THE SECRETARY OF EDUCATION'S COMMISSION ON
OPPORTUNITY IN ATHLETICS
PHILADELPHIA FULL BUSINESS MEETING
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TRANSCRIPT OF PROCEEDINGS
DECEMBER 3, 2002
1:00 o'clock p.m.
TUESDAY

REPORTED BY: LORI ANN ASAUSKAS, CSR, RPR.

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

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

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

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

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

athletes.

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

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

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

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

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

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

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

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

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

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

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

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

MR. GRIFFITH: What is the time line?

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

MR. LELAND: It says agenda. Excuse me.

MR. BATES: Oh.

MR. LELAND: I'm sorry.

MR. BATES: I've got that.

MS. COOPER: The agenda called the time line!

MR. SPANIER: All right. Thank you.

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

Percy, do they have this? Debbie?

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

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

MS. COOPER: What about Jerry's?

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

MS. COOPER: Jerry Reynolds.

MR. LELAND: I don't have those.

MS. COOPER: I'm special.

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

MR. REYNOLDS: Yes, present.

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

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

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

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

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

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

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

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

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

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

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

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

MS. GROTH: Okay. Well --

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

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

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

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

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

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

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

The second issue would be how do you measure proportionality.

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

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

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

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

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

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

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

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

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

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

MR. SPANIER: I missed that.

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

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

MR. SPANIER: But isn't there some

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

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

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

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

MS. COOPER: Tomorrow.

MR. SPANIER: That's tomorrow.

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

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

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

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

MR. GRIFFITH: Okay.

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

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

MR. GRIFFITH: Gotcha.

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

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

MS. COOPER: Not today.

MS. PRICE: She is stuck at the airport.

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

here tomorrow.

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

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

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

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

So, I think we are on question number one.

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

MR. LELAND: Cynthia tells me we are

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

MS. COOPER: We are on a time line.

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

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

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

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

MR. LELAND: No, I think go through

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

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

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

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

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

non-traditional students.

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

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

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

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

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

MS. PRICE: Which they are printing it now.

MR. GRIFFITH: Gotcha.

MS. GROTH: I thought mine was pretty thin.

MR. LELAND: I apologize.

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

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

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

Were you going to say something?

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

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

MS. COOPER: We're on record now.

MS. GROTH: Okay.

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

MS. GROTH: Okay. Well, let --

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

MS. GROTH: Uh-huh.

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

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

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

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

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

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

MS. GROTH: That might be a lot easier.

MR. LELAND: How long will that take?

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

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

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

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

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

MS. GROTH: Gene? There we go.

MR. LELAND: Professor DeFilippo?

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

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

have benefited so much from athletics as have the men.

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

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

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

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

for us.

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

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

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

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

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

them.

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

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

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

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

MS. COOPER: Could you reread the group?

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

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

MR. LELAND: Yes, sir, so far.

Do you have a different --

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

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

MR. BATES: Okay.

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

MR. BATES: Okay.

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

MR. DeFILIPPO: I would agree with that.

MR. LELAND: Okay.

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

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

MR. JONES: Ted, I have one thing.

MR. LELAND: Yes.

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

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

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

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

correct?

MS. COOPER: There could be conflicting findings.

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

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

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

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

MS. FOUDY: But the reason it's the

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

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

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

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

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

MS. FOUDY: Right.

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

Yes, Donna?

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

seems to me this misunderstanding is part of it.

MS. de VARONA: Right.

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

(Whereupon, Mr. Bowlsby entered the proceedings.)

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

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

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

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

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

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

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

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

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

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

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

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

of trouble with the other two.

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

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

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

MS. COOPER: Could you repeat it?

MR. LELAND: It's about quotas. That's where we are. I think over and above sort of the procedural and legal issues you guys are talking about, there's the other issue, which is sort of the public education issue.

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

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

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

MS. de VARONA: Right.

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

MR. BATES: Ted?

MR. LELAND: Yes.

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

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

OCR documents. That's not debatable.

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

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

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

MR. LELAND: Safe harbor just means something different.

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

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

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

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

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

MR. REYNOLDS: Those are different concepts.

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

MR. GRIFFITH: It may be the understanding of safe harbor and maybe my understanding of safe harbor is it means that if 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 --

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

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

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

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

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

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

DR. YOW: Yes.

MR. BATES: Gene, was that--

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

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

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

MR. LELAND: Anything other on Gene's?

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

MS. FOUDY: Sure.

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

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

MS. FOUDY: Right. I'm finally figuring that out.

MR. LELAND: Okay.

MS. FOUDY: Okay. Can I go over question one again?

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

athletes?

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

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

MR. LELAND: I think people can read them.

Any discussion on this?

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

MR. LELAND: Other comments?

MR. JONES: I guess my comment does sort of touch on Jerry's thought. I guess it's 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,

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

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

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

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

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

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

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

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

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

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

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

MS. FOUDY: But like you said originally, maybe it is technical, but it's a finding. It's not a recommendation. This is

what Title IX's purpose is.

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

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

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

The next one, Julie?

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

treatment of female athletes.

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

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

Any other comments or thoughts on this?

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

MR. LELAND: I don't remember that.

MS. de VARONA: I don't --

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

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

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

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

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

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

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

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

If it's discriminatory, then, that implicates the whole panoply of civil rights 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

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

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

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

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

MS. COOPER: Keep going.

MR. LELAND: -- to stick with that. Donna?

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

MR. LELAND: Anybody else?

Yes, Debbie?

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

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

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

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

MS. FOUDY: Always.

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

Third one now?

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

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

MS. FOUDY: Okay.

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

MS. FOUDY: We'll move that to five?

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

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

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

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

DR. YOW: Ted?

MR. LELAND: Yes.

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

MS. FOUDY: Right.

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

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

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

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

MR. GRIFFITH: How about it could be?

DR. YOW: Could be. Thank you.

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

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

MS. FOUDY: Tom, don't make me give you --

MR. GRIFFITH: I was only kidding!

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

MS. FOUDY: Uh-huh.

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

MS. FOUDY: 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. FOUDY: 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. FOUDY: I think also we have to

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

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

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

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

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

MR. DeFILIPPO: And it needs more clarity.

MR. LELAND: It needs more clarity.

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

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

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

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

what that is.

MS. FOUDY: Right, but that's something I think we need to address in the recommendations, not -- I mean, we're still in the findings.

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

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

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

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

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

MS. FOUDY: I'm fine with that.

MS. de VARONA: Yes.

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

Good. Any other thoughts on this one?

MS. FOUDY: Way to go, Percy.

MR. BATES: Thank you.

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

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

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

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

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

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

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

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

Donna?

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

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

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

be a close proxy.

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

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

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

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

MS. GROTH: Okay.

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

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

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

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

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

MR. LELAND: Thank you.

Bob?

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

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

a lack of opportunity.

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

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

MR. BOWLSBY: Okay. I'm sorry.

MR. LELAND: No, that's fine.

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

MR. LELAND: Yes, sir.

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

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

MR. LELAND: Which one?

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

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

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

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

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

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

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

MR. BATES: Right.

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

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

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

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

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

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

MR. REYNOLDS: Well --

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

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

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

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

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

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

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

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

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

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

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

MS. FOUDY: Right.

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

MS. GROTH: Sure.

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

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

Cary, why don't you go ahead.

MS. GROTH: Sure.

MR. LELAND: Does everybody have this?

MS. GROTH: It's titled Commission findings.

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

Go ahead, Cary.

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

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

Okay. Next one?

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

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

MR. LELAND: Comments on that?

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

MR. LELAND: Jerry?

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

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

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

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

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

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

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

MR. SPANIER: It does say that.

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

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

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

MR. JONES: Well, that's right.

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

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

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

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

MR. REYNOLDS: Did you skip one?

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

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

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

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

MS. GROTH: Okay.

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

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

MR. LELAND: Yes.

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

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

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

MS. GROTH: It's a finding.

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

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

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

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

MS. GROTH: I see.

MS. de VARONA: Right.

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

MS. de VARONA: Right.

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

MS. de VARONA: Right.

Debbie?

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

MS. FOUDY: Where's yours, Debbie?

DR. YOW: In my head.

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

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

sports.

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

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

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

the incentives that are attached to each of the prongs?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. GRIFFITH: So that we understand it?

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

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

little bit of a consensus here about the dropping of men's sports as it relates to Title IX. Maybe I'm wrong, but I see one.

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

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

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

MR. LELAND: Yes.

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

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

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

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

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

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

MS. GROTH: Made the choice.

MS. de VARONA: You said not felt.

MS. GROTH: Okay.

MS. de VARONA: Had made the choice.

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

MS. de VARONA: Because that's true.

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

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

MS. de VARONA: Yes, it is.

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

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

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

MS. FOUDY: I mean, if you look at --

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. de VARONA: I think they are important.

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

MS. de VARONA: There is.

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

on every campus.

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

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

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

MS. FOUDY: Go ahead.

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

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

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

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

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

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

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

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

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

MR. DeFILIPPO: That's right.

MR. BATES: We could probably agree on that.

MR. DeFILIPPO: We agree on that.

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

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

MR. LELAND: Thank you, Gene.

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

MS. de VARONA: We agree.

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

MR. DeFILIPPO: Do we all agree on something?

MS. COOPER: Yes.

MS. GROTH: Yes.

MS. de VARONA: Yes.

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

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

DR. YOW: Ditto.

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

MS. FOUDY: Where are you, Ted? Sorry.

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

MS. FOUDY: Oh, you're on recommendations?

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

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

MS. COOPER: Q2-F1.

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

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

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

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

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

MR. DeFILIPPO: Yes.

MS. FOUDY: Was the prong two and three only used after the OCR complaint has been filed?

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

MS. FOUDY: Are you talking about Division I again or what are we talking about because I remember the --

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

MS. FOUDY: Because I remember the

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

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

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

I'd like to see a way to

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

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

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

MR. LELAND: Yes. I apologize.

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

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

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

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

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

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

MS. COOPER: Sounds good.

MR. REYNOLDS: Does that take

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

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

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

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

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

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

MS. FOUDY: That's what I remember.

MR. REYNOLDS: No.

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

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

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

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

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

MS. GROTH: He presented.

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

MR. SPANIER: There you have numbers

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

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

MR. SPANIER: Uh-huh.

MR. LELAND: And I apologize again. I don't know where my brain is today. Maybe I never had one and I just thought I did.

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

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

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

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

MS. GROTH: Ted?

MR. LELAND: Yes.

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

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

DR. YOW: Just don't let it happen

again.

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

MS. FOUDY: No.

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

MS. FOUDY: Yes. We --

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

MR. FOUDY: Right.

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

MS. FOUDY: The interest one.

MR. LELAND: Yes.

MS. FOUDY: Do you want me to read it again?

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

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

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

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

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

MS. FOUDY: No.

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

MS. FOUDY: No. We talk about that later.

DR. YOW: Okay.

MS. FOUDY: I was trying to stick to the first question, which is not the second question.

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

MS. FOUDY: Where are you?

MS. GROTH: Survey.

MS. STROUP: Survey.

DR. YOW: Survey.

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

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

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

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

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

MS. FOUDY: Uh-huh.

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

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

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

MS. FOUDY: What if we said something like surveys can be subject to tell you what sport rather than if?

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

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

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

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

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

MR. SPANIER: There could be more.

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

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

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

MR. LELAND: Go ahead, Gene.

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

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

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

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

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

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

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

MR. SPANIER: Only if you misuse the survey.

MR. REYNOLDS: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. LELAND: Yes, sir.

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. FOUDY: Yes. It's labeled as Q3, but I put them under Q2, I think.

MR. LELAND: Okay.

MR. FOUDY: I don't know if you want me to do it now.

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

MS. FOUDY: The question was is further guidance -- is there adequate Title IX guidance that enables colleges and school districts to know what is expected of them in

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

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

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

Debbie?

DR. YOW: Not a question.

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

MS. FOUDY: Right.

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

here.

MS. FOUDY: Uh-huh.

MR. DeFILIPPO: Ditto to what Debbie said.

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

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

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

gap, does that disqualify you from using prong two?

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

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

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

sometimes.

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

MS. FOUDY: I think -- I think I probably didn't write this that well. I totally agree that we need more examples of compliance and ways to comply.

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

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

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

MR. LELAND: Gene?

MR. DeFLIPPIO: Go ahead, Graham.

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

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

MS. FOUDY: How about we just leave the first sentence with however out and just put in some schools need or even many schools need.

MR. DeFILIPPO: Many would be closer.

MS. de VARONA: Yes, educational institutions.

MS. FOUDY: What's that? Many educational institutions?

MS. de VARONA: Educational institutions.

MS. FOUDY: Yeah, that's fine.

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

MS. FOUDY: Where did we talk about the EADA? Was that in this one?

MS. COOPER: It's Q3-F3.

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

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

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

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

MS. FOUDY: Oh, yeah, right. Sorry.

MR. LELAND: That's more high school.

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

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

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

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

MR. LELAND: Yes.

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

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

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

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

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

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

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

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

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

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

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

Sally, is that your shop?

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

MR. REYNOLDS: Yes.

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

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

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

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

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

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

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

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

MR. REYNOLDS: That's right.

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

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

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

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

MS. COOPER: Jerry --

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

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

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

MS. FOUDY: I just don't want a survey to tell me that I'm not interested in playing sports.

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

MS. FOUDY: Why couldn't you just say indicate which prong? Why do you have to give the story? Why couldn't you just say prong two?

MR. GRIFFITH: Because it is for OCR.

MR. REYNOLDS: OCR may disagree.

MR. GRIFFITH: Students are supposed to know.

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

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

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

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

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

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

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

We already have that with prong

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. COOPER: Nine, ten?

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

already through going over those.

MS. COOPER: We already did those?

MR. LELAND: I think so.

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

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

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

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

MR. BATES: So there is hope?

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

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

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

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

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

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

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

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

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

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

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

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

MS. de VARONA: I think Georgia.

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

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

MS. FOUDY: I recall the issue being that the only means of collecting information was

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

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

MR. LELAND: Right.

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

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

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

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

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

MS. de VARONA: Right.

MR. BATES: With no real connection between them.

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

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

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

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

MR. LELAND: Julie?

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

MR. LELAND: No.

MS. FOUDY: When we talk about the

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

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

Is that what happens?

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

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

MS. FOUDY: Wasn't it that they had different states kind of instituted different

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

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

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

MS. FOUDY: Should this fall

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

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

MR. FOUDY: Right.

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

MR. BOWLSBY: Knowledge and representation.

MR. LELAND: In knowledge and representation. Yeah.

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

you said.

MR. BOWLSBY: I said and representation.

THE COURT REPORTER: Thank you.

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

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

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

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

MS. FOUDY: Okay.

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

MS. FOUDY: Okay. Gotcha.

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

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

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

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

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

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

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

MR. BATES: Okay.

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

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

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

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

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

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

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

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

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

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

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

what those five questions are.

MR. REYNOLDS: Uh-huh.

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

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

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

DR. YOW: Right.

MS. FOUDY: That was my recommendation following it. It was to disseminate -- I said to disseminate the existing OCR support determination methodology as administrative guidance.

MR. SPANIER: This particular finding

says if the purpose of the activity is primarily to support and promote other athletes, then, the team would not be considered engaged in the sport, now, I would just like some thinking on that primarily engaged phrase because I was at one of our -- at a luncheon event. We had the head cheerleader there and they were -- what she was talking about is they were getting ready to go to the national championships and they, you know, thought they would be in contention for something there and this is what they had been focused on all year in practicing and getting ready for their routine.

So, I mean, that sounds sport-like, but I don't think that would meet the criteria of what they are primarily in existence for because they probably -- the reason they exist is because we have this cheerleading program where they support other athletes, but they are on a separate track that I never even knew about until recently when I heard they are, you know, on the side and all season long, they are getting ready for this other thing.

How intentional is it that somebody wrote this? I don't know if you wrote it or if someone wrote it for you. Is this primarily to support and promote?

MS. FOUDY: That's taken from definitions provided by, like, the OCR and OCR and other NCAA guidelines.

MR. SPANIER: Uh-huh. And so how do we operationalize that?

MR. REYNOLDS: It seems to me that -- well, there are some cases that are easy. If cheerleading is primarily -- well, if it's solely a -- if it's just sideline cheerleading where they are engaged in providing support to a team, then, the answer is no, it's not a sport, but you've got me to think about those situations where a team may do sideline cheerleading and also engage in competitive cheerleading and I think in those cases, we wouldn't have a right line rule. We would have to look at the percentage of time that the team was engaged in competitive cheerleading as opposed to sideline cheerleading and also look at the remaining factors.

MR. SPANIER: I also suspect what

we have happening here is we may have -- I know we have a couple -- you know, the A squad and the B squad. We may have a pool of 30 or 40 male and female cheerleaders who do sideline cheerleading, but from that group, whatever the number is, ten or something, go to the national competition. Isn't it about ten?

DR. YOW: Yes, the best you have.

MR. SPANIER: You take the best out of a larger group and so I don't know how -- maybe there is no clear definition of it.

MR. REYNOLDS: Well, I think that the sideline cheerleaders that don't go and compete, they are not -- they would not be considered -- it would not be considered a sport, that portion. This also comes into play in terms of counting the number of athletes you have. You could desegregate those students that compete competitively versus the students that merely engage in sideline cheerleading.

MR. LELAND: Well, let me get back to this. How should activities such as cheerleading and bowling factor into the analysis of equitable opportunities?

There is already a mechanism to do this, is there not?

MR. REYNOLDS: That's correct.

MR. LELAND: You know, and so I think our finding just needs to say there is already a mechanism -- I mean, there are a lot of misunderstandings. A lot of people think that there is no way to do this. There is a way to do this. People don't know about it, but --

DR. YOW: It's educational. It's the educational part of this needs -- no one -- that people don't know.

MS. FOUDY: Right.

DR. YOW: They don't know the difference between the ones that are sideline only and the ones that are sideline plus competitive.

MR. SPANIER: But okay, you've got a competitive cheerleading team. Do you count them in your numbers?

DR. YOW: Right now, I do not. In fact, I was unaware until recently that they could be counted if they meet certain criteria.

Of course, let me say this, you know, those squads, a lot of times, have men so you're going to have to count male participants if you decide to count them.

MR. SPANIER: Oh, yeah.

DR. YOW: In our case, we have a male and female squad and an all female squad. So some of us have more than one cheerleading group.

MR. LELAND: Okay. Any other thoughts on question number four?

MR. BOWLSBY: Ted, is the first line of the statement correct then? If we have the five questions that are applied relative to the definition of a sport, doesn't that render that first line incorrect?

MR. LELAND: You might say instead OCR has a set of guidelines.

MS. FOUDY: Yeah. It's not a specific definition. It's criteria, correct, Jerry?

MR. REYNOLDS: Well, I was chastised about this the last time I spoke about this so I want to take this opportunity to clear this up. The NCAA, whatever sport that organization -- whatever activity the NCAA says is a sport, then,

by God, it's a sport.

If the NCAA concludes that a certain activity is an emerging sport, then, we presume that it's a sport.

Any activity that the NCAA has not addressed, those -- it falls within this gray zone. Then OCR will come in and apply the -- apply it's criteria to determine if it's a sport. In some cases we do have a specific definition of a sport and that's whatever the NCAA says it is.

MR. BATES: They don't say so now.

MR. LELAND: Can we write this in a way that takes care -- I mean, sort of takes what Julie has down here and adds what Jerry just said to make this thing sensible?

MS. GROTH: And, Ted, the information we received, I think, in San Diego -- Debbie, I don't know if you put this together, but it lists what the NCAA, NJCAA, AIA, FHS, USOC and OCR determine is what is a sport. I mean, it's very clear. OCR refers back to interscholastic or intercollegiate participation.

There is one criteria that says whether primarily the purpose of the activity

is athletic competition and not the support or promotion of other athletes. I know that our cheerleading programs compete as well in the national championship, but that's a one-time activity for competition.

It's not as if we compete against other schools. I think a whole lot needs to change with cheerleading for it to be considered a sport at least from my perception based on all the definitions by these associations that we received, which is very important information.

DR. YOW: I have a question to Jerry.

Your guidelines used by OCR can change, can they not, if you determine that's appropriate? Cary, I admit, I mean, it doesn't sound like on the surface that competing once per year in a national championship is -- I mean, that sounds odd because we're all raised in athletics and we compete and compete and compete, but I do know they train toward that goal of that competition.

In fact, I know they do that -- I know that so well that we have people who

complain about the way they cheer because they say what happened to cheerleading? These people are gymnasts. They are performers. They don't do for the crowd what we want them to do. The reason that comment continuously comes up is because they consider the use of the event as a training opportunity for the national championship. So I know somewhere it is a gray area, I think.

Do the guidelines -- I mean, Cary just read that right off the sheet.

MR. REYNOLDS: The answer to your question is yes, we can change any policy.

MR. LELAND: Let's just get back to answering this question. Are we okay on answering this question at least as to the first set of findings?

MR. DISKEY: Ted, I think we have it.

MR. LELAND: At least as to the first set of findings.

MR. BATES: Ted, I have a question for clarification now. It would seem to me that we don't have any other sport that has a once a

year activity. It seems to me if we're going to have cheerleading as a sport, the issue of competition somehow intercollegiately would have to be included rather than just saying it ought to be a sport and that you have this thing once a year because that puts it in a different kind of category. I don't know how many contests you would need, but it would seem to me that you need to do it more than getting ready for ESPN, which is where I see it every year.

MR. REYNOLDS: Interesting issues. I mean, basketball has X-number of games and football has fewer. Should one be considered -- should we consider one of them not a sport because the number of games are different?

MR. BATES: Oh, no, no, no, no, no, but at least they are set in a number --

MS. COOPER: They have seasons.

MR. BATES: -- of competition.

MS. COOPER: They have seasons.

MR. BATES: That's different than saying we're just getting ready for the final four. I mean, you do a lot more before that. Sorry.

MR. LELAND: No, I'm -- I think the

OCR has criteria. So there is already a mechanism to handle this problem.

MS. GROTH: Right.

MS. FOUDY: It's not our job to mess with that.

MR. LELAND: Let's not get into a discussion about how many cheerleading competitions are required to be a sport. I mean, we will have -- you can make your own determination on your campus or the OCR can make it, but I think there is -- to answer the question, there is a mechanism in place. Maybe it needs to be better publicized so people understand it better.

MR. BATES: Okay.

MR. SPANIER: The question we have been presented with is really not about cheerleading and bowling, per se. It's really a larger question. We got stuck on those two because it says, for example -- I forgot the exact wording.

MR. JONES: It's for example.

MR. SPANIER: We could be talking about 10 or 20 sports.

MR. LELAND: Right. But there is a mechanism in place for all of those. The

mechanism is not just for -- the OCR has a way of determining how should activities such as bowling or cheerleading, such as, factor into the analysis of equitable opportunities. The OCR as a system, a way or a criteria of declaring a sport a sport. So there is already a system to handle this.

MR. SPANIER: But I think also this gets a little muddled because of club sports. I don't know if we all have club sports, but we have right now 51, 52, something like that, men and women. They all compete against other universities. So what -- at what point, you know -- and bowling is a club support. We could now say, okay, we're calling it a different type of sport, but then are we talking about scholarships or what? I think it's not as simple --

MR. LELAND: One of the criteria is they have to declare it a varsity sport. Isn't that the case? It used to be.

MR. REYNOLDS: Don't press me on the details.

MR. LELAND: It was at one time. You had to declare it varsity. Club sports do not

count.

MR. SPANIER: I'm saying we could declare club sport a varsity sport, but what does that mean? If we took a half a dozen of our women's club sports and say we now clarify them to be varsity sports, what does that mean?

MR. REYNOLDS: Well, if the club sport is basketball --

MR. SPANIER: We already have basketball, but some club sports duplicate others and many of our club sports are not -- we don't have them declared -- there is nothing that's a varsity sport.

MR. DeFILIPPO: There is one thing about that though. On our campus, once you are declared a sport, then, you have use of the training room, you have use of the weight room, you have -- you know, there's a lot of benefits that go with being a varsity athlete that don't go with the club sports and the intramural sports. That's -- that would be one differentiation.

I see where you are getting to though. One competition, I mean, our intramural champion might play venues in women's basketball

and men's basketball. Is that a sport? I think it goes back to the declaration that we're not ready to give them the other benefits that go with it.

MR. REYNOLDS: Well, this raises another interesting issue. Our universe right now is limited to varsity sports for assessing interests and abilities. In terms of compliance, we just look at varsity. One question that's always -- one issue that's always puzzling me is why such a limited universe when you have this other universe out there of male and female athletes participating at the club and intramural level?

MS. de VARONA: That's a good point.

MR. LELAND: Do you want to make part of our answer to question four? I almost ran through a door. I almost had question four slammed shut. Now, we're worried how many times the cheerleaders compete.

MS. FOUDY: What was the part that you wanted to add? Say that again.

MR. LELAND: The whole issue of club sports and what's defined -- I mean, you know, right

now you look at the AD report, fairly clear what's a varsity, what's not a varsity. There are guidelines that are pretty easy to figure out. We're calling that into question. Do we want to call that into the question?

MS. FOUDY: Is that our purpose?

MR. LELAND: I'm asking the question.

MS. FOUDY: I'm asking it back, though. Is that our purpose to do that here?

MR. LELAND: I thought our purpose was to answer this question.

MS. FOUDY: I mean, I think that goes into an arena that --

MR. LELAND: If club sports is part of this question, then, let's expand it. We didn't take any testimony regarding club sports. I was a little uncomfortable seeing that's the direction we're headed here.

MS. FOUDY: Yeah. I don't think it's --

MR. REYNOLDS: How about this, I'll withdraw the statement. It's an aside.

MR. LELAND: I mean, people are concerned about it. We just didn't get into that

very much. We didn't have any club sport people come and talk to us. We didn't have anybody discuss the parameters of club sports. It may be one way to get out of the log jam to get through the door that I thought we had run through is to ask, Jerry, if maybe you could get the five criteria in writing and print for us something like that.

MS. FOUDY: We have them. We already have that.

MR. REYNOLDS: We handed them out once before.

MR. LELAND: Why don't everybody look at those and if they don't like those or don't understand them, we can --

MS. FOUDY: Why don't we suggest that we work on recommending educational materials to people and educating them more on what the criteria are rather than changing them?

MR. LELAND: That's a recommendation. What I want is a finding on, you know, how should such activities such as bowling fit into the analysis of equitable opportunities. We sort of had a finding for a minute.

MS. FOUDY: Did we change mine?

MR. LELAND: I think we only changed does OCR rely on a definition. It has their definition of sport. It's not specific. It doesn't say this is a sport, that's -- bowling is a sport and cheerleading isn't, but it has had a set of criteria, which we are in possession of.

MS. FOUDY: Right.

MR. LELAND: So I think that's where we are. Now, there's a whole other question of how many times cheerleaders compete and then there's the question of club sports. Do we want to expand our findings to this question into those two areas because that's where the conversation has taken us?

MS. GROTH: I think we answered the cheerleading issue when we went back with the five criteria, that OCR has defined that for us unless we want to go in and redefine those five criteria and in my own personal opinion about the club sports is I think we keep that out of the answer to this question. Again, we have not heard testimony regarding club sports and I just don't think we are in a position to -- to go down that road.

MR. LELAND: Okay. Other -- I'm not trying to cut off debate. I just thought we'd get a little bit --

MS. FOUDY: I second Jerry.

MR. LELAND: Okay. Any other thoughts on number four?

Let's go to number five. How do revenue-producing and large-roster teams affect the provision of equal athletic opportunities? The Department has heard from some parties that whereas some men athletes will walk-on to intercollegiate teams without athletic financial aid and without having been recruited, women rarely do this. Is this accurate and, if so, what are its implications for Title IX analysis?

We also said that this was the area under which we take on issues regarding walk-ons and capping of sports in the athletics arm's race, which we have heard a lot of about. I'm trying to find if we have any -- Gene has one. We'll take yours first, Gene. It's either you or Julie.

MR. DeFILIPPO: Question four, finding one, males tend to walk-on at a higher

rate. I'm just going to ditto what Bob Bowlsby said earlier. I don't know what the facts -- what the findings are. You know, we hear that other people have said -- other speakers have said that that's not necessarily the case. I'm not going to repeat, but I found throughout intercollegiate athletics the same thing that Bob Bowlsby spoke about earlier.

MR. LELAND: Okay. Comments? Yes?

MR. SPANIER: Well, we know that's -- we know that's the case or we wouldn't have roster management. I mean, every -- all of our schools are heavily engaged in controlling men's rosters. We have literally several dozen male athletes who we have closed out. So that's not any kind of statement about whether it's right or wrong, but I think it is factual.

MR. LELAND: Cary?

MS. GROTH: If we go back to the three-prong test, the number question, and if we are successful in getting to a place where all three prongs are safe for institutions, then, there is no need to cap men's programs anymore because we can have unlimited walk-ons

under prongs two and three; if we can get to that place.

DR. YOW: The problem with that, Cary, is that there's a difference in allowing additional opportunities into an existing sport versus continuing to add sport after sport after sport after sport for women just so that men, in a traditional men's sport like wrestling, can walk-on to the team.

I don't know how you decide, as an example, what adequate -- what is adequate interest before you have to add that, you know, for me, the 15th, 16th women's sport so that the wrestlers can walk-on.

The disconnect is that those wrestlers are walking on knowing they are not going to be part of the big picture in the sense that they are not going to start, they may never get in a match, but they get to go to practice.

What we are saying is, okay, you can do that, but before you do that, go over and add women's bowling and there might be some women on campus who are interested in women's bowling because they are going to start on the

women's bowling team.

You know, the question is how much of that do you have to do just to make a place for those walk-ons in that traditional sport and that's a disconnect for people -- from a logic-flow perspective that you have to put yourself continually in that position just so those other guys can show up at that practice because the cost implications are extraordinary as you continue to have to add those sports.

I will tell you in terms of club sports, there would be no end to women's club teams who would like to be considered varsity and use the training table, the academic support services, et cetera. I personally don't think that's a legitimate means of judging fairness to women.

MR. DeFILIPPO: Ditto to that and it also depends in what area of the country you live in. I'm not familiar at all with the Midwest so I couldn't begin to speak about it, but in our area, we are in with the ivy leagues and you talk about institutions that have 35, 40 and 42 sports.

I mean, there are people for us to play and there would be a continual adding of sports if that's what we have to do on the women's side. We don't have the facilities or the revenue to be able to do that.

MR. REYNOLDS: Well, one possible way out is not to count walk-ons, both male and female, so that would get around the necessity of adding teams.

MS. FOUDY: I think we are locked into this picture of Division I-A. You know, how do you define walk-on? I mean, we're looking at it from our experiences and my experience at Stanford, but we're just a small picture of what is happening to all of Title IX. I mean, look at Division II and Division III. How do you define walk-on? All of their athletes are walk-ons.

MR. BOWLSBY: None of their athletes are walk-ons. I would suggest to you that 95 percent of every student athlete that competes in this country on a college campus is recruited in one form or another and that includes --

MS. FOUDY: It defines it as a scholarship athlete.

MR. BOWLSBY: -- Division II and Division III.

MS. FOUDY: It also defines it as a scholarship athlete.

MR. BOWLSBY: No. It doesn't have anything to do with a scholarship athlete. There are a lot of invitations made at the Division III level. People don't just end up at Cornell College and Iowa. They are invited to that campus.

Sometimes there is an aid package involved because those institutions typically have lots of need-based aid and even some grant aid under certain circumstances, but there are very few student athletes engaged in college athletics in that country that aren't invited at one level or another or recruited at one level or another to participate in those programs. It is -- there are very few pure walk-ons.

MR. LELAND: Well, let me just focus this a little bit. The department heard from some parties whereas men athletes will walk-on intercollegiate teams without financial

aid and without being recruited. Women rarely do this. Is this accurate? If so, what are some implications for Title IX analysis?

We've got one finding here that says that male athletes walk-on at a higher rate. I feel a little more comfortable if it said many cases, male athletes walk-on at a higher rate because I think there are some instances where they don't.

I think that what Bob was suggesting is maybe the whole idea of walk-on needs to be talked about or thought about because -- and I know that was the case at least in part of the Brown decision was, gee, these aren't really walk-ons you're talking about, they are recruited through the whole recruitment process at the university.

MR. BOWLSBY: To go back to the example that Debbie used at our -- I think it was San Diego or maybe it was Colorado Springs, with regard to your Lacrosse program, you know, I'm sure that some sports lend themselves to walk-ons more than others.

Team sports are probably a

little tougher than individual sports in some ways, but if a program with that level of tradition and that level of profile, you'd think it would be natural for people to want to affiliate themselves with that program yet you identified your frustration, vis-a-vis, the wrestling program and I think it's entirely emblematic of what we see in other places. It isn't universal, but it certainly is an enormously strong trend in that direction. To ignore it, I think, is to be irresponsible in our process.

MR. SPANIER: I'm not sure it's of great consequence to precisely figure out what the walk-on imbalance is. I think most of us would acknowledge that it's there, but I think the heart of the issue here is if we're trying to create maximum opportunities for men and women to participate and if our goal is to create maximum opportunities for women without denying opportunities to men, then, we have to be concerned about the phenomenon of roster management.

It's really a little more about the roster management part of this, I think, than

settling the walk-on issue, per se. I mean, they are conceptually linked, but I think you could have a school with ten men sports and ten women sports and we are tinkering with the numbers in some cases, even with normal roster sizes, to force ourselves into a particular box.

We all know that with football in its big numbers that that accounts for some of it at the scholarship and participation level, but it does -- I think it probably concerns all of us when we get into the zone where we are closing out opportunities for men who are not necessarily taking up huge resources as part of all of this.

If that's happening as an excuse for not properly treating women's athletics, then, that's a problem at the same time. But I think you have to tie the -- you know, so we could spend all of our time talking about the sociology of men walking on more. It's an interesting sociological question, but it's not really what I care about most in this discussion.

It's really about a lot of the people we heard from and a lot of the people at institutions that we know we are closing the

doors on and I think that's what we have to talk about. I don't imagine that there was a big difference between the coach of a men's soccer team or women's soccer team or a men's volleyball team and a women's volleyball team, how many people they would like to have at practice and they need to fill a team, but we have different limits for all of those sports at our school and I suspect some of you do.

We -- the men are only allowed to have so many people come out and the women have a different number. I think that's a phenomenon we just need to face up to here and decide what to do about it.

Again, that's on the other side of our discussion, but I would rather spend our time on that than the nuances of the finding of the sociology of the walk-on.

MR. REYNOLDS: It seems to me that if we dig a little deeper, I mean, there is something more important involved in this issue, especially if you face a circumstance where the marginal expense associated with the walk-on is nominal and no benefit is being taken away from

women. If that is the case, then, what's the point other than to get your numbers right.

If there is no corresponding benefit that flows to women or money not being taken away from the women's program, then, what are we doing by telling a male walk-on, I'm sorry, we hit our cap. No, it's not going to cost any money, but we can't do it because you would throw numbers out.

MS. GROTH: Jerry, with walk-ons, at least at our institutions, it's probably true for the others sitting around the table, the walk-ons receive the same type of benefits as the non-walk-ons. They get the academic support, they use the weight room, they get the practice gear, they get the coaches. I mean, so --

MR. REYNOLDS: Does that take away -- I mean, does that take away a benefit from women? I mean, because the coach is there, the weight room, these were all fixed costs, you have to make your monthly debt service payments whether it's ten people using equipment or 15 people using the equipment.

For me, if a school has sinned

and discriminated against women, the -- I would hope that the primary goal is to help women, not to say that we're going to fix this problem and the problem is discrimination by saying we're going to make an accounting adjustment in terms of numbers and that adjustment basically is roster management or the elimination of teams.

MS. GROTH: You know, I'm going to throw something else out here that's not directly related to the participation numbers with roster management, but we have to get a handle on the number of student athletes per institution, and it differs, on how much we can afford, how many student athletes can we afford to have on our rosters.

Not all of the institutions around the country can afford a full compliment of staff and when is it safe or not safe to have a certain number of wrestlers or women's gymnasts, men or women student athletes in the gyms practicing or when does it get to a point where we can afford to spend an extra couple thousand dollars for the tennis team for men's or women's walk-ons.

I mean, I think roster management

is something real we need to face whether it has to do with men's versus women's participation numbers or not. We roster -- we do roster management at Northern Illinois University, but we have approached it in a manner that we cannot afford to have that many student athletes or this many student athletes in our particular program.

MR. REYNOLDS: Well, as a financial matter, I think that there is a limit and you have to decide when -- you know, when you can't afford to add anymore. I'm not saying that a school shouldn't have that prerogative. I mean, it just wouldn't work if there was just a blank check that students could sign.

What I am saying, though, is if this limit -- if this limit is not due to financial concerns, but due to Title IX compliance concerns specifically with the first prong, then, again, if no benefit is being taken away from women, I just don't -- it just doesn't make sense.

MS. COOPER: I think we've kind of gotten in the recommendation part of it.

MR. LELAND: Yeah. I think we're a little bit into the recommendation area. It

seems to me we might have a consensus here that there is a -- you know, many times or in many cases, males tend to walk-on at a higher rate than females and that this has caused institutions to engage in various forms of roster management, which many times disadvantages opportunities. I don't know. Maybe you could even say male opportunities.

Would everybody be comfortable with something a lot brighter than that, but something that said something like that?

MS. FOUDY: I'm sorry. Say that again, Ted. I wasn't listening. Tom was distracting me again.

MR. LELAND: It's Tom's fault!

In many cases, many times, males tend to walk-on at a higher rate than females. I mean, we are answering specifically this question.

And it seems to us that this has caused a number of institutions to roster manage and that roster management is -- has disadvantaged some male athletes without a corresponding advantage to females or something

like that. I mean, it seems to me there's a --

MS. FOUDY: I know Graham doesn't want to bring in the sociology of it, but I think we would be remiss if we didn't mention that there is a lot of other intangible benefits associated in men's sports that foster walk-ons coming to the men and that, I mean, it's much more attractive, there's much more publicity with football teams, with basketball teams, to be a part of that group than you see on the women's side. There are better facilities, better coaching. I mean, the list, you can go on and on. I think that we have to bring that into play to understand the big picture of it as well.

MR. SPANIER: Right. Can't we -- I mean, certainly we could have a recommendation that acknowledges -- I mean, I -- what you are saying is fine, although it seems much to slippery to me. Maybe -- no, maybe sometimes in most cases, I mean, okay, it's a phenomenon.

But in our recommendation -- we should acknowledge it is and, then, in our recommendation say whatever -- there should be

further study of why this phenomenon exists and in the spirit of encouraging more opportunities for women, let's encourage -- let's change whatever needs to be changed to encourage more women to walk-on.

MS. FOUDY: And I think that those --

MR. SPANIER: I think in time that we won't see any differences like that. I don't know how long it will --

MS. FOUDY: Yeah.

MR. SPANIER: -- take, but at some point, women will walk-on like men are now walking on and we should encourage that. In the meantime, let's not artificially close off opportunities or force schools to close certain sports down because that imbalance exists at this point in time.

MR. LELAND: Does that make you more comfortable?

MS. FOUDY: I mean, I think -- but I think it goes to the heart of what Percy was talking about, too, is that, you know, with the grass roots level and having a strong presence there because that's what I think brings this about in that men are taught from a young age

that it's the manly thing to do, to play sports, and we come back again to the sociology of it, which I think affects your numbers, which we have to somehow bring out.

DR. YOW: Ted, I agree with that, Julie. I know you are shocked, but I do.

MS. FOUDY: Thanks, Debbie.

DR. YOW: Any time!

I think that it's all about the foundation. I don't -- I think, though, that we might be mischaracterizing it to talk maybe about the football and basketball being higher profile. I'm really talking wrestling. There's not much of a profile, God bless them, at least at our institution. I know they are there. I see them occasionally. That's about it. There is certainly no one there watching them compete in any significant numbers.

Those are the people that we're concerned about and part of the reason I think there's a little bit of a disconnect is because of the trust factor again. I don't think there is -- I don't think there is any way it could ever fly that we just say we don't

count walk-ons because there really is a trust issue there of significance in terms of what that might mean.

But whether or not when we get to recommendations there might be some way -- some wiggle room to allow some percentage or some number of walk-ons that wouldn't be countable, it would seem to be healthy to just consider because that is the single most disenfranchised population related to this and if there's a way to help them, if we don't get anything else done for them, I believe that they would acknowledge and appreciate that.

I know that there have to be safeguards in place or there would be a fear of abuse. In other words, walk-ons for football versus walk-ons for wrestling, none of us, as athletic administrators, believe we can afford to go to football programs again that had 150, 170 people on the roster. I don't think we want that, but we do want to try to help the wrestlers somehow.

MS. FOUDY: How do you bring into the issue -- I mean, my experience -- and I know

Bob and Gene have different anecdotal experiences with it at their schools, but my experience at Stanford was there were a ton of walk-ons for the women's soccer team that didn't make the team, you know? I feel awful for them, but there is only a number you can take and how do you address that issue, then, because it's not just -- I mean, I know we have heard a lot of the men talking about it, but there are -- I'm sure Cynthia has similar experiences where there were a lot of walk-ons with her sport.

I know Stanford programs -- I mean, soccer programs across the country, that's the case. Maybe that's the consequence of the grass roots being so strong, but I think we need to consider that as well because it's not just a one-sided issue.

DR. YOW: Absolutely. I am making that assumption that if they are there for the women or if they are there for the men, that something needs to be done to better ensure that they are able to do that.

MS. FOUDY: Right.

DR. YOW: I'm really not -- it's

not just the men's issue, although I always use the example that's in my world, but I hear what you are saying.

MS. FOUDY: Uh-huh.

MR. GRIFFITH: Yes. At least the experience on our campus leads me to believe that if we don't fix this walk-on issue for the men's side, eventually we have it on the women's side too.

Eventually, when all the sociological things change and everything, I think we're going to have it on the women's side if we started roster managing both sides. So it would disadvantage the people we really meant to advantage when we started this thing. I would like to see some way to solve that, Ted.

MR. BOWLSBY: Let me --

MR. LELAND: Yes?

MR. BOWLSBY: One other item on that, just as a frame of reference, maybe this program exists someplace, but I'm not aware of programs that allow anybody that wants to be a part of a program to be a part of a program.

That just isn't the way it works out.

I mean, there are more football players that want to be walk-ons than the football coach is willing to keep around and there are more wrestlers that want to be a part of the program than the wrestling coach is going to want to keep around. So your Stanford soccer example, I think, is everywhere at the upper end of collegiate athletics. There are always more people that aspire to be Rudy than there are opportunities to be Rudy.

I think the artificial predesignation of who can be involved and in what numbers is a real flash point on this issue. I agree with Ted that, you know, if we continue down the path we are with men's sports, I think it won't be long before we have it in women's sports as well and I don't think we've gained anything. As an enterprise, we have lost by taking those opportunities away from them.

MR. LELAND: Okay. That's the walk-on area.

We've got another part to

this question we've got to take on. Any other thoughts on roster management and walk-on issues?

Okay. Let's talk about do revenue-producing -- how do revenue-producing and large-roster teams affect the provision of equal athletic opportunities?

Judy, would you -- Julie, would you do your Q5-F1?

MS. FOUDY: Q5, which one?

MR. LELAND: F1, the one about football.

MS. FOUDY: Right. On numerous occasions, Congress has considered and rejected proposals to exempt football, men's basketball and other revenue-producing sports. This is consistent with the interpretation of all civil rights laws that there is no financial justification for discrimination.

MR. LELAND: Okay. Let's talk about this. Any other -- anybody still hoping to be able to push our way into exempting revenue-producing sports from the calculations? I shouldn't say that. That's cut off all debate because nobody is going to jump on

that band wagon right here. Let's discuss what Julie put on here and let's see where that goes.

MR. SPANIER: Is this the only finding on this question that anyone has submitted?

MR. LELAND: No. Julie has about five more and you have a couple and we've got some others, but we have to do them sort of one at a time, I think.

MR. SPANIER: Yes. I just have to say that there is a problem with this finding approach because everybody went off and wrote between zero and however many they wanted. We only scratched the surface of the potential findings.

Somebody on the staff has to sit down and fill in all the gaps. We have to have a comprehensive set of findings. You have a couple of findings here and there that talk about one tiny little part of the picture. I mean, this is the big question with a lot of things you could say about it. We spend our time talking about what somebody has to propose.

MR. LELAND: Well, I also think it gets to the heart of one of the controversies you hear consistently. People are saying football should be exempt. We heard testimony to that extent so I think it's important -- there may be other findings that we have under this question, but I think this is an appropriate one for us to discuss comfortably.

MR. SPANIER: I think it would be inappropriate to exempt football or any other sport. The question is what about sports that carry -- that require carrying so many people on the roster that they greatly affect the overall balance of numbers and, I mean, it seems like that is what the question is designed to get at.

Is large roster -- how do they affect the provision as well? There ought to be some -- whether we -- wherever we end up with it, I mean, we may say too bad, football has got that many sports, you're going to need six women's sports to equal it out. That may be what we believe in the end, but we really have to face up to the finding that acknowledges

that this is a phenomenon. We're going to have some findings that spell out those facts.

MR. LELAND: Well, let's get to those.

MR. SPANIER: Yeah.

MR. LELAND: Okay. Let's -- let's talk about this one in terms of the question that's been asked how do net -- how do revenue-producing large-roster teams -- so let's go on the revenue-producing first and that's what I saw as Julie's taking the bold step of putting something down for us. So does anybody --

DR. YOW: Yeah. This disproportionately impacts the numbers of student athletes.

MR. LELAND: Right. But let's stick on the revenue --

DR. YOW: That's a finding.

MR. LELAND: Let's stick on the revenue-producing issue first because I --

DR. YOW: All right. Football.

MR. LELAND: Right. Or basketball.

DR. YOW: Or basketball.

MR. LELAND: This is -- this is revenue-producing, which I --

DR. YOW: But basketball doesn't produce the finding that I just suggested. I mean, you just asked a very basic question, right? What does it do?

MR. LELAND: How do revenue-producing teams affect the provision of equal athletic opportunities? Julie has written a finding that addresses that question. So I think we should talk about this finding.

It doesn't really relate to large roster teams at the moment. So can we just -- let's try to take Julie's, which she has taken the time to write down. I think this is an important question. People are going to want to know, you know, is football still counted and what if basketball makes a lot of money, can't you exempt them?

DR. YOW: Okay. Now, Julie's going to think you can't tell what side I'm on here, Julie, but this is -- this is -- I don't think it should ever be how it impacts it. It deals with the numbers in a very peculiar way

because we have no other sport for women that carries 110 people on the roster.

With that being said, I personally don't believe that it should be exempted. I know you're shocked. Aren't you shocked that I said that? I don't believe it should be exempted. It is -- and the reason again, there is such an emotion about it is because it's a cultural phenomenon. We've had this sport quite awhile and it's dear to us and we want to keep it. We want it to be healthy.

Because of the proportionality situation, we find that to keep that sport and to also meet prong one's safe harbor that all of -- that many of us as ADs are told to focus on, we now have to add what Graham said. Five sports for women and all the operational expenses that go with it.

MR. LELAND: I'm hearing no one who is wanting to bring up the revenue-producing issue. So we'll -- we can dispatch with almost unanimous consent with Julie's -- yes?

MS. FOUDY: Go ahead. I don't understand how that relates. I mean, are we okay

with the finding?

MR. LELAND: I think that's what I'm trying to get to.

MS. FOUDY: Oh, okay.

MR. LELAND: I've heard no one object to it. That's what I just said.

MR. GRIFFITH: I have a question as to its accuracy. Isn't it, in fact, true that on numerous occasions --

MS. COOPER: Get your microphone.

MR. GRIFFITH: Oh, I'm sorry. Educate me.

Is it, in fact, true that on numerous occasions, Congress has considered an objective?

MS. de VARONA: Yes.

MR. GRIFFITH: What does that mean? Bills have been introduced?

MS. de VARONA: Yes.

MR. GRIFFITH: Hearing held?

MS. de VARONA: Yes.

MR. GRIFFITH: I mean, I'm aware of one, the --

MS. de VARONA: Yes.

MR. GRIFFITH: -- Tower.

MS. de VARONA: Yes, many times.

MR. GRIFFITH: Many times?

MS. de VARONA: Many times.

MR. GRIFFITH: Okay.

MR. SPANIER: Well, I think it depends on --

MS. de VARONA: And the Javis --

MR. GRIFFITH: Was it rejected --

MS. de VARONA: And the Javis --

MR. GRIFFITH: Was it rejected or have they actually had, like, a vote on it?

MS. de VARONA: The Javis amendment was passed to accommodate -- to compromise football.

MR. GRIFFITH: I see. I know that twice -- I don't know. I just --

MS. de VARONA: No. It's been more than --

MR. LELAND: There were -- there were a couple other sets of hearings on it. In almost every one of the hearings, it's come up.

MS. de VARONA: Right.

MR. LELAND: I don't know. Maybe we could ask this --

MR. GRIFFITH: I'm being just technical. What does it mean that Congress has considered this thing anyway?

MR. LELAND: -- whether this was enacted.

MR. SPANIER: I would think to say Congress has considered and rejected means the bill introduced, there was debate on the floor and there was a vote.

MS. FOUDY: Senator Hasser has a few times.

MR. SPANIER: There was a vote on it and the vote went down. I think that's --

MR. LELAND: Is it okay if we ask the staff to put this in the kind of verbiage and --

MS. FOUDY: Just for that first sentence?

MR. LELAND: Yeah.

MS. FOUDY: Yeah.

MS. de VARONA: Failure to act?

MS. FOUDY: On numerous occasions.

MR. LELAND: And this is consistent with all civil rights laws. There is no financial 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. FOUDY: I like what I have, but --
9 MR. LELAND: Okay.
10 MS. FOUDY: -- 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

we're going to make a recommendation like this, I mean, essentially what we are recommending is that the secretary, in turn, recommend to the Congress that this sort of change be made because he does not have that independent authority to waive the Civil Rights Act.

MR. LELAND: Are you going with that as a modifier?

MS. FOUDY: Uh-huh.

MR. LELAND: Any other thoughts on Q5-F1 from Julie? We've got to turn the page. I hate to put you on the spot, but you did all the work.

Do you want to do this one, F2?

MS. FOUDY: Revenue-producing and profit-generating are not equivalent terms. Many sports produce revenues, but few produce profits. Whether a team or athletic program produces revenues or profits does not remove the obligation of a school to comply with Title IX. In fact, often the heavy spending on revenue-producing sports causes the loss of opportunities for some men in other sports.

MR. SPANIER: Where did we find that out? I mean, where did this Commission learn that? It sounds like somebody's opinion rather than a finding of the Commission.

MS. FOUDY: When we looked at the different studies on the different football programs, when we talked about the two distinctions, revenue-producing and profit-generating, which was brought into play on this question, a lot of the statistics point to the fact that many are revenue-producing, but fewer are profit-generating and I think it goes back to the issue of the issue of resources, which we talked about initially.

MR. LELAND: Well, this is the arm's race issue, which is the other one we said we were going to discuss in number five. It's appropriate that we now -- Julie has put it out -- laid it out in front of us. So we can now talk about it.

MS. FOUDY: I don't remember which hearing it was at, but --

MR. LELAND: An argument has been -- I remember testimony. An argument was made that there was a quicker and more significant increase

in spending on men's sports during a certain period of time than there was on women's sports during that same period of time. I don't remember the exact time frame, but I remember testimony. I don't know if I ever agreed with the numbers.

MS. FOUDY: I think it was Zimbolus in San Diego actually when I read his testimony, Andrew Zimbolus.

MS. de VARONA: We also talked about the train wreck --

MR. LELAND: Yeah.

MS. de VARONA: -- that we were headed for because of escalation.

MR. SPANIER: Well, I think there was far more testimony just to the contrary that, I guess, what's behind this point is that some people believed that men's sports had been closed down not because of Title IX, but because of financial problems in the athletic department and those financial problems developed to feed football and men's basketball. I guess that must be what's behind that.

MR. LELAND: Yeah.

MR. SPANIER: But we have heard

from a lot of athletic directors and other people saying that football brings in -- I can't remember the Penn State numbers now -- but football brings in maybe $30 million and costs us $10 million and the other $20 million is what supports our 14 women's sports.

So I'm just very uneasy about a sweeping statement like that is sort of an accusation hurled at heavy spending. It's a pejorative term. It's an accusation hurled at revenue-producing sports.

Thank goodness we have some revenue-producing sports to allow us to have intercollegiate athletics in this country at the Division I level. Division III level, a different phenomenon. Division II is somewhere in between.

I just think it would be an embarrassment for us to make a couple of these statements and act like we support intercollegiate athletics.

MS. FOUDY: I don't think I'm disputing -- this finding does dispute the fact that these football programs are great sources

of income for a lot of programs. What the finding says is that there often is the case of this arm's race where the expenditures are so high that even if they are profit-generating -- if they are revenue-producing, they don't become profit-generating and it's more the question of the expenditure control and that --

MR. SPANIER: No question about that.

MS. FOUDY: -- and that resources are dwindling because of that.

MR. SPANIER: Any of us in university or athletic administration worries every day about the arm's race. That is a very big, important issue. It's just not --

MR. GRIFFITH: Is there another proposed finding somewhere setting forth what Graham stated about the role of revenue-producing sports and providing money for these programs?

MR. SPANIER: I think you just -- if you're going to do this, you've got to have -- you know, we've heard this, yet we've heard this and we found this. It's -- I think, you know, 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?

MR. LELAND: Yes?

MR. BOWLSBY: This is part of what I sent in and if I may, I will just read it to the group. I know you don't have it in front of you.

There could be no question that the cost of operations in intercollegiate athletics has escalated rapidly and in some cases, has been the rationale for discontinuation of sports programs for men and women. While necessary, controlled expenses is well beyond the province of this Commission and neither the scope of the task nor the time available provide any hope of quality outcomes. Many, if not most, of those involved with the leadership of intercollegiate recognize the need for national action, which will slow the escalation. Some statement to that effect from the Commission could be helpful, particularly if it assisted in convincing Congress that form of antitrust relief might be well advised.

MS. de VARONA: I could -- I could go for that.

MR. LELAND: We're getting unanimity

here.

MS. de VARONA: I could go for that.

MS. FOUDY: I like that. I like that, but the reason this finding -- my particular finding talks about the question of complying whether football should be exempt from complying with Title IX and I address it.

MR. LELAND: Yeah. I think -- but that was the last finding we were working on.

MS. FOUDY: Right.

MR. LELAND: This one, we haven't. This, I like the revenue versus non profit-generating, the difference in the terms, the first two sentences.

MS. FOUDY: Uh-huh.

MR. LELAND: But I think the third sentence -- my opinion is that we have to have what Bob just said in here, but we have to have something maybe that says it a little softer than this. We have to have something in here that recognizes that the heavy spending on -- in some institutions on revenue-producing sports, I'm not sure it's cost opportunities, but it's a factor.

I mean, it's hard to go to the general public to a school that has dropped two or three sports, indicate that it's Title IX, and then six months later gives the coach a $400,000 raise. It's hard to go to the public and say that wasn't -- you know, this escalation in men's sports isn't at all a fact offer. So I -- I'm not sure I would state it in a heavy-handed way, and I love what Bob said, but I think we have to have something in there that says we recognize there is this set of trade-offs that people are making.

MS. de VARONA: Right.

MR. BOWLSBY: Except, Ted, it isn't just in revenue-producing sports. There are people paying baseball coaches and softball coaches enormous amounts of money.

MR. LELAND: Right.

MR. BOWLSBY: There are soccer coaches that are extremely well compensated. The whole Director's Cup thing that you have had such good success in, indeed, has driven a national escalation in compensation that is not limited to just football and basketball,

but to virtually every sport we sponsor.

MR. LELAND: I agree. I stand corrected.

MR. BOWLSBY: It's caused all of us to be national programs.

MR. LELAND: Yeah. We're spending more and more money per student athlete in our program all the time. Some people have to wonder is that costing -- is that hurting our ability to provide equal opportunity, you know, and I think that's a fair question.

MR. BOWLSBY: Especially as it pertains to program expansion.

MR. LELAND: Yeah, yeah. Because it makes it harder and harder to expand.

So are we okay with that, you guys?

MR. REYNOLDS: Well, I'd like to --

MR. LELAND: You told me we did all right this morning.

MR. REYNOLDS: -- pipe up briefly. Money is a factor, but there are instances where money is not and the example that comes to mind is Marquette. Sometimes your numbers are just

not right and money just has nothing to do with it whether we have a huge budget associated with football or not. If your numbers aren't right, you have to do something about it. That's just a commentary.

MR. LELAND: Okay.

MR. REYNOLDS: That's it.

MS. FOUDY: Something similar to that is -- I'm going back. You switched that question one to five.

MR. LELAND: Oh, yeah.

MS. FOUDY: Something similar, I think, to Bob's is the -- finding number six, Q1-F6.

Do you want to look at that? I just noticed that.

MR. LELAND: Yeah. We were -- we changed this, remember? We reorganized this one. That's -- it's a longer one. This states that second -- third sentence in the other one --

MS. FOUDY: Right.

MR. LELAND: -- in much better terminology.

MS. FOUDY: Right, right.

MR. LELAND: So let's talk about this one for a second, Q5 amended, I guess we would say it, F6.

MS. FOUDY: Q1-F6, which is now amended Q5-F6?

MR. LELAND: It used to be Q1.

MS. FOUDY: Okay.

MR. LELAND: Any objections or comments?

DR. YOW: Ted?

MR. LELAND: Yes.

DR. YOW: Just to play on what Jerry said earlier, Julie, where you use the terminology equal opportunities, I think that Jerry had indicated a desire or look at using the word nondiscriminatory versus equal opportunities. That's --

MS. FOUDY: In the second paragraph?

(Whereupon, Ms. de Varona exited the proceedings.)

DR. YOW: Yes, the second paragraph. Title IX requires that members of both sexes have nondiscriminatory opportunities to participate.

MR. LELAND: Does anybody have any --

are we doing okay?

Does anybody have any objection besides what we just heard to Q1?

MR. SPANIER: This is the one that includes the word curtailing bloated expenditures?

MS. FOUDY: Okay. Maybe that was a little bit of a recommendation.

MR. SPANIER: Yeah.

MS. FOUDY: But, Graham, you have to recognize somewhere that we have a problem with an arm's race. That's what it is. I mean, that's what we have heard.

MR. SPANIER: Yes. I believe that is correct.

MS. FOUDY: I mean, to not recognize that, I think, would be a mistake.

MR. SPANIER: But I think there is a difference between the fact that we are in a competitive environment. There's an arm's race going on and saying that there are bloated expenditures, I don't allow my athletic director to participate in bloated expenditures. So I will go on record saying that we don't do that at Penn State. I will acknowledge the national

phenomenon of their being an arm's race.

MS. FOUDY: So we can change that to savings can be realized by reigning in the athletics arm's race.

MR. SPANIER: Yes.

MS. FOUDY: That's fine.

MR. SPANIER: That doesn't contain any fighting words that way.

MS. COOPER: Do you want me to read Muffet's?

MR. LELAND: Yeah, why don't we? Let's get Julie off the spot here for a second. She's the one that did all the work.

MS. COOPER: I'm just going to read a finding from Muffet McGraw.

Large roster teams have no impact on the provision of equal opportunity for schools who choose to comply with Title IX through prongs two and three.

Do you guys have her comments? I'll repeat it. Large roster teams have no impact on the provision of equal opportunity for schools who choose to comply with Title IX through prongs two and three.

MR. LELAND: We've sort of done -- I mean, if you look at question number five, we've sort of done the revenue-producing. We have some findings there. We did the idea of walk-on and capping and now we have to deal with the large roster teams.

Debbie? You wanted to see something, I know. I can see that gleam!

DR. YOW: We've spent too much time together if you can tell that!

It's just that it's an interesting statement, but it's half the story again. For those of us who have been told prongs two and three are not options, that statement says for those of us who have chosen to use prongs two or three, that the large roster teams don't matter.

Well, what about those of us who have been told that prong one, the safe harbor prong, is all we can use? We didn't choose it. It chose us and the large roster teams do have an impact. So it's just got half a story. I'm uncomfortable with it.

MR. LELAND: Are there any other comments on -- does anybody support that? Do

you want --

MS. GROTH: Support Muffet?

MR. LELAND: Support Muffet's finding. I don't know what that does for us.

MR. SPANIER: I'm not sure where it gets us.

MR. LELAND: I'm not sure what it does.

MS. COOPER: Don't look at me. I didn't write it.

MS. GROTH: After Julie's, did we support Julie's with that change at the end?

MR. LELAND: The F6?

MS. GROTH: Yeah, F6. On Julie's Q1-F6, did we -- are we all in consensus with that -- with the change reading the last sentence, savings can be realized by reining in the athletics arm's race?

DR. YOW: No, because we talked about the difference of terms of equal opportunity versus nondiscriminatory.

MR. LELAND: I would rather have savings maybe realized, but I'm fine with it.

Is there anybody else that wants

to stop the presses from rolling and the people from hedging, et cetera?

MR. JONES: I'm unclear. Are we accepting Debbie's suggested change or not?

MR. LELAND: I think so. It was your --

MR. REYNOLDS: Right, exactly.

MR. LELAND: Yes, I think we are. I see them all as friendly amendments, taking out the bloated and the whole --

MR. BOWLSBY: Where is this, Ted?

MR. LELAND: Pardon me?

MS. COOPER: This is --

MR. LELAND: It was originally Q1-F6.

MS. PRICE: It was Q1-F6 and we renumbered it.

MR. BOWLSBY: Q1 what?

MS. PRICE: F6.

MR. BOWLSBY: Q1-F6.

MS. GROTH: I mean, that addresses some of your concerns, Bob, but we are talking about that and we jumped to another one and I just wondered if we should question that.

MR. LELAND: Yeah. No, I think

we are okay on it now that we've amended them. I'm glad you brought it up.

Which one are we on now, Muffet's?

MS. COOPER: Yes.

MR. LELAND: And we did -- are there any others on --

MS. COOPER: Bob, do you have any other recommendations -- I'm sorry -- findings under question five?

MR. BOWLSBY: Relative to this one?

MS. COOPER: Yes.

MR. BOWLSBY: Not other than what I read.

MS. GROTH: I think Bob Bowlsby's comment from Chicago is worthy of a finding. The arm's race in intercollegiate athletics is a train wreck waiting to happen, end of quote. I don't know if you are comfortable with it, but I think that goes hand and hand with that last comment. I think it's got bigger ramifications than just Title IX. If you're comfortable...

MR. BOWLSBY: Well, I don't

think that's inconsistent with what I just read. Perhaps the second one was a little more carefully stated. The fact is that is where we are. I don't think we can deny that, but I also don't know that it's entirely germane to this discussion.

MR. LELAND: All right. Any other questions on number five?

Julie has a couple more if you will turn to -- she did all the work so she gets to sort of control the agenda a little bit, but she deserves it.

We are now on Q5-F4. This is really going back over the walk-on issue. Julie, is there any part of this you would like -- I mean, we gave a lot of --

MS. FOUDY: Yeah. No, we've already talked about that a lot.

MR. LELAND: Are you okay with what we did before?

MS. FOUDY: Did we talk about the F3 one in terms of larger roster size?

MR. LELAND: Yes. I thought we -- let's go back to Q5-F3.

MS. FOUDY: I don't know what we

decided on that.

MR. LELAND: It talks about the roster size. I thought it was pretty good. I'm not trying to butter you up.

MS. FOUDY: Thanks, Ted.

MR. LELAND: I mean, we had to deal with the roster size issue in some way and this looks like a pretty good shot at it.

Okay. Do you want to try F4 now? I think we already did that one.

MS. FOUDY: Yes. We already did F4, I think. Yeah. I think we're good.

MR. LELAND: I think we're fine with that too.

MS. FOUDY: Yeah.

MR. LELAND: Anybody else on prong -- not prong -- whew -- on question number five? We said we would take care of the arm's race, the walk-on, and the capping of sports issues. I think we answered -- at least made a first shot at answering the other parts to this question.

DR. YOW: I just have a question.

MR. LELAND: Uh-huh.

DR. YOW: In Julie's document under Q5-F5, what happened to this finding?

MS. FOUDY: Q5-F5?

MR. LELAND: Where a school chooses to comply with prongs two and three of the three-part test, the number of male athletes is irrelevant. The only question is the school's accommodation of the interests and abilities of female athletes. As a result, a school need not count its number of male walk-ons under either prong two or prong three.

MS. FOUDY: That's the one that Cary brought up, right?

MR. REYNOLDS: Yes.

MS. FOUDY: So we've already addressed it?

MR. LELAND: Yes.

DR. YOW: What did we say? I mean, I'm looking at the last sentence. It says, as a result, a school need not count its number of male walk-ons under either prong two or prong three. So this stood?

MR. SPANIER: I don't see how we can have this finding.

DR. YOW: That hasn't been my experience. I'm just raising it as a question. I would have trouble, Graham, of supporting it given the reality of my world -- in my world.

MR. SPANIER: Well, it's just not so, is it? I mean, there is no such thing as not counting anything. We count everything. I mean, it's a whole different point if you are trying to say -- what you're really trying to say here is, okay, folks, don't tell us you are scared to death of proportionality because there is a way out. Your numbers could be way out of whack if you are complying with prong two or prong three. Then you could ignore your numbers.

How you got to not having proportionality and ignoring the numbers, you're not in a good situation. I mean, this is not -- this is another one of these disingenuous kinds of comments.

MS. FOUDY: But it's -- I mean, it may not be true in your case, Graham, but there are people who can comply under prongs two and three and that would be the case.

That's just a finding. That's a fact. Maybe not for you.

MR. SPANIER: They can --

MR. BOWLSBY: I don't believe that is factual. I think --

MS. FOUDY: Why not?

MR. BOWLSBY: I think even under the new and improved prong three advice and guidance that we hope to have at the Commission, has completed its work, every athletics administrator and president in the country is going to be counting noses still. I don't think there is any doubt about it for all of the reasons that Graham noted.

MR. SPANIER: It's another -- it just feels too slippery. The number of male athletes is irrelevant. I don't want to hear from any of you over there telling me you've got a numbers problem. You can comply this way. The numbers are irrelevant. That is just too far-fetched.

The numbers are highly relevant under any scenario. They are so relevant, we're spending $100,000 or whatever

it is to send reports to Sally to put up on the web.

MR. LELAND: She's not bothered anybody and Sally just gets it!

MS. STROUP: It's not my fault.

MR. SPANIER: I know, but I'm just saying it's not -- I don't think it does our work credit to do that. A lot of the findings -- not just Julie's, but I see a lot of what all of us sent in and we have been bending over backwards, and maybe for good reason, to try to say there is a lot of good things about everything leading up to where we are with Title IX.

We're putting all of that stuff in there, but we don't have a good balance of these findings yet and some of them go just a little beyond credibility and I don't want us to do that. I think when we get in the direction where we're using fighting words or we're being pejorative or calling things irrelevant or we're missing the heart of an argument just so we can make a point that will make someone feel good, it's not a good zone for us to be in.

MR. BATES: Ted, I guess I thought I heard us saying earlier that there are other reasons other than Title IX to watch our numbers that have nothing to do with Title IX.

Earlier, I think Debbie said maybe we ought to think about a certain percentage. I don't think it will ever be open-ended, but I think the question has to do with pointing the finger that said we can't have these walk-ons. I'm losing opportunities. The article in the New York Times sort of highlighted this.

That's what I think we're trying to get away from and to say there is nothing in this legislation that says you have to behave that way, that's how I interpret this. Now, we may want to put some parameters on it, but I think this deals with that question that simply says whatever the reasons are, they may go beyond Title IX, that's fine, but if you're looking at prongs two and three, you have some options to deal with.

Again, to go back to what Debbie said, we may want to put some parameters, because, Graham, I agree with you. I don't

think we can't not count them. We're going to count them at some point, but we may want to give some guidelines as to how many, but we do not have to be locked in is how I read this.

MR. SPANIER: Yes. But it says where a school chooses to comply with -- no school chose to comply with prongs two or three. They -- that -- when one of the prongs is defined as a safe harbor, how many chose to do it that way?

MR. BATES: But aren't we trying to get out of that?

MR. SPANIER: They may have ended up there.

MR. BATES: But I guess that I'm suggesting we are trying to get out of that. I mean, I -- we're looking at where we have been and I think the real question is can we get out of this bind and can we help somehow?

MR. LELAND: Gene?

MR. DeFILIPPO: If we had clarity on prongs two and three, this would make sense, but there is no clarity. There is nothing substantive so we can't use it.

MR. BATES: But that's what we're going to get when we -- who was it? There was somebody over here. I think Bob said when we're done with this, we're going to have that clarity.

MR. DeFILIPPO: So it's unrealistic at this point? No, in the future, this could be something that could be factual.

MR. BATES: But that's where we're trying to go and trying to get people there and hopefully to educate them.

MR. BOWLSBY: That's where I said I think we're trying to go.

MS. FOUDY: But we've heard -- we've heard testimony of people using prong two and prong three. I mean, we've heard them and, Graham, you say no one uses it, but that's where I think we are misguided. I think there are people that are using it that we haven't heard from and that we're not educated enough in those areas to encourage people to use it more often. It may not be the case at these big Division I-A schools, but there are other schools that are using it and Debbie Corum was the last panelist we heard talk about her using garbage stock about her using prong three.

MR. SPANIER: But what's our objective on that, that it's irrelevant?

MR. LELAND: Let me just --

MS. COOPER: I have a question for you, Julie. Right here where it says that the male athletes, that the numbers are irrelevant, did we hear testimony to that effect?

MS. FOUDY: When we're talking about a finding, we're talking about what the statute says. If you are using two and three, they're saying that then you don't have to use proportionality and that's what I'm referring to.

MR. LELAND: Let me try to see if there is a common ground here.

The question is how do large roster teams affect the provision of equal athletic opportunities. What -- it seems to me what Julie is saying here is if you use prong two and prong three, large roster teams don't make any difference because you don't have to count heads -- you don't necessarily have to count heads. If we worded this a little bit softer, Graham, would you be okay with it?

DR. YOW: Let me try this before Graham says no.

Julie, what if it said something like this, because actually of the rhetoric -- what happens is you do get hung up on the word. There are connotations associated with various words -- different words and irrelevant is, you know, a bell ringer.

As an example, what if it just said something basic like this; a number of institutions have been successful in the utilization of prongs two or three in meeting Title IX requirements, period. In those cases, the respective institutions have not been held to proportionality. That is what you say we heard in the testimony. That has not been my personal set of -- that's not my experience, but you're trying to indicate it's been the experience of somebody that's testified to us, but take out all the words irrelevant and --

MS. FOUDY: That's fine.

DR. YOW: -- as a result, schools don't need to count. You know, that's not my -- again, that's not my reality. I do have to count.

MS. FOUDY: Uh-huh.

DR. YOW: Because we were in prong one land and our attorneys have not let me out. I mean, that's where I live.

MS. FOUDY: And I know that, but I just think that we need to remember that not everyone is in prong one land even though the majority of us at this table are.

DR. YOW: That reflects that it says a number of institutions have been successful in the utilization of.

MR. LELAND: Can we use that as a friendly amendment?

MR. SPANIER: Well, no, no. It's fine with me because with every one of these, we can come up with a change in words that make it okay. But if you were a suspicious person, seeing a statement like this, I would probably be thinking what is the underlying message here?

The underlying message is when we come to the end of this, we're going to want to say under no circumstances should we back off from the concept of proportionality

or strict proportionality and this becomes an argument for supporting that conclusion and so what we're doing by talking through all of these findings is if I made the mistake that -- of reading the conclusion that you wrote first, which I don't know if you've all -- there is a concluding page and this whole document reads like a lawyer prepared a legal brief to support all of the points leading to that conclusion. So tinkering with the words here and there of one particular set of documents is, I mean, we have a format that, I guess, was agreed to, but I would have started with what are the ten or the 20 questions that we need to answer as a Commission and let's answer those questions.

That's the way I wrote it up not knowing ahead of time that we would -- were to be in this findings format. That's why, you know, I hate being in the position of feeling like I'm in an adversarial mode with these things that are written, but I just don't think it's the right way to get from here to there.

That's what I'm a little worried

about, that with each one, we're tinkering around the edges and we haven't gotten to the heart of the issues.

DR. YOW: I understand that. In fact, I would suggest that if we had this finding, I would like to add a finding that says a number of institutions have not been successful in the attempted utilization of prongs two and three and have been held to a strict prong one land.

MS. FOUDY: That's fine, but just put that out there. I mean, I've put out, you know, my version, but that doesn't prevent you from putting out findings as well.

MR. LELAND: That last finding probably belongs in question one.

MS. GROTH: Right. I think what Julie is getting at is going back to the flexibility of the three prongs and addressing the walk-on issue, which could go back to the first question, is that accurate?

MS. FOUDY: Uh-huh.

DR. YOW: It kind of goes back to it, but what it also points out is there isn't flexibility. If you have been held to prong one,

you have no flexibility, which is why if we have this finding, we really should have the other because a number of us are not experiencing any flexibility for many, many, many years on how this is dealt with.

MR. GRIFFITH: And it was my understanding that the purpose of the exercise today was simply to let those who have prepared findings present them here, make certain that the rest of us understand it, see if there are corrections so that we can better understand it and then it goes forward.

It wasn't my understanding that at this point in time, I'm supposed to say whether I agree or disagree with that finding.

MR. LELAND: You are correct. I think the process that we are -- and it's an imperfect process. We are inventing as we go along. We are to have this discussion today on the findings tomorrow on the recommendations, ask the staff to write an elegant document that will allow us in some way to come back in January and then if we need to, if there is not consensus,

actually sit down and vote on different things and wordsmith again.

So I think that's where we are. I don't think by moving this forward we're not necessarily locking ourselves into --

MR. GRIFFITH: All I'm looking at is I'm just trying to understand what the findings are.

MR. LELAND: And I think that's what the purpose was of today. These are complicated things. I also think there has been a nice negotiation on many of the findings that have made them more palatable on the front end so we don't have to do that in January and we don't waste our time, you know, just writing them up and having people that can't agree with them dismiss them out of hand. It's been imperfect too.

We've suffered, you guys, because we've -- there wasn't as much time between the San Diego meeting and now when you include football games and all the pressures we have on us and Thanksgiving. We didn't have a lot of time to get this stuff in advance.

MR. GRIFFITH: There you go blaming

football again, Ted.

MR. LELAND: So it's been difficult for many of us to get this stuff in on time. I don't want to pillar the people that did. So any other thoughts on the question? It seems to me that we've talked about how revenue-producing teams affected opportunity, how large roster teams and then we've discussed the walk-on issue.

Are there any other thoughts? Okay. Let's go down to question number six. In what ways do opportunities in other sports venues, such as the Olympics, professional leagues, and community recreation programs, interact with the obligations of colleges and school districts to provide equal athletic opportunity. What are the implications for Title IX?

MS. COOPER: Wait a second. We said we would go back to one before the break if we finished with these, you know, before we go to six and seven.

MR. LELAND: Our coach here thinks we should, which I agree with her -- as promised earlier, instead of jumping to six and seven,

which we said we would do after dinner, is go back to number one and try -- and try to finish it, which there is a lot of the big issues still there.

MS. COOPER: And Debbie wants me to hammer home the fact that dinner is a working dinner and we're going to eat right here so we all need to make space. They are coming in a box and they are going to be cold. Just kidding!

MR. GRIFFITH: What is dinner?

MS. PRICE: Salmon.

MS. COOPER: Dinner is salmon.

MS. PRICE: It's a very nice dinner.

MS. COOPER: It's a very nice dinner, says Debbie.

MR. GRIFFITH: Should I stop eating the candy, then?

MS. COOPER: And for the public, she's going to pay for your dinner!

MR. LELAND: Cary, did we already do your question one findings? We did, did we not?

MS. GROTH: Yes.

MR. BATES: What do we still need to

do on one? I don't remember what we left hanging.

MS. COOPER: Well, there is -- for example, Cary has some different points under one that we didn't get to. There were different findings that we didn't get to.

MR. BATES: Okay.

MS. COOPER: And if anyone else has any comments or findings under question number one, then, we want to get to those also.

MR. LELAND: You know. I thought -- I think we have gone through the question one findings that have been submitted. We went through Cary's.

MS. GROTH: I think we covered this. I can't see any.

MR. LELAND: The one issue that I thought -- we will look through up there to see if there are any of the submitted findings on one that we need to deal with.

The one issue that we did say -- there were three issues that we wanted to talk about and it ended up being four that weren't sort of part of the question. One is the issue of safe harbor, which we've talked about. There

is the issue of dropping men's sports, which we've talked about. There was the appropriateness of the three-prong test. The last one was how we defined and measured proportionality.

In other words, it seems to me we heard testimony where people were concerned that we now measure proportionality by the number of student athletes on the team on the first day of competition and, in fact, we are measuring an outcome and what we should be measuring is an opportunity in some way. Go ahead.

MS. GROTH: We talked, and I think it was brought up substantially at Chicago, but eliminating the proportionality prong does not guarantee that institutions will not continue to eliminate men's Olympic sports. I would also like to throw in women's Olympic sports.

Unfortunately, we are in an institution where we dropped field hockey back in 1991, which is a very viable women's sport, but you see the numbers decreasing in women's field hockey. There was a trend. You see the numbers, and they are staggering, with women's gymnastics programs that have been dropped and

we hear about the unfortunate situation with wrestling, men's and women's swimming and men's gymnastics. It's not just wrestling and men's gymnastics. We have some trends that have happened over the years with some of these sports programs, men's and women's sports programs.

I guess this is more of a comment than a finding, even though I listed it as a finding. The elimination of prong one does not guarantee that institutions will not continue to eliminate men's Olympic sports. I think that's -- there is a lot of truth to that.

We just need to remember that many, many sports programs have been eliminated, men's and women's, and it seems that once there is a trend of ten to 12 or ten to 15, it's easier for institutions to drop those sports because of conference affiliations or regional competition.

I think the rest of them, Ted, have been covered through Julie's or some of the others.

MR. LELAND: Okay. I'm still -- I have a particular vent here. I'm concerned about the issue of proportionality based on -- I think I shared this with some of the staff people. We got a letter from John Parry at Butler. He is one of the best thinkers around and John -- the problem that we have with proportionality and the way we now define it is that we end up having to roster manage the men's teams and then we also create false opportunities -- what I would call or what John Parry calls false opportunities for women.

By that, I mean, you tell the coaches you've got to jack your numbers up. You have to have 160 rowers. There is one EADA report I saw that had reported 70 women's water polo players. Well, there probably were 70 women on that roster the first day of competition, but because of the way we measure Title IX, I'm sure that there was sort of a department initiative. Let's make sure we work this thing out and you get as many guys as you can and as many women as you can on the team and I just think there might be a way you can

do it differently. I think it's a problem.

I don't know other areas lawyers have been in here. I don't know other areas of civil rights law where you actually measure the outcome and that's how you comply with the law as opposed to measuring the opportunity, which we don't measure the opportunity. We measure the outcome.

How many kids are actually there playing -- not playing, but are on the roster. So I have a recommendation, which doesn't come until tomorrow, on how to try to solve this, but I see this as being an issue. I think there is a -- we both roster manage and create false opportunities for women because of this definition we have with what a participant is.

MR. GRIFFITH: Well, I can't speak to civil rights law, but you are not allowed to measure outcome alone unless there is a finding of discriminatory intent. That's pretty clear.

Title IX is unique in this way. Title IX, as interpreted by the Office of Civil

Rights, is unique in that regard. I don't know that that answers overall questions, but you asked the discreet question about how does this compare to other civil rights laws.

MR. REYNOLDS: Well, I would have to quibble with Tom just a bit. If you look at the statute, the statute conceptually is similar to the rest of civil rights laws. It is the policy interpretation and the clarification. It's what OCR has done in terms of establishing conceptual framework for enforcement. These problems don't flow from -- if you just look at the statute, the statutory language, the problems don't flow from that statute.

MR. GRIFFITH: Yes, I agree with that. I should have said Title IX, as it's been interpreted, by OCR.

MR. LELAND: I mean, I think we've heard a little -- one or two people who have testified that this was an issue. Is it an issue for anybody else but me?

MR. REYNOLDS: Well, no, I think your point is an important one. It's a fundamental issue. The question is what's discrimination?

If you have done everything in your power and your numbers don't come out right, you still can be -- we could still conclude that you have discriminated against women or men. I'm not sure -- I mean, is that a rational approach to take?

If you can't find any intent, if you have evidence, if you can show the efforts that you've made to increase opportunities and you've fallen short from some numeric -- from some number, is that fair to conclude that a college has discriminated? Well, I have grave concerns about that. It's not fair.

MR. JONES: Just to piggyback and add something on that, when you typically think about this kind of sort of statistical analysis as it plays out in the anti-discrimination context, you look at the way these sorts of statistical imbalances typically play out in discrimination law, you know, and I'm an employment lawyer by training, typically you show the imbalance, but then there is the opportunity for -- for the company or the institution or whatever it is to then be able to show that there was some

legitimate basis for the imbalance.

You know, as the analysis seems to work here, you know, it doesn't appear that that's always the case. We often, and in a lot of the discussion here, it is sort of just presumed that, you know, if there is not the balance and you can't meet prongs two and three, if you're out of balance, somehow the statistical imbalance equals discrimination and generally that's a concept that really is quite succinct from how statistical balances play out in other discrimination contexts.

MR. REYNOLDS: It would make more sense if we would set up a rebuttable presumption. If we are going to keep this framework, schools should have an opportunity to come in and present evidence that it's nondiscriminatory reasons that explain a statistical disparity and that evidence would have to be evaluated.

It seems to me again if we want to be fair and if the goal is to ensure that men and women aren't discriminated

on the basis of sex, then, we have to ask some fundamental questions. I mean, do these disparities flow from discriminatory conduct or are there nondiscriminatory reasons that explain it? That analysis -- we don't do that analysis.

MR. LELAND: Let me tell you the way this sort of works. Let me just use -- let's say you have a men's rugby team and a women's rugby team what you do -- people do this all over the country. They tell all the kids in the fall if you'd like to try out for rugby, let's try out for rugby. So the two teams show up and there are 60 men and 60 women. They all want to play rugby.

So what you do is a week later, you play your first women's game and there are still 70 kids on the team and you tell your men they can't play until February. Then, there are 30 men on the team. You made it. You know, there is your offset for football, whatever you need to do, because you can now count 70 women, 30 men because it's the first day of competition. It happens all over.

So when you count participants, that's the kind of games that people play and that's why I call those false opportunities because there really weren't any more opportunities for women in that case that I just showed you in rugby because the competition really doesn't start until February, but you can find somebody to play in October. You can get a team to come and play you, you know, so you play a game in October and you know there will just be this natural attrition.

You don't have to kick anybody off. It's just a natural attrition over a period of time. That's why I think I would like to look at some model or at least point out the issue that we're measuring an outcome, not an opportunity. I don't think that made me popular with anybody.

MS. COOPER: I had a question. This is -- this could be -- did we make the finding? I'm reading this from Ted's findings. In the past 20, 30 years, there has been a small drop off in men's opportunities.

Did we submit that as a

finding or did we --

MS. FOUDY: Which one are you on?

MS. COOPER: Q1-F3.

DR. YOW: Cynthia, somebody said at about that time that the number was larger than smaller and there was some discussion about what wording would be used.

MS. COOPER: Right. I'm kind of confused on what we ended up saying for that finding.

MR. SPANIER: I had asked earlier about that report that was done. I checked during the break to get a little more -- the NCAA statistician did not disagree with that report. He supported it.

MS. COOPER: Right. That's what I remember also.

MR. SPANIER: And so, I mean, here a study was commissioned to get the real numbers. The Commission has those numbers available. That should be a part of the -- I think there are data out there and I would like us to be --

MS. COOPER: Yes. I guess I wouldn't say the last 20, 30 years, but I probably would say

the last ten years, 10, 20 years. I think there was a decline --

MS. FOUDY: What report are we talking about again?

MS. COOPER: The NCAA, the guy who came to testify --

MR. SPANIER: No, no. There was an independent -- everybody was criticized in the NCAA report. We had different -- we had 20 different testimonies. People were arguing about one set of data and remember, we said between hearings -- after hearing three, but before hearing four, we know why the people are arguing about the data because there are some other variables in the picture.

The variables were that the NCAA itself has changed. There were some new members that came in. Some people weren't members. There were sports ramping up. It depended on whether you wanted to look at how many people were per team, per school, per sport and so on.

So an independent was commissioned by real statisticians to make sense

of all the data. It was presented in San Diego. We got a printed document. I looked it over and so the numbers are there. It was an attempt to put things into an apples to apples comparison.

I think to the extent that we wanted to site numbers, that is a pretty good set of numbers to look at. I don't know, probably the person only had a few minutes and maybe didn't get through all the data, but I see some people shaking their head.

MR. GRIFFITH: What was that gentleman's name?

MR. JONES: It was Kravitz Mr. Kravitz.

MS. FOUDY: I haven't seen it.

MR. SPANIER: I see several of you drawing a blank on that like it didn't happen.

MS. GROTH: I remembered it differently. I thought he challenged some of the statistics of the NCAA and then the NCAA staff, when they were asked specifically about the number of sport teams or the number of institutions coming into the NCAA, if

those numbers were accurately reflected in the NCAA report, and I thought you said yes. I think since there is confusion, we need to make sure that we are all on the same page as what numbers are accurate. We need to go back to those two reports, but I thought he addressed that.

MR. SPANIER: My understanding was that he specifically used NCAA data, but then tried with it to go beyond it and answer the questions that we were -- that we had asked after the third hearing. That's why I thought it was a pretty useful report.

MR. BATES: Well, he did use the NCAA. He was -- that's what he relied upon, but he did indicate that he and Todd -- he and Corey disagreed on certain aspects as to the way they were interpreting it.

MR. REYNOLDS: Well, we could just refer to the transcript.

MR. BATES: Pardon?

MR. REYNOLDS: We could just refer to the transcript.

MS. COOPER: Right. I was just

talking to Debbie about the transcript and we don't have them yet.

MS. PRICE: We just received the transcripts late afternoon yesterday from the transcriber. So I don't -- oh, wait. Matt is trying to print it right now. Tah-dah!

MR. LELAND: Well, maybe as a -- we could ask the staff to print it during dinner or maybe just develop a finding based on what the transcript says for us to look at when we get back in January. What's the preference? Do you want to look at it first and then --

MS. FOUDY: Yes. Let's have some time to look at it, I think. I haven't looked at it before.

MR. SPANIER: I just think that with all of the hand ringing we've collectively done at each meeting about the data and we finally went out and said, okay, take all of these different data sets, make some sense out of them, report back to us, we ought to have some finding, and it's probably not a sentence, I mean, it might be a couple of pages that summarizes the data, not that it will really change what we decide

tomorrow or in January, but at least it's there for the public to have as some factual matter.

MR. LELAND: Okay. Any other comments?

Okay. Why don't we -- you guys did a great job of hanging in there. I really do appreciate your patience with the process because the process has not been elegant or smooth, but I think we have made a lot of progress today in hammering some of the big issues.

Come back at 6:15 and we eat and begin again. Thank you, guys!

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

MR. LELAND: Okay. Let's get back into business if we could.

We have three things left on our agenda. One is try to ferret out and develop findings on question six and the same for question seven and then we'll try to leave a little time for any additional findings -- any issues that you think that we have come across in testimony

that we have heard and the documents that we reviewed that doesn't quite fit into one of the seven questions we committed earlier to provide that opportunity for you.

So let's leap in here. We don't have very many findings submitted regarding questions six and seven.

Let me read six. In what ways do opportunities in other sports venues, such as the Olympics, professional leagues, and community recreation programs interact with the obligations of colleges and school districts to provide equal athletic opportunity? What are the implications for Title IX?

I think I've got one or two suggestions here. Cary, you happen to have sent one in?

MS. GROTH: My finding was that opportunity at the Olympic and professional levels enhanced students interests in participating in these sports in high school and collegiate programs.

MR. LELAND: Comments? Let me see.

Does anybody disagree with that?

I might -- well, we have one from Julie. No, this is a recommendation, Julie.

MS. FOUDY: Which one are we on?

MR. LELAND: We are on question six. All you have left is recommendations. So that's the only finding that we have.

MS. COOPER: Muffet has one. Are we finished with Cary's?

MS. GROTH: Uh-huh.

MR. LELAND: Yes.

MS. COOPER: This is from Muffet's fax. While offering sports at the high school and college level could lead to a select group of individuals participating in the Olympics, this is merely a by-product of Title IX and not of our immediate concern. With regard to community recreation programs -- did we want to discuss that before I get to the other one?

MR. LELAND: Yes. Let's open it up for discussion now. I think this -- after we listened to the people in Colorado Springs that were directly involved in the Olympic movement, I think what Muffet just put on the table, I guess, was voiced by a couple of the commissioners.

Now, does anyone want to add anything?

MS. FOUDY: Could you read it again, Cindy -- Cynthia?

MS. COOPER: While offering -- are we ready? I'll let you guys get a mouthful of salmon first!

While offering sports at the high school and college level could lead to a select group of individuals participating in the Olympics, this is merely a by-product of Title IX and now our immediate concern.

MR. LELAND: No comments? No one wants to refute that?

MR. SPANIER: Was that supposed to be a finding?

MS. COOPER: Yes. She submitted it as a finding.

MR. LELAND: As a draft of a finding.

MR. SPANIER: That something is not our concern? That sounds like a finding.

MS. COOPER: Yes, not our immediate concern.

MR. BATES: I guess I heard that and thought about it, but I'm not so sure how

we can simply ignore the Olympic sport as it relates to the broader question of providing opportunities in athletics.

I mean, it seems that it belongs there. Now, whether we're talking about K-12 or higher ed is a different question, although certainly some of the sports that we would be interested in high school are not in high schools. They are mostly club sports.

But somehow, I think we need to embrace that somehow because that's the broader question pool of providing athletic opportunities. I just don't think we can say it's not our business. Let it go away. I really do think we need to somehow address it.

MS. COOPER: Well, there has been testimony that the Olympic sports -- the demise of Olympic sports in colleges could hurt the Olympic movement.

MR. LELAND: I mean, I think that was the point of the panel.

MS. COOPER: Yes, from UCLA swimmers to gymnasts.

Do we need to wait until after dinner?

MR. LELAND: No. I'm thinking is there a -- would there be a consensus to leave something here that talked about sort of a continuum of youth sports to school sports to college sports to professional sports and they all sort of interact with each other?

MR. BATES: That would be my druthers, if we could --

MR. LELAND: Although it's not really the direct purview of, you know, the implementation of Title IX to enhance these other programs and provide the impetus for people below us, it's certainly a nice by-product.

MR. GRIFFITH: Was the testimony that one of the by-products of cutting back on Olympic sports for men in college -- is that what you were saying -- is that it has an unintended consequence of damage in the American Olympic movement, is that it?

Is this a wrestler's argument sort of thing?

MS. COOPER: It's not necessarily a

wrestler's argument. I remember testimony, and I don't remember from the exact names, but I remember testimony from different people stating that because of the demise of sports -- Olympic sports in universities, a lot of those -- a lot of Olympic athletes come from those programs or came from those programs and those programs no longer exist. Thus, it would hurt -- it probably will hurt in the future our Olympic movement because those programs no longer exist. It wasn't really wrestling. To be honest, it was gymnastics, I remember, and swimming, I think.

MR. LELAND: It seems like the arguments we've heard were both that Title IX had adversely affected a couple of sports, if you buy the argument that that caused sports to be dropped, but it also enhanced other sports because it caused them to be added.

So maybe the way to say it is the menu of opportunities provided in the collegiate setting affects both the grass roots programs in terms of providing inspiration and potential opportunities and it affects the post graduate programs and international by providing

elite athletes.

Does that get where we are? I don't see any controversy here.

MR. GRIFFITH: Is there an element here of -- I know the wrestlers have made the argument that there are all these wrestling programs in high school throughout the country and opportunities are not being provided for these wrestlers once they get to college, that the number of college programs has declined.

Is that part of this here that somehow -- is there an implication here that when there is a recognized interest below the college level that as we look at colleges providing opportunities for young people to participate in athletics, that that's a factor that ought to be considered as if there really is a desire out there that somehow ought to be addressed? I don't know. I don't remember any testimony about that.

MR. LELAND: I thought the only testimony we heard about that might have been from the LSU case where they were trying to do the needs and interests assessment and they had

to look at the number of high school athletes in that sport in the state of Louisiana.

That's the only thing that I can remember. I don't remember that being specific. Any other thoughts on this one?

MS. FOUDY: Was there any mention about funding possibilities at the Olympic committee? I wasn't in Colorado Springs and I know that topic came up before that and that we were going to mention it there about opportunities to help through the Olympic community funneled to the NCAA or through the -- I don't remember the exact point.

MS. COOPER: Is that question seven?

MS. FOUDY: Because that seemed to be a big issue.

MS. COOPER: Would that be covered under question seven, what you are asking?

MR. LELAND: We can just say it's under seven if you want.

MS. COOPER: I'm asking.

MS. FOUDY: Yes, it could be. That's true.

DR. YOW: Ted, do we not -- Donna

is the person who has had a lot of emotion around this. Did we not get anything in writing because that surprises me a little bit because she was very passionate about this particular issue.

MS. FOUDY: I think Donna has been out of the country.

DR. YOW: Okay.

MS. FOUDY: That's what I heard. I think she just got back.

MS. COOPER: We haven't received anything from Donna.

DR. YOW: So, Julie, you can't represent anything she shared with you as an example about that.

MS. FOUDY: She may have been the one that mentioned that at a prior town hall meetings, but I just remember that being a big issue. I wasn't at the Colorado Springs meeting so I don't recall.

MR. LELAND: Well --

MS. FOUDY: We can hit on that later, though, when she gets back or she can type something in if she remembers.

MR. LELAND: Okay. Why don't we run

with what we've got and then we'll make a special effort to see if Donna has a proposal for us that might cover some more ground.

Does that sound all right to you guys?

MS. COOPER: There is another finding from Muffet. She has been busy.

With regard to community recreation programs -- with regard to community recreation programs, they should meet Title IX standards for equity between men and women.

I'll repeat it. With regard to community recreation programs, they should meet Title IX standards for equity between men and women.

DR. YOW: That would mean -- I think we probably should be dealing with club sports on our university campuses if we were going to go that route before we ever went to neighborhood gatherings.

MR. GRIFFITH: That strikes me as quite an overreach here. I mean, Title IX is limited to federal funding to educational programs. We're now talking about extending

it to local teams. Somebody maybe ought to do that, but it's not us and it's not the Department of Education. That ought to be done at a different level. I think that's way beyond our scope.

MR. LELAND: I would agree.

Anybody disagree? Would you like to second that motion? We're sort of stuck here because I don't think we have any passion -- we haven't heard a lot of testimony that was really -- that rang the bell on this one.

So are we okay with what we discussed, in essence, to staff craft a -- I don't want to call it a milk toasty, but an answer?

MR. BATES: Ted, I just have one question, both on the Olympics and on this recent mention of Muffet about the community. While I think it's an overreach, it was my understanding that we are the Secretary's Commission's in Opportunities in Athletics and not just on Title IX. I thought that was purposeful in the sense that we could, in fact, look at a broader picture

and not just limit it to Title IX. Otherwise, we would have been Commission on Title IX.

I assume there was a reason for this title versus focusing only on Title IX and it seems to me there are some things that when we get to that, we say, well, that's not in our bailiwick. Again, not to comment, I don't have a suggestion, but I do think the issue really is broadening athletic opportunities and not necessarily limiting it to college campuses.

MR. GRIFFITH: Well, I agree. It's not limited to college campuses, but I think it has to have some nexus with the jurisdiction of the Department of Education. That's all.

MR. BATES: I understand.

MR. LELAND: And I also think there may be an opportunity for us, when we start talking about other findings or other recommendations, as opposed to handling it under number six.

MR. BATES: That's only an observation.

MR. LELAND: Okay.

MR. BATES: It's just that I don't want that to be the limiting factor for us.

MR. LELAND: All right. Hearing no more -- anybody pushing to the microphone?

MR. GRIFFITH: Move on, move on.

MR. LELAND: Move on to seven?

MS. FOUDY: Yeah.

MR. GRIFFITH: Bury it. Bury six.

MR. LELAND: Question number seven, apart form Title IX enforcement, are there other efforts to promote athletic opportunities for male and female students that the department might support such as public/private partnerships to support the efforts of schools and colleges in this area?

Cary, do you want to -- you've got one underneath here. I think you are the only one that I got anything from.

MS. COOPER: Muffet has one.

MR. LELAND: And Muffet. Oh, Julie. Okay.

MS. GROTH: Educational initiatives must also comply with Title IX regulations. Partnerships would be beneficial, especially with

today's economic challenges.

MR. LELAND: Okay.

MS. COOPER: Give me the money! Show me the money!

MR. LELAND: Okay. Any comment?

MR. GRIFFITH: I'm not certain I understand. Could you help me?

MS. GROTH: Pardon me?

MR. GRIFFITH: I didn't -- could you read that again? I didn't catch that.

MS. GROTH: Educational initiatives must also comply with Title IX regulations. If we get some private funding, of course, development monies or corporate partnership monies, it must comply with Title IX provisions and that partnerships would be beneficial, especially with today's economic challenges.

MR. LELAND: I think she's saying that, in fact, anything the Department of Education helps sponsor would have to comply with the rules -- with the regulations anyway and partnerships would be beneficial especially in today's economic challenges.

MR. SPANIER: Just an observation,

I think we in the Department of Education need to deal head on very squarely with all of the issues before us and I hope we don't succumb to the tendency in the end to say that it's really all about money and so let's just encourage schools and universities to go off and engage in public/private partnerships and step up their fund-raising and that's how they will take care of this and maybe the problems we're struggling with will go away.

Most universities are heavily involved in fund-raising for their athletic departments already. Maybe our number is -- I mean, it's only a fraction of Stanford's. We're maybe at $10 million and I wouldn't even want to mention in public what Stanford raises, but the point is we would not be able to balance our intercollegiate athletics budget if we weren't heavily involved in athletic fund-raising as it is.

Moreover, we all have sponsorships of some level ranging from local car dealers to shoe contracts to names of companies up on our score boards. In fact, we are so heavily into

public/private partnerships already that we all are under some degree of criticism for having gone too far in that direction and we are striving to create the right balance between supporting our athletic programs with outside money and not going so far that it looks like we've over-commercialized athletics.

From the very beginning, I've worried about this particular question because it seems like one where the answer is obviously sure, we're for it, go ahead and do it. Well, we are sort of doing it and it's all about balance in the end. I don't think the answer to that question should relieve any of our anxieties it's about dealing with the other issues before us. I just wanted to get that out.

MR. GRIFFITH: Is there some sense here that this question might get into the issue of what if you could raise money to put on a men's gymnastics program or something like that?

DR. YOW: Yes.

MR. GRIFFITH: I hadn't thought about that until just now.

DR. YOW: The question is are there other efforts and one other effort would be to allow sport-specific fund-raising through private sources without penalizing and in that case, just counting the money that's given.

Another -- just to bring it down to, you know, the pragmatic level, we have a friends -- what we call friends of accounts for every -- for each of our 25 sports. You can donate money specifically to the fund for men's swimming because this is the team I'm talking about.

For men's swimming, they have $70,000 friends of account. They want to use it, as you would guess, for scholarship money. It has never been allowed so the money sits in the fund. They could technically use it perhaps for some other operational expense as long as it's proven that it's nondiscriminatory to our women swimmers, but there are limited uses of the funds.

So because it's that way, we can't get people -- we can't maximize the revenue potential of those gifts because we

have so little flexibility in terms of how we can use them, especially when it comes to participation opportunities. We're paying for those walk-ons, to dress those walk-ons or for scholarship support.

MR. LELAND: I'm not optimistic because I happen to agree with Graham in terms of the economic -- the public/private partnerships at all the universities. We're stretching it at about -- we're maximizing our revenue and stretching it about as far as we can giving the academic milieu we live in.

I've also had some background and talked to some of the people in Colorado Springs about the national governing bodies being of assistance and I don't see that as a way to help ameliorate the financial situation because they have just as bad financial problems as we do and they -- I mean, I remember years ago, about four years ago -- it must have been about seven years ago when the Los Angeles money finally got to the national governing bodies when water polo worried about their status as an NCAA sport.

They went and set up this grant program for $10,000 a year for three years. They would help start a men's water polo program and no one could do it because they knew it was more than $10,000 and it was a life-long commitment and for the Water Polo Foundation, that was a lot of money, $30,000 to give to some school to start a program, but nobody took them up on it because it just didn't make any sense in the long run.

It only had little to do with Title IX, the fact that it was men's water polo. You know, it had more to do with the fact they would have this obligation in perpetuity because then they would have to drop the sport at the end of three-year period or something. So I don't see a lot of -- I wouldn't look to national governing bodies to help us out of our, you know, finite problem with dollars nor do I look for a lot of public/private partnerships because I think we're all pretty good in doing that now.

I can't imagine that there's a bunch of money laying out there to support college athletics that we haven't tried to

vacuum up already. So maybe that's a -- is that the consensus sort of? Not what I just said specifically, but the kind of, gee, this isn't a real avenue we ought to look into?

DR. YOW: It's that way as long as the money that's being raised is used as replacement funds for the athletic program. In other words, we cut our expenses by using that private funding and then people don't give that money to us because they don't see that a bit like paying debt.

They are not very interested in either one of those concepts. They only seem to be interested in it if it is used as money in addition to whatever the commitment is institutionally has already been made to further enhance the sport.

MR. LELAND: Okay. Other thoughts and comments on question seven?

MS. COOPER: Muffet.

MR. LELAND: Muffet?

MS. GROTH: Yeah, Muffet!

MS. COOPER: Rules on scholarship limits imposed by the NCAA may have negative

affect on compliance with Title IX.

I'll repeat it. Rules on scholarship limits imposed by the NCAA may have a negative affect on compliance with Title IX.

There is another part. Do you guys want me to read that one also while we are here?

MR. LELAND: Uh-huh.

MS. COOPER: Title IX does not prohibit public/private partnerships.

MR. LELAND: I think that could be part of our --

MS. FOUDY: That's one of -- that's one of my findings. Both of those are two of mine actually.

MS. COOPER: Cool, Julie!

MR. LELAND: What was the other one, scholarships and...

MS. COOPER: Title IX does not prohibit public/private partnerships.

MR. SPANIER: It's almost too obvious to state, isn't it? That's not really a finding, is it?

MR. BOWLSBY: Well, the issue of the NCAA scholarship limits has been around for a long time. It works okay for -- we've run it up the flag pole in the Big Ten several times. We could advance our situation rather dramatically by going from -- from 14 scholarships to 18 scholarships in women's basketball or something along those lines.

It becomes a non-starter because for everybody below the top 60 institutions, it's a competitive issue. You know, we are all stock piling athletes and they are all trying to compete against us. So, you know, as a solution, it really is a non-starter because there are so many competitive level playing field issues.

We've proposed one scholarship increase after another and they never go anyplace because there is just too much critical mass and it's not even -- even under the new government structure of NCAA, it never goes anyplace because the mid-majors and some of the fairly -- other than the top six conferences, you can never get any of it through because it's a competitive issue for them. They don't want us putting another

four people that they should be having on their roster on our rosters.

DR. YOW: That is true, Bob, but the reason it's true is because there is no enforcement of Title IX in the way -- that's not well stated.

There is not a broad based application -- uniformly applied application to Title IX compliance. So what happens is if we added the equivalency of two scholarships to women's field hockey because that's more likely because we might have 30 student athletes on the team, but maybe only 12 scholarships, whatever the limit is right now, that would really be feasible if people understood that the choice came down to either adding scholarship 13 and 14 in field hockey or starting a new women's sport and paying all of the operational costs that are associated with it.

It is only -- it is exactly as you stated it, but it's that way because that dynamic is not in play right now because people don't have to be in compliance, so to speak.

MR. BOWLSBY: Well, yeah. I think that's right and -- but at its base level, you know, that Cary's institution doesn't want 11 institutions in the Big Ten to put another 44 women's basketball players on their roster because those are 44 kids that would be playing at Northern Illinois and playing at the other places.

DR. YOW: I understand. I think it's just tough for me to think about it with women's basketball given they already have 15 and the men only have 13.

If it's just another -- you already have 30 players on the field hockey team and you know whether or not everybody else understands the difference in a head count sport and an equivalency sport where so many of them aren't on full rides anyway, it's a matter of parceling out additional monies to a lot of times existing people on the teams because there are already 30 of them there.

Whether or not our ability to offer, you know, $1,000 or $4,000 would make the difference in a mid-major program, I don't know. Maybe it would. I still think it's cost-effective

if the choices are to do that versus adding another women's team.

MR. BOWLSBY: Well, it's also popular. If we go back and ask the coaches on our campus whether they wanted to do some other things to enhance their perhaps or add an additional sport on the women's side, every one of them will tell you they don't want any more sports. They want enhancements to what we are currently doing because it's an issue of the quality for them.

DR. YOW: Correct. I think that's accurate. If you only have 12 scholarships, but you have 30 student athletes, then, as a coach, you look at that and you go, yes, that person does deserve more aid and so does that one and so forth and so on. So you are right. It's very popular with the coaches.

MR. LELAND: All right. Any other -- I'm not sure if that fits into this question. I think it's something that's been discussed, but I'm not sure it fits in this particular question.

MR. BOWLSBY: It was a great discussion.

MR. LELAND: It was a good discussion

among two of our bright lights.

Okay. Apart from Title IX enforcement, are there other efforts to promote athletic opportunities for male and female students that the department might support such as public/private partnerships to support the efforts of schools and colleges in this area?

Any other comments for the good of the cause? Hearing none and seeing none, we'll -- we're done with number seven. So we've answered the questions now.

Let's give everybody a chance to just take a deep breath here for a second and talk about other areas -- we just mentioned one in terms of the scholarship limitations the NCAA imposes.

What other areas are people interested in having findings that aren't subsumed in the seven questions or things that we went through?

We discussed last time we met the possibility of having findings over and above the seven questions. We think it is probably

within our purview to do that, but want to be cautious when we do that.

So where else do we need to -- what other issues have you heard about or that you want to -- or thought about that you want to discuss now? Now is the time for us to go through them.

If there are none, we can adjourn. Yes, Cary?

MS. GROTH: Can we think about that overnight? Is there any time in the morning that we can start off with that since we're a little fried today going through those and give us a chance to --

MS. COOPER: No.

MS. GROTH: That's out of the time line?

MS. COOPER: Tomorrow is my day. No, I'm just kidding. No.

MR. LELAND: I think we could put it at the end of the agenda tomorrow if you want.

DR. YOW: No.

MR. LELAND: Oh, you want to put it at the start?

DR. YOW: I won't be here at the end of the agenda tomorrow. Can you stick with it for ten minutes?

MR. LELAND: Yes.

DR. YOW: Okay. Can I talk?

MR. LELAND: Yes.

DR. YOW: Other than the NCAA scholarship limits, which I think is a marvelous topic, I would like for us to consider the possibility of a recommendation that the Office of Civil Rights would development some type of government pilot program with a significant budget to encourage high school sports participation with boys and girls with an emphasis on the girls. That would be one I would like to think about and maybe talk about.

Is the cheerleading thing in here already or do we need to bring that up again? Is that a done deal? We don't need to discuss that anymore? We said we have guidelines and that's what they are? We don't --

MR. LELAND: I think that's where we are.

DR. YOW: Okay.

MR. LELAND: You will have a chance to look at those again in January.

DR. YOW: Nope, nope. The other suggestion is that we modify the EADA report to provide for clear delineation of nondiscriminatory scholarship variances like summer school or other special -- special term costs. Like, some have a winter term, they have a mini term, you have people going to these terms because they have to stay eligible, as an example, or they just want to and that opportunity is made available to others who chose not to utilize it.

MR. LELAND: These are more in the form of recommendations.

DR. YOW: Oh, this is not a new topic?

MR. LELAND: No. We're looking for findings. What have we heard from the public?

DR. YOW: Please forgive me.

MR. LELAND: No, that's great. We've got a jump on tomorrow, but --

DR. YOW: That's very tactful, Ted. I really appreciate that.

MR. SPANIER: Well, now, I don't want

to launch into anything if I'm on the wrong track here. You're looking for findings that we haven't talked about at all, not topics that we need to deal with?

MS. COOPER: Findings.

MR. LELAND: Do you have a topic that needs a finding?

MR. SPANIER: Well, let me take two minutes.

MR. LELAND: Let's let him throw it out there. Yes, please.

MR. SPANIER: I think we need a whole discussion on enforcement and we need findings -- more findings on enforcement.

I think a consistent theme that we've heard in testimony and I think all of the commissioners have felt that we have this very peculiar phenomenon going on here where we have had Title IX for years and years. No school has ever actually had the ultimate penalty occur, namely, the withholding of funds from the Department of Education. Nobody has been found to be bad enough that they have ever been penalized that way.

Now, maybe that's because the negotiations were always so well done that everybody said, oh, yeah, we can agree on that, but we all know that there are schools out there -- I mean, it's one thing to argue one percent off or three percent off. Are you this prong or that prong? Heck, there are schools out there that are 30 percent off. I mean, there are schools out there that -- I just think haven't begun to comply with the spirit let alone the letter of any of the laws and what's the deal there?

I mean, we have this peculiar thing where we are arguing about the nuances around the edges when there are a lot of bad apples out there that we really ought to be doing something about. I'm just wondering how -- you know, if we can come up with things out of the Commission that get people to stop arguing about the nuances around the edges and let the Department of Education channel its resources into really doing something about programs, whether it's high schools or colleges or universities that really have only been protected because they haven't been on somebody's radar

screen, you know, I have the impression that you guys spend all of your time dealing with complaints that somebody files.

Maybe a whole different approach to enforcement is needed than the one now. I mean, that doesn't require any -- I'm just saying that's a whole topic I am wondering we should spend some time on. I think, you know, we spend a lot of time talking about walk-ons, roster management, and so on, but if we're going to have any recommendations in that arena, we really need to think about what we mean by walk-ons.

I think we may need a whole new vocabulary for a lot of these things too. We are stuck with a lot of old vocabulary terms. We even know there are such things as invited walk-ons and other walk-ons. So, you know, if there is going to be some set of clarifications about the -- and is a walk-on, and this was in a couple of other people's write-ups, too, is a walk-on somebody who just doesn't have a scholarship, full or partial, or do we have some concept of what is an appropriate size to field the team?

Is it -- you know, let's say it's

20 in soccer or 12 in volleyball or 12 in basketball and then is a walk-on anything above that number because if you just counted everybody who didn't have a scholarship, that might be too -- people could hide behind that and really get away from the spirit of Title IX.

I think we actually need to think about what we mean by equity, what we mean by gender equity. We have gotten kind of hung up in converting equity to numbers and if we just, you know, for a minute or two, not now, but in a discussion if we could get away from saying what are we trying to accomplish here and what do we mean by equity, is it having the same number of sports?

Is it having sport by sport equivalency? Is men's gymnastics being treated the same as women's gymnastics? Is women's being treated the same as men's basketball? Are their facilities the same? Is their travel the same? Are their stipends the same? Is that the kind of equity that is important to us or do we really believe that all 85 football players or 30 wrestlers or whatever might have to be matched up person by

person to a woman in a completely different sport? Is that the kind of equity we're after? I think we danced around the edges of that a little bit.

We've talked about the one prong versus the three prongs and I've mentioned this a couple of times. I'm just wondering if there might also be some other prongs. You know, who knows, I wasn't there, but when they were all sitting around the table in 1995 writing up that letter or in 1989, one step back from that, was it always -- were there always three prongs on the table or were there a couple other prongs that somebody has forgotten?

Are there some other ways of truly demonstrating and enhancing gender equity? We have had so many lawyers before us talking about the way it was and is and the three prongs. The legislation never said there will be three prongs. Somebody along the way wrote that down and that became it.

I just -- you know, I haven't spent enough time to think about what might be missing, but I'm just wondering if there are a couple other things that might be missing and, you know, I said this before, we could argue a

lot about what is the good of surveys, but if there are going to be surveys, what should they really be trying to find out? What are the appropriate populations to be surveyed?

So those are a few things that I think, you know, would be some worthwhile topics to think through. If this group's charge was different, if this was 30 years ago and they appointed a Commission like this to design Title IX and all of its clarifications, interpretations and policies, you know, what would we have done then and what we do now to really do everything we could to enhance gender equity in athletics?

There may be some things out there that we just haven't talked about that we should even if it's not technically one of the questions asked. Most of those questions are broad enough, if we were bold enough, we could probably put a couple of new ideas on the table.

MR. LELAND: Well, I just want to pick up on one thing that Graham said, which I thought we had a consensus or sort of a consensus at the meetings and that was the idea that sort of -- there is a need to make sure that the law --

that the implementation of the law is flexible to make sure that it's clearer, but to make sure that we beef up the enforcement.

I thought when he -- which he sort of reiterated again here. I thought there was a consensus around the room that that seemed reasonable. I hope we get a finding written that we look at that says something like that. I'm not sure we did earlier when we talked about enforcement under question number one.

I thought when Graham gave a similar talk, I thought most of us were nodding our heads last time. I think we at least ought to -- unless somebody objects, let's get at least a finding done that way so that we feel comfortable.

MR. DeFILIPPO: Did we also all agree that the Office of Civil Rights ought to be consistent with all of their regional offices in their interpretation of what we are working with as well as the enforcement, but we need more clarity and we need, you know, similar guidelines from everybody?

MR. BATES: Those would be in the

recommendation, correct?

MS. FOUDY: It's already one of the findings.

MR. LELAND: Yeah. I think we already did that one. I should talk in the microphone.

Any other comments?

MR. REYNOLDS: Several of the presenters alleged that what we have is actually strict proportionality as opposed to substantial proportionality. So I think that it would be useful for us to explore that issue and should we have a variance between X and Y amount that is acceptable. Right now, we don't have an official policy on what the -- what's an acceptable variance. The three percent variance, is that okay? Most of the time, I think that we wind up saying yes. If we go up to five or six percent, is that okay? We start to scratch our head when we get to that zone.

So I guess the question that will be helpful is what is an acceptable variance? Did we want to tackle that?

MR. LELAND: Well, I don't think in

terms of a finding, that doesn't seem to fit. I mean, it might be a recommendation to, you know, the office of the secretary to leave the initiative to -- I was thinking this up -- to clarify that after getting input from the community or something like that. I could see that as being one of the recommendations. I don't think that's a finding.

I don't think we had a lot of evidence come to us or people saying, you know, this is what you ought to do. I think it is something that would be helpful.

DR. YOW: Ted?

MR. LELAND: Yes?

DR. YOW: While we were on that subject, can I ask Jerry a question about civil rights law in general. This is not the only civil rights statute. How do you define compliance with other civil rights statutes in terms of percentages?

MR. REYNOLDS: Well, I think --

MS. COOPER: Jerry, can you speak up a little bit?

MS. PRICE: Please try to use the microphone.

MR. REYNOLDS: Well, there are many aspects of Title IX enforcement that's unique. Again, the presumption that if you -- well, most other areas, you have an opportunity to explain your numbers. It's a rebuttable presumption. Here, at least with respect to prong one, if you don't hit the numbers, then, you have to go from prong two to prong three.

You can't stay within prong one and explain why -- you can't point to nondiscriminatory factors to explain why the disparity is not due to discriminatory conduct. I guess that's the biggest difference when looking at other civil rights statutes.

MR. GRIFFITH: Jerry, I just caught this and maybe everyone else caught this long before, but you're saying the Office of Civil Rights has no working guidelines for what substantial proportionality means, that on each case, you handle it on a case-by-case basis?

MR. REYNOLDS: We have no written policy with respect to that issue.

MR. GRIFFITH: Has there ever been a written policy as a practice?

MR. DeFILIPPO: Jerry, I thought that schools lately were being told to be de minimus, which meant less than one percent, which is really a concern to us because --

MR. REYNOLDS: You should not be in the position of guessing. If I were to ask you where did you get that from, you can't point to anything on our web site and you can't point to anything on our written documents and for me, that's a huge problem.

MR. GRIFFITH: Yes. That could be a finding -- a finding that there was no guideline that a university or college would know beforehand as to what substantial proportionality means.

MR. LELAND: Even for prong one. We've already said that about two and three. We would like some guidelines.

MR. DeFILIPPO: This is dealing with prong one. We've been told that it's de minimus. That means less than -- I didn't know what de minimus meant, but it means less than one percent.

MR. REYNOLDS: Well, if that is the case, then, it is not substantial proportionality. It has been straight proportionality.

MR. SPANIER: You survey major universities and ask them what they -- where they thought they were supposed to be, you would get three-fourths at least saying we understand we have to be within one percent.

DR. YOW: Jerry, was that a Norma Cantu -- was there a letter?

MR. REYNOLDS: Well, in the letter, it states that it would be unreasonable to require strict proportionality, but terms were never defined. What is strict proportionality? Is that one percent or less?

I would say yes, that if you have to hit -- you know, if the variance is one percent or less, that's strict proportionality. At the same time, though, you have a document here, the '96 letter, stating that strict proportionality is unreasonable, there needs to be some -- there needs to be a clarification of the clarification.

MS. FOUDY: Doesn't she say in the same letter, Cantu's letter, that the variance depends on the school size?

DR. YOW: Cary is looking for the

letter as we speak.

MS. FOUDY: Because the percentages would be different if you only had so many athletes in terms of you couldn't add another and so the variance would be higher. She talks about that in the letter. I believe that creates a flexibility that was substantially proportionate.

MR. DeFILIPPO: Whatever the letter says, if what Dr. Spanier says is correct in that three out of all the four 1-A schools would say that you have to be less than one percent, then, something is wrong if you're telling us that we don't have to be.

MR. SPANIER: I think it's a perception problem.

DR. YOW: And Julie, that is also -- my poor attorneys, I feel like they've been beaten up, but that's our stance as well, one percent, so there has to be some genesis to that perspective from our legal staff.

Cary has that letter somewhere, but that is, of course, strict proportionality and what we worry about is we can't -- we have trouble staying within it. For natural reasons, kids don't

get to start and they can start at other institutions so you know they leave or they get home sick and they leave the institution or they get hurt and they can't compete. There are so many different reasons.

MS. FOUDY: But doesn't she address those reasons as well in the 1996 clarification letter about these variance issues? I think she does --

DR. YOW: Cary is looking for the letter. Cary was looking for the letter. It's now in the past tense.

MR. REYNOLDS: I have a letter and, Julie, the concept that you refer to, you were referring to prong three when you -- if you do a --

MS. FOUDY: He has got the letter.

MR. REYNOLDS: Here it is. The bottom line is I think what we need to do -- OCR needs to do a better job of articulating what our positions are. I don't think that a one percent variance is substantial proportionality. I believe that is strict proportionality and that is not what is required by the '79 policy interpretation or the '76 clarification letter.

MR. GRIFFITH: Ted, you were asking whether we have any new findings?

MR. LELAND: Yes.

MR. GRIFFITH: I would throw that out there as one, that we have some finding about prong one and the standard that's been used to enforce prong one with respect to what does substantial proportionality mean. We have a number who feel that it means less than one percent, which I think most of us would agree that's not substantial proportionality. That's something very higher than that. There may be others who have had different experiences. I think we ought to have something in there about what the practice has been.

MR. LELAND: I think there is a consensus after this conversation that we ought to -- I think we can couch it saying there is a confusion among the practitioners because we happen to be practitioners. I'm sure there might be an answer for it somewhere.

Do you have an answer?

MS. FOUDY: It's not in the part that he has.

MR. REYNOLDS: I have a letter, but not the examples that were attached.

MR. LELAND: Okay. See, I would have thought the Cantu letter said five percent participation variance and one percent scholarship variance. That's how crazy I am. That's what I thought.

MR. REYNOLDS: Oh, not the five percent.

MR. LELAND: Well, that's my humble little memory.

MS. FOUDY: There's one behind us.

MR. LELAND: We hate to have the facts here.

All right. Any other thoughts while we wait for this? I don't think it should cause an uproar if we find out one way or another. I want to adjourn before I'm proven wrong for one thing.

Any other thoughts on findings? We're going to meet again tomorrow morning on the -- yes?

MS. GROTH: I don't know if this is possible, but is there any way that we can get a

copy of our findings tonight just to read or when we leave tomorrow so we can --

MS. COOPER: No.

MS. GROTH: Just what we decided today?

MR. SPANIER: Well, this is all supposed to go to some subcommittee that was decided on in San Diego who is going to now, between the staff and some subgroup of commissioners, write up --

MR. LELAND: We've asked them too much to -- they are going to have to refer to the transcripts. We are asking for too much. It was a good question, though. We love good questions.

MS. COOPER: If we have more findings, can we submit them?

MR. LELAND: Yes.

MS. COOPER: If we have other's findings, if we go home and we think of something, can we --

MR. LELAND: Yes. Let's get as many of them done by tomorrow as we can.

Any other thoughts for the good of the cause? All right. Thanks for your patience on

our little disorganization at the start. I thought we made a lot of progress.

MR. BATES: Can we leave our materials here in this room?

MS. PRICE: We will be in a different room tomorrow. You will need to take them with you tonight.

MR. BATES: Sorry. They've got to go. All right.

MS. COOPER: Okay. We're going to kind of go over what we are doing tomorrow. I don't have my papers in front of me, but Secretary Paige will be here tomorrow and I hope everyone is listening because I'm not repeating. So we're going to pretty much follow the same format.

So 9:00 o'clock is opening statements and we're going to follow the same format that we did today in the sense that we're going to go down the list of questions to discuss different recommendations.

Secretary Paige will be here. He is going to come in and he is going to observe -- observe for a little while and then around --

MS. PRICE: He'll arrive -- his plane

doesn't get in until nine something. He'll arrive after we've started. He'll just come up and sit down. When we have our break, he will come back. Cynthia will introduce him and he will have some opening comments, but not to interrupt the dialogue we have going, he will sit and watch until we have the break. He will then come back and make some comments. Primarily, he is here -- he is taking the role of you all. He is basically here as a listener to observe and see the Commission.

MS. COOPER: Any questions? Good.

MR. BATES: See you at 9:00.

MS. COOPER: I think we are adjourned. I think Ted's little nnnng-nnnng meant that we are adjourned.

(Whereupon, the proceedings in the above-entitled cause were adjourned, to be reconvened on Wednesday, December 4, 2002, at 9:00 o'clock a.m.)

STATE OF ILLINOIS)
) SS.
COUNTY OF C O O K)

I, LORI ANN ASAUSKAS, a notary public within and for the County of Cook and State of Illinois, do hereby certify that heretofore, to-wit, on the 3rd day of December, A.D., 2002, personally appeared before me at Marriott Philadelphia, 1201 Market Street, in the City of Philadelphia, State of Pennsylvania, The Secretary of Education's Commission on Opportunity in Athletics, Chicago Town Hall Meeting, called by the United States Department of Education is a certain cause now pending and undetermined before the appointed Commission.

I further certify that the said testimony was by me reduced to writing by means of shorthand in the presence of said Commission and afterwards transcribed upon a computer, and the foregoing is a true and correct transcript of the testimony so given as aforesaid.

I further certify that the taking of the proceedings were pursuant to public notice, and that there were present at the taking of the

proceedings were the aforementioned parties.

I further certify that I am not counsel for nor in any way related to any of the parties in these proceedings, nor am I in any way interested in the outcome thereof.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this 9th day of December, A.D., 2002.

_____
LORI ANN ASAUSKAS, CSR, RPR.
Notary Public, Cook County, IL
Illinois License No. 084-002890