
6 sports programs, men's and women's sports  
7 programs.

8 I guess this is more of a  
9 comment than a finding, even though I listed  
10 it as a finding. The elimination of prong one  
11 does not guarantee that institutions will not  
12 continue to eliminate men's Olympic sports.  
13 I think that's -- there is a lot of truth to  
14 that.

15 We just need to remember  
16 that many, many sports programs have been  
17 eliminated, men's and women's, and it seems  
18 that once there is a trend of ten to 12 or  
19 ten to 15, it's easier for institutions to  
20 drop those sports because of conference  
21 affiliations or regional competition.

22 I think the rest of them,  
23 Ted, have been covered through Julie's or  
24 some of the others.

1                   MR. LELAND: Okay. I'm still --  
2 I have a particular vent here. I'm concerned  
3 about the issue of proportionality based on --  
4 I think I shared this with some of the staff  
5 people. We got a letter from John Parry at  
6 Butler. He is one of the best thinkers around  
7 and John -- the problem that we have with  
8 proportionality and the way we now define  
9 it is that we end up having to roster manage  
10 the men's teams and then we also create false  
11 opportunities -- what I would call or what  
12 John Parry calls false opportunities for women.

13                   By that, I mean, you tell  
14 the coaches you've got to jack your numbers  
15 up. You have to have 160 rowers. There is one  
16 EADA report I saw that had reported 70 women's  
17 water polo players. Well, there probably were  
18 70 women on that roster the first day of  
19 competition, but because of the way we measure  
20 Title IX, I'm sure that there was sort of a  
21 department initiative. Let's make sure we work  
22 this thing out and you get as many guys as you  
23 can and as many women as you can on the team  
24 and I just think there might be a way you can

1 do it differently. I think it's a problem.

2 I don't know other areas  
3 lawyers have been in here. I don't know other  
4 areas of civil rights law where you actually  
5 measure the outcome and that's how you comply  
6 with the law as opposed to measuring the  
7 opportunity, which we don't measure the  
8 opportunity. We measure the outcome.

9 How many kids are actually  
10 there playing -- not playing, but are on the  
11 roster. So I have a recommendation, which  
12 doesn't come until tomorrow, on how to try  
13 to solve this, but I see this as being an  
14 issue. I think there is a -- we both roster  
15 manage and create false opportunities for  
16 women because of this definition we have  
17 with what a participant is.

18 MR. GRIFFITH: Well, I can't speak  
19 to civil rights law, but you are not allowed  
20 to measure outcome alone unless there is a  
21 finding of discriminatory intent. That's pretty  
22 clear.

23 Title IX is unique in this way.  
24 Title IX, as interpreted by the Office of Civil

1 Rights, is unique in that regard. I don't know  
2 that that answers overall questions, but you  
3 asked the discreet question about how does this  
4 compare to other civil rights laws.

5 MR. REYNOLDS: Well, I would have  
6 to quibble with Tom just a bit. If you look at  
7 the statute, the statute conceptually is similar  
8 to the rest of civil rights laws. It is the policy  
9 interpretation and the clarification. It's what  
10 OCR has done in terms of establishing conceptual  
11 framework for enforcement. These problems don't  
12 flow from -- if you just look at the statute, the  
13 statutory language, the problems don't flow from  
14 that statute.

15 MR. GRIFFITH: Yes, I agree with  
16 that. I should have said Title IX, as it's been  
17 interpreted, by OCR.

18 MR. LELAND: I mean, I think we've  
19 heard a little -- one or two people who have  
20 testified that this was an issue. Is it an issue  
21 for anybody else but me?

22 MR. REYNOLDS: Well, no, I think  
23 your point is an important one. It's a fundamental  
24 issue. The question is what's discrimination?

1 If you have done everything in your power and  
2 your numbers don't come out right, you still  
3 can be -- we could still conclude that you have  
4 discriminated against women or men. I'm not  
5 sure -- I mean, is that a rational approach  
6 to take?

7                               If you can't find any intent,  
8 if you have evidence, if you can show the efforts  
9 that you've made to increase opportunities and  
10 you've fallen short from some numeric -- from  
11 some number, is that fair to conclude that a  
12 college has discriminated? Well, I have grave  
13 concerns about that. It's not fair.

14                           MR. JONES: Just to piggyback and  
15 add something on that, when you typically think  
16 about this kind of sort of statistical analysis  
17 as it plays out in the anti-discrimination context,  
18 you look at the way these sorts of statistical  
19 imbalances typically play out in discrimination  
20 law, you know, and I'm an employment lawyer by  
21 training, typically you show the imbalance, but  
22 then there is the opportunity for -- for the  
23 company or the institution or whatever it is  
24 to then be able to show that there was some

1 legitimate basis for the imbalance.

2                   You know, as the analysis  
3 seems to work here, you know, it doesn't appear  
4 that that's always the case. We often, and  
5 in a lot of the discussion here, it is sort  
6 of just presumed that, you know, if there is  
7 not the balance and you can't meet prongs  
8 two and three, if you're out of balance,  
9 somehow the statistical imbalance equals  
10 discrimination and generally that's a concept  
11 that really is quite succinct from how  
12 statistical balances play out in other  
13 discrimination contexts.

14                   MR. REYNOLDS: It would make  
15 more sense if we would set up a rebuttable  
16 presumption. If we are going to keep this  
17 framework, schools should have an opportunity  
18 to come in and present evidence that it's  
19 nondiscriminatory reasons that explain a  
20 statistical disparity and that evidence  
21 would have to be evaluated.

22                   It seems to me again if  
23 we want to be fair and if the goal is to  
24 ensure that men and women aren't discriminated

1 on the basis of sex, then, we have to ask  
2 some fundamental questions. I mean, do  
3 these disparities flow from discriminatory  
4 conduct or are there nondiscriminatory reasons  
5 that explain it? That analysis -- we don't  
6 do that analysis.

7 MR. LELAND: Let me tell you the  
8 way this sort of works. Let me just use --  
9 let's say you have a men's rugby team and a  
10 women's rugby team what you do -- people do  
11 this all over the country. They tell all the  
12 kids in the fall if you'd like to try out for  
13 rugby, let's try out for rugby. So the two  
14 teams show up and there are 60 men and 60 women.  
15 They all want to play rugby.

16 So what you do is a week later,  
17 you play your first women's game and there are  
18 still 70 kids on the team and you tell your men  
19 they can't play until February. Then, there  
20 are 30 men on the team. You made it. You know,  
21 there is your offset for football, whatever  
22 you need to do, because you can now count 70  
23 women, 30 men because it's the first day of  
24 competition. It happens all over.

1                   So when you count participants,  
2 that's the kind of games that people play and  
3 that's why I call those false opportunities  
4 because there really weren't any more  
5 opportunities for women in that case that I  
6 just showed you in rugby because the competition  
7 really doesn't start until February, but you  
8 can find somebody to play in October. You can  
9 get a team to come and play you, you know, so  
10 you play a game in October and you know there  
11 will just be this natural attrition.

12                   You don't have to kick  
13 anybody off. It's just a natural attrition  
14 over a period of time. That's why I think I  
15 would like to look at some model or at least  
16 point out the issue that we're measuring an  
17 outcome, not an opportunity. I don't think  
18 that made me popular with anybody.

19                   MS. COOPER: I had a question.  
20 This is -- this could be -- did we make the  
21 finding? I'm reading this from Ted's findings.  
22 In the past 20, 30 years, there has been a  
23 small drop off in men's opportunities.

24                   Did we submit that as a

1 finding or did we --

2 MS. FOU DY: Which one are you on?

3 MS. COOPER: Q1-F3.

4 DR. YOW: Cynthia, somebody said  
5 at about that time that the number was larger  
6 than smaller and there was some discussion about  
7 what wording would be used.

8 MS. COOPER: Right. I'm kind of  
9 confused on what we ended up saying for that  
10 finding.

11 MR. SPANIER: I had asked earlier  
12 about that report that was done. I checked during  
13 the break to get a little more -- the NCAA  
14 statistician did not disagree with that report.  
15 He supported it.

16 MS. COOPER: Right. That's what I  
17 remember also.

18 MR. SPANIER: And so, I mean, here  
19 a study was commissioned to get the real numbers.  
20 The Commission has those numbers available. That  
21 should be a part of the -- I think there are data  
22 out there and I would like us to be --

23 MS. COOPER: Yes. I guess I wouldn't  
24 say the last 20, 30 years, but I probably would say

1 the last ten years, 10, 20 years. I think there was  
2 a decline --

3 MS. FOU DY: What report are we talking  
4 about again?

5 MS. COOPER: The NCAA, the guy who  
6 came to testify --

7 MR. SPANIER: No, no. There was  
8 an independent -- everybody was criticized in  
9 the NCAA report. We had different -- we had  
10 20 different testimonies. People were arguing  
11 about one set of data and remember, we said  
12 between hearings -- after hearing three, but  
13 before hearing four, we know why the people  
14 are arguing about the data because there are  
15 some other variables in the picture.

16 The variables were that the  
17 NCAA itself has changed. There were some new  
18 members that came in. Some people weren't  
19 members. There were sports ramping up. It  
20 depended on whether you wanted to look at how  
21 many people were per team, per school, per  
22 sport and so on.

23 So an independent was  
24 commissioned by real statisticians to make sense

1 of all the data. It was presented in San Diego.  
2 We got a printed document. I looked it over and  
3 so the numbers are there. It was an attempt to  
4 put things into an apples to apples comparison.

5 I think to the extent that we  
6 wanted to site numbers, that is a pretty good  
7 set of numbers to look at. I don't know, probably  
8 the person only had a few minutes and maybe didn't  
9 get through all the data, but I see some people  
10 shaking their head.

11 MR. GRIFFITH: What was that  
12 gentleman's name?

13 MR. JONES: It was Kravitz  
14 Mr. Kravitz.

15 MS. FOU DY: I haven't seen it.

16 MR. SPANIER: I see several of  
17 you drawing a blank on that like it didn't  
18 happen.

19 MS. GROTH: I remembered it  
20 differently. I thought he challenged some  
21 of the statistics of the NCAA and then the  
22 NCAA staff, when they were asked specifically  
23 about the number of sport teams or the number  
24 of institutions coming into the NCAA, if

1 those numbers were accurately reflected in  
2 the NCAA report, and I thought you said yes.  
3 I think since there is confusion, we need to  
4 make sure that we are all on the same page  
5 as what numbers are accurate. We need to  
6 go back to those two reports, but I thought  
7 he addressed that.

8 MR. SPANIER: My understanding  
9 was that he specifically used NCAA data, but  
10 then tried with it to go beyond it and answer  
11 the questions that we were -- that we had  
12 asked after the third hearing. That's why I  
13 thought it was a pretty useful report.

14 MR. BATES: Well, he did use  
15 the NCAA. He was -- that's what he relied  
16 upon, but he did indicate that he and Todd --  
17 he and Corey disagreed on certain aspects  
18 as to the way they were interpreting it.

19 MR. REYNOLDS: Well, we could  
20 just refer to the transcript.

21 MR. BATES: Pardon?

22 MR. REYNOLDS: We could just refer  
23 to the transcript.

24 MS. COOPER: Right. I was just

1 talking to Debbie about the transcript and we don't  
2 have them yet.

3 MS. PRICE: We just received the  
4 transcripts late afternoon yesterday from the  
5 transcriber. So I don't -- oh, wait. Matt is  
6 trying to print it right now. Tah-dah!

7 MR. LELAND: Well, maybe as a --  
8 we could ask the staff to print it during dinner  
9 or maybe just develop a finding based on what the  
10 transcript says for us to look at when we get back  
11 in January. What's the preference? Do you want to  
12 look at it first and then --

13 MS. FOUDY: Yes. Let's have some  
14 time to look at it, I think. I haven't looked  
15 at it before.

16 MR. SPANIER: I just think that with  
17 all of the hand ringing we've collectively done  
18 at each meeting about the data and we finally went  
19 out and said, okay, take all of these different  
20 data sets, make some sense out of them, report  
21 back to us, we ought to have some finding, and  
22 it's probably not a sentence, I mean, it might  
23 be a couple of pages that summarizes the data,  
24 not that it will really change what we decide

1 tomorrow or in January, but at least it's there  
2 for the public to have as some factual matter.

3 MR. LELAND: Okay. Any other  
4 comments?

5 Okay. Why don't we -- you guys  
6 did a great job of hanging in there. I really do  
7 appreciate your patience with the process because  
8 the process has not been elegant or smooth, but  
9 I think we have made a lot of progress today in  
10 hammering some of the big issues.

11 Come back at 6:15 and we eat  
12 and begin again. Thank you, guys!

13 (Whereupon, after a short  
14 break was had, the  
15 following proceedings  
16 were held accordingly.)

17 MR. LELAND: Okay. Let's get  
18 back into business if we could.

19 We have three things left on  
20 our agenda. One is try to ferret out and develop  
21 findings on question six and the same for question  
22 seven and then we'll try to leave a little time  
23 for any additional findings -- any issues that  
24 you think that we have come across in testimony

1 that we have heard and the documents that we  
2 reviewed that doesn't quite fit into one of the  
3 seven questions we committed earlier to provide  
4 that opportunity for you.

5                   So let's leap in here. We  
6 don't have very many findings submitted regarding  
7 questions six and seven.

8                   Let me read six. In what ways  
9 do opportunities in other sports venues, such as  
10 the Olympics, professional leagues, and community  
11 recreation programs interact with the obligations  
12 of colleges and school districts to provide equal  
13 athletic opportunity? What are the implications  
14 for Title IX?

15                   I think I've got one or two  
16 suggestions here. Cary, you happen to have sent  
17 one in?

18                   MS. GROTH: My finding was that  
19 opportunity at the Olympic and professional  
20 levels enhanced students interests in participating  
21 in these sports in high school and collegiate  
22 programs.

23                   MR. LELAND: Comments? Let me see.

24                   Does anybody disagree with that?

1 I might -- well, we have one from Julie. No, this  
2 is a recommendation, Julie.

3 MS. FOU DY: Which one are we on?

4 MR. LELAND: We are on question six.  
5 All you have left is recommendations. So that's  
6 the only finding that we have.

7 MS. COOPER: Muffet has one. Are  
8 we finished with Cary's?

9 MS. GROTH: Uh-huh.

10 MR. LELAND: Yes.

11 MS. COOPER: This is from Muffet's  
12 fax. While offering sports at the high school  
13 and college level could lead to a select group  
14 of individuals participating in the Olympics,  
15 this is merely a by-product of Title IX and not  
16 of our immediate concern. With regard to community  
17 recreation programs -- did we want to discuss that  
18 before I get to the other one?

19 MR. LELAND: Yes. Let's open it  
20 up for discussion now. I think this -- after we  
21 listened to the people in Colorado Springs that  
22 were directly involved in the Olympic movement,  
23 I think what Muffet just put on the table, I  
24 guess, was voiced by a couple of the commissioners.

1 Now, does anyone want to add anything?

2 MS. FOU DY: Could you read it again,  
3 Cindy -- Cynthia?

4 MS. COOPER: While offering -- are  
5 we ready? I'll let you guys get a mouthful of  
6 salmon first!

7 While offering sports at the  
8 high school and college level could lead to a  
9 select group of individuals participating in  
10 the Olympics, this is merely a by-product of  
11 Title IX and now our immediate concern.

12 MR. LELAND: No comments? No one  
13 wants to refute that?

14 MR. SPANIER: Was that supposed to  
15 be a finding?

16 MS. COOPER: Yes. She submitted it  
17 as a finding.

18 MR. LELAND: As a draft of a finding.

19 MR. SPANIER: That something is not  
20 our concern? That sounds like a finding.

21 MS. COOPER: Yes, not our immediate  
22 concern.

23 MR. BATES: I guess I heard that  
24 and thought about it, but I'm not so sure how

1 we can simply ignore the Olympic sport as it  
2 relates to the broader question of providing  
3 opportunities in athletics.

4 I mean, it seems that it  
5 belongs there. Now, whether we're talking  
6 about K-12 or higher ed is a different question,  
7 although certainly some of the sports that  
8 we would be interested in high school are  
9 not in high schools. They are mostly club  
10 sports.

11 But somehow, I think we need  
12 to embrace that somehow because that's the broader  
13 question pool of providing athletic opportunities.  
14 I just don't think we can say it's not our business.  
15 Let it go away. I really do think we need to  
16 somehow address it.

17 MS. COOPER: Well, there has been  
18 testimony that the Olympic sports -- the demise  
19 of Olympic sports in colleges could hurt the  
20 Olympic movement.

21 MR. LELAND: I mean, I think that  
22 was the point of the panel.

23 MS. COOPER: Yes, from UCLA swimmers  
24 to gymnasts.

1 Do we need to wait until after  
2 dinner?

3 MR. LELAND: No. I'm thinking is  
4 there a -- would there be a consensus to leave  
5 something here that talked about sort of a  
6 continuum of youth sports to school sports to  
7 college sports to professional sports and they  
8 all sort of interact with each other?

9 MR. BATES: That would be my druthers,  
10 if we could --

11 MR. LELAND: Although it's not  
12 really the direct purview of, you know, the  
13 implementation of Title IX to enhance these  
14 other programs and provide the impetus for  
15 people below us, it's certainly a nice by-product.

16 MR. GRIFFITH: Was the testimony  
17 that one of the by-products of cutting back  
18 on Olympic sports for men in college -- is  
19 that what you were saying -- is that it has  
20 an unintended consequence of damage in the  
21 American Olympic movement, is that it?

22 Is this a wrestler's argument  
23 sort of thing?

24 MS. COOPER: It's not necessarily a

1 wrestler's argument. I remember testimony, and  
2 I don't remember from the exact names, but I  
3 remember testimony from different people stating  
4 that because of the demise of sports -- Olympic  
5 sports in universities, a lot of those -- a lot  
6 of Olympic athletes come from those programs or  
7 came from those programs and those programs no  
8 longer exist. Thus, it would hurt -- it probably  
9 will hurt in the future our Olympic movement  
10 because those programs no longer exist. It wasn't  
11 really wrestling. To be honest, it was gymnastics,  
12 I remember, and swimming, I think.

13 MR. LELAND: It seems like the  
14 arguments we've heard were both that Title IX  
15 had adversely affected a couple of sports, if  
16 you buy the argument that that caused sports  
17 to be dropped, but it also enhanced other sports  
18 because it caused them to be added.

19 So maybe the way to say it  
20 is the menu of opportunities provided in the  
21 collegiate setting affects both the grass roots  
22 programs in terms of providing inspiration and  
23 potential opportunities and it affects the post  
24 graduate programs and international by providing

1 elite athletes.

2 Does that get where we are? I  
3 don't see any controversy here.

4 MR. GRIFFITH: Is there an element  
5 here of -- I know the wrestlers have made the  
6 argument that there are all these wrestling  
7 programs in high school throughout the country  
8 and opportunities are not being provided for  
9 these wrestlers once they get to college, that  
10 the number of college programs has declined.

11 Is that part of this here that  
12 somehow -- is there an implication here that when  
13 there is a recognized interest below the college  
14 level that as we look at colleges providing  
15 opportunities for young people to participate  
16 in athletics, that that's a factor that ought  
17 to be considered as if there really is a desire  
18 out there that somehow ought to be addressed?  
19 I don't know. I don't remember any testimony  
20 about that.

21 MR. LELAND: I thought the only  
22 testimony we heard about that might have been  
23 from the LSU case where they were trying to do  
24 the needs and interests assessment and they had

1 to look at the number of high school athletes  
2 in that sport in the state of Louisiana.

3 That's the only thing that  
4 I can remember. I don't remember that being  
5 specific. Any other thoughts on this one?

6 MS. FOU DY: Was there any mention  
7 about funding possibilities at the Olympic  
8 committee? I wasn't in Colorado Springs and  
9 I know that topic came up before that and that  
10 we were going to mention it there about  
11 opportunities to help through the Olympic  
12 community funneled to the NCAA or through  
13 the -- I don't remember the exact point.

14 MS. COOPER: Is that question seven?

15 MS. FOU DY: Because that seemed to  
16 be a big issue.

17 MS. COOPER: Would that be covered  
18 under question seven, what you are asking?

19 MR. LELAND: We can just say it's  
20 under seven if you want.

21 MS. COOPER: I'm asking.

22 MS. FOU DY: Yes, it could be. That's  
23 true.

24 DR. YOW: Ted, do we not -- Donna

1 is the person who has had a lot of emotion around  
2 this. Did we not get anything in writing because  
3 that surprises me a little bit because she was  
4 very passionate about this particular issue.

5 MS. FOU DY: I think Donna has been  
6 out of the country.

7 DR. YOW: Okay.

8 MS. FOU DY: That's what I heard. I  
9 think she just got back.

10 MS. COOPER: We haven't received  
11 anything from Donna.

12 DR. YOW: So, Julie, you can't  
13 represent anything she shared with you as an  
14 example about that.

15 MS. FOU DY: She may have been the  
16 one that mentioned that at a prior town hall  
17 meetings, but I just remember that being a big  
18 issue. I wasn't at the Colorado Springs meeting so  
19 I don't recall.

20 MR. LELAND: Well --

21 MS. FOU DY: We can hit on that later,  
22 though, when she gets back or she can type something  
23 in if she remembers.

24 MR. LELAND: Okay. Why don't we run

1 with what we've got and then we'll make a special  
2 effort to see if Donna has a proposal for us that  
3 might cover some more ground.

4 Does that sound all right to you  
5 guys?

6 MS. COOPER: There is another finding  
7 from Muffet. She has been busy.

8 With regard to community  
9 recreation programs -- with regard to community  
10 recreation programs, they should meet Title IX  
11 standards for equity between men and women.

12 I'll repeat it. With regard  
13 to community recreation programs, they should  
14 meet Title IX standards for equity between men  
15 and women.

16 DR. YOW: That would mean -- I  
17 think we probably should be dealing with club  
18 sports on our university campuses if we were  
19 going to go that route before we ever went to  
20 neighborhood gatherings.

21 MR. GRIFFITH: That strikes me  
22 as quite an overreach here. I mean, Title IX  
23 is limited to federal funding to educational  
24 programs. We're now talking about extending

1 it to local teams. Somebody maybe ought to  
2 do that, but it's not us and it's not the  
3 Department of Education. That ought to be  
4 done at a different level. I think that's  
5 way beyond our scope.

6 MR. LELAND: I would agree.

7 Anybody disagree? Would you  
8 like to second that motion? We're sort of stuck  
9 here because I don't think we have any passion --  
10 we haven't heard a lot of testimony that was  
11 really -- that rang the bell on this one.

12 So are we okay with what we  
13 discussed, in essence, to staff craft a -- I  
14 don't want to call it a milk toasty, but an  
15 answer?

16 MR. BATES: Ted, I just have  
17 one question, both on the Olympics and on  
18 this recent mention of Muffet about the  
19 community. While I think it's an overreach,  
20 it was my understanding that we are the  
21 Secretary's Commission's in Opportunities  
22 in Athletics and not just on Title IX. I  
23 thought that was purposeful in the sense that  
24 we could, in fact, look at a broader picture

1 and not just limit it to Title IX. Otherwise,  
2 we would have been Commission on Title IX.

3 I assume there was a reason  
4 for this title versus focusing only on Title IX  
5 and it seems to me there are some things that  
6 when we get to that, we say, well, that's not  
7 in our bailiwick. Again, not to comment, I  
8 don't have a suggestion, but I do think the  
9 issue really is broadening athletic opportunities  
10 and not necessarily limiting it to college  
11 campuses.

12 MR. GRIFFITH: Well, I agree. It's  
13 not limited to college campuses, but I think it  
14 has to have some nexus with the jurisdiction of  
15 the Department of Education. That's all.

16 MR. BATES: I understand.

17 MR. LELAND: And I also think  
18 there may be an opportunity for us, when we  
19 start talking about other findings or other  
20 recommendations, as opposed to handling it  
21 under number six.

22 MR. BATES: That's only an  
23 observation.

24 MR. LELAND: Okay.

1 MR. BATES: It's just that I don't  
2 want that to be the limiting factor for us.

3 MR. LELAND: All right. Hearing  
4 no more -- anybody pushing to the microphone?

5 MR. GRIFFITH: Move on, move on.

6 MR. LELAND: Move on to seven?

7 MS. FOU DY: Yeah.

8 MR. GRIFFITH: Bury it. Bury six.

9 MR. LELAND: Question number seven,  
10 apart from Title IX enforcement, are there other  
11 efforts to promote athletic opportunities for  
12 male and female students that the department might  
13 support such as public/private partnerships to  
14 support the efforts of schools and colleges in this  
15 area?

16 Cary, do you want to -- you've  
17 got one underneath here. I think you are the only  
18 one that I got anything from.

19 MS. COOPER: Muffet has one.

20 MR. LELAND: And Muffet. Oh, Julie.  
21 Okay.

22 MS. GROTH: Educational initiatives  
23 must also comply with Title IX regulations.  
24 Partnerships would be beneficial, especially with

1 today's economic challenges.

2 MR. LELAND: Okay.

3 MS. COOPER: Give me the money!

4 Show me the money!

5 MR. LELAND: Okay. Any comment?

6 MR. GRIFFITH: I'm not certain I  
7 understand. Could you help me?

8 MS. GROTH: Pardon me?

9 MR. GRIFFITH: I didn't -- could  
10 you read that again? I didn't catch that.

11 MS. GROTH: Educational initiatives  
12 must also comply with Title IX regulations. If  
13 we get some private funding, of course, development  
14 monies or corporate partnership monies, it must  
15 comply with Title IX provisions and that  
16 partnerships would be beneficial, especially  
17 with today's economic challenges.

18 MR. LELAND: I think she's saying  
19 that, in fact, anything the Department of Education  
20 helps sponsor would have to comply with the rules --  
21 with the regulations anyway and partnerships would  
22 be beneficial especially in today's economic  
23 challenges.

24 MR. SPANIER: Just an observation,

1 I think we in the Department of Education need  
2 to deal head on very squarely with all of the  
3 issues before us and I hope we don't succumb to  
4 the tendency in the end to say that it's really  
5 all about money and so let's just encourage  
6 schools and universities to go off and engage  
7 in public/private partnerships and step up their  
8 fund-raising and that's how they will take care  
9 of this and maybe the problems we're struggling  
10 with will go away.

11                   Most universities are heavily  
12 involved in fund-raising for their athletic  
13 departments already. Maybe our number is -- I  
14 mean, it's only a fraction of Stanford's. We're  
15 maybe at \$10 million and I wouldn't even want to  
16 mention in public what Stanford raises, but the  
17 point is we would not be able to balance our  
18 intercollegiate athletics budget if we weren't  
19 heavily involved in athletic fund-raising as  
20 it is.

21                   Moreover, we all have sponsorships  
22 of some level ranging from local car dealers to shoe  
23 contracts to names of companies up on our score  
24 boards. In fact, we are so heavily into

1 public/private partnerships already that we all are  
2 under some degree of criticism for having gone too  
3 far in that direction and we are striving to create  
4 the right balance between supporting our athletic  
5 programs with outside money and not going so far  
6 that it looks like we've over-commercialized  
7 athletics.

8                                 From the very beginning, I've  
9 worried about this particular question because  
10 it seems like one where the answer is obviously  
11 sure, we're for it, go ahead and do it. Well,  
12 we are sort of doing it and it's all about  
13 balance in the end. I don't think the answer  
14 to that question should relieve any of our  
15 anxieties it's about dealing with the other  
16 issues before us. I just wanted to get that  
17 out.

18                                 MR. GRIFFITH: Is there some sense  
19 here that this question might get into the issue  
20 of what if you could raise money to put on a men's  
21 gymnastics program or something like that?

22                                 DR. YOW: Yes.

23                                 MR. GRIFFITH: I hadn't thought about  
24 that until just now.

1 DR. YOW: The question is are there  
2 other efforts and one other effort would be to  
3 allow sport-specific fund-raising through private  
4 sources without penalizing and in that  
5 case, just counting the money that's given.

6 Another -- just to bring it  
7 down to, you know, the pragmatic level, we have  
8 a friends -- what we call friends of accounts  
9 for every -- for each of our 25 sports. You  
10 can donate money specifically to the fund for  
11 men's swimming because this is the team I'm  
12 talking about.

13 For men's swimming, they  
14 have \$70,000 friends of account. They want  
15 to use it, as you would guess, for scholarship  
16 money. It has never been allowed so the money  
17 sits in the fund. They could technically use  
18 it perhaps for some other operational expense  
19 as long as it's proven that it's nondiscriminatory  
20 to our women swimmers, but there are limited  
21 uses of the funds.

22 So because it's that way, we  
23 can't get people -- we can't maximize the  
24 revenue potential of those gifts because we

1 have so little flexibility in terms of how we  
2 can use them, especially when it comes to  
3 participation opportunities. We're paying for  
4 those walk-ons, to dress those walk-ons or for  
5 scholarship support.

6 MR. LELAND: I'm not optimistic  
7 because I happen to agree with Graham in terms  
8 of the economic -- the public/private partnerships  
9 at all the universities. We're stretching it at  
10 about -- we're maximizing our revenue and stretching  
11 it about as far as we can giving the academic  
12 milieu we live in.

13 I've also had some background  
14 and talked to some of the people in Colorado  
15 Springs about the national governing bodies being  
16 of assistance and I don't see that as a way to  
17 help ameliorate the financial situation because  
18 they have just as bad financial problems as we  
19 do and they -- I mean, I remember years ago,  
20 about four years ago -- it must have been  
21 about seven years ago when the Los Angeles  
22 money finally got to the national governing  
23 bodies when water polo worried about their  
24 status as an NCAA sport.

1                   They went and set up this  
2 grant program for \$10,000 a year for three years.  
3 They would help start a men's water polo program  
4 and no one could do it because they knew it was  
5 more than \$10,000 and it was a life-long commitment  
6 and for the Water Polo Foundation, that was a lot  
7 of money, \$30,000 to give to some school to  
8 start a program, but nobody took them up on it  
9 because it just didn't make any sense in the  
10 long run.

11                   It only had little to do with  
12 Title IX, the fact that it was men's water polo.  
13 You know, it had more to do with the fact they  
14 would have this obligation in perpetuity because  
15 then they would have to drop the sport at the  
16 end of three-year period or something. So I  
17 don't see a lot of -- I wouldn't look to national  
18 governing bodies to help us out of our, you know,  
19 finite problem with dollars nor do I look for  
20 a lot of public/private partnerships because I  
21 think we're all pretty good in doing that now.

22                   I can't imagine that there's  
23 a bunch of money laying out there to support  
24 college athletics that we haven't tried to

1 vacuum up already. So maybe that's a -- is  
2 that the consensus sort of? Not what I just  
3 said specifically, but the kind of, gee, this  
4 isn't a real avenue we ought to look into?

5 DR. YOW: It's that way as long  
6 as the money that's being raised is used as  
7 replacement funds for the athletic program. In  
8 other words, we cut our expenses by using that  
9 private funding and then people don't give that  
10 money to us because they don't see that a bit  
11 like paying debt.

12 They are not very interested  
13 in either one of those concepts. They only  
14 seem to be interested in it if it is used as  
15 money in addition to whatever the commitment  
16 is institutionally has already been made to  
17 further enhance the sport.

18 MR. LELAND: Okay. Other thoughts  
19 and comments on question seven?

20 MS. COOPER: Muffet.

21 MR. LELAND: Muffet?

22 MS. GROTH: Yeah, Muffet!

23 MS. COOPER: Rules on scholarship  
24 limits imposed by the NCAA may have negative

1 affect on compliance with Title IX.

2 I'll repeat it. Rules on  
3 scholarship limits imposed by the NCAA may  
4 have a negative affect on compliance with  
5 Title IX.

6 There is another part. Do  
7 you guys want me to read that one also while we are  
8 here?

9 MR. LELAND: Uh-huh.

10 MS. COOPER: Title IX does not  
11 prohibit public/private partnerships.

12 MR. LELAND: I think that could be  
13 part of our --

14 MS. FOUDY: That's one of -- that's  
15 one of my findings. Both of those are two of mine  
16 actually.

17 MS. COOPER: Cool, Julie!

18 MR. LELAND: What was the other  
19 one, scholarships and...

20 MS. COOPER: Title IX does not  
21 prohibit public/private partnerships.

22 MR. SPANIER: It's almost too  
23 obvious to state, isn't it? That's not really  
24 a finding, is it?

1                   MR. BOWLSBY: Well, the issue of  
2 the NCAA scholarship limits has been around for  
3 a long time. It works okay for -- we've run  
4 it up the flag pole in the Big Ten several  
5 times. We could advance our situation rather  
6 dramatically by going from -- from 14 scholarships  
7 to 18 scholarships in women's basketball or  
8 something along those lines.

9                   It becomes a non-starter because  
10 for everybody below the top 60 institutions, it's  
11 a competitive issue. You know, we are all stock  
12 piling athletes and they are all trying to compete  
13 against us. So, you know, as a solution, it  
14 really is a non-starter because there are so  
15 many competitive level playing field issues.

16                   We've proposed one scholarship  
17 increase after another and they never go anyplace  
18 because there is just too much critical mass and  
19 it's not even -- even under the new government  
20 structure of NCAA, it never goes anyplace because  
21 the mid-majors and some of the fairly -- other  
22 than the top six conferences, you can never get  
23 any of it through because it's a competitive  
24 issue for them. They don't want us putting another

1 four people that they should be having on their  
2 roster on our rosters.

3 DR. YOW: That is true, Bob, but  
4 the reason it's true is because there is no  
5 enforcement of Title IX in the way -- that's  
6 not well stated.

7 There is not a broad based  
8 application -- uniformly applied application  
9 to Title IX compliance. So what happens is if  
10 we added the equivalency of two scholarships  
11 to women's field hockey because that's more  
12 likely because we might have 30 student athletes  
13 on the team, but maybe only 12 scholarships,  
14 whatever the limit is right now, that would  
15 really be feasible if people understood that  
16 the choice came down to either adding scholarship  
17 13 and 14 in field hockey or starting a new women's  
18 sport and paying all of the operational costs that  
19 are associated with it.

20 It is only -- it is exactly  
21 as you stated it, but it's that way because  
22 that dynamic is not in play right now because  
23 people don't have to be in compliance, so to  
24 speak.

1                   MR. BOWLSBY: Well, yeah. I think  
2 that's right and -- but at its base level, you  
3 know, that Cary's institution doesn't want 11  
4 institutions in the Big Ten to put another 44  
5 women's basketball players on their roster because  
6 those are 44 kids that would be playing at Northern  
7 Illinois and playing at the other places.

8                   DR. YOW: I understand. I think  
9 it's just tough for me to think about it with  
10 women's basketball given they already have 15 and  
11 the men only have 13.

12                   If it's just another -- you  
13 already have 30 players on the field hockey team  
14 and you know whether or not everybody else  
15 understands the difference in a head count sport  
16 and an equivalency sport where so many of them  
17 aren't on full rides anyway, it's a matter of  
18 parceling out additional monies to a lot of times  
19 existing people on the teams because there are  
20 already 30 of them there.

21                   Whether or not our ability to  
22 offer, you know, \$1,000 or \$4,000 would make the  
23 difference in a mid-major program, I don't know.  
24 Maybe it would. I still think it's cost-effective

1 if the choices are to do that versus adding another  
2 women's team.

3 MR. BOWLSBY: Well, it's also popular.  
4 If we go back and ask the coaches on our campus  
5 whether they wanted to do some other things to  
6 enhance their perhaps or add an additional sport on  
7 the women's side, every one of them will tell you  
8 they don't want any more sports. They want  
9 enhancements to what we are currently doing because  
10 it's an issue of the quality for them.

11 DR. YOW: Correct. I think that's  
12 accurate. If you only have 12 scholarships, but  
13 you have 30 student athletes, then, as a coach,  
14 you look at that and you go, yes, that person does  
15 deserve more aid and so does that one and so forth  
16 and so on. So you are right. It's very popular  
17 with the coaches.

18 MR. LELAND: All right. Any other --  
19 I'm not sure if that fits into this question. I  
20 think it's something that's been discussed, but  
21 I'm not sure it fits in this particular question.

22 MR. BOWLSBY: It was a great  
23 discussion.

24 MR. LELAND: It was a good discussion

1 among two of our bright lights.

2                                 Okay. Apart from Title IX  
3 enforcement, are there other efforts to promote  
4 athletic opportunities for male and female  
5 students that the department might support  
6 such as public/private partnerships to support  
7 the efforts of schools and colleges in this  
8 area?

9                                 Any other comments for the  
10 good of the cause? Hearing none and seeing  
11 none, we'll -- we're done with number seven.  
12 So we've answered the questions now.

13                                 Let's give everybody a  
14 chance to just take a deep breath here for  
15 a second and talk about other areas --  
16 we just mentioned one in terms of the scholarship  
17 limitations the NCAA imposes.

18                                 What other areas are people  
19 interested in having findings that aren't subsumed  
20 in the seven questions or things that we went  
21 through?

22                                 We discussed last time we met  
23 the possibility of having findings over and above  
24 the seven questions. We think it is probably

1 within our purview to do that, but want to be  
2 cautious when we do that.

3                   So where else do we need to --  
4 what other issues have you heard about or that  
5 you want to -- or thought about that you want  
6 to discuss now? Now is the time for us to go  
7 through them.

8                   If there are none, we can  
9 adjourn. Yes, Cary?

10                   MS. GROTH: Can we think about  
11 that overnight? Is there any time in the morning  
12 that we can start off with that since we're a  
13 little fried today going through those and give  
14 us a chance to --

15                   MS. COOPER: No.

16                   MS. GROTH: That's out of the time  
17 line?

18                   MS. COOPER: Tomorrow is my day.  
19 No, I'm just kidding. No.

20                   MR. LELAND: I think we could put  
21 it at the end of the agenda tomorrow if you want.

22                   DR. YOW: No.

23                   MR. LELAND: Oh, you want to put it  
24 at the start?

1 DR. YOW: I won't be here at the end  
2 of the agenda tomorrow. Can you stick with it for  
3 ten minutes?

4 MR. LELAND: Yes.

5 DR. YOW: Okay. Can I talk?

6 MR. LELAND: Yes.

7 DR. YOW: Other than the NCAA  
8 scholarship limits, which I think is a marvelous  
9 topic, I would like for us to consider the  
10 possibility of a recommendation that the Office  
11 of Civil Rights would development some type of  
12 government pilot program with a significant  
13 budget to encourage high school sports participation  
14 with boys and girls with an emphasis on the girls.  
15 That would be one I would like to think about and  
16 maybe talk about.

17 Is the cheerleading thing in  
18 here already or do we need to bring that up  
19 again? Is that a done deal? We don't need to  
20 discuss that anymore? We said we have guidelines  
21 and that's what they are? We don't --

22 MR. LELAND: I think that's where we  
23 are.

24 DR. YOW: Okay.

1                   MR. LELAND: You will have a chance  
2 to look at those again in January.

3                   DR. YOW: Nope, nope. The other  
4 suggestion is that we modify the EADA report to  
5 provide for clear delineation of nondiscriminatory  
6 scholarship variances like summer school or other  
7 special -- special term costs. Like, some have a  
8 winter term, they have a mini term, you have people  
9 going to these terms because they have to stay  
10 eligible, as an example, or they just want to and  
11 that opportunity is made available to others who  
12 chose not to utilize it.

13                  MR. LELAND: These are more in the  
14 form of recommendations.

15                  DR. YOW: Oh, this is not a new  
16 topic?

17                  MR. LELAND: No. We're looking for  
18 findings. What have we heard from the public?

19                  DR. YOW: Please forgive me.

20                  MR. LELAND: No, that's great. We've  
21 got a jump on tomorrow, but --

22                  DR. YOW: That's very tactful, Ted. I  
23 really appreciate that.

24                  MR. SPANIER: Well, now, I don't want

1 to launch into anything if I'm on the wrong track  
2 here. You're looking for findings that we haven't  
3 talked about at all, not topics that we need to deal  
4 with?

5 MS. COOPER: Findings.

6 MR. LELAND: Do you have a topic that  
7 needs a finding?

8 MR. SPANIER: Well, let me take two  
9 minutes.

10 MR. LELAND: Let's let him throw it  
11 out there. Yes, please.

12 MR. SPANIER: I think we need a whole  
13 discussion on enforcement and we need findings --  
14 more findings on enforcement.

15 I think a consistent theme that  
16 we've heard in testimony and I think all of the  
17 commissioners have felt that we have this very  
18 peculiar phenomenon going on here where we have  
19 had Title IX for years and years. No school has  
20 ever actually had the ultimate penalty occur,  
21 namely, the withholding of funds from the  
22 Department of Education. Nobody has been found  
23 to be bad enough that they have ever been  
24 penalized that way.

1                                Now, maybe that's because the  
2 negotiations were always so well done that  
3 everybody said, oh, yeah, we can agree on that,  
4 but we all know that there are schools out there --  
5 I mean, it's one thing to argue one percent off  
6 or three percent off. Are you this prong or that  
7 prong? Heck, there are schools out there that  
8 are 30 percent off. I mean, there are schools out  
9 there that -- I just think haven't begun to comply  
10 with the spirit let alone the letter of any of the  
11 laws and what's the deal there?

12                                I mean, we have this peculiar  
13 thing where we are arguing about the nuances  
14 around the edges when there are a lot of bad  
15 apples out there that we really ought to be  
16 doing something about. I'm just wondering how --  
17 you know, if we can come up with things out of  
18 the Commission that get people to stop arguing  
19 about the nuances around the edges and let the  
20 Department of Education channel its resources  
21 into really doing something about programs,  
22 whether it's high schools or colleges or  
23 universities that really have only been protected  
24 because they haven't been on somebody's radar

1 screen, you know, I have the impression that you  
2 guys spend all of your time dealing with complaints  
3 that somebody files.

4                   Maybe a whole different approach  
5 to enforcement is needed than the one now. I mean,  
6 that doesn't require any -- I'm just saying that's a  
7 whole topic I am wondering we should spend some time  
8 on. I think, you know, we spend a lot of time  
9 talking about walk-ons, roster management, and so  
10 on, but if we're going to have any recommendations  
11 in that arena, we really need to think about what we  
12 mean by walk-ons.

13                   I think we may need a whole new  
14 vocabulary for a lot of these things too. We are  
15 stuck with a lot of old vocabulary terms. We even  
16 know there are such things as invited walk-ons and  
17 other walk-ons. So, you know, if there is going to  
18 be some set of clarifications about the -- and is a  
19 walk-on, and this was in a couple of other people's  
20 write-ups, too, is a walk-on somebody who just  
21 doesn't have a scholarship, full or partial, or do  
22 we have some concept of what is an appropriate size  
23 to field the team?

24                   Is it -- you know, let's say it's

1 20 in soccer or 12 in volleyball or 12 in basketball  
2 and then is a walk-on anything above that number  
3 because if you just counted everybody who didn't  
4 have a scholarship, that might be too -- people  
5 could hide behind that and really get away from the  
6 spirit of Title IX.

7 I think we actually need to  
8 think about what we mean by equity, what we mean  
9 by gender equity. We have gotten kind of hung  
10 up in converting equity to numbers and if we  
11 just, you know, for a minute or two, not now,  
12 but in a discussion if we could get away from saying  
13 what are we trying to accomplish here and what do we  
14 mean by equity, is it having the same number of  
15 sports?

16 Is it having sport by sport  
17 equivalency? Is men's gymnastics being treated  
18 the same as women's gymnastics? Is women's being  
19 treated the same as men's basketball? Are their  
20 facilities the same? Is their travel the same?  
21 Are their stipends the same? Is that the kind of  
22 equity that is important to us or do we really  
23 believe that all 85 football players or 30 wrestlers  
24 or whatever might have to be matched up person by

1 person to a woman in a completely different sport?  
2 Is that the kind of equity we're after? I think  
3 we danced around the edges of that a little bit.

4                   We've talked about the one prong  
5 versus the three prongs and I've mentioned this a  
6 couple of times. I'm just wondering if there might  
7 also be some other prongs. You know, who knows, I  
8 wasn't there, but when they were all sitting around  
9 the table in 1995 writing up that letter or in 1989,  
10 one step back from that, was it always -- were there  
11 always three prongs on the table or were there a  
12 couple other prongs that somebody has forgotten?

13                   Are there some other ways of  
14 truly demonstrating and enhancing gender equity?  
15 We have had so many lawyers before us talking  
16 about the way it was and is and the three prongs.  
17 The legislation never said there will be three  
18 prongs. Somebody along the way wrote that down and  
19 that became it.

20                   I just -- you know, I haven't  
21 spent enough time to think about what might be  
22 missing, but I'm just wondering if there are a  
23 couple other things that might be missing and,  
24 you know, I said this before, we could argue a

1 lot about what is the good of surveys, but if  
2 there are going to be surveys, what should they  
3 really be trying to find out? What are the  
4 appropriate populations to be surveyed?

5                               So those are a few things  
6 that I think, you know, would be some worthwhile  
7 topics to think through. If this group's charge  
8 was different, if this was 30 years ago and they  
9 appointed a Commission like this to design Title IX  
10 and all of its clarifications, interpretations and  
11 policies, you know, what would we have done then and  
12 what we do now to really do everything we could to  
13 enhance gender equity in athletics?

14                              There may be some things out  
15 there that we just haven't talked about that we  
16 should even if it's not technically one of the  
17 questions asked. Most of those questions are  
18 broad enough, if we were bold enough, we could  
19 probably put a couple of new ideas on the table.

20                              MR. LELAND: Well, I just want to  
21 pick up on one thing that Graham said, which I  
22 thought we had a consensus or sort of a consensus  
23 at the meetings and that was the idea that sort  
24 of -- there is a need to make sure that the law --

1 that the implementation of the law is flexible to  
2 make sure that it's clearer, but to make sure that  
3 we beef up the enforcement.

4 I thought when he -- which he  
5 sort of reiterated again here. I thought there  
6 was a consensus around the room that that seemed  
7 reasonable. I hope we get a finding written that  
8 we look at that says something like that. I'm  
9 not sure we did earlier when we talked about  
10 enforcement under question number one.

11 I thought when Graham gave a  
12 similar talk, I thought most of us were nodding  
13 our heads last time. I think we at least ought  
14 to -- unless somebody objects, let's get at  
15 least a finding done that way so that we feel  
16 comfortable.

17 MR. DeFILIPPO: Did we also all  
18 agree that the Office of Civil Rights ought to  
19 be consistent with all of their regional offices  
20 in their interpretation of what we are working  
21 with as well as the enforcement, but we need  
22 more clarity and we need, you know, similar  
23 guidelines from everybody?

24 MR. BATES: Those would be in the

1 recommendation, correct?

2 MS. FOU DY: It's already one of the  
3 findings.

4 MR. LELAND: Yeah. I think we  
5 already did that one. I should talk in the  
6 microphone.

7 Any other comments?

8 MR. REYNOLDS: Several of the  
9 presenters alleged that what we have is actually  
10 strict proportionality as opposed to substantial  
11 proportionality. So I think that it would be  
12 useful for us to explore that issue and should  
13 we have a variance between X and Y amount that  
14 is acceptable. Right now, we don't have an  
15 official policy on what the -- what's an acceptable  
16 variance. The three percent variance, is that okay?  
17 Most of the time, I think that we wind up saying  
18 yes. If we go up to five or six percent, is that  
19 okay? We start to scratch our head when we get to  
20 that zone.

21 So I guess the question that  
22 will be helpful is what is an acceptable variance?  
23 Did we want to tackle that?

24 MR. LELAND: Well, I don't think in

1 terms of a finding, that doesn't seem to fit. I  
2 mean, it might be a recommendation to, you know,  
3 the office of the secretary to leave the initiative  
4 to -- I was thinking this up -- to clarify that  
5 after getting input from the community or something  
6 like that. I could see that as being one of the  
7 recommendations. I don't think that's a finding.

8 I don't think we had a lot of  
9 evidence come to us or people saying, you know,  
10 this is what you ought to do. I think it is  
11 something that would be helpful.

12 DR. YOW: Ted?

13 MR. LELAND: Yes?

14 DR. YOW: While we were on that  
15 subject, can I ask Jerry a question about civil  
16 rights law in general. This is not the only  
17 civil rights statute. How do you define compliance  
18 with other civil rights statutes in terms of  
19 percentages?

20 MR. REYNOLDS: Well, I think --

21 MS. COOPER: Jerry, can you speak  
22 up a little bit?

23 MS. PRICE: Please try to use the  
24 microphone.

1                   MR. REYNOLDS: Well, there are many  
2 aspects of Title IX enforcement that's unique.  
3 Again, the presumption that if you -- well, most  
4 other areas, you have an opportunity to explain  
5 your numbers. It's a rebuttable presumption.  
6 Here, at least with respect to prong one, if you  
7 don't hit the numbers, then, you have to go from  
8 prong two to prong three.

9                   You can't stay within prong  
10 one and explain why -- you can't point to  
11 nondiscriminatory factors to explain why the  
12 disparity is not due to discriminatory conduct.  
13 I guess that's the biggest difference when  
14 looking at other civil rights statutes.

15                   MR. GRIFFITH: Jerry, I just caught  
16 this and maybe everyone else caught this long  
17 before, but you're saying the Office of Civil  
18 Rights has no working guidelines for what  
19 substantial proportionality means, that on each  
20 case, you handle it on a case-by-case basis?

21                   MR. REYNOLDS: We have no written  
22 policy with respect to that issue.

23                   MR. GRIFFITH: Has there ever been  
24 a written policy as a practice?

1                   MR. DeFILIPPO: Jerry, I thought  
2 that schools lately were being told to be de  
3 minimus, which meant less than one percent, which  
4 is really a concern to us because --

5                   MR. REYNOLDS: You should not be in  
6 the position of guessing. If I were to ask you  
7 where did you get that from, you can't point to  
8 anything on our web site and you can't point to  
9 anything on our written documents and for me, that's  
10 a huge problem.

11                  MR. GRIFFITH: Yes. That could be a  
12 finding -- a finding that there was no guideline  
13 that a university or college would know beforehand  
14 as to what substantial proportionality means.

15                  MR. LELAND: Even for prong one.  
16 We've already said that about two and three. We  
17 would like some guidelines.

18                  MR. DeFILIPPO: This is dealing with  
19 prong one. We've been told that it's de minimus.  
20 That means less than -- I didn't know what de  
21 minimus meant, but it means less than one percent.

22                  MR. REYNOLDS: Well, if that is the  
23 case, then, it is not substantial proportionality.  
24 It has been straight proportionality.

1                   MR. SPANIER: You survey major  
2 universities and ask them what they -- where they  
3 thought they were supposed to be, you would get  
4 three-fourths at least saying we understand we have  
5 to be within one percent.

6                   DR. YOW: Jerry, was that a Norma  
7 Cantu -- was there a letter?

8                   MR. REYNOLDS: Well, in the letter,  
9 it states that it would be unreasonable to require  
10 strict proportionality, but terms were never  
11 defined. What is strict proportionality? Is  
12 that one percent or less?

13                   I would say yes, that if you  
14 have to hit -- you know, if the variance is one  
15 percent or less, that's strict proportionality.  
16 At the same time, though, you have a document  
17 here, the '96 letter, stating that strict  
18 proportionality is unreasonable, there needs  
19 to be some -- there needs to be a clarification  
20 of the clarification.

21                   MS. FOU DY: Doesn't she say in the  
22 same letter, Cantu's letter, that the variance  
23 depends on the school size?

24                   DR. YOW: Cary is looking for the

1 letter as we speak.

2 MS. FOU DY: Because the percentages  
3 would be different if you only had so many athletes  
4 in terms of you couldn't add another and so the  
5 variance would be higher. She talks about that in  
6 the letter. I believe that creates a flexibility  
7 that was substantially proportionate.

8 MR. DeFILIPPO: Whatever the letter  
9 says, if what Dr. Spanier says is correct in that  
10 three out of all the four 1-A schools would say  
11 that you have to be less than one percent, then,  
12 something is wrong if you're telling us that we  
13 don't have to be.

14 MR. SPANIER: I think it's a  
15 perception problem.

16 DR. YOW: And Julie, that is also --  
17 my poor attorneys, I feel like they've been beaten  
18 up, but that's our stance as well, one percent, so  
19 there has to be some genesis to that perspective  
20 from our legal staff.

21 Cary has that letter somewhere,  
22 but that is, of course, strict proportionality and  
23 what we worry about is we can't -- we have trouble  
24 staying within it. For natural reasons, kids don't

1 get to start and they can start at other  
2 institutions so you know they leave or they get home  
3 sick and they leave the institution or they get hurt  
4 and they can't compete. There are so many different  
5 reasons.

6 MS. FOU DY: But doesn't she address  
7 those reasons as well in the 1996 clarification  
8 letter about these variance issues? I think she  
9 does --

10 DR. YOW: Cary is looking for the  
11 letter. Cary was looking for the letter. It's  
12 now in the past tense.

13 MR. REYNOLDS: I have a letter and,  
14 Julie, the concept that you refer to, you were  
15 referring to prong three when you -- if you do a --

16 MS. FOU DY: He has got the letter.

17 MR. REYNOLDS: Here it is. The  
18 bottom line is I think what we need to do -- OCR  
19 needs to do a better job of articulating what our  
20 positions are. I don't think that a one percent  
21 variance is substantial proportionality.  
22 I believe that is strict proportionality and that  
23 is not what is required by the '79 policy  
24 interpretation or the '76 clarification letter.

1                   MR. GRIFFITH: Ted, you were asking  
2 whether we have any new findings?

3                   MR. LELAND: Yes.

4                   MR. GRIFFITH: I would throw that  
5 out there as one, that we have some finding about  
6 prong one and the standard that's been used to  
7 enforce prong one with respect to what does  
8 substantial proportionality mean. We have a  
9 number who feel that it means less than one  
10 percent, which I think most of us would agree  
11 that's not substantial proportionality.  
12 That's something very higher than that. There  
13 may be others who have had different experiences.  
14 I think we ought to have something in there about  
15 what the practice has been.

16                   MR. LELAND: I think there is a  
17 consensus after this conversation that we ought  
18 to -- I think we can couch it saying there is a  
19 confusion among the practitioners because we  
20 happen to be practitioners. I'm sure there might  
21 be an answer for it somewhere.

22                                 Do you have an answer?

23                   MS. FOUDY: It's not in the part that  
24 he has.

1 MR. REYNOLDS: I have a letter, but  
2 not the examples that were attached.

3 MR. LELAND: Okay. See, I would have  
4 thought the Cantu letter said five percent  
5 participation variance and one percent scholarship  
6 variance. That's how crazy I am. That's what I  
7 thought.

8 MR. REYNOLDS: Oh, not the five  
9 percent.

10 MR. LELAND: Well, that's my humble  
11 little memory.

12 MS. FOUDY: There's one behind us.

13 MR. LELAND: We hate to have the  
14 facts here.

15 All right. Any other thoughts  
16 while we wait for this? I don't think it should  
17 cause an uproar if we find out one way or another.  
18 I want to adjourn before I'm proven wrong for one  
19 thing.

20 Any other thoughts on findings?  
21 We're going to meet again tomorrow morning on the --  
22 yes?

23 MS. GROTH: I don't know if this is  
24 possible, but is there any way that we can get a

1 copy of our findings tonight just to read or when  
2 we leave tomorrow so we can --

3 MS. COOPER: No.

4 MS. GROTH: Just what we decided  
5 today?

6 MR. SPANIER: Well, this is all  
7 supposed to go to some subcommittee that was  
8 decided on in San Diego who is going to now,  
9 between the staff and some subgroup of  
10 commissioners, write up --

11 MR. LELAND: We've asked them too  
12 much to -- they are going to have to refer to the  
13 transcripts. We are asking for too much. It was  
14 a good question, though. We love good questions.

15 MS. COOPER: If we have more findings,  
16 can we submit them?

17 MR. LELAND: Yes.

18 MS. COOPER: If we have other's  
19 findings, if we go home and we think of something,  
20 can we --

21 MR. LELAND: Yes. Let's get as many  
22 of them done by tomorrow as we can.

23 Any other thoughts for the good of  
24 the cause? All right. Thanks for your patience on

1 our little disorganization at the start. I thought  
2 we made a lot of progress.

3 MR. BATES: Can we leave our materials  
4 here in this room?

5 MS. PRICE: We will be in a different  
6 room tomorrow. You will need to take them with you  
7 tonight.

8 MR. BATES: Sorry. They've got to go.  
9 All right.

10 MS. COOPER: Okay. We're going to  
11 kind of go over what we are doing tomorrow. I  
12 don't have my papers in front of me, but Secretary  
13 Paige will be here tomorrow and I hope everyone is  
14 listening because I'm not repeating. So we're  
15 going to pretty much follow the same format.

16 So 9:00 o'clock is opening  
17 statements and we're going to follow the same  
18 format that we did today in the sense that we're  
19 going to go down the list of questions to discuss  
20 different recommendations.

21 Secretary Paige will be here.  
22 He is going to come in and he is going to observe --  
23 observe for a little while and then around --

24 MS. PRICE: He'll arrive -- his plane

1 doesn't get in until nine something. He'll arrive  
2 after we've started. He'll just come up and sit  
3 down. When we have our break, he will come back.  
4 Cynthia will introduce him and he will have some  
5 opening comments, but not to interrupt the dialogue  
6 we have going, he will sit and watch until we have  
7 the break. He will then come back and make some  
8 comments. Primarily, he is here -- he is taking  
9 the role of you all. He is basically here as a  
10 listener to observe and see the Commission.

11 MS. COOPER: Any questions? Good.

12 MR. BATES: See you at 9:00.

13 MS. COOPER: I think we are adjourned.  
14 I think Ted's little nnnng-nnng meant that we are  
15 adjourned.

16

17 (Whereupon, the proceedings in  
18 the above-entitled cause were  
19 adjourned, to be reconvened  
20 on Wednesday, December 4,  
21 2002, at 9:00 o'clock a.m.)

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24

1 STATE OF ILLINOIS )  
 ) SS.  
2 COUNTY OF C O O K )

3

4 I, LORI ANN ASAUSKAS, a notary  
5 public within and for the County of Cook and State  
6 of Illinois, do hereby certify that heretofore,  
7 to-wit, on the 3rd day of December, A.D., 2002,  
8 personally appeared before me at Marriott  
9 Philadelphia, 1201 Market Street, in the City of  
10 Philadelphia, State of Pennsylvania, The Secretary  
11 of Education's Commission on Opportunity in  
12 Athletics, Chicago Town Hall Meeting, called by the  
13 United States Department of Education is a certain  
14 cause now pending and undetermined before the  
15 appointed Commission.

16 I further certify that the said  
17 testimony was by me reduced to writing by means of  
18 shorthand in the presence of said Commission and  
19 afterwards transcribed upon a computer, and the  
20 foregoing is a true and correct transcript of the  
21 testimony so given as aforesaid.

22 I further certify that the taking  
23 of the proceedings were pursuant to public notice,  
24 and that there were present at the taking of the

1 proceedings were the aforementioned parties.

2 I further certify that I am not  
3 counsel for nor in any way related to any of the  
4 parties in these proceedings, nor am I in any way  
5 interested in the outcome thereof.

6 In testimony whereof I have  
7 hereunto set my hand and affixed my notarial seal  
8 this 9th day of December, A.D., 2002.

9

10

\_\_\_\_\_  
LORI ANN ASAUSKAS, CSR, RPR.  
Notary Public, Cook County, IL  
Illinois License No. 084-002890

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