The Commission convened in Room 540 at 624 Ninth Street, N.W., Washington, D.C. at 9:30 a.m., Gerald A. Reynolds, Chairperson, presiding.

PRESENT:

GERALD A. REYNOLDS, Chairperson
ABIGAIL THERNSTROM, Vice Chairperson
JENNIFER C. BRACERAS, Commissioner
GAIL L. HERIOT, Commissioner
PETER N. KIRSANOW, Commissioner
ASHLEY L. TAYLOR JR., Commissioner
MICHAEL YAKI, Commissioner (via telephone)

KENNETH L. MARCUS, Staff Director

STAFF PRESENT:

TYRO BEATTY, Director, Human Resources Division
DAVID BLACKWOOD, General Counsel
TERESA BROOKS
CHRISTOPHER BYRNES, Attorney Advisor to the Office of the Staff Director and Acting Deputy General Counsel, OGC
DEBRA CARR, ESQ., Associate Deputy Staff Director, OSD (via telephone)
PAMELA A. DUNSTON, Chief, Administrative Services and Clearinghouse Division
BARBARA FONTANA
LATRICE FOSHEE
DEREK HORNE
MAHA JWEIED
SOCK-FOON MACDOUGALL
TINALOUISE MARTIN, Director of Management
AUDREY WRIGHT
MICHELLE YORKMAN

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COMMISSIONER ASSISTANTS PRESENT:

LISA NEUDER
DOMINIQUE LUDVIGSON
RICHARD SCHMECHEL
KIMBERLY SCHULD

PANELISTS PRESENT:

DANIEL A. COHEN, ESQ., Senior Associate, Rogers & Hardin LLP
JESSICA L. GAVOR, Vice President, College Sports Council
JOCELYN SAMUELS, Vice President for Education and Employment, National Women’s Law Center
JUDITH M. SWEET, Consultant, National Collegiate Athletic Association
DAVID F. BLACK, Deputy Assistant Secretary for Enforcement, Office of Civil Rights, United States Department of Education
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9:33 A.M.

CHAIRPERSON REYNOLDS: This meeting will come to order. This is a meeting of the U.S. Commission on Civil Rights. This meeting is taking place at 624 9th Street in Room 540, Washington, D.C. With the exception of Commissioners Yaki and Melendez, all Commissioners are participating here at the Commission.

This morning we will have a brief briefing meeting which includes a rechartering of one of our State Advisory Committees. Afterwards, we will hold a briefing on Title IX Athletics Accommodating Interest and Abilities.

The first item on the agenda is the approval of the agenda.

I. Approval of Agenda

CHAIRPERSON REYNOLDS: May I have a motion to approve the agenda.

COMMISSIONER KIRSANOW: So moved.

CHAIRPERSON REYNOLDS: Is there a second?

VICE CHAIRPERSON THERNSTROM: Second.

CHAIRPERSON REYNOLDS: Discussion? All in favor?

(Chorus of ayes.)

V. State Advisory Committee Issues

CHAIRPERSON REYNOLDS: Next, I move to amend the agenda to delete discussion of the item labeled Virginia SAC under the State Advisory Committee issues. Under this motion, the discussion of this item will be tabled until the next business meeting.

Is there a second?

COMMISSIONER KIRSANOW: Second.

CHAIRPERSON REYNOLDS: Discussion?

COMMISSIONER YAKI: Yes, I have discussion.

CHAIRPERSON REYNOLDS: Yes?

COMMISSIONER YAKI: Commissioner Yaki here. I would like to amend the motion to include the Michigan SAC as well.

VICE CHAIRPERSON THERNSTROM: Because?

COMMISSIONER YAKI: Because -- well, we can discuss it later, but because of the inquiry from Chairman Nadler of the Oversight Committee.

CHAIRPERSON REYNOLDS: Well, we have two letters. The first we received from Conyers. We
responded to that letter. We received a second letter, I believe it was yesterday, is that right?

    STAFF DIRECTOR MARCUS: Last night, yes.

    COMMISSIONER YAKI: The letter was received last night was because I understand the letter from us was received from them last afternoon.

    CHAIRPERSON REYNOLDS: That's correct. Quite frankly --

    COMMISSIONER YAKI: And I believe that that letter from Chairman Nadler raises additional questions and seeks additional information on both Michigan and Virginia and if we are postponing Virginia for reasons I would like to hear about, I would also move that we postpone Michigan as well since both of them are specific items of discussion in Chairman Nadler's follow up letter to Congress --

    CHAIRPERSON REYNOLDS: Do you interpret this as a moratorium on rechartering our SACs until this exchange of letters ceases? Or is it limited to these two particular SACs?

    COMMISSIONER YAKI: Well, I think that the first part of the letter, as I read it, certainly goes to a more general question about SAC appointments in general. We can discuss that, if you want to later, but just in terms of this motion, I would say that
that can be discussed. I don't know what the intent of the chairman is. Perhaps a meeting might facilitate clarification on that because I don't know what it means, but I do think that if Virginia is being postponed and Michigan is the subject of the same letter as Virginia in the chairman's letter, I believe that we should postpone it.

CHAIRPERSON REYNOLDS: The only reason Virginia is being postponed is because several Commissioners have asked that we consider certain individuals for Virginia SAC and so we just need additional time to go through our process to vet the individuals. So that is the reason why we have this motion to postpone Virginia and not Michigan.

COMMISSIONER YAKI: Well, given that the letter goes exactly to that process, and if we're doing additional responses to Virginia and that would be responsive to that letter, I believe we should either include Michigan in the subject of that letter in the motion.

CHAIRPERSON REYNOLDS: Okay. Any other comments around the table?

Michael, are you comfortable then voting on both SACs at this time? I mean if we do, then we would not be able to consider the request that we
consider these additional individuals.

VICE CHAIRPERSON THERNSTROM: Why not?

Why can't we consider them later?

CHAIRPERSON REYNOLDS: Actually, you're right, we could. We could add them if they make it through our vetting process.

So Michael, are you comfortable if we vote on both SACs?

COMMISSIONER YAKI: No, why would I? I'm supporting the motion to postpone, so why would I be comfortable with voting for them right now?

CHAIRPERSON REYNOLDS: I thought that the rationale was that we were postponing one, we should postpone the other?

COMMISSIONER YAKI: No, I'm simply saying if you were moving to postpone one, we should postpone the other as well, but I was going to make a motion on my own to postpone both of them anyway in order for the Commission to provide responses to Chairman Nadler.

CHAIRPERSON REYNOLDS: Okay, well, as a technical matter, let's get a second for your motion? I assume there's a second?

Is there a second for Commissioner Yaki's motion?
VICE CHAIRPERSON THERNSTROM: Mr. Chairman, there doesn't seem to be.

CHAIRPERSON REYNOLDS: Okay, well, Michael, I don't believe that we can move forward with your motion without a second.

COMMISSIONER YAKI: Well, then the original motion stands which was to postpone Virginia, correct?

VICE CHAIRPERSON THERNSTROM: That is correct.

CHAIRPERSON REYNOLDS: Yes.

COMMISSIONER HERIOT: Withdrawn?

CHAIRPERSON REYNOLDS: No, that motion is still on the table and we're going to vote on it if someone wants to make an amendment to vote on both, and we would consider other individuals for the Virginia SAC at a later date, we can do that.

VICE CHAIRPERSON THERNSTROM: I would like to ask the Staff Director whether there's any downside to doing simply voting on both at this time and considering then additional members for the Virginia SAC?

STAFF DIRECTOR MARCUS: I can't think of any downside. We haven't been doing it in the past, but we can certainly charter the state now and then
add the names later. That's within our rules. There's no procedural reason we can't do it that way.

CHAIRPERSON REYNOLDS: Okay, so is there a motion to that effect?

(Pause.)

CHAIRPERSON REYNOLDS: Okay, this is what the plan is. The plan is that the motion that was seconded is still on the table. We would just vote on the Michigan SAC. We would table the Virginia SAC for the next meeting. All in favor, please say aye.

(Ayes.)

CHAIRPERSON REYNOLDS: Any opposition?

COMMISSIONER YAKI: Yes.

CHAIRPERSON REYNOLDS: Any abstentions?

COMMISSIONER HERIOT: I abstain.

CHAIRPERSON REYNOLDS: Let the record reflect that Commissioner Yaki voted against the motion; Commissioner Heriot abstained; the remaining Commissioners voted in favor of the motion, so the motion carries.

COMMISSIONER YAKI: I move to -- Mr. Chairman?

CHAIRPERSON REYNOLDS: Yes.

COMMISSIONER YAKI: I'd like to move to postpone consideration of this item until Commissioner
Melendez joins. I'd like to amend the agenda to postpone consideration of the Michigan SAC until Commissioner Melendez joins --

CHAIRPERSON REYNOLDS: Commissioner Yaki, we just voted.

COMMISSIONER YAKI: No, you voted on tabling Virginia. You took a vote on tabling Virginia. I'm now making a new motion that for the remaining agenda item that is consideration of the Michigan SAC that we postpone consideration of that until Commissioner Melendez joins the meeting.

CHAIRPERSON REYNOLDS: Okay, I'm comfortable with that, so I will second the motion.

Discussion?

VICE CHAIRPERSON THERNSTROM: Wait a minute? So we're not going to vote on Michigan either today, then?

CHAIRPERSON REYNOLDS: We would vote on it today. Apparently, it's my understanding that Commissioner will join us and at that point we would vote on the Michigan SAC.

COMMISSIONER HERIOT: We're expecting him any minute?

CHAIRPERSON REYNOLDS: That is my assumption. If that's not the case, the bottom line
is we will vote on this today unless the majority of us decide --

    COMMISSIONER HERIOT: Why don't we change it to postponing it assuming that he joins us within the next so many minutes.

    CHAIRPERSON REYNOLDS: Commissioner Yaki, do you have a sense of when he'll join us?

    COMMISSIONER YAKI: No. You might want to ask his assistant.

    MR. SCHMECEL: He had a speech earlier this morning, but I've been unable to reach him.

    CHAIRPERSON REYNOLDS: Did he intend to participate by phone?

    MR. SCHMECEL: Yes, he intended to be on time.

    CHAIRPERSON REYNOLDS: Okay. All right, well assuming that he -- well, we will vote on this issue unless we decide otherwise. I think that as a courtesy we should just push it back a little bit, but the plan is to vote on it during this business meeting.

    Okay, next item up is the approval of the minutes for the April 13th meeting.

    II. Approval of the Minutes of the April 13, 2007 Meeting
CHAIRPERSON REYNOLDS: May I have a motion?

COMMISSIONER KIRSANOW: So moved.

CHAIRPERSON REYNOLDS: Is there a second?

COMMISSIONER BRACERAS: Second.

CHAIRPERSON REYNOLDS: Discussion? All in favor, please say aye.

(Chorus of ayes.)


CHAIRPERSON REYNOLDS: Next up we have the announcements.

III. Announcements

CHAIRPERSON REYNOLDS: The month of May marks the 53rd anniversary of the Supreme Court's ruling in *Brown v. Board of Education*. The landmark decision declared state-sponsored racial segregation in public schools unconstitutional, stating that separate educational facilities are inherently unequal. This decision set the stage for the modern civil rights movement. Today, we honor the lasting legacy of the Court's ruling in *Brown v. Board of Education*.

Next we have the Staff Director's Report.

IV. Staff Director's Report

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STAFF DIRECTOR MARCUS: Thank you, Mr. Chairman. We have a briefing, and so I'll keep it brief. I would like to announce two important new staff additions to the Commission. First, I'd like to introduce Kara Silverstein who joins us as an attorney advisor in the Office of the Staff Director. Kara replaces Derek Horne who will continue to work for the Commission as attorney advisor in the Southern Regional Office. Kara previously worked as an attorney advisor in the Department of Energy. She received her bachelor's degree from Emory University and her law degree from Boston University School of Law and we're delighted to have her with us.

And second, I'm also pleased to introduce Dominique Ludvigson who joins the Commission as Special Assistant to Chairman Reynolds and is also working with Commissioner Kirsanow. She previously served as Associate Director for Legal Affairs at the White House Office of Faith-Based and Community Initiatives. She's a graduate of the American University and received her law degree from the University of Illinois College of Law and we're delighted to have her as well.

Last, I have to announce that in addition to some of the retirements that we discussing during
the last month, we have another long-serving employee who will be retiring from the Commission. I don't know if she's here today. Barbara Fontana has served as a Librarian of the Commission since April 1988 and served as the Records Officer since 1994. She began her library career at the U.S. Department of the Interior Library and has worked as an independent researcher for the Congressional Research Service at the Library of Congress. We will miss her. She's done a wonderful job here and will be retiring after many years of service.

Those are my announcements, unless there are questions from the Commissioners.

COMMISSIONER KIRSANOW: Mr. Chairman, before we move on to the next agenda item, I had neglected to mention during the announcement phase, I wanted to note that Vice Chair Thernstrom won the Bradley Prize last week and I wanted to make sure we got that on the record and congratulate her. I'm particularly pleased because she promised, in writing, to share some of the proceeds with me.

(Laughter.)

VICE CHAIRPERSON THERNSTROM: You're getting a dollar.

COMMISSIONER KIRSANOW: You moved up. It
was 50 cents before.

(Laughter.)

VICE CHAIRPERSON THERNSTROM: Thank you very much, Pete. That's very gracious and lovely of you.

CHAIRPERSON REYNOLDS: Okay, are there any future agenda items that need to be discussed?

VI. Future Agenda Items

CHAIRPERSON REYNOLDS: Okay, that being the case, unless there are objections, I'd like to go right into the briefing. At this point, I would ask the panelists to join us.

Briefing: Title IX Athletics: Accommodating Interest and Abilities

CHAIRPERSON REYNOLDS: Okay, on behalf of the Commission, I welcome everyone to this briefing on Title IX Athletics: Accommodating Interest and Abilities. At this briefing, the Commission has assembled a panel of experts to discuss Title IX of the Higher Education Act's prohibition of discrimination on the basis of sex in any education program activity, including athletics receiving federal financial assistance.

Beginning in 1979, the educational institutions receiving funds had demonstrated
compliance with the Act's athletic requirements by having a program that fully and effectively accommodates the interests and abilities of a sex that's under represented. In March of 2005, the U.S. Department of Education's Office for Civil Rights issued further guidance to assist schools in complying with the athletic requirements.

The record of this briefing will remain open for 30 days and public comments may be submitted and mailed to the Commission.

This morning, we're pleased to welcome Daniel Cohen who is a Senior Associate with the law firm of Rogers & Hardin of Atlanta, Georgia; Jessica Gavora, Vice President of the College Sports Council and author of a book entitled *Tilting the Playing Field, Schools, Sports, Sex and Title IX*. Also, we have Jocelyn Samuels who is Vice President for Education Employment at the National Women's Law Center. Judith Sweet also joins us. She is the National Collegiate Athletic Association, independent contractor, and consultant. And finally, we have David Black, who is the Deputy Assistant Secretary for Enforcement at the Department of Education's Office for Civil Rights.

I am going to introduce -- well, I'm going
to provide a brief -- I'll briefly discuss the backgrounds of each of the panelists and after that we will start, the order is -- we will start on this end and work our way down. Each panelist will have ten minutes. We have our doohickey over here. When it goes red, expect me to cut you off.

(Laughter.)

Okay, Jessica Gavora. She authored a book which I mentioned already, *Tilting the Playing Field: Schools, Sports, Sex, and Title IX*. It was published in May of 2002 by Encounter Books. She is a speech writer and policy advisor at the Justice Department -- she was a speech writer and policy advisor at the Justice Department. Prior to joining the Justice Department, Ms. Gavora was a Washington-based freelance political speech writer and a writer. In addition to writing for a variety of governmental and nongovernmental clients, Ms. Gavora has written extensively on politics and public policy under her own byline. Her articles have appeared in *The Wall Street Journal*, *The L.A. Times*, *The Washington Post*, and a host of other publications.

I'm sorry, my order is wrong. I should have started with Mr. Cohen.

VICE CHAIRPERSON THERNSTROM: I was just
going to say.

(Pause.)

CHAIRPERSON REYNOLDS: Okay, since 2005, Mr. Cohen has studied the legal implications of the Office for Civil Rights 2005 additional clarification and its model survey. He co-authored an article regarding compliance with prong three of the three-part tests. The Law Review article was published in 2005 in the *Vanderbilt Journal of Entertainment and Technology Law*. The article is titled, "Navigating in the New Safe Harbor, Model Interest Surveys as a New Tool for Title IX Compliance Programs."

His work in the area of Title IX has been cited in *USA Today*, the *NCAA News*, *The Chronicle of Higher Education* and elsewhere. Mr. Cohen received his undergraduate degree from Duke University and his law degree from Vanderbilt University School of Law.

Jocelyn Samuels is President for Education and Employment at the National Women's Law Center where she supervises an active litigation docket of Title IX cases. Prior to joining the Center, Ms. Samuels was labor counsel to Senator Kennedy. She also worked for a decade as a senior policy attorney at the Equal Employment Opportunity Commission where she specialized in issues of sex and race.
discrimination. Ms. Samuels received her law degree from Columbia University and her bachelor's degree from Middlebury College.

Ms. Sweet joined the NCAA as Vice President for Championships and Senior Woman Administrator in 2001 and in 2003 she was promoted to Senior Vice President for Championships and Education Services. Prior to her work with the NCAA, Ms. Sweet served as Director of Athletics at the University of California at San Diego beginning in 1975, when she became one of the first women in the nation selected to direct a combined men's and women's intercollegiate athletic program. While at the University of Wisconsin at Madison, she majored in physical education and mathematics and served as President of the Women's Recreation Association and National President of the Athletic and Recreation Federation of College Women. She was also elected to a two-year term as Membership President of the NCAA in January of 1999 and was Secretary-Treasurer of the NCAA from 1989 to 1991.

Finally, we have David Black. Mr. Black joined the Department of Education on November 1 of 2004. He is currently the Deputy Assistant Secretary for Enforcement in the Department's Office for Civil
Rights. In this capacity, Mr. Black acts as the principal advisor to the Secretary, Assistant Secretary on civil rights enforcement to further the mission of OCR. That mission is to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights.

Specifically, Mr. Black works with the Assistant Secretary to oversee the resolution of approximately 5,000 civil rights cases filed annually in 12 enforcement offices. The Office for Civil Rights enforces several federal civil rights laws that prohibit discrimination and programs or activities that receive federal financial assistance from the Department of Education. Prior to this appointment, Mr. Black worked as an attorney in the area of civil rights, labor, employment law, and litigation as a member of the U.S. Army Judge Advocate General's Corps. In the Office of the Attorney General for the -- well, and the Office of the Attorney General for the State of Minnesota, amongst others.

I welcome all of you. I will, as I mentioned earlier, we are going to start from my right to left and I guess we have an oath here.

(Pause.)
CHAIRPERSON REYNOLDS: Okay, we have a new policy in place, so forgive me. We now require our panelists to offer up an oath, so please raise your right hands and repeat after me. "I hereby swear and affirm" --

COMMISSIONER YAKI: Do they get to choose what kind of oath they swear or --

CHAIRPERSON REYNOLDS: Commissioner Yaki, please don't complicate things.

(Laughter.)

I hereby swear and affirm that the information I am about to give is to the best of my knowledge and belief.

PANELIST: Yes.

(The panel was sworn.)

CHAIRPERSON REYNOLDS: Thank you very much.

COMMISSIONER YAKI: Mr. Chairman, questions will be deferred until the end of all the panelists' discussions?

CHAIRPERSON REYNOLDS: That is correct.

COMMISSIONER YAKI: I have one question I can address later, but usually we strive in these meetings to have an equally-balanced panel and I have asked prior to this meeting with the addition of Mr.
Black, that the panel seems to be imbalanced and I just wanted to know if any attempts were made to add an additional witness to the other side?

CHAIRPERSON REYNOLDS: Well, I'll let the Staff Director answer that piece, but we had a panel that was balanced, at least numerically, at one point, but an opportunity to have a representative from OCR presented itself recently, so we did not have much time to find an additional panelist to have a numerical balance.

COMMISSIONER YAKI: Was there any attempts made because I was not made aware of that and would have certainly insisted on that effort I'm sure.

CHAIRPERSON REYNOLDS: Mr. Staff Director?

STAFF DIRECTOR MARCUS: Well, first, I would agree with the Chairman's assessment which is to say that we have a balanced panel, but not strictly numerically balanced and that the reason is that we had a last minute change in availability of a witness and considering that the last minute change was within 48 hours it was embarrassingly short notice to bring someone in.

COMMISSIONER YAKI: Perhaps we're quibbling over semantics here because just on my observation I would say that not always numerically
imbalanced, but it's imbalanced in terms of viewpoint, but I guess it just depends on the way you view it.

CHAIRPERSON REYNOLDS: Yes, indeed. Mr. Black?

MR. BLACK: May I address the Commissioner's concern? I represent OCR which is a law enforcement agency and we neither advocate a liberal or conservative view. We interpret and apply the law to the cases we investigate.

COMMISSIONER YAKI: I appreciate your answer, Mr. Black, and this is not meant any disrespect to you as an individual, but I would say that certainly events on Capitol Hill involving the Attorney General might speak otherwise the position of OCR in this matter.

CHAIRPERSON REYNOLDS: Be nice, Commissioner Yaki.

Commissioner Braceras?

COMMISSIONER BRACERAS: Also, I don't sense an imbalance. I mean just from reviewing the statements that were submitted it's not clear to me that these witnesses and we'll hear from them, but it's not clear to me that these witnesses are necessarily going to agree one way or the other on the issue presented to them. So while it may be that we
don't have 50 percent of the panel on one side and 50 percent of the panel on another side of the issue, I think there will be a wide range of views and a good range of views without any bias one way or the other.

COMMISSIONER YAKI: And Commissioner Braceras, I will keep an open mind on this, as anybody would. There is a concern that he strove to -- earlier in the year to deal with issues on how we go through a checklist on balance, et cetera. That's my only concern and I look forward to hearing what the appellant has to say.

CHAIRPERSON REYNOLDS: Vice Chair Thernstrom?

VICE CHAIRPERSON THERNSTROM: And I would just add that whatever troubles and obviously there are troubles associated with the firing of U.S. Attorneys, it is completely irrelevant to the question of Mr. Black's professionalism.

COMMISSIONER KIRSANOW: It's a slightly different department.

VICE CHAIRPERSON THERNSTROM: Yes, slightly different department.

CHAIRPERSON REYNOLDS: But on that note, Mr. Cohen, please save us from ourselves.

(Laughter.)
MR. COHEN:  Thank you. My name is Dan
Cohen and I'm a lawyer from Atlanta who practices in
the area of Title IX, among other areas. I work with
the law firm of Rogers & Hardin, but I'm here today to
express my own views, not necessarily the views of my
firm.

I've been studying Title IX for a dozen
years, ever since I got a hands-on experience with
Title IX while serving as a member of Duke
University's Athletics Department oversight board.
Today, most of my Title IX practice is related to
colleges and universities who are looking to comply
with the law. Since 2005, I've studied the OCR's
additional clarification in depth and I've been
published on this topic.

Much of the publicity and the debate about
the additional clarification is policy based, but that
has limited relevance to a school that's simply trying
to comply with what the law is. And that's my job, to
tell my clients what the law is and how to comply with
it. In that regard, I'm not for or against the
additional clarification and I disagree with
Commissioner Yaki's contention in that regard.

That said, I do generally favor the use of
the model survey approach for schools that are
attempting to comply with Prong Three. The additional
clarification has been criticized, but much of that
criticism I contend is unfair. By that I mean that
it's actually criticism of Title IX as a whole or it's
policy-based criticism. The result is is that the
additional clarification itself has been given a bad
name and I think undeservedly so.

I'm not saying that the additional
clarification couldn't be improved, but it's important
to separate the general policy concerns from the
criticisms that are specific to the additional
clarification. And today, I hope that I can help you
focus on that.

I think a good starting point would be to
put the additional clarification into context. First,
let's talk about the test for measuring and compliance
with Prong Three. That same test has been in place
since 1979. It lists three factors: interest,
ability, and competition. And all of the factors must
be present for a school to be considered out of
compliance with Prong Three. What that means is that
there must be a showing of unmet interest on campus,
the students who have interest in an additional sport
must have sufficient ability to sustain a team in the
sport, and there also must be a likelihood of
competition in the region.

In measuring interest, Title IX has always been concerned only with a school’s current and admitted students, not its future, potential students. For example, the 1996 clarification; in the very first paragraph introducing the discussion of Prong Three, it says that Title IX “does not require an institution to accommodate the interests and abilities of potential students.” Nonetheless, since 1996, the OCR also recommended monitoring the athletic interests of local nonstudents and high school students as a way of gauging future, potential interest in a sport. Or as the test provides, perhaps that relates to the sustainability of the team.

Now it’s good policy to keep nonstudents’ interests in mind. But technically, it’s not a part of the interest measurement requirement under the test and that’s a distinction we need to focus on. Of course, the 1996 clarification went much farther. It recommended that schools monitor a number of direct indicators of interest among current and admitted students. The list provided in the 1996 clarification was thorough, but it’s not particularly helpful. It’s too vague for schools to know when they’ve actually reached compliance. No indicators were considered
more persuasive than others and it was not at all clear when a showing of some interest might rise to the level of sufficient unmet interest so as to require the addition of another team.

So schools came up with their subjective measures of complying with Prong Three. And the main way that they tried to measure their compliance with Prong Three was through a varying array of self-administered surveys. According to the OCR, approximately two-thirds of all schools investigated between 1992 and 2002 attempted to prove compliance with Title IX through Prong Three. Of those schools, approximately three-quarters of them used some form of survey mechanisms to try to measure interest on campus.

Title IX and the 1996 guidance were studied at length in 2002 and 2003 by Secretary of Education Rod Paige's Commission on Opportunity in Athletics. They held meetings across the country. They collected as much information as possible. And they were repeatedly told by collegiate athletic administrators that the OCR's 1996 guidance, while it had its merits, was so ambiguous that they didn't know how to comply with Prong Three. Thus, many schools resorted to proportionality, simply because it was
measurable - they could know when they had reached compliance with the law. Thus, the Commission unanimously recommended that OCR study the possibility of allowing institutions to use surveys to measure compliance with Prong Three. This idea was adopted by the OCR and it was specifically mentioned in the 2003 further clarification.

Soon thereafter, the OCR commissioned expert independent statisticians to study the various survey mechanisms that schools had used and submitted to the OCR between 1992 and 2002. As a result of this analysis, the statisticians designed a streamlined web-based model survey that was based on the best practices and the collective learnings of schools over the previous decade. That interest measurement tool became the centerpiece of the additional clarification.

Then, in the additional clarification, the OCR gave guidance and built in safeguards for how to administer the model survey - to ensure reliable data and how to measure the responses. One of the key safeguards built into the additional clarification for how to administer the model survey - and this is the key safeguard that's almost always overlooked - is that the model survey must be administered "in a
manner that is designed to generate high response rates." If this is not satisfied, the OCR will not assume that the model survey results are reliable, and they will consider other indicia of interest, including those listed in the 1996 clarification. But most direct indicia of interest will be picked up by a well-administered model survey, which is why the additional clarification is not inconsistent with the 1996 guidance. The model survey simply provides a more direct way to measure the same thing.

That safeguard related to response rates is why the pejorative titling of the model survey as an email survey is just plain wrong. That criticism implies that a school can simply pretend as if sending out one email that does not generate a high response rate is good enough for a school to sit back and pretend as if it's in compliance with the law. That's not accurate.

Moreover, the preferred method of Model Survey administration is one in which students must complete the survey or purposefully choose to bypass it. That generates a 100 percent response rate. The OCR recommends making the model survey a part of the student's mandatory class registration process. I know of another school that instead has integrated the
model survey into its on-line application process. But even if a school instead decides to initially distribute the model survey via email, which is permitted under the additional clarification, the OCR continues to require that sufficient follow-up efforts be made with an eye toward generating that high response rate. Now that is another area that's gotten some criticism. When has the school engaged in sufficient follow-up efforts so as to ensure the reliability of the model survey? I don't know. That's an area of subjectivity. And that's one that's open for debate. But it's important to keep in mind that the preferred method of administration is not via email. The preferred method of administration is via a mandatory response methodology.

As I mentioned, the additional clarification also gives guidance on a largely objective way to measure the responses. And if the responses indicate that there is sufficient interest on campus, then the additional clarification provides further guidance on the assessment process that must take place to gauge whether there is sufficient ability on campus and the other factors. Now it's important to keep in mind the model survey truly only relates to the interest part of the test. Ability,
sustainability, competition in the region, that still
need to be measured, even if there is a showing of
interest. And that's under any scheme.

The result of the OCR's guidance is that
schools now have a relatively clear road map to
compliance with Prong Three. There's a huge
improvement over 1996. It makes Prong Three useable
and it makes Prong Three practical. But the key to
all of this is that you've got to follow the OCR's
advice. Indeed, if a school properly follows the
OCR's instructions, including administering the model
survey in that manner, "in a manner that is designed
to generate high response rates", then the OCR will
defer to the model survey results. That gives another
potentially huge benefit. It gives schools comfort
that they know when they've reached compliance.

In the past, they would do their best to
subjectively gauge interest and try to meet that
interest. But just because a school engaged in good
faith efforts or it's best faith efforts, the school
couldn't feel comfortable or satisfied that a judge or
an OCR investigator would agree with its judgments.
There was always a risk there because it was
subjective.

Now on the other hand, if a school does
not properly administer the model survey, the OCR will not defer to its results. We instead go back to the 1996 scheme. But in any event, even under the additional clarification, there's nothing to prevent a school from continuing to monitor other indicia of interest, and I encourage schools to do that.

The majority of schools rely on Prong Three for their compliance efforts. And the additional clarification lays out a better path to compliance with Prong Three. It lays out a more demonstrable way to compliance. In one way it lays out an objective path to compliance. It explains when a school can feel secure that it has complied and it allows a school deference to its efforts when the additional clarification is properly followed.

I would argue that most schools that are relying on Prong Three should at least consider whether their compliance efforts would benefit from following the OCR's guidance in the additional clarification.

CHAIRPERSON REYNOLDS: Thank you, Mr. Cohen.

Ms. Gavora?

MS. GAVORA: Thanks. Thank you for the opportunity to be here. My statement has changed
slightly, but substantially from the statement that I believe is in your briefing books, but it's been redistributed to you.

It's gratifying to me that after over ten years of studying Title IX that we are here today talking about the issue that is at the issue of heart of Title IX in athletics which is interest. For over a decade now, Title IX compliance has been based on a very different standard, statistical proportionality.

The triumph of statistical proportionality, the argument that absent discrimination, men and women would play athletics at the same rate, has been achieved not by proving that men and women have identical interests. The data and the participation rates themselves fall far short of that. It has been achieved by making the whole question of interest irrelevant to Title IX compliance.

As you know, statistical proportionality demands that schools manipulate their athletic programs so that their gender ratios match that of their undergraduate student population. In this way, proportionality ignores student interests in favor of an arbitrary numerical formula. No other opportunity in education, be it in the engineering department or the drama or dance programs is apportioned in this
way, even opportunities that are apportioned, that are segregated by sex, like student housing, are apportioned according to student interest.

And this brings me to the Commission's first question, that of the strengths and the weaknesses of the 2005 model survey. Its strength and I think its only strength is that it is for the first time in a decade reinforces the notion that government should view women as thinking, discerning individuals, capable of expressing and acting on their interest, when judging an institution under Title IX.

The 2005 policy clarification was an attempt, as Daniel has said, to respond to a long-expressed desire on the part of college administrators for more specific guidance in complying with Prong Three. Prong Three asks that schools "demonstrate that the interests and abilities of the members of the under represented sex have been fully and effectively accommodated by the present athletic program."

For decades schools have complained that the government's guidance is subjective and so in 2005, the Department of Education provided this guidance, but the reaction of the model test critics has been curious to say the least. Groups like the Women's Sports Foundation and the National Women's Law...
Center have long insisted that there are three equally valid ways to comply with Title IX and that assessing the interests of women is one of them. And yet, their reaction to the model survey has been to refute interest as a measure of compliance on two fronts. They have argued first that women's interests cannot be discerned, and second, even when they are discerned, fulfilling the interest of women on campus is insufficient to comply with Title IX.

On the first objection, two prominent defenders of the Title IX status quo wrote that surveys can't gauge men's and women's relative interests in sports because "culturally men are simply more likely than women to profess an interest in sports." Women, on the other hand, "are less likely to profess an interest in sports, even if they are interested." In other words, women are as interested in sports as men, they just can't bring themselves to admit it.

The critics’ second objection to the model survey is that surveying current students' interest in athletics only serves to freeze the school's sports program in the status quo. The theory is that women who are interested in a particular sport will not attend an institution that does not already offer that
sport. Critics do not explain, however, why this same phenomenon does not likewise adversely impact men's college choices.

To the extent that there is some merit in this argument, the remedies suggested by critics are so broad and ill-defined that they serve to return Prong Three to its previous vague and unworkable status. The critics demand that in addition to the survey, schools also consult with local club sports, youth coaches, high schools, junior high schools, elementary schools, as well as considering national trends in determining women's opportunities.

The amorphousness and the scope of these requirements serves to put Prong Three compliance once again out of reach of well-meaning administrators and more importantly guarantees that their lawyers and Title IX consultants will continue to advise them to adhere to substantial proportionality. And here, I think the role of the National Collegiate Athletic Administration deserves some scrutiny. Like many of the single-issue critics of the model survey, the NCAA has long maintained that measuring and fulfilling interest is a valid method of compliance with Title IX.

And like these groups, the NCAA has
vehemently denounced the model survey. But the NCAA bears a burden that the National Women's Law Center does not. It exists to represent all collegiate athletes, not just female athletes. And yet, just yesterday, the NCAA president participated in a news conference with the Women's Sports Foundation and others designed to pre-empt this discussion of the model survey.

Groups like the Women's Sports Foundation and the National Women's Law Center have been clear in their expressions of support for the status quo in Title IX enforcement. Indeed, their only objection is that statistical proportionality is not applied aggressively enough. This is their right as special interest groups, but what is the responsibility of the NCAA?

In just the past year alone, hundreds of athletes at Rutgers, James Madison, Ohio University, Butler, Clarion, Slippery Rock, have all lost their opportunity in full or in part due to Title IX. Does the NCAA support this status quo?

Which brings me to the Commission's second question, no school, to my knowledge, has used the model survey to demonstrate compliance with Title IX. They haven't because the NCAA, which periodically
examines its member institutions for their commitment to gender equity, has told them expressly not to. And they haven't because the interest groups which routinely sue colleges and universities under Title IX, have publicly deemed the model survey an illegitimate and illegal tool, promising still more law suits for the brave administrator who dare uses the survey.

But more important than the negative public relations and legal campaign targeting schools employing the model survey, is the fact that the survey relies on Prong Three and Prong Three is in itself flawed. Remember, that Prong Three only applies in cases where schools have not reached statistical proportionality. And for these schools, it requires that they accommodate only the interest of the under represented sex; in most cases, in virtually all cases, women.

So if a school has reached statistical proportionality and it surveys its students and finds some unmet interest among women and massive unmet interest among men, it is obligated only to fully accommodate the women's interest. What's more, a school that is not proportional and has a women's club team, that requests varsity status, regardless of how
many men's club teams request the same, must accommodate that interest and that interest only.

James Madison University is a perfect case in point. Last fall, James Madison offered 28 athletic teams to its students, 13 for men and 15 for women. Only six schools in Division I offered more opportunities, but JMU's female student population was 61 percent and growing and its athletic rosters couldn't keep pace. JMU was in no position to add women's teams, but the model survey offered no protection for its existing teams. And when two women club teams petitioned for varsity status, JMU had no recourse but to achieve statistical proportionality by cutting ten teams.

The College Sports Council and others have proposed a remedy for this absurd and senseless loss of opportunity that is occurring under Title IX today. It's a small change, not to the law, but to the implementing regulation that will return Title IX to its original anti-discrimination purpose, protect the gains of women and above all, reflect the interests in students in athletics when judging an institution under the law.

Prong Three should be modified from its current requirement that only the interest of the
underrepresented sex be accommodated to a requirement that schools equally accommodate the interests of both sexes. Under this approach, the results of the model survey become the qualified pool against which an equal accommodation standard is measured. So if a school finds that 40 percent of its students who are interested in athletics are women, it would apportion 40 percent of its opportunities to women. In this way, students who shouldn't be considered in a disparate impact determination of discrimination like older students, students with families, students who simply lack the interest and ability to compete in sports would rightly be excluded.

Thank you again for this opportunity. I'm happy to answer any questions you have. I will conclude by saying that speaking for myself and the College Sports Council, we wholeheartedly support the spirit and intention of Title IX. We believe that the changes that I've just described to the law will guarantee that is preserved and protected for new generations of American athletes, both men and women, boys and girls. Thank you.

CHAIRPERSON REYNOLDS: Thank you, Ms. Gavora.

Ms. Samuels?
MS. SAMUELS: Thank you very much. I appreciate the opportunity to appear before you today.

Fundamentally, I believe that the 2005 clarification conflicts with long standing Department of Education policy, violates basic principles of equality under the law, and threatens to stall or reverse the progress that women have made under the Title IX since its enactment.

We call on the Department to rescind this clarification and return to prior policies for the reasons that I'll discuss in my testimony. As you all know, compliance with Title IX's participation requirements is assessed by means of a three-part test. Frequent attacks on the three-part test have been resoundingly rejected. The test has been uniformly upheld by nine out of nine Federal Appellate Courts that have considered it, and uniformly applied by prior Administrations. In fact, in July of 2003, the Department of Education reaffirmed its commitment to applying long standing Department interpretations of the law, rejecting in the wake of a massive public outcry recommendations made by the Commission on Opportunity in Athletics that would have dramatically reduced and undermined women's rights to equal opportunity.
I'd like to discuss several specific reasons that the 2005 clarification is so inconsistent with the law and with prior policies. The first is this, it impermissibly allows schools to rely on surveys alone to measure student interest. The 2005 clarification permits schools that haven't offered equal opportunity to their students and haven't been able to show that they have been continuously improving opportunities for their underrepresented sex, to measure the interests of those students by results of an email survey alone to evaluate whether they've satisfied their obligation to provide equal opportunity.

As Courts have consistently recognized, interest can't be measured apart from opportunity. Interest and ability, as the First Circuit has said, rarely develop in a vacuum. They evolve as the function of opportunity and experience. As a result, surveys are likely only to measure the discrimination that has limited and continues to limit women's opportunities to participate in sports. Basing women's future opportunities on responses to surveys that measure their prior lack of exposure thus will only perpetuate the cycle of discrimination and enshrine the status quo of women's lower participation.
in athletics.

It's for these reasons that the 1996 clarification and prior Department policies have endorsed a range of factors that schools must consider in evaluating women's interests. Contrary to being vague and ill-defined, these are very specific: requests by students to elevate a team from club to varsity status; requests by students to start a team; opinions of coaches and athletics administrators; a survey of what's being played in the high schools from which the schools typically draw their students; a survey of what's being played in the communities from which the university typically draws its students. Those all provide additional indicia of the interests that would exist on the campus if the school were offering equal opportunity to its current students.

The Department's decision to eliminate the obligation to consider these factors is a real disservice to students and I think contrary to the basic principles of Title IX.

Here's the second problem. The 2005 clarification allows schools to restrict the surveys to admitted and enrolled students. This approach ignores the reality that students interested in a sport not offered by a school are unlikely to attend
that school. By failing to require schools to look beyond their own campuses to, for example, the high schools from which they typically draw students, the clarification rewards schools with a presumption of compliance, that OCR will not look behind for in effect wearing blinders -- that is, for restricting their sports offerings and then claiming that they are satisfying the interests of those who attend the school and are therefore content with those restricted sports offerings.

The clarification also ignores the ways that schools typically recruit for men's teams. Most colleges assess prospective players, offer them various incentives and inducements, bring them to campus for visits. The clarification effectively requires women to show that they can fill a new team by relying on students already within their schools' current student bodies, a requirement that isn't imposed on men.

As the Fifth Circuit has noted, the heart of this contention is that "an institution with no coach, no facilities, no varsity team, no scholarships and no recruiting in a given sport must have on campus enough national caliber athletes to field a competitive varsity team in that sport before a Court
can find sufficient interest and abilities to exist. It should go without saying that adopting this criteria would eliminate an effective accommodation claimed by any plaintiff at any time.” That's precisely what the 2005 clarification has done.

Third, the survey methodology chosen by the clarification is deeply flawed for at least two reasons. The first is the fact that the school is permitted to accept as evidence of lack of interest a nonresponse to the survey. There are numerous reasons entirely unrelated to their level of interest in participating in sport that students may fail to respond to an email survey. They may not receive it. It may get caught in their spam filter. They may not have time to respond. They may think that it contains a virus. They may put it aside to respond to it later and then have it get lost in their massive amount of email.

To treat nonresponses as evidence of lack of interest is methodologically unsound and unfair. It also violates basic principles governing survey response rates. One Court has said that a 39 percent response rate was insufficient to justify a school's reliance on a survey purporting to measure athletic interest. The NCAA guidelines say that response rates
below 60 percent are suspect. But what the
clarification does effectively is to allow schools to
create the fiction that 100 percent of surveyed
students have, in fact, responded. That should not be
allowed to obscure the reality that the clarification
permits schools to deny opportunities to students
based on actual response rates that would likely be
rejected by a court that examined the evidence.

Equally troubling is the clarification's
authorization for schools to rely on a woman's self-
assessment of lack of ability to compete as evidence
of that student's actual ability. Many students who
played different sports at the high school level can
play varsity-level sports in college if given the
opportunity to do so. To accept that a student who
had no expectation of playing upon her arrival lacks
the ability without consulting coaches, administrators
and others who are in a position to make that
assessment is again a disservice to young women.

Another problem is that the clarification
shifts the burden to female students to prove that
they are interested in sports. We never asked women
whether they were interested in voting before we
passed the amendment giving them the right to do so.
To say that a person's civil rights are dependent on
their carrying the burden of proving that they are interested in and entitled to them, is an inversion of basic civil rights principles and a real change from prior law.

It's also contrary to the requirement of full accommodation of female athletes' interest and abilities. Opponents of the three-part test and Ms. Gavora today have argued that Prong Three should be read only to require that schools accommodate the relative interests of students on their campus. But the relative interests argument ignores the fact that a school relying on Prong Three to comply with the three-part test is by definition failing to offer students, female students, equal opportunities to participate. It also relies on the inaccurate and impermissible stereotype that women are inherently less interested in sports than men, a stereotype that is unlawful under Title IX and has been disproved by the vast explosion in women's participation since Title IX was passed.

Finally, the 2005 clarification provides for absolutely inadequate oversight by the Department of Education. As Mr. Cohen has noted, the Department will presume compliance and so if schools have questions or thoughts about what is sufficient follow
up, there is no mechanism in place under the clarification for OCR to go behind a school's assertion that it has, in fact, done enough to satisfy itself that the interest survey was representative and in fact delivered to an adequate number of students and that efforts were made to gain an adequate response rate. That is an inadequate response by an enforcement agency the role of which is not to make it easy for regulated entities to comply, not to set bright line rules so that schools can be certain of when they are treading close to the line, but to enforce the law and to ensure that all students get their equal opportunity to participate in sports and are entitled to the civil rights that the law gives them.

Thank you very much.

CHAIRPERSON REYNOLDS: Thank you, Ms. Samuels.

Ms. Sweet?

MS. SWEET: Thank you, Mr. Chairman. Thank you Commissioners. Before I share my statement with you, I do want to point out that I am probably the only panelist who has had the experience of being on a college campus prior to Title IX and post-Title IX. I have experienced campus life without
opportunities and after Title IX’s enactment have had an opportunity to provide opportunities. I can tell you first hand that post-Title IX is a lot better than it was prior to the passage of Title IX.

On behalf of the National Collegiate Athletic Association and its more than 1200 member colleges, universities, conferences, and affiliated organizations who are committed to equal opportunity for both men and women, I am pleased to have the opportunity to provide the Commission with information about the impact of Title IX on intercollegiate athletics, comments about the application of the law, particularly Prong Three, the three-part test, and any other assistance wherever possible, as you undertake this review.

I have been involved in inter-collegiate athletics and higher education for more than 30 years as an athletics director, faculty member, and in leadership roles within the NCAA. During my tenure in the field of intercollegiate athletics, I have worked extensively on matters involving growth of opportunities and advancement of both men and women in athletics. Through my work, I have seen first hand the commitment of the NCAA and many universities to promote equity and consequently the resulting strides
that have been made in the pursuit of gender equity on campuses and NCAA programs. I'm pleased with the progress, but wary of efforts to undo more than three decades of work.

The gap in opportunities and support remain significant for women and thus more needs to be done to ensure parity. The goals of Title IX are far from realized.

I would like to comment on the questions that you identified. Shortly after the additional clarification was issued on March 17, 2005, the NCAA Executive Committee, which consists of university presidents and chancellors representing all three divisions of the NCAA and NCAA President Myles Brand, reviewed the 2005 Department of Education's new guidance and found it to be an inappropriate means of assessing interest and Title IX compliance.

The Executive Committee and President Brand submitted a letter to Secretary of Education Margaret Spellings, and issued a resolution distributed to the NCAA membership outlining the most glaring flaws of the 2005 clarification. Both the letter and resolution have been submitted with my statement.

The Department of Education's previous
clarification in 1996 acknowledged that surveys are to be one element of several measures that provide a thorough and complete evaluation of interest by women in sports participation. By contrast, the 2005 clarification allows the survey to be a sole method of measurement and appears contrived to show that females are not interested in participation. These are strikingly different approaches. The 2005 survey methodology permits institutional manipulation to prove disinterest, an approach contrary to the spirit and the 35 year history of Title IX.

While I would like to believe that all universities are committed to equal opportunity and Title IX compliance, a review of Equity in Athletics Disclosure Act data shows this is not the case. There is much work to be done to address the existing inequities. The reality is that 35 years after passage of Title IX women still only receive 43 percent of athletics participation opportunities; 38 percent of operating budgets; and 33 percent of recruiting budgets. All this is despite the well-documented and burgeoning interest by women in sports since the passage of Title IX.

At the high school level, participants have increased ten fold and six fold at the college
level as new opportunities have been provided and societal attitudes toward female participation in sports has improved. In 2005-06, there were close to three million female high school student athletes and 180,000 NCAA collegiate female student athletics.

The pool of high school female student athletics suggests that if more opportunities were provided at the collegiate level, there would be a larger number of interested participants. The bottom line is this, women are still the under represented gender in college sports and less funding is devoted to the support of women's programs. The spirit of Title IX with regard to athletics and other campus opportunities recognizes that participation has educational and life developmental value for both men and women and benefits society as a result.

The 2005 additional clarification provides an easy way for noncompliant institutions to claim compliance with Prong Three by merely administering an electronic survey that by its nature measures inattention or neglect as disinterest. The effect of the survey approach potentially would be to freeze participation opportunities at their current level, or worse, to roll back the progress made over the last 35 years.
One of the greatest weaknesses of this electronic survey approach is counting a nonresponse as a lack of interest. Researchers have repeatedly stated that a nonresponse is just that, a nonresponse, and should not be interpreted in any other way. I've submitted a report from the NCAA data analysis research network which consists of university faculty researchers throughout the country identifying the flaws in the 2005 clarification. The overall tenor of that report is that the 2005 clarification allows for the use of a survey method that does not meet accepted professional standards for conducting this type of study. In addition, students have consistently indicated that they rarely, if ever, respond to online surveys. Oftentimes such surveys are filed in spam folders and/or totally ignored.

The NCAA leadership and its membership strongly support the 1996 clarification which considers many factors in determining interest of the under represented sex and has urged the withdrawal of the 2005 additional clarification. Under the 2005 guidance, even if there was a favorable response from the under represented sex, indicating interest in sports not currently sponsored by the college or university, there would be many other conditions that
would need to be present, including a demonstration of acceptable skill before an institution might add the identified sport team.

Since the sport doesn't exist on the respective campus, there would be no coach to even fairly evaluate skill level.

Furthermore, this approach of sampling ignores the fact that athletics team members are recruited to a campus from regional or national pools of high school and community college students. Sampling the existing student population eliminates the input of students who potentially would have attended that university or college had their preferred sport been sponsored.

The consistent and uniform opinion of college presidents, chancellors and athletics administrators is that the 2005 guidance is contrary to the original intent of Title IX in that it provides an incomplete means of measuring interest. I'm not aware of how OCR has used the survey data, but I do know that very few universities or colleges have acknowledged using the model survey.

The 2005 clarification is cumbersome, confusing and unprecedented in length, detail and method of dissemination. It covers one part of one
program component of the 13 program components reviewed for compliance under Title IX, but exceeds the length of OCR's 166-page 1990 Title IX Athletics Investigators Manual which addresses all 13 program components.

At various national meetings, NCAA members have been asked if they have used the 2005 clarification and almost no one has responded affirmatively. The extent to which each of the three prongs are used has been proven through OCR's own review of campuses prior to 2005 where it was shown that close to two thirds of those reviewed were using Prong Three to achieve Title IX compliance. To me, that suggests that Prong Three has been working and those facts came prior to the 2005 clarification.

Most university presidents, chancellors and athletics administrators believe that the new guidance inappropriately has made it easier to comply with Title IX and at the same time not truly comply with the spirit and intent of the law. It may be easier, but it's not fair. The new guidance is viewed as a flawed means of compliance for the reasons stated previously.

In addition, OCR's clarification acknowledges that the model survey narrows the scope
of OCR's analysis for interests and abilities. My understanding of the creation of the three-part test is that it was intended to provide institutions flexibility in meeting the goals of Title IX, but not to make one prong a means for easier compliance, especially when the results are not consistent with the true spirit of providing equal opportunity.

In a perfect world Title IX would not be necessary.

CHAIRPERSON REYNOLDS: Please sum up.

MS. SWEET: I plan to do that. In a perfect world Title IX would not be necessary. There would be resources well enough to do the right thing and meet everyone's needs both for our male and female student athletes. The model survey does not allow for this to happen. Thank you very much.

CHAIRPERSON REYNOLDS: Thank you, Ms. Sweet.

Mr. Black?

MR. BLACK: Mr. Chairman, before I deliver my opening remarks, let me thank the Commission for sponsoring this hearing on Title IX. Regardless of the views of Title IX, I think such open, public discussion of Title IX brings attention to the issue which hopefully furthers compliance with Title IX.
I also want to thank the other panel members. Clearly from the remarks we've had you see that we have a number of experts here on Title IX and I think it's going to further the spirited discussion when it comes to questions and hopefully help clarify some of your questions, both the additional clarification.

I'm going to reserve most of my time to answer those questions because the reason I'm here today is to clarify any misperceptions about our policy.

I appreciate the opportunity again to meet with you to discuss the additional clarification which the Department of Education Office for Civil Rights issued in March of 2005. I want to begin by emphasizing that OCR is committed to ensuring that no student, regardless of race, national origin, sex, disability or age is denied or limited in his or her educational opportunities because of discrimination. To fulfill this commitment as a law enforcement agency, OCR must fairly and vigorously enforce the civil rights laws and seek compliance of educational institutions at all levels of education nationwide.

As you know, Congress entrusted OCR with the responsibility of enforcing Title IX, one of the
nation's landmark civil rights laws. In response to growing concern about disparities in educational experiences of male and female students, Congress enacted the law to eliminate sex discrimination in all aspects of education; in the classroom, in class offerings, in employment, and all extracurricular activities. It was also clear as early as 1974 that Congress intended for this prohibition to extend to athletics programs as well.

Although Title IX prohibits a broad range of discriminatory actions, it is perhaps this later context, intercollegiate athletics, for which it is best known. Thanks to Title IX, more women than ever are participating in sports and attending and excelling in college and graduate programs. For example, when Title IX was enacted, women comprised 43 percent of college enrollment, but only accounted for 15 percent of intercollegiate athletic participants. Nearly 35 years later, female participation in intercollegiate athletics has increased by over 400 percent and women account for well over 50 percent of students enrolled in college.

Despite the significant progress, no one disputes discrimination continues to exist across the nation in education programs and activities.
Discrimination occurs in access to programs and activities in the classrooms and in opportunities for participation in athletics. The Department is working diligently to address complaints of Title IX violations in all areas, and in particular athletics. To ensure that students are not discriminated against in athletics, we also provide technical assistance and tools to institutions so that they can determine for themselves without an investigation whether they are in compliance with the law. I believe the additional clarification furthers that mission.

I know that some members of this panel have expressed concerns about the additional clarification, that it weakens protections for female athletes. I believe some of this controversy is the result of misunderstanding the policy. The additional clarification does not establish new substantive standards under Title IX. Instead, it provides schools with additional guidance of OCR athletic policies and practices that have been established over the last 35 years.

The intercollegiate athletics policy interpretation, which the Department issued in 1979, established a three-part test as a standard that OCR would use to determine if post-secondary institutions
are providing nondiscriminatory athletic opportunities to their male and female athletes. The test identified three separate methods of complying and permitted schools to choose any one of those methods to choose Title IX compliance.

Under the third compliance option, part three of the three-part test, schools have been permitted to demonstrate compliance with Title IX by showing that they were accommodating the athletic interests and abilities of their male and female students. Thus, ever since 1979, one means of Title IX compliance has always been dependent on the assessment of student athletic interests and abilities.

An important principle of OCR's enforcement is that schools have the flexibility to select the means they will use to achieve compliance with the three-part test. One method schools have chosen to use for a number of years in the past is athletic interest surveys. In fact, the model survey and user's guide and accompanying additional clarification are based on the statistical analysis of OCR cases involving the use of surveys under the three-part test during a ten-year period, specifically 1992 to 2002.
NCES evaluated 130 of OCR's cases. Two-thirds of those institutions used part three to comply with the three-part test. And more than half of those used interest surveys. After an extensive review and analysis of these cases, the National Center for Education Statistics concluded in the user's guide that survey instruments used by these schools were flawed and often were administered to limited pools of students and resulted in very low response rates.

The Department issued the model survey and user's guide accompanying the additional clarification to address these deficiencies. The additional clarification provides schools for the first time with a practical tool, the model survey. They may now choose to use it to assess athletic interest, using effective, unbiased methods, rather than having the burden of developing their own surveys as they did in the past, and as I said, were not very good. But it is more important to emphasize that schools can rely on the model survey as an acceptable method to measure students' athletic interests only if it is administered consistent with the recommendations developed by NCES in the user's guide.

I believe the additional clarification promotes compliance with Title IX by clarifying the
obligations of educational entities under the three-part test, a commitment which OCR made both in the 1996 clarification and the 2003 Dear Colleague letter. We know that schools have faced a number of challenges in their efforts to ensure that they do not discriminate in the athletics programs that they offer and how they operate those programs. This guidance and additional clarification promotes Title IX compliance by making it easier for schools to assess whether their own athletic programs are in compliance with part three and how they can bring themselves into compliance.

Thank you.

CHAIRPERSON REYNOLDS: Thank you. Okay, the first question will come from Commissioner Kirsanow.

COMMISSIONER KIRSANOW: Yes, I want to thank the panelists for a very fine presentation. I also want to thank the staff for assembling a very fine panel.

I just want to clarify the record, some technical matters. I think Mr. Cohen indicated that in terms of the model survey, simple -- and correct me if I'm wrong, simple email solicitation of responses may not be sufficient to comply with the third prong
insofar as there has to be some method used to increase the probability of response. I think you used the term a mandatory response methodology. And that very often these kinds of surveys were done in conjunction with registration or application to ensure the greatest or maximize the response rate.

Ms. Samuels, on the other hand, and I think Ms. Sweet indicated that it sounded as if it was simply an email solicitation and that was the end of the story. Where are we on this? What are the facts?

MR. COHEN: The fact remains that simply sending an email is not permissible under the additional clarification and the arguments that are based on that assumption are inaccurate. Under the OCR's guidance, yes, it's true that a school can initially distribute the model survey via email, but that cannot be the end. The school has got to engage in sufficient follow-up efforts. It's an area of subjectivity and that's why it's an area where there's some discomfort.

What follow-up efforts are sufficient to comply with the law, to satisfy the OCR that the follow-up efforts have been sufficient? Should a school send follow-up emails to the entirety of the student body? If so, how many? Does the school have
the capability of targeting only those students who --

COMMISSIONER KIRSANOW: You said send them
to the entirety of the student body, I want to be
clear on this. Is it the case that the third prong
mandates sending the surveys only to under represented
athletes or is it sent to the entire student body?

MR. COHEN: The additional clarification
provides for two alternatives in that regard. The
first one - and the recommended method under the
additional clarification - is that the model survey be
administered to the entirety of the student body.
Alternatively, the model survey can be administered to
all members of the under represented gender, but
sampling is not permitted under the additional
clarification.

COMMISSIONER KIRSANOW: Do you know what
the practice is?

MR. COHEN: Well, yes, let me address that
because you hear all these attacks about the “email”
survey. I'm not aware of a single school that's
employed an email methodology for the additional
clarification. I am aware of mandatory response
methods.

If a school administers the model survey,
for example, as part of its application process, (that
didn't come from the OCR, that came from a school that
made it part of the application process) every student
must respond to the survey. Or they can click on a
button to say no, I'm not interested, after -- and
again, this comes back to the requirements of the OCR:
A nonresponse is only treated as an actual lack of
interest if all students have been given easy access
to respond to the census, if the purpose of the census
has been made clear, and if students have been
informed that the school will take nonresponses as an
indication of lack of interest.

So if you've got a mandatory response
methodology set up where the first screen complies
with that and says those things, you don't have to
flip through the other seven screens. The model
survey is only eight screens long. You don't have to
flip through the other seven screens. After being
informed of that, you can click on a different button
and "bypass" the survey - but that's a response. And
so if schools administer the model survey via a
mandatory response method, all of these concerns fall
away. And that is the preferred methodology for
administering the model survey.

MS. SAMUELS: I wonder if I might follow
up on what Mr. Cohen said on a couple of fronts. The
first is I am not a statistician and in fact, I'd like
to submit for the record a report done by the National
Coalition for Women and Girls in Education which
contains a statistical analysis and a methodological
analysis of what we perceive to be the flaws with the
survey methodology. But my understanding is that
there are statistical problems with administering a
survey in a mandatory form. They are different from
the ones that OCR has adopted by allowing the survey
to be done in this discretionary way.

I think there are several problems with
the email survey. It is true that the additional
clarification calls for schools to undertake effort to
ensure that there is a reasonable response rate. But
as Mr. Cohen notes, there's no guidance as to how that
should be done. It can be done by the same methods
that students have disregarded in ignoring or not
receiving the initial email. So if a school sends an
email and it gets caught in someone's spam filter or
the student deletes it because they think it's a virus
or because they get 400 emails a day from different
parts of the school or from their friends, there is
nothing that will enable the school to -- or there's
nothing that would require the school to follow up
with that student to find out why she or he has not
responded. If they send another email saying we really meant it, you should really respond this time, that is liable to end up in the same recycling trash bin that the original email did. And a significant gap in the additional clarification is that there is no oversight or monitoring by OCR to evaluate whether schools have engaged in a sufficient effort to ensure that students respond.

CHAIRPERSON REYNOLDS: Commissioner Braceras?

COMMISSIONER BRACERAS: I wanted to ask another question.

MS. SWEET: I'd like to respond. Based on practical experience that I have had, first of all, I have had an opportunity to talk with students, undergraduate and graduate students. Almost all of them have had some interest in sports or are current student athletes. When I've asked them the question how many of you respond to an email survey, I spoke to 200 undergraduates students. Not one hand went up. I spoke with 50 graduate students and asked the same question. One hand went up and she immediately stated I'm in marketing and I understand that it's important to respond to surveys. So based on those 250 students, the conclusion would be none of them have an
interest in athletics participation, even though they currently are participating.

Secondly, the question came up in regards to is anybody using the survey? I am aware of one institution and I reference it in my statement that has used the survey. They used the survey and modeled it to a certain degree because they felt that they had to adapt it to their specific situation, but they didn't use it to determine if there was interest because they were looking at a number of other factors. What they used it for was to get some information on what sports they might consider adding to their program in the future. The response that I heard from that institution was that it was cumbersome and they had to offer a $10 gift certificate to the campus bookstore in order to ensure response and even with that, they only had a 25 percent response.

COMMISSIONER KIRSANOW: Is it the case that the survey is only -- it is a minimal means by which to gauge interest? In other words, there's nothing that prohibits the university from using any other type of means by which it wants to gauge interest, correct?

MS. SWEET: You make a very good point and that's really what the concern is. If an institution
is fully committed to Title IX compliance, I believe that they would use a variety of approaches to determining interest. But if an institution is looking for as one of the questions asked an easy way to meet the three prong test, this is an easy way because it doesn't require them to go any further.

MR. BLACK: May I address the issue of email surveys?

CHAIRPERSON REYNOLDS: Yes.

MR. BLACK: The Department has looked at a number of universities’ handbooks and most universities have email policies. A lot of universities, such as Purdue, University of Texas, Syracuse, New York University, have email policies that require students to read their email. They tell students it's a presumed mode of communication. And this email survey or notice of the survey is not going to come from OCR. It's not going to come from a private vendor. It's going to come from the university in the form of an official email. The universities also have email policies regarding spam. Stanford University, which I looked at recently, has the ability to turn on a spam filter or turn off a spam filter to recognize a university email. It is not going to end up in a spam folder.
And in order to use the model survey again, the preferred method, as Mr. Cohen pointed out, is a mandatory event such as registering for classes, getting your grades, being admitted to the university. But email is an option, but only if you follow the strict guidance of the user's guide: one, that it's a census; two, that students are informed of the purpose of the survey; three, they're informed of the fact that if they do not respond, it will be recognized as a lack of response and then fourth, that there is a reasonable effort to follow up, and it could be an additional email, official email. It could be contacting those students who haven't responded.

COMMISSIONER KIRSANOW: So simply sending out an email and then sitting back and not do anything, would that satisfy OCR?

MR. BLACK: No. And to say that OCR will not look behind the survey, that's incorrect. If we have a complaint that we are going to investigate and they say, "We administered your survey," we get the presumption; we're not going to turn around and walk away. We're going to look at whether they actually follow our user's guide. Did they do the reasonable efforts to follow up?

I also want to clarify what this survey
is. There's a lot of confusion of what we're measuring here. This is not a survey to identify the extent to which women are interested in sports or to measure whether they continue to be interested in sports or even interested in sports to the same degree as men. This is only meant as a way of identifying those women on campus that are interested in additional opportunities.

I don't know of any other better way to contact a student than to email them directly. These surveys that we looked at, they would put a flyer in the gymnasium and hope the student would pick it up. This is a direct means of communicating with each and every student to ask them if they're interested and again what it's measuring is an X factor. So if what you need to have a softball team is 25 students, we would love the highest response rate possible, but this email survey is trying to find those 25 students because if you find those 25 students who are interested in softball and that's all it takes to add softball, now the university has a responsibility to now assess the ability and look for competition. So you could have a response rate at two percent, but if it's 25 students interested in softball and you don't have softball, you now have got to go the extra step.
and look at ability. So we want a high response rate, but this is only looking for an X number of students interested in a particular sport.

So if it's tennis and there's only six people to have a tennis team -- Judith would be the expert on NCAA rules of how many it takes for a particularly NCAA championship team, but you may be only looking for six students on your campus and what better way to find those six students than to email them and ask them directly.

MR. COHEN: May I make one more very brief comment?

CHAIRPERSON REYNOLDS: Go ahead.

MR. COHEN: As a lawyer, I tend to be a textualist and there's one point that's been missed here and I just want to read from the additional clarification because I think it's important and I think it's a point that's often overlooked. This is another quote. "Schools may either require students to complete the census" -- the model survey -- "or provide the census in a context in which most students will complete it." That's a quote off of page 7 of the additional clarification.

So the assumption that schools can simply send out one email and then just response rates will
be what they may be, it's not accurate. The OCR will not defer if it's not administered in a context in which most students would complete it.

CHAIRPERSON REYNOLDS: Okay, we have a few questions lined up. Ms. Braceras, Commissioner Braceras?

VICE CHAIRPERSON THERNSTROM: I just wanted one follow-up question on this specifically -- are you --

COMMISSIONER BRACERAS: I have a few questions, but why don't you go ahead.

VICE CHAIRPERSON THERNSTROM: Yes, just the one question. I don't quite understand why we haven't heard from any of you except we got two anecdotes from Ms. Sweet what exactly the survey response rate has been. Are we talking -- have we got a serious problem here or not in terms of the level of the response rate?

MS. SAMUELS: The problem is that there is no mechanism to systematically assess which schools or whether any schools are in fact using the model survey.

COMMISSIONER BRACERAS: Do you know of any that are using it?

MS. SAMUELS: I do not. I think Ms. Sweet
knows of one. Research shows --

COMMISSIONER BRACERAS: That's the first question.

MS. SAMUELS: -- that responses to email surveys are extremely low.

COMMISSIONER BRACERAS: I know, but that's not the question on the table that the Vice Chair posed. The Vice Chair wants to know specifically has it been used, who has it been used by and in those cases where it has been used, what has been the response rate?

Grand platitudes about whether or not email surveys work or whether or not this is an email survey are really not relevant. She wants the facts. Has it been used?

CHAIRPERSON REYNOLDS: It's an empirical question.

MS. SWEET: I'd like to try to answer that question.

CHAIRPERSON REYNOLDS: As opposed to predicting the problems that could unfold in the future, we're trying to get at what the data says now and the fact that this is such a new approach and also the fact that the NCAA has urged colleges not to use it. Some time may go by, I suspect some time will go
by before we have data, but the question that Vice Chair Thernstrom asked is still on the table. Any one is welcome to respond.

MS. SWEET: I can share with you my experiences as a presenter at several NCAA meetings and conventions where I have asked those in attendance, which range --

VICE CHAIRPERSON THERNSTROM: Again we're into anecdotes there. Really, there has got to be some harder data than that.

MS. SWEET: Well, I don't believe that there would be any way of knowing --

MS. GAVOR: The relevant question is, has the model survey been used to defend against Department of Education investigation or a lawsuit?

CHAIRPERSON REYNOLDS: And we have a representative from OCR. So Mr. Black?

MR. BLACK: Well, first let me address the point that Ms. Samuels raised, which is there is no mechanism for gathering that data other than the context of an active OCR investigation.

We ask all institutions when they receive federal funds to sign an assurance that they will comply with federal civil rights laws, but we don't ask them how they are going to comply with Title VI,
504, the ADA, and we don't ask them how they're going
to comply with Title IX.

In the three-part test that we're talking
about today, there is that flexibility factor. You
might one month be compliant with prong one. And then
your enrollment changes. So you want to shift to
comply with part three and assess interest and see if
you have it and add a team. So it would be difficult
to gather or require schools to have that reporting
requirement.

In the context of open investigations, I
can't, of course, comment on open investigations. We
have had schools express interest in surveys. And in
the past, OCR has even mandated the use of surveys
once we have found a violation in order to continue to
monitor unmet interest.

We have not required anyone to use our
model survey. And, to my knowledge, no one has used
the model survey that we have found in any of our
investigations.

CHAIRPERSON REYNOLDS: Mr. Black, would --

COMMISSIONER YAKI: Mr. Chairman, I just
want to be recognized to be put in line for
questioning at some point.

CHAIRPERSON REYNOLDS: Okay. Mr. Black,
OCR does have the capability, say, through a compliance review to gather this data, I would imagine?

MR. BLACK: Through a compliance review. Our compliance reviews would normally target a specific institution. And we can in doing that say, "Are you using the model survey?" Yes, just --

CHAIRPERSON REYNOLDS: Not just are you using it but what is your response rate? And if you chose the right group of schools and got a representative sample, you could extrapolate from that data.

MR. BLACK: Assuming that they're using part three and then assuming they're using a survey to comply with part three and then assuming that they're using our model survey. We've seen schools use surveys. That was clear. We've seen an example of a survey that got a response rate of two percent. And it required the addition of a team.

So, as I said, you can have a low response rate. And it may require the addition of a team.

CHAIRPERSON REYNOLDS: Okay. Commissioner Thernstrom?

VICE CHAIRPERSON THERNSTROM: I think Mr. Cohen has something to say on the subject.
MR. COHEN: I did just have a brief response to the Commissioner's prior question with respect to response rates. Response rates are going to depend on the method of administration. And, as I believe I said before, I'm not aware of a single school that has administered the model survey via e-mail.

I am aware, however, of instances where the preferred methodology has been adopted; in other words, like I said before, a school has used it via the mandatory application process. You're talking about 100 percent response rate.

COMMISSIONER BRACERAS: What school does that?

MR. COHEN: I'm not in a position where I am going to give any identifications.

COMMISSIONER BRACERAS: But anybody who applies would see it. It's public information. If I were to apply, if I were of the age to apply to school and did so, it would be right there. So that doesn't seem too confidential.

MR. COHEN: Well, if the school feels like disclosing it, I'll leave that to the school to disclose. That's not a situation I'm going to get into here.
COMMISSIONER BRACERAS: I don't know why.

MR. COHEN: One quick note to complete my other thought is that with respect to the administration of the Model Survey, schools see some of the concerns that have been expressed about e-mail administration. And schools look to avoid that. Subjectivity was the problem under the '96 scheme. Schools didn't know when they had complied, when they had done enough. Today when is their response rate high enough is the present corollary. That's not helpful to a school that's looking to know "I am in compliance. I am not in compliance." And that's why this whole idea of response rates assumes the existence of a situation that schools are actually looking to avoid.

And I do briefly want to return to your other point. That is that this is a contentious area of the law. Schools are subject to attack at any time based on simply their good faith efforts to comply with the law. And I'll give you an example.

It's a school that I have not worked with. I don't have any information beyond the media reports. But what I have is a school that I'm aware of that implemented a survey. And the first response that came back from one of the groups was a quote
something akin to, chomping at the bit to make this school its “test case” for litigation over the model survey.

This was a school that was looking to comply with the law in a legal method. It turns out that this school was not even using the model survey. Rather, it had already decided to add a women's team. It was looking to comply with proportionality and add additional teams. But, yet, here it was subject to attack. For that reason, schools do not go public with what their compliance efforts are.

CHAIRPERSON REYNOLDS: Okay. Commissioner Yaki?

VICE CHAIRPERSON THERNSTROM: No, no. Wait a minute. It's Commissioner Braceras. She allowed me to have a question.

CHAIRPERSON REYNOLDS: Oh, I'm sorry. I'm sorry.

COMMISSIONER YAKI: Yes. That's true. It's Commissioner Braceras first.

COMMISSIONER BRACERAS: I have a few questions. And they're not as specific or as empirical as the questions that have previously been asked. They're more policy-oriented questions.

But I would like to preface my questioning
by saying that I'm privileged to sit on the Board of Trustees of the University of Massachusetts, where I am a member of the Athletic Committee. So I'm very much aware of these issues and aware of the fact that schools are trying mightily to comply with Title IX and looking for as much guidance as they can get from the Department of Education.

I would also add that I am the mother of three daughters, all of whom play ice hockey. So, with that in mind, I also teach a course on Title IX at Boston College Law School. So I do have a background in this.

COMMISSIONER YAKI: So when your children misbehave, do you spend them to the penalty box?

COMMISSIONER BRACERAS: Yes, I do. It's what's known as the naughty chair.

I am interested in hearing from Ms. Samuels whether her objections are to this survey in particular or to surveys generally under the third prong. In other words, if the survey measured interest level of an applicant pool or of potential applicants, would you support the use of such a survey in complying with Title IX?

MS. SAMUELS: Well, I think, for the reasons that I described in my testimony, surveys are
inherently unreliable as the sole means to evaluate whether there is sufficient interest to provide additional opportunities for women because they tend to measure not whether there would be interest had women been fully exposed and had they had nondiscriminatory opportunities to participate in the past but the lack of exposure.

COMMISSIONER BRACERAS: Well, see, and that's --

MS. SAMUELS: That's why --

COMMISSIONER BRACERAS: And that's what I'm trying to get at because there's been a lot of criticism about this particular survey and from all four panelists, it seems, other than the representative of the Department of Education.

But what I sense from your testimony is that that is not the real issue for you. And my sense is -- and you feel free to correct me if I am wrong -- is that you would be satisfied with very little other than close to full proportionality.

MS. SAMUELS: We firmly believe that there are three independent means to comply, one of which is prong three.

COMMISSIONER BRACERAS: Okay. If that is
MS. SAMUELS: Under the '96 clarification, which we believe sets forth the appropriate and lawful standards under Title IX, surveys are permissible as long as --

COMMISSIONER BRACERAS: Okay. Let me stop you there. Let me stop you there. That's fine. But then you go on to say that surveys are generally not a good measure because they reflect current discriminatory patterns.

MS. SAMUELS: That's why the 1996 clarification requires schools to go further. They can use a survey as one component of their scan of whether they are providing adequate and fair and equal opportunities to women.

COMMISSIONER BRACERAS: But ultimately for you it comes back to proportionality?

MS. SAMUELS: Ultimately what we are interested in --

COMMISSIONER BRACERAS: It's a "Yes" or "No" question.

MS. SAMUELS: -- is providing equal opportunity to women.

COMMISSIONER BRACERAS: Okay.

MS. SAMUELS: The law asks schools to comply --
COMMISSIONER BRACERAS: I guess I would like -- I would like --

MS. SAMUELS: -- by one of three different prongs.

COMMISSIONER BRACERAS: Oh, I understand that.

MS. SAMUELS: If a school is in compliance with prong three, we have no problem.

COMMISSIONER BRACERAS: And it would be in compliance with prong three by doing what?

MS. SAMUELS: If it followed the guidance of the 1996 clarification.

CHAIRPERSON REYNOLDS: So is the 1996 guidance, is that sacrosanct? Is there anything that we can do to the current survey, not going back to the exact approach used in 1996 because that does not provide the guidance that administrators need?

MS. SAMUELS: Well, although, as Ms. Sweet noted, the GAO has found that most schools, I think two-thirds or somewhere in that neighborhood, complied with prong three under the 1996 --

COMMISSIONER BRACERAS: Can I --

MS. SAMUELS: So to suggest that it didn't provide adequate guidance I think is misguided.

COMMISSIONER BRACERAS: Excuse me. I want
to hear from Ms. Gavora, but before we do, I just want
to, frankly, nail you down for the record, Ms.
Samuels, as to whether or not you think, generally
speaking, interest and ability is an appropriate
method of proving compliance with Title IX.

MS. SAMUELS: I believe that full
accommodation of the interests and abilities of the
under-represented sex is a means of complying through
prong three. I also fully support the idea that --

COMMISSIONER BRACERAS: Well, we know that
it is a means. That's what the guidance in the law
says. We know that it is a means. My question is
whether you support that --

MS. SAMUELS: Yes.

COMMISSIONER BRACERAS: -- as a policy
matter, whether you think that is a legitimate way of
showing nondiscrimination --

MS. SAMUELS: I do.

COMMISSIONER BRACERAS: -- in your policy
--

MS. SAMUELS: If it is done in compliance
with the standard set in the 1996 clarification and
provides for the full accommodation of the interests
of the under-represented --

COMMISSIONER HERIOT: I'm confused now.
Exactly how do you think one could comply with prong three? What's the preferred way that you would see?

MS. SAMUELS: The 1996 clarification sets forth a very detailed road map for that very question. It says you can do surveys. You also must do other things, including talking to your coaches and administrators, looking at what high schools in your area and in your recruiting area do, looking at what rec leagues in the area from which you recruit do, looking at the kinds of requests you have gotten from female students with --

COMMISSIONER BRACERAS: And if that is all done but it still turns out that only 43 percent of athletic opportunities are provided to women on a campus with 60 percent females, are you satisfied with that?

MS. SAMUELS: If all of that is done and schools, in fact, comply with the law, then yes. I suspect that that will not be the case and that, in fact, we believe there is widespread noncompliance with the law, which accounts for --

COMMISSIONER BRACERAS: I would like to hear Ms. Gavora. I would like to hear Ms. Gavora.

CHAIRPERSON REYNOLDS: Hold on now. Let me play traffic cop here. Ms. Gavora, you are next
and then Mr. Black and then Vice Chair Thernstrom.

VICE CHAIRPERSON THERNSTROM: Well, I was just going to say --

CHAIRPERSON REYNOLDS: I'm sorry. Commissioner Yaki.

VICE CHAIRPERSON THERNSTROM: I was just going to say you didn't get an answer to a crucial question. But okay.

MS. GAVORA: I just want to point out that the letter that transmitted the 1996 policy clarification to colleges and universities, in that letter, the assistant secretary declared proportionality a safe harbor for schools seeking to comply with Title IX.

COMMISSIONER BRACERAS: I think it's important to define what that harbor is.

MS. GAVORA: I took a look at this. I heard this two-thirds number bantied about, two-thirds of schools choosing prong three to comply with the law. And when I was writing my book, I took a look at this because this runs contrary to every statement of every athletic director on the record, the Commission, the President's Commission on Title IX. It runs contrary to the advice of every Title IX consultant out there that they use prong three.
And what happens is I FOIA'd the Department of Education's investigations, compliance reviews at schools under Title IX athletic and found out that, in fact, around 64 percent of these institutions chose prong three, but they ended up. These investigations were all to the letter ended with agreements between the schools and the Department of Education to add women's teams or to eliminate men's teams to move further towards proportionality.

So there is a kind of "Oh, yeah. We're trying to see work under prong three. Nudge, nudge. You've got to do this. You've got to add these teams. You've got to eliminate these teams" and with the end result always being proportionality.

Ms. Samuels herself defined equity as proportionality. She did so several times in her statement. I think it's a fiction to say that there are three ways to comply with the law, and that is one of the things we have to get around before we can have a rational discussion of this survey or prong three.

CHAIRPERSON REYNOLDS: Okay.

MS. SAMUELS: Could I just respond to the -- my testimony speaks for itself. Proportionality means that every student on campus, whatever his or her gender, has an equal chance of participating in
sports. That's why it is in the law. That's why it is a permissible means of compliance.

MS. GAVORA: That's proportionality.

MS. SAMUELS: It is not the only means of compliance.

MS. GAVORA: You define it as equal participation. You do not define it as opportunity.

The 1996 policy clarification says that opportunities in teams will not be considered, only students on the field.

MS. SAMUELS: Well, that is because --

MS. GAVORA: That is not opportunity. That is --

MS. SAMUELS: That is to avoid the possibility that schools that are not, in fact, interested in full compliance with Title IX will provide so-called opportunities but do insufficient recruitment, provide insufficient coaching, provide second-rate facilities and scheduling and fields.

One of our coalition partners often says, "You know, if a guy invites me out to the Four Seasons, I'm likely to go. If a guy invites me to McDonald's, I'm going to think twice about it." If women are being provided a McDonald's-level opportunity, that's going to be substantially less
appealing.

VICE CHAIRPERSON THERNSTROM: Did you --

CHAIRPERSON REYNOLDS: The order is Mr. Black, then Commissioner Yaki.

COMMISSIONER BRACERAS: I'm not done.

MR. BLACK: Well, I think I can clarify a few things and get us on track. Number one is to clarify the '96 policy. What is really controlling is the '79 policy, which went through notice and comment under the Administrative Procedures Act.

The '96 clarification, although it solicited feedback from institutions, didn't go through formal notice and comment. And '96 does not mandate certain things. It says things OCR may look at.

What is controlling is the '79 policy, which says institutions may determine the athletic interest and abilities of the students by nondiscriminatory methods of their choosing.

And in '96, all it did is talk about some things OCR may look at, but it doesn't say any of them are required. It doesn't say one is preferred over another. The only language is, really, is that it is still up to the university. They don't need to do any expensive survey methods. And there has been a lot of
attention paid to high schools. That's important, again, to plan for your athletic department.

But the requirement of Title IX, as Mr. Cohen I think pointed out previously, is only to provide equal opportunity for your students, your admitted or enrolled students. So while it's important to know what is going on in high schools, you don't owe the high school students or someone from across the country a responsibility under Title IX.

I want to also talk about the two-thirds. That two-thirds have been batted around. It was recognized through looking at OCR cases that two-thirds complied with part three, but you have to understand the context of an OCR investigation.

If they were in compliance with proportionality, we probably wouldn't have an OCR investigation. It's only because they were not proportional that we had an investigation and brought them into compliance one way or the other.

And most chose the third part of the three-part test. But you can't really extrapolate that and say all colleges are using the three-part test.

MS. GAVOR: But were they as Commissioner Braceras said? Did they prove themselves in
compliance with the law with the 43 percent participation rate with a 60 percent female student body? Were they able to prove their compliance with the law as their programs existed? That was emphatically not what I found.

MR. BLACK: Most of them moved towards part three with OCR helping them get there.

MS. GAVOR: Yes.

CHAIRPERSON REYNOLDS: Okay.

COMMISSIONER BRACERAS: Could I just ask one more question?

CHAIRPERSON REYNOLDS: Commissioner Braceras? Yes.

COMMISSIONER BRACERAS: I just have one more question, which, again, you know, we can talk all day about the best survey methods and the best method of evaluating interest and ability and the best method of complying overall.

But again I'm left with this feeling, particularly from Ms. Samuels, that anything less than proportionality is a failure. And, actually, I think it was even Ms. Sweet who mentioned as evidence of discrimination, she said that only 43 percent of athletic opportunities are worded to women as if this was proof positive that somebody is purposely denying
opportunities to women.

Now, that may be or it may not be, but I don't think that those statistics tell the whole story or answer the question as to whether there's been discrimination in the way that you presented it.

So why is it that that 43 percent number gives you pause and raises eyebrows and makes you concerned?

MS. SWEET: My statement was really reflective of the number of participants at the high school level, that there are millions of young girls that are participating in high school sports. And, yet, we only have 43 percent of our athletic participants on campus being --

COMMISSIONER BRACERAS: But isn't that, in part, just a matter of time? I mean, for example, as I sit here today, I can tell you that, you know, the University of Massachusetts is working mightily to establish a women's ice hockey program.

I mean, we believe that as a New England university, that it would be a travesty for us not to have a women's ice hockey program. All we have to do is pick up the newspapers to see that female youth hockey is growing every day in our own state, tripling year after year the numbers of enrollees.
The fact that we don't have one now is not reflective of discrimination. It's reflective of the fact that the interest is percolating up from the bottom. We observe it. We're working on it.

By the time those eight and nine-year-old girls, like my daughter, get to college, I'm pretty confident that U. Mass. will have a women's ice hockey program and many other things.

So I'm not sure that when you take those statistics and compare it to the population of high school athletes or youth sport athletes that that reflects discrimination.

MS. SWEET: Well, I think what it reflects -- and I think it's important to put this in the context of it's been 35 years that Title IX has been law, we're talking about how we measure interest and ability. This model survey approach allows for an institution to use a non-response to a survey as indicating non-interest.

The context of my comments was based on the fact that we know that there is interest. And you gave a perfect example. And I applaud the University of Massachusetts for looking and hopefully adding a women's ice hockey team. That's what we would like for all institutions to do.
And I want to go on record because there has been some reference to the NCAA perhaps misdirecting its membership, the NCAA is committed to opportunity for both men and women. The NCAA has repeatedly stated that we do not favor institutions dropping men's sports.

Those are institutional decisions. That gives us all great pain when institutions make those decisions. They're making them primarily for financial reasons because they choose to put more resources into a couple of select programs that they want to be more competitive, as opposed to giving a broad-based participation opportunity to both their male and female student athletes.

I also want to mention that you are hearing from college presidents and chancellors who are suggesting that this approach of the electronic model survey does not work and that they feel that it should be withdrawn.

CHAIRPERSON REYNOLDS: Okay. Commissioner Yaki?

COMMISSIONER YAKI: I have a general question for the panelists. And then I have some specific questions for individual panelists.

My general question, we have been seeing
here rather -- and forgive me if I describe it as such -- dryly discussing e-mail surveys, three-prong tests.

I want to know -- and the reason I voted to have this hearing on the briefing list is that I want to know why people believe that there is a problem that requires clarification in how Title IX is administered.

I mean, as far as I know from my limited history with this, GAO did a survey in 2001 and showed no real impact from Title IX on men's programs. I have not seen anything that would say that there is a problem in this administration or, indeed, anything other than this is the type of program that as a nation we embrace and we continue to work to expand.

I never thought that we would start until perhaps I joined this commission, that we would start setting bars of how high people should go, rather than simply urging, you know, continuing onward and upward.

So for the panelists -- and I will just throw it open to all of you, but then I have some questions for Ms. Sweet and Ms. Samuels -- is what apparently is the issue that is attempting to be resolved here when the data doesn't seem to support that there is a problem in how Title IX has worked on behalf of young women and girls in this country?
MS. SAMUELS: This is Jocelyn Samuels.

I will say I agree with you. All of the
data that has been made available to date -- and there
will be a report being released in early June that
updates data that was looked at by the Government
Accountability Office in 2001 -- shows that both men's
and women's opportunities have grown since Title IX.
Women's opportunities have grown faster because they
had more ground to make up, but men's opportunities
overall have grown.

There are some men's sports that have
suffered declines. And, as Ms. Sweet said, we regard
that as a deeply unfortunate thing. But it is not
Title IX that is responsible for those declines.

Schools make all kinds of decisions about
the sports to offer based on factors that include
popularity of the sports; liability concerns; whether
they have adequate coaching; and, most importantly,
the budgets that they have.

And when we are in a climate, which the
report that I would like to submit for the record
shows that we are, where football and men's basketball
are consuming three-quarters of the budgets for men's
sports, there is very little left over for schools to
offer the broad-based opportunities that I think
everybody at this table would like to see them do.

COMMISSIONER KIRSANOW: Aren't those sports also providing three-quarters of the revenue? I mean --

MS. SAMUELS: What our data show is that the vast majority of schools do not even cover their costs, much less provide subsidies for other sports.

MS. SWEET: There's a difference between revenue-producing and profit-producing. And a week ago, I heard Myles Brand, President of the NCAA, say that recent research that they have done indicates that there may be 6 schools, 6 out of close to 1,000, that will actually have a net profit.

COMMISSIONER KIRSANOW: But that's not really my point. Schools make assessments as to where they are going to direct revenue for a variety of reasons, not necessarily to make a profit. But you have Ohio State, stadium of 100,000, a team that maybe should have won the national championship. And they --

PARTICIPANT: Where are you from?

COMMISSIONER KIRSANOW: I'm not from Florida.

(Laughter.)

COMMISSIONER KIRSANOW: And they make a
decision and hundreds of schools make a decision as to where they are going to direct their revenue because they have made a choice, not because it's necessarily for discriminating against one race or one sex by the -- well, forget that. But they make a decision because it highlights the school. That goes beyond that particular sport or the sports program in general.

They do it because they think that it is something that is the draw in terms of alumni dollars, not necessarily ticket revenue but alumni dollars, applications to the school, the prestige of the school, and a lot of other reasons that are market-based reasons that go far beyond.

In fact, I would think that if I were an alumni and I had a vote, I would be very upset at a board of trustees or a university chancellor or president who decided he is going to lose money on football, despite the fact that it doesn't do anything in terms of generating more alumni contributions.

I know, for example, that there are a lot of alumni out there for a variety of schools that if their football or basketball or whatever their chosen sports program goes downhill, they start withholding donations. And that is where the real money is, not
the ticket revenue. That's chump change.

MS. SWEET: If I may give you some statistics?

COMMISSIONER KIRSANOW: Sure.

MS. SWEET: In 2005 in Division I-A, which is the major football division of the NCAA, the deficit average at I-A schools was $5.7 million.

COMMISSIONER KIRSANOW: And that's chump change because I know at my alma mater, there are 50 people who put down that kind of money in donations alone. I'm not talking about ticket revenue. That's not my point.

There are programs out there. And you know them, University of Alabama, University of Oklahoma, Florida, Florida State, Ohio State, where the alumni are out there and going, "We've got a national championship. And here come the contributions." The ticket revenues are maybe one-one hundredth of what the program generates in terms of, for lack of a better term, good will.

MS. SWEET: This is the overall athletic budget, which includes --

COMMISSIONER YAKI: Is that a market-based approach --

COMMISSIONER KIRSANOW: No. I'm simply
talking about in terms of --

COMMISSIONER YAKI:  -- in terms of whether
or not we should allocate funds --

COMMISSIONER KIRSANOW:  No, not at all.

COMMISSIONER YAKI:  -- among sports
budgets?

COMMISSIONER KIRSANOW:  No, not at all
Commissioner Yaki. It was simply a response to how
the administrators are allocating their dollars and
somehow that this is being done in a way that may be
perhaps discriminatory or have a disparate impact on,
say, female sports. Maybe that is, but I'm not so
sure that that is what the data prove.

MS. SWEET:  Actually --

COMMISSIONER YAKI:  I'm not too sure
that's exactly where Ms. Sweet or Ms. Samuels was
coming from. I think that what they were saying is
that -- I don't think they were going into the area of
saying that this is a perfect issue. I think what
they're saying is that we have a program in place now
that is working and, instead, continuing a program
that the NCAA endorses and others endorse and the NCAA
includes all those campuses and universities that do
the alumni and do -- I think the point they are trying
to make is that why are we taking this work and
fiddling with it to make it work less better. I think that's a different point than what you are trying to make here.

CHAIRPERSON REYNOLDS: Okay. Ms. Gavora?

MS. GAVORA: Yes. If I could address that? I mean, the GAO has a troubling tendency of producing sometimes the results that it has asked for. But when a single GAO study, study of men's athletics, that corrected -- the problem is that the NCAA is the sole repositor of these data.

The NCAA except for limited circumstances when it's measuring men's and women's participation does not correct for new institutions entering the NCAA. When the GAO corrected for that, they found a 12 percent decline in men's opportunities for the late '80s and to the mid '90s.

When those data are corrected, as they were recently by the College Sports Council, the decline for men's opportunities are clear. Now, that's not saying it's all due to Title IX, but men's opportunities are declining. There are 17 men's collegiate gymnastic programs left in the country today.

Men's opportunities in track, men's opportunities for minority male athletics are
declining precipitously. And big-time football, NCAA
football, the kinds of football that we have been
talking about raising or not raising revenue, counts
for 11 percent of NCAA teams, 11 percent.

So this notion that this is a money issue,
that they are throwing good money after bad for
football, is a distraction. This is a system-wide
failure.

CHAIRPERSON REYNOLDS: Okay. Commissioner
Kirsanow, then Vice Chair Thernstrom.

COMMISSIONER YAKI: Wait, wait, wait,
wait, wait. Hello. I only had one question, I think.

CHAIRPERSON REYNOLDS: Well, Commissioner
Yaki, your presence is needed here.

COMMISSIONER YAKI: Just because you don't
see me doesn't mean I'm not there.

CHAIRPERSON REYNOLDS: Yes, that is true.

(Laughter.)

CHAIRPERSON REYNOLDS: I hear you.

VICE CHAIRPERSON THERNSTROM: By the way,
I want to know if Commissioner Melendez is with us or
not.

COMMISSIONER YAKI: I just tried calling
his office. He is just leaving a speech or something
and is on his way to the airport. I have no idea.
VICE CHAIRPERSON THERNSTROM: Okay.

COMMISSIONER YAKI: I have one question for Ms. Sweet, one question for Ms. Samuels. Then we'll -- why does the NCAA support the 1996 clarification and not the 2005 clarification?

MS. SWEET: As has been identified earlier, the 1996 clarification is a complete way of assessing interest and ability. The 2005 clarification allows -- even though Mr. Black has indicated that OCR might encourage institutions to look at information beyond the e-mail survey or beyond a survey, it allows for only surveying your existing student population. And the NCAA feels that that is a flawed method of truly evaluating interest.

And I think it's really important to point out that in intercollegiate athletics, you recruit. You don't just look at the students that are on your campus. Depending on the profile of the institution, that might be regional. It might be national.

So to just expect that people are going to show up on your campus if they have an interest in a sport that you're not offering and then they're going to tell you, "I would like to have this experience," there is not going to be a team that could be put together in time for them to have that experience.
They will go someplace else.

    Bottom line is the 2005 clarification is not complete.

CHAIRPERSON REYNOLDS: Commissioner Yaki, do you have another question?

VICE CHAIRPERSON THERNSTROM: I think there were other responses to that.

MR. BLACK: Yes. I would like to add on to that. The recruiting issue is a separate issue that OCR looks at and requires equity in recruiting as well. This principle of getting away from the fact that you're required to meet the needs of your student is meeting the needs of premier athletes around the United States. If you are going to focus on who you can recruit in, you're ignoring the fact that the university has an obligation to its students.

    And what we see in some of our cases, we may have a viable club team at a university, but those students don't want to be elevated to a varsity status. So it's not necessarily the best indicator of unmet interest. And the reason they don't want to be elevated is because then most of them are going to lose their opportunity to compete because you are going to recruit in the premier athlete that is going to replace them.
So a student could work hard to elevate their club team or intramural team to varsity status when they are a freshman. By the time they are a junior, hopefully it is a varsity team. But then they will see most of their teammates eliminated from competition that senior year because they aren't good enough.

The recruiting ideals brought in the more premier athletes. And so the students who started the initiative, the students who were the students on campus whose interest you had to meet, they're no longer having an opportunity to compete.

Now, I want to also say that this survey captures a lot of those factors of that 1996 clarification. The 1996 clarification said, "Look at national trends." Well, the survey requires you to ask students about every single sport recognized by the three major athletic associations. If they're not capturing national trends, then I don't know who is. It allows athletic directors' and coaches' opinions to come in because it allows them to add sports to the survey.

OCR just requires that you can't take them away because we don't want a situation where the university is just going to ask if you are interested
in tennis. We require that you ask if they are interested in all the sports recognized by the athletic associations.

Schools can add to it, thereby capturing high school participation rates, national trends, coaches' opinions and athletic directors' opinions. So a lot of the factors that we are talking about in '96, which, again, are not required, are rolled into this survey.

CHAIRPERSON REYNOLDS: Mr. Cohen?

MR. COHEN: Yes. First of all, I would like to say that I agree with Ms. Sweet in the sense that it is an important societal goal to continue to try to expand opportunities for women. But the place where I want to stop is that that is a policy concern. That is not a criticism of the additional clarification.

As Mr. Black noted, the law has always been that you accommodate your current and your admitted students. Once you get beyond that, you get into sample size problems.

And, again, I'm a textualist. Let me go back to what the actual experts have said about this. I'm going to quote out of the users' guide, which was designed by the NCES, the expert statisticians that
the OCR commissioned.

“The catchment area.” That's what they called the survey sample area that you would have to look at in terms of high school interest or interest of others in the community.

The catchment area might be local for a rural community college, national for a small state college, and international for a large four-year and doctoral institution. Even if definable, such a large target population is almost surely unreachable in any meaningful way and thus is not recommended here.”

Let me also try to give an example that's a little bit closer to me. I'm from Atlanta. We have Georgia Tech there. We have Georgia up the road in Athens, pretty close by; Emory; Spelman; Mercer. We have a ton of schools in the Atlanta area. Which one is supposed to add, say, equestrian if there is interest in that?

It is a very important societal goal to expand opportunities for women in athletics. And everyone agrees with that, I believe. But it's not a point that is germane to the additional clarification.

The additional clarification simply tracks the law in regards to meeting the interests and abilities of your current students and your admitted
students. It's been that way since 1979.

COMMISSIONER YAKI: My last question -- thank you very much. And let me first say to Mr. Black if I am guilty by association, I apologize. Needless to say, as my colleagues know, I am quite a partisan on these kinds of things.

VICE CHAIRPERSON THERNSTROM: No, no.

COMMISSIONER YAKI: And I apologize. One of the issues that I have on the e-mail -- and, actually, I think it is a criticism of government in general -- is that we tend to look at technology as a means to achieve an end, not knowing, of course, that technology that we're looking at has actually gone five years ahead. And I think that one of the problems with e-mail as it stands right now -- you heard Ms. Sweet and Ms. Samuels talk about it.

There's an unfortunate real life experience not too far from here, where now the issue being discussed is that e-mail alerts are not the way to go. Text message alerts are much better in terms of informing the population about a problem that may be going on in any one time. And e-mail is taking a much bigger back seat among young men and women than what they can do with their cell phone, Sidekicks, and things like that.
But for Ms. Samuels -- and this does follow on Mr. Black. And I know this probably occurred well before you were there, sir, but this to define clarification is not the first time that the current administration has tried to make changes to the three-prong test.

I think a little historical background on that I think is important to understand the context of this hearing. So if you could explain a little bit about that, that would be helpful.

MS. SAMUELS: Sure. I think, as most people are aware, in 2002, the Department of Education created the Commission on Opportunity in Athletics, which was a 15-member commission which was the majority of the commissioners were representatives of division I-A schools, which I think we all acknowledge have had the hardest time complying with Title IX and, therefore, the greatest incentive in weakening the standards for it.

After a series of regional hearings, where the witnesses opposed to Title IX vastly outweighed the witnesses in support of it, the commission came up with 22 recommendations, a significant number of which would have brought really damaging changes in the longstanding athletics policies, which had been
applied by prior administrations and accepted by every
court that had looked at them.

The Department of Education after what I
can only characterize as a massive public
demonstration of support for the then prevailing Title
IX standards in July 2003 issued the further
clarification, which said that they would reject the
commission's recommendations and, instead, enforce and
provide technical assistance on the longstanding
policies.

We regard this 2005 clarification, which,
by the way, was issued on a Friday afternoon without
notice and without any opportunity for public comment
--

COMMISSIONER YAKI: You mean trash day?

MS. SAMUELS: The Friday afternoon timing
I guess speaks for itself, but, in any event, we
regard that as in direct conflict with the
department's July 2003 commitment to keep the
policies, which they had spent $750,000 and a
year-long process reexamining, in place and to
strongly enforce them.

COMMISSIONER BRACERAS: Okay. Can I just
interject for a second? You referred to schools that
you believe have an incentive to weaken Title IX. Do
you honestly believe that universities are attempting
to weaken Title IX? Because in my experience,
universities want only to expand opportunities for
women and are grappling with how to do so in a time of
limited budgets.

MS. SAMUELS: I believe that universities
that offer big football and men's basketball programs
are facing financial constraints.

COMMISSIONER BRACERAS: And do you believe
they want to weaken Title IX, as you have said?

MS. SAMUELS: I believe they want to make
it easier to comply with Title IX so that they can
continue to run their football and basketball programs
in the same way that they have and not have to offer
additional opportunities to women on their campuses.
I think there --

COMMISSIONER BRACERAS: I have to tell you
I take it as fighting words when you accuse somebody
of wanting to weaken or undermine a civil rights
statute.

I think that that is an extreme accusation
to make, one that is a little bit different than
saying they have a vested interest in preserving
football, which is, whether it's true or not, a
nonpartisan, non-accusatory statement.
When you say that you believe there are universities out there that wish to undermine the civil rights of women, that is an extremely strong accusation. You had better be prepared to back that up.

MS. SAMUELS: I am not suggesting that universities are malicious. I believe they --

COMMISSIONER BRACERAS: That is what you were suggesting.

MS. SAMUELS: -- are seeking easier ways to comply and ways that they can demonstrate that they are already fully satisfying the women's interests on their campuses.

COMMISSIONER YAKI: With all due respect to Commissioner Braceras, I believe I join her when I say anyone who is attempting to undermine the civil rights law is fighting words to me, as she well knows.

But it begs a question and one that continues to nag me through the course of this hearing, which is why, then, are we attempting -- not "we." Why is the administration putting into place clarification and procedures that would make it easier on institutions they say to comply with Title IX, which advocates believe would result in a weakening of the program?
CHAIRPERSON REYNOLDS: I agree. Quick question -- well, statement. It seems to me that with a survey, it could increase the burdens on schools if over time the interest and ability of women continue to increase.

Well, if this is a method for avoiding an obligation to add teams for women, Mr. Black, I have to say it's a dumb idea. It's a vehicle that has the potential and I suspect will increase the burdens on schools over time.

MR. BLACK: If I may comment? The whole purpose, again, is to give the schools a tool to look for that unmet interest. And I agree with you. Large universities do not want to use this tool because they will find unmet interest.

MS. GAVORA: And it points to the current bias behind proportionality. When schools hit that magic number, they don't want anything to push them off it. And that means adding women's teams if unmet interest is there. They worked hard to get to proportionality. And they're not going to add women's teams to --

CHAIRPERSON REYNOLDS: Vice Chair Ternstrom?

MS. SAMUELS: Excuse me. Schools that are
in compliance with the proportionality prong do not need to add any teams. The third prong occurs when schools have not met either substantial proportionality or been able to show that there is a continuing pattern of adding teams for the under-represented sex.

CHAIRPERSON REYNOLDS: So you believe that you have to go down the line? A university --

MS. SAMUELS: Not at all.

CHAIRPERSON REYNOLDS: Well, a university --

MS. SAMUELS: It's at the school's discretion which prong they comply with.

CHAIRPERSON REYNOLDS: Okay.

MS. GAVORÁ: That's impossible for a school to have more e-mail athletic interest on their campus than is represented in their student body --

MS. SAMUELS: If they are offering --

MS. GAVORÁ: -- is what you are saying.

MS. SAMUELS: No. If they are offering proportional opportunity --

MS. GAVORÁ: Again, they will be --

COMMISSIONER BRACERAS: If they offered no sports, that would be proportional opportunity. But there would be greater interest than was being met.
MS. SAMUELS: Unfortunately, no college athletics program is likely to be able to satisfy the universe of interest that exists among both men and women.

COMMISSIONER KIRSANOW: But it's also ability, too. It's not just interest. I mean, a lot of people may be interested in it, but they're not going to be able to cut it on a varsity team.

MS. SAMUELS: Well, it's true, but there are 3 million high school girls playing sports and --

COMMISSIONER KIRSANOW: High school is different than college.

MS. SAMUELS: -- only 200,000 or so college athletes.

COMMISSIONER KIRSANOW: We have -- that's true -- finite resources and --

MS. SWEET: I think this conversation really goes back to a comment that Ms. Gavora made earlier in regards to safe harbor and the misunderstanding that goes along with it.

There are three opportunities for compliance with the participation aspect of Title IX. If you start with prong one and if you meet proportionality, you don't have to go any further. That's what safe harbor means. It doesn't mean it's
the only place that you can be safe.

CHAIRPERSON REYNOLDS: Can we talk about this and use different language? For me, it is as an administrator, the question is what is the probability that I am going to have to incur additional transaction costs by going through door number one, door number two, door number three?

Now, the transaction cost associated with complying with prong three, if you hit your numbers, it's over.

MS. SWEET: Prong one.

CHAIRPERSON REYNOLDS: That's right.

MS. SWEET: If you reach proportionality, you don't have to go any further.

CHAIRPERSON REYNOLDS: It's over. You pick two or prong number three before we have the model survey. You have to hire Mr. Cohen. You have to hire experts. You have to have back and forth with OCR. Would schools have complained about for decades, they want clear guidance. They want to know when they have complied with the law without incurring a lot of transaction costs.

And prong one, substantial proportionality, that provides a way of complying without incurring too many transaction costs. Prongs
two and three prior to the model survey were approaches where you could not get a high level of comfort. Many athletic directors would hire lawyers in their departments to provide them with advice and counsel on when they satisfied two or three.

If you have to hire a lawyer to have on your staff to tell you whether you are in compliance with the law, that is an expensive approach to complying with the law.

MS. SWEET: Well, I can tell you that I spent 24 years as a director of athletics. And I never had to hire an attorney to tell me that I was meeting the responsibilities of equal opportunity.

But I want to speak specifically to prong two. Prong two allows you to be in transition. If you haven't yet reached prong one, if that's your goal, you could use two. You could use three.

Prong two really is what Title IX is about. You're adding opportunities. If you go back to 1972, when Title IX was passed as law, if institutions were adding sports, which we have good documentation that that is what has happened over the last 35 years, they would be in compliance with Title IX because they have been adding sports, which is what we should be trying to do to meet the unmet interests.
If you're fully meeting all of the interests and abilities of your student population, you would meet prong three. So you have three very flexible ways.

Now, if you're saying that you're looking for a way that institutions don't have to spend any more money in order to be in compliance with Title IX, to me that suggests discrimination because we have already shown that we're not spending as much money on our women as we are on our men.

And we are still needing to add opportunities. We are still needing to support the benefits of our female student athletes.

CHAIRPERSON REYNOLDS: So I guess, at bottom, what we are talking about here is a disagreement over the numbers. One side believes proportionality, that we should have statistical equality. And that, in itself, constitutes nondiscrimination versus another school of thought that believes that the numbers may or may not be an indication of discrimination.

MS. SWEET: In my opinion, there are three separate ways of complying with Title IX. The argument --

CHAIRPERSON REYNOLDS: I wasn't referring
to --

MS. SWEET: The argument that I have heard in respect to the numbers is that there are some institutions who have claimed that the only way that they can be in compliance with Title IX is by reaching proportionality.

COMMISSIONER BRACERAS: Well, that's the only safe harbor, so to speak, but that's --

MS. SAMUELS: The Department of Education actually has now explicitly said in the July 2003 clarification that it is not the only safe harbor, that each way of complying is an equally --

COMMISSIONER BRACERAS: But, in fact, I mean, as somebody who sits on a university board, the easiest way of complying is actually to cut men's teams. We have been talking about what is easiest, what is burdensome, what has more transaction costs. That is the easiest way. Nobody wants to do that, but that is the easiest way.

MS. SAMUELS: Well, I guess what I would say in response to that is what I alluded to in my testimony, which is I am all for providing technical assistance and guidance and help to schools that want to figure out how to comply with Title IX within the context of the three-part test. I think what the 2005
clarification does is to elevate ease of compliance over fair adherence to the standards of equal opportunity.

COMMISSIONER BRACERAS: No. I think ease of compliance is what we had before. Ease of compliance was to cut. This is more difficult.

MS. SAMUELS: I beg to differ since we think that, in fact, a huge loophole is opened by this 2005 clarification. It is not necessarily that every school will administer a survey in a way that would be inadequate, not that every school will inappropriately act on findings. But the clarification authorizes and allows schools to deny additional opportunity for women in circumstances where interest would exist under prong three properly administered.

CHAIRPERSON REYNOLDS: Okay. Vice Chair Thernstrom?

VICE CHAIRPERSON THERNSTROM: Well, the Chairman has partially made the point that I was going to make. And I was going to be building on Commissioner Braceras. And it seems to me a question that you posed earlier was not properly answered.

There are enormous incentives here to institute policies that will ensure proportionality. And it does seem to me that Ms. Samuels in her
previous comment had collapsed the whole notion of result and opportunity, two very different concepts. And you have simply merged them. And the definition of equity, of gender equity, has become proportionality. I mean, I think that is the running theme through what you have had to say.

And Commissioner Braceras earlier said to you, posed the question directly to you, "Do you believe that the definition of equity is proportionality?" And she did not get a satisfactory answer.

But I think that the answer has become very clear in this testimony. So I don't --

MS. SAMUELS: If I could just respond?

VICE CHAIRPERSON THERNSTROM: No. Wait a minute. I would like to pose a question also to Ms. Sweet and then have the two of you answer both of them.

Ms. Sweet, you said earlier that Title IX has resulted in a huge increase in women's interest in sports. Now, I mean, lots of things have, including an entire cultural change in this country with respect to the status of women, the definition of being female and so forth has, resulted in much more participation in athletics on the part of young women. So to say
that we know exactly how much Title IX has contributed, as opposed to a whole lot of other factors, seems to me ridiculous.

And you also said that the survey was -- you charged it with being contrived. And I would like to know what that word "contrived" means.

So I have got questions to Ms. Samuels on the table and to Ms. Sweet.

MS. SAMUELS: Well, I will just respond first. And I don't want there to be any misunderstanding about my testimony or my position. I believe that equity is satisfied when an institution meets any one of the three prongs of the three-part test as long as those prongs are appropriately and lawfully applied and interpreted.

Proportionality is one important way in which a school can show that it is offering equality of opportunity. To eliminate proportionality would freeze the status quo, would deny the opportunity for women to participate in sports based on the principle that men and women are equally interested in and able to compete in athletics. It is not the only means of compliance.

COMMISSIONER BRACERAS: Equally interested?
MS. SAMUELS: There is no reason to assume that they are not.

PARTICIPANT: What are the data?

COMMISSIONER BRACERAS: I think that's a very critical question right there.

MS. SAMUELS: On what basis would you say that they are not?

COMMISSIONER BRACERAS: It's a very --

MS. SAMUELS: I can only answer one question at --

COMMISSIONER BRACERAS: It's a very specific question. And I have no assumptions, one way or the other, because I have three daughters who are very interested in sports. My question is simply, what data do you have that shows that girls and boys are interested in sports at the same levels, both either as spectators or as participants?

MS. SAMUELS: Well, I think that that question is an inversion of the basic civil rights concept that everyone is entitled to equality of opportunity. The notion --

PARTICIPANT: It's an empirical question.

MS. SAMUELS: Could I finish? The notion --

COMMISSIONER BRACERAS: But not everybody
is entitled to --

MS. SAMUELS: The notion --

COMMISSIONER BRACERAS: Everybody is entitled to --

MS. SAMUELS: -- that women are inherently less interested in sports, which I think underlies a lot of what opponents to Title IX say, is based on stereotypes that are both impermissible under the law and disproved by the facts.

Women's participation in sports has continued to grow over the last 35 years, since Title IX was enacted. Every time an opportunity is offered, women show up in droves to fill it.

COMMISSIONER BRACERAS: But not in the same proportion as men with respect to sports. I mean, look, I've got to be honest with you. I am on the soccer fields and the softball fields every night of the week. And the fact of the matter is yes, there are a lot of little girls out there that love to play, but there are also a lot of little girls out there that don't. There are a lot of --

MS. SAMUELS: That is true.

COMMISSIONER BRACERAS: It is not that the opportunities aren't --

MS. SAMUELS: And there are a lot of
little boys who do and don't want to play.

COMMISSIONER BRACERAS: Well, no, no, no.

MS. SAMUELS: The culture is still and the school availability of opportunities in school is still --

COMMISSIONER BRACERAS: I'm sorry.

MS. SAMUELS: -- geared toward male participation.

COMMISSIONER BRACERAS: I'm sorry. You are wrong about that. You are absolutely wrong because I have four children: one boy and three girls. I am out there every day. The opportunities for the boys and the girls in the town in which I live are exactly the same.

And, yes, there are double the number of girls out there playing than there were ten years ago. And I applaud that. And there probably will be even more in the future, but there are still many, many girls that don't want to play. And that is fine. That is their choice.

My daughter has a lot of friends that don't play sports. And to the extent that they don't, that has nothing to do with the opportunities that are being provided them by the town organizations. Maybe that is a cultural thing within their families, but
the law can't change that.

MS. SAMUELS: Well, the fact of the matter is --

COMMISSIONER BRACERAS: The opportunities are exactly the same.

COMMISSIONER BRACERAS: And, in fact, in fact, there are so many fewer girls that play softball than boys who play baseball that they have to combine grade levels. So, whereas, the boys have a third grade team, a fourth grade team, a fifth grade team, the boys have third grade, fourth grade, fifth grade, girls have to play third and fourth combined, fifth and sixth combined because there aren't enough girls to field a team per grade.

MS. SAMUELS: I think fundamentally I --

COMMISSIONER YAKI: Is the answer, then, Commissioner Braceras, to simply eliminate the girls' teams because they can't fill them up within their age grades?

COMMISSIONER BRACERAS: No, absolutely not.

COMMISSIONER YAKI: I don't understand what you mean.

MS. SAMUELS: Can I just respond?

COMMISSIONER YAKI: Simply because, again,
I'm getting this idea about market-based Title IX, and
I don't quite understand. We're talking about, again,
a civil rights issue, which is not based on the
market, is not based on ability, is based on one
access to that.

COMMISSIONER BRACERAS: You can't force
people to do something they don't want to do, Michael.

CHAIRPERSON REYNOLDS: Okay.

MS. SAMUELS: Could I finish in response
to Commissioner Braceras?

CHAIRPERSON REYNOLDS: Hold on. Hold on.

Mr. Cohen, are you aware of data that discusses the
relative interests between boys and girls with respect
to athletics?

MR. COHEN: You know, I'm glad that you
returned to me here. I can't escape the irony. I
mean, we've gone far afield from the additional
clarification here. We're talking about societal
issues. We're talking about policy issues.

CHAIRPERSON REYNOLDS: Welcome to Title
IX.

MR. COHEN: Well, what does the model
survey do? It asks them. If you want to get
empirical evidence on whether or not women are
interested at the same level, more or less, ask them.
That's what a well-administered model survey is designed to do.

Ms. Samuels mentioned that compliance is easier under the additional clarification. There is absolutely no basis for that statement. There is no empirical evidence that supports that statement. It's based on an assumption. And it's based on the assumption that I began my statement with, which is that the model survey be administered via e-mail and it generates a low response rate.

Yes, if you have a poorly administered model survey, it's not going to be robust enough to give you true information, but return to what the model survey is trying to do, what the additional clarification is trying to do.

If you administer it via a mandatory response method, you are going to get 100 percent response rates. Here comes your empirical data.

MS. GAVOR: And there are data. There are data. The University of California system surveyed its members as part of the consent agreement with the National Organization for Women. And they found about a 60/40 split. Sixty percent of the people interested in athletics in colleges were men, 40 percent women.
And that's the same data that Brown presented in defending itself in the lawsuit, the landmark lawsuit, that they found on their campus. It's the same basic breakdown that the College Board finds when it asks people that take the PSAT and the SAT about their interest in sports, the gender breakdown.

There is more data, overwhelming data, on participation in club sports, in intramural sports, where boys outnumber girls by about three to one, four to one, five to one, and those completely voluntary opportunities on college campuses.

Now, I'm not arguing that this level can't change. I'm just saying that it's there. There are data that show it. There's --

COMMISSIONER BRACERAS: I think what we're hearing is that you don't like the data.

MS. GAVORA: No.

MS. SAMUELS: Can I --

COMMISSIONER BRACERAS: And you believe the data is socially constructed.

CHAIRPERSON REYNOLDS: Okay. Ms. Samuels, please respond.

MS. SAMUELS: Thank you.

I vehemently disagree with the notion that
there is evidence that women are inherently less interested in sports than men.

COMMISSIONER BRACERAS: Nobody said anything --

MS. SAMUELS: Excuse me.

COMMISSIONER BRACERAS: -- time right now, not inherently.

VICE CHAIRPERSON THERNSTROM: Take away the word "inherently."

MS. SAMUELS: I disagree with the premise that they are less interested. To the extent that their responses to surveys show less interest or that they are participating at lower levels, I believe that that is a product of the lingering lack of exposure and the second-class nature of the opportunities they get.

COMMISSIONER BRACERAS: And whose fault is that? Whose fault is that?

CHAIRPERSON REYNOLDS: And so if --

MS. SAMUELS: Can I just finish? But the bottom line is I disagree with the premise. And I believe that it will be disproved in circumstances where surveys and analyses are done in an appropriate way. But if it is right that on a particular campus women, in fact, are satisfied with less than
proportional opportunities, that is what the third prong is all about.

And we support use of the third prong as long as the evidence that is used to evaluate whether you are fully meeting women's interests is sufficiently analytical and takes account of the indications of interest to give you a true picture --

COMMISSIONER BRACERAS: But you just said because it has that interest, the current interest, as reflected by empirical data, is the product of discrimination and, therefore, you're not satisfied with that status quo, even if an institution meets it, fully and completely meets it.

MS. SAMUELS: If the status quo for an institution shows after they have done all of the kinds of analyses required under the 1996 clarification that they are fully satisfying the interest that exists on their campus --

COMMISSIONER BRACERAS: Even if it's a product of, as you believe, discrimination?

MS. SAMUELS: Correct. The law accepts that as compliance with the equal opportunity --

VICE CHAIRPERSON THERNSTRÖM: And I suppose you think that if you survey men and women on how many hours of sports competition that they watch
on television, that there would be equal interests between men and women. I mean, that's ridiculous.

Men obsessively watch sports on television and women not to the same degree. A college professor can walk into his barber. And they've got a conversation about the latest results about whatever sports event is going on. Women do not walk into their hairdresser and have the same conversation. There is a difference in the level of interest between men and women in athletics.

MS. SAMUELS: With all due respect, Title IX prohibits that kind of stereotyping, which is why it is so important that you have a --

VICE CHAIRPERSON THERNSTROM: That's empirical evidence.

MS. SAMUELS: -- robust evidentiary basis for --

COMMISSIONER YAKI: In my law office, I've got a bunch of crazy Giants fans. And they're all women. So what does that mean? I mean, does that --

COMMISSIONER BRACERAS: Of course. Of course, there are women who are sports fans, Michael. That's the whole point.

COMMISSIONER YAKI: We can't go by what someone says in the beauty parlor --
VICE CHAIRPERSON THERNSTROM: I'm just saying, Michael --

CHAIRPERSON REYNOLDS: You could rely on surveys.

COMMISSIONER YAKI: -- in the Commission on Civil Rights. And the idea that we are going down that path is just completely ridiculous.

VICE CHAIRPERSON THERNSTROM: I'm just saying, Michael, if you gathered data, you would find gender differences.

CHAIRPERSON REYNOLDS: Let's ask the women. Let's just ask the women "Are you interested in participating in intercollegiate sports?"

COMMISSIONER TAYLOR: That's a nice segue into my question. I have two questions. The first is this question of interest. It sounds like we have a disagreement on interest and what it means in the Title IX context.

We have I think Ms. Samuels saying interest has a secondary component to it. That is, you must establish if you have diminished interest, whether or not that diminished interest is a result of active discrimination, society, lack of exposure.

And that requires you to go beyond simply asking the students on your campus, but you have to go
to their communities to determine whether or not they were exposed to the sport in their community. And if they weren't exposed to the sport in their community, then you can come back to campus and say, "Well, you found insufficient interest, but let's now substitute a cohort for lack of exposure to move that number."

Is that accurate?

MS. SAMUELS: I'm not sure if I exactly understand your question, but let me say how I believe the third prong ought to operate. A school, as Mr. Cohen said, is only obligated to accommodate the interests and abilities of its current and its admitted students.

But in evaluating what the interests of those students are or will be for future admissions purposes, taking account of the sports that are played in feeder schools, the sports that are played in rec leagues in the areas from which the school draws its students -- I mean, as Commissioner Braceras said, the University of Massachusetts is looking around and realizing everyone and her sister is playing ice hockey.

It would be foolish and I think ignoring the fact that there is very clearly an interest in playing ice hockey that would be subscribed to were
the university to offer a team to say, "We're just going to look exclusively at what exists now."

COMMISSIONER TAYLOR: But what you just described, though, are two different scenarios. The first is in my view measuring current interest. The second is measuring what is going on in society to project and determine what you will need in the future.

And so I'm wondering, would you use that evidence of what she sees in the pipeline in her community to support moving your measurement of current interest?

MS. SAMUELS: Well, as Ms. Sweet said, the three-part test recognizes and allows for transition periods and recognizes that you cannot necessarily wake up one morning and have equality on your campuses.

That's why it allows for prong two to say, "Yes, we are planning to offer additional teams and additional opportunities for the under-represented gender, which, as we all agree, in the vast majority of cases is women," and do so over time.

Prong three says, "If you are fully satisfying the interests that exist on your campuses, you are in compliance." But under the 1996
clarification, schools were under an obligation to regularly make that assessment and to evaluate on an ongoing basis whether interest is developing or whether they are still continuing to fully accommodate that interest.

The 2005 clarification relieves schools of any obligation to do that as long as they have administered a survey on some unspecified periodic basis.

COMMISSIONER TAYLOR: Is the position that we have a law and there are three ways to comply and the three prongs are all equally sufficient in your view to comply?

MS. SAMUELS: That's correct.

COMMISSIONER TAYLOR: But I thought you said if you eliminated the first prong, that you would freeze the status quo?

MS. SAMUELS: Well, that's why you need to preserve it as one of the three options for compliance.

COMMISSIONER TAYLOR: This is my question. If all three are equal; that is, proportionality is no better or no worse in prong two and prong three, if you eliminate prong one, why do you freeze the status quo?
MS. SAMUELS: Because prong one embodies the notion that every student on campus will have an equal opportunity to play sports.

COMMISSIONER BRACERAS: Of course not.

COMMISSIONER TAYLOR: And that's not reflected in two and three?

MS. SAMUELS: Two and three are based on the premise that women have less than equal opportunity but that there are ways that you can satisfy the law either because you are continuing to add teams for women and you have a history of doing so or because you happen to be a campus on which you are fully satisfying those interests, even though you are not --

MS. GAVORA: Prong one emphatically does not speak to opportunity. It emphatically speaks to result. Prong one is a result-based measure of compliance.

COMMISSIONER TAYLOR: I mean, I am just trying to get a sense of whether or not we --

MS. GAVORA: It simply does not speak to opportunity.

COMMISSIONER TAYLOR: Yes. You know, is it first among equals or are they all three equal? If they're all three equal, I'm just having a difficult
time understanding why if you eliminate one prong and they're all --

MS. SWEET: You're eliminating one approach. As Ms. Gavora indicated, even her misunderstanding was that if you did prong three and you did a model survey, that you were in compliance with prong one, proportionality, and you found that there was unmet interest in your female population, that you would need to add more opportunities for women.

COMMISSIONER BRACERAS: No. No, that's not what she said.

MS. GAVORA: My point was that you have every incentive not to add those opportunities if you have reached proportionality, which --

COMMISSIONER BRACERAS: But expansion stops --

MS. GAVORA: That's right.

COMMISSIONER BRACERAS: -- once you reach proportionality.

MS. GAVORA: That was my point.

MS. SWEET: So in that respect, if you're meeting one of the opportunities, one of the parts of Title IX --

VICE CHAIRPERSON THERNSTROM: That's

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results, not opportunities.

PARTICIPANT: What does the Department of Education say in the 1996 --

VICE CHAIRPERSON THERNSTROM: That's again collapsing the concept of result and opportunity, which, of course, we see as pervasive in other areas of civil rights law.

MS. GAVORA: There are 1,000 more teams for women in NCAA championship sports than there are for men.

PARTICIPANT: But there are more opportunities --

COMMISSIONER BRACERAS: I think what is perfectly clear is that Ms. Samuels' views -- to answer Commissioner Taylor's question, it sounds like she views prongs two and three as transitional to get to one.

COMMISSIONER TAYLOR: Right.

COMMISSIONER BRACERAS: So, in other words, one is the touchstone. You can under the law comply with two and three and be safe, but that is not good enough. They are transitional.

MS. SAMUELS: There is no time limit on two and three. They are the law. If you can show that you have a history and continuing practice of
improving opportunities for the under-represented sex
or that you are fully satisfying the interest that
exists, you are in compliance.

COMMISSIONER BRACERAS: But if, as
Commissioner Taylor said, they were sufficient, each
of them, as stand-alone ways to comply, then as a
hypothetical, one could eliminate prong one and you
would be fine. Now, we're not advocating doing that.

MS. SAMUELS: Would you then say that a
school that did offer proportional opportunities was
not in compliance with the law?

CHAIRPERSON REYNOLDS: You could make that
argument if you had a survey that showed that there
was a significant amount of unmet interest by the
under-represented sex.

MS. SWEET: What's particularly
interesting is that the whole concept of
proportionality was proposed by the football coaches
association in the 1970s, when there was a large
population percentage of males on campus than females.
Then it made sense.

Now, interestingly, since the enrollment
of females on campuses has shifted to the larger
percentage, now suddenly it doesn't make any more
sense.
CHAIRPERSON REYNOLDS: Hold on.

Commissioner Heriot was next.

COMMISSIONER BRACERAS: I don't think it made sense then.

COMMISSIONER HERIOT: I've got something completely different here. Maybe we will go back to these issues. I think that my question is probably primarily aimed at Ms. Samuels. I apologize for keeping you on the hot seat all the time, but others of you might have comments on this as well.

I think I'm asking this question part from my status as the Commission's biggest nerd. I'm the nearsighted, left-handed kid who can't throw the ball to save her life.

CHAIRPERSON REYNOLDS: No. Gail, I compete with you.

(Laughter.)

CHAIRPERSON REYNOLDS: You have a challenger.

COMMISSIONER HERIOT: My question is, what is so special about sports? Title IX, of course, isn't specific about sports. It talks about nondiscrimination generally. And I'm getting the feeling from your argument -- let me back up a little bit here.
It seemed to me the reason that the Department of Education would be interested in sports in particular is the notion that sports are sex-segregated on campus and, therefore, you really just can't opt in easily.

There has to be something to opt in to. So if I want to play hockey, there has to be a hockey team. If I want to register for chemistry, all I've got to do is register. And so we don't necessarily need special regulations for chemistry class except when you start getting rolling about the reasons for your objections to the current legal regime. It sounds to me that maybe you have to back up and rethink the chemistry issue.

You have been talking about actual expressions not really being good enough here, you know, the fact that I fail to respond to a survey or even I do respond to a survey and I say I'm not interested, that not being enough for you and that it's a question of a matter of exposure to athletics early in life. And you even said at one point that it was the school's fault that some students have not been exposed to these opportunities.

What does that say about going back and rethinking the fact that there is not just one area of
the curriculum and extracurricular activities are under-represented but there are lots of them, like science classes, math classes? Is that something that the Department of Education should be issuing regulations on?

MS. SAMUELS: Well, I think, actually, there is a fundamental difference between athletics and every other aspect of educational activities. I agree with you that more attention ought to be paid to Title IX compliance in the non-athletics areas because athletics has been such a high profile issue, over 35 years. There are areas in which women are still lagging, for example, in math and science disciplines, where I think we could use some greater attention and enforcement of Title IX.

That said, the reason that special rules are appropriate in the context of athletics is for precisely the reason you said, which is that it is schools that decide in the first instance how many athletics opportunities they are going to offer for men and how many for women. It is a discipline, an educational activity that is explicitly and permissibly sex-segregated.

In chemistry, in engineering, in English, in drama, there are not the same prior decisions by
schools to offer those opportunities on the basis of sex. They are --

COMMISSIONER HERIOT: It seems to me you argued yourself out of that position earlier in the day when you were talking about the notion that a questionnaire is simply not going to really measure what is going on here because there has been this period of lack of exposure and we need somehow to correct that.

How can those be consistent if we're going to go down the road of not taking people at their word when adults say, "I don't want to play field hockey"? If we're going to go down that road, how are we going to trust them when they say, "I don't want to register for chemistry" or when the men say, "I don't want to be in the chorus"?

It seems to me that once we go away from taking people at their word, then we have opened up everything because there is nothing anywhere in the university or anywhere in the world where there aren't different ratios of males and females in interest.

There's nothing, absolutely no activity, other than perhaps going to the bathroom that everybody does in the same sex ratio. Different sports attract --
MS. SAMUELS: I see that Ms. Sweet wants to say something. And I will turn to her in just a moment. I would simply say there is a fundamental difference in that chemistry is an opportunity that is available to men and to women without regard to their gender. Athletics is not.

As you said, if there is no field hockey team, you are not going to be able to --

COMMISSIONER HERIOT: Again, that made perfect sense to me when you were talking about taking people at their word. But when you don't, then all bets are off.

MS. SWEET: I want to comment because I think you make a really important point when you say, "Take them at their word." One of the very strong objections that we have to the methodology of this survey approach is that we're not getting any word. We're assuming when somebody doesn't respond what their word is.

If they were going to say, if they were going to respond and say, "I don't want to play field hockey," that's far different than not getting any response and assuming that they don't want to play field hockey.

If I may, I believe that Commissioner
Thernstrom had asked me a couple of questions. And I don't want to miss the opportunity.

VICE CHAIRPERSON THERNSTROM: And, again, what you just said goes to the question of what are the data on survey, responses to the survey. Anyway, I mean, because you're saying no answer is meaningful. Well, what percentage of students have no answer?

MS. SWEET: I think you need to ask OCR that, --

VICE CHAIRPERSON THERNSTROM: Anyway, go on.

MS. SWEET: -- the questions that you asked earlier.

VICE CHAIRPERSON THERNSTROM: Right.

MS. SWEET: And it really ties in with the conversation that has taken place since you asked the question. In respect to opportunity and actual participation, we can't lose sight of the fact that men have been participating in athletics much longer than women have.

Last year the NCAA celebrated its centennial anniversary. The NCAA has only sponsored opportunities for females for 25 years. So the men had a 75-year head start in the collegiate athletic arena.
I can speak from personal experience. Prior to Title IX, I was discouraged from participating in sports. Even though I loved sports, there were no high school opportunities. I attended the University of Wisconsin, which I like to think is fairly progressive. There were no collegiate opportunities.

The question, I believe, was why do I think that Title IX has been so influential in respect to the athletics changes that have taken place. I want to speak to the question about Title IX and emphasize Title IX is for education at all levels. We have seen dramatic changes in career opportunities in medicine, in science. Even though we may not have gone as far with women in engineering, we now have at least 50 percent of women in the medical field, in the law field. That wasn't the case prior to Title IX.

The same is true in athletics. Prior to Title IX, there were 30,000 female athletes on our college campuses. Now there are over 200,000. And why has that happened? It has happened because colleges have made a commitment to trying to provide new opportunities. And as those new opportunities have been provided, there have been young women that have been clamoring to fill those spots.
So to say that the interest is different, don’t forget that the history is different. We're not talking about apples and apples. We're talking about apples and oranges. And we just need to accept that. But we also need to accept that there are glowing disparities that we need to address.

The second part of your question if I remember correctly --

Vice Chairperson Thernstrom: Let me just say something to that. Look, my point was not that Title IX has made no contribution. My point is simply that you've got decades of transformative change in the status of women and how women think of themselves and how women -- the definition of -- and how feminine is defined. And so you've got multiple factors. And I wouldn't want to try to weigh any one of them. And the multiple factors include Title IX in the results we've got today, which is our enormously increased interest in athletics. That was my sole point.

Ms. Sweet: I agree. There are multiple factors, but I feel very strongly without Title IX, we would not have the number of women in law school, the number of women in medical school, the number of women that are participating on sports teams.

Vice Chairperson Thernstrom: And I just
don't know that on medical school or law school
without -- I mean, I don't think you can say that.
But, anyway, go on.

MS. GAVORA: I think that there is an
important generational difference here that is being
touched on. And I think it's one that you folks
should be concerned about.

I talk to young girls on campuses today
whose experience is very different from yours and even
mine to a certain degree. They feel completely
empowered. And what they are starting to say is, "Why
do we need this law anymore? Title IX has outlived
its purpose. You know, I mean, it's hurting these
guys we're training with. It's hurting. You know,
it's just mindlessly ending these opportunities for
men. We don't need this. We're a majority on our
campuses."

I think we still need Title IX, but these
women, young women, have an experience with this law
that is completely different from what it was intended
when it was passed.

VICE CHAIRPERSON THERNSTROM: They have a
completely different experience in life than when I
entered college, --

MS. GAVORA: Yes.
VICE CHAIRPERSON THERNSTROM: -- where I roomed with one of three women who attended NYU Law School. I mean, that transformation is not due to Title IX, the fact that you've got, actually, women over-represented in medical school, for instance. I don't know what the law school proportion is, but I think it's now at parity.

I mean, that isn't a Title IX. That is an incredible societal change.

MS. SWEET: Is it not true that there were a number of universities that didn't even allow females to attend, the University of Virginia being one, that there has been this ongoing lack of opportunities for females? And we are transitioning away from it, but we're still not there.

I just want to say again the decisions that are made on campuses to eliminate men's opportunities are institutional decisions, though men still have more actual opportunities, but it’s true there have been men's teams in certain sports that have been dropped. That is not something that Title IX states should happen, something that the NCAA emphatically has said should not happen, but, unfortunately, those are institutional decisions that are being made because it's easier. It's easier to
administer a smaller program than it is a larger, more
broad-based program in the same way --

  COMMISSIONER HERIOT: But isn't that
disingenuous to say that this isn't due to Title IX?
I mean, you know, why isn't it warm in January?
Because it's not. There are limited funds. If you
tell people that they have to have proportionality,
they believe that is their safe harbor. They are
going to achieve it by cutting men's programs. I
mean, that's just --

  MS. SWEET: All you're telling the
institution is that they have to --

  COMMISSIONER HERIOT: -- saying it's not
required by the law. It just means that you don't
care that things happen.

  MS. SWEET: You're telling them that they
need to provide equity. And you're not telling them
--

  COMMISSIONER BRACERAS: How do they get
the money to do it?

  MS. SWEET: I had an institution that had
23 sports. We had several years of budget cuts. We
never dropped a sport.

  COMMISSIONER BRACERAS: And that's great.

  MS. SWEET: We took the --
COMMISSIONER BRACERAS: I applaud that.

MS. SWEET: We divided our resources up differently. And every institution has an opportunity to do that, but they choose not to do that because they want to put more of their resources into a select number of sports.

I live on campus. I know what that's like. People in the NCAA live on campus. They know what that's like. The university presidents, who have responsibility for looking out for both their male and female students in all aspects of the campus, know what it's like. And what they are saying is this survey method is not the right approach.

COMMISSIONER BRACERAS: I have a quick specific question. And that is why isn't the College Board survey of interest a good measure of interest and ability? Is it because it's too broad and too national?

MS. SWEET: I'm not familiar with what that is.

COMMISSIONER BRACERAS: I heard Ms. Gavora reference the fact that the College Board asks students their interest in participating in collegiate athletics. Is that --

MS. GAVORA: And signing up for the PSAT
and the SAT.

COMMISSIONER BRACERAS: Right.

MS. GAVORA: It was at least the case when
I wrote my book about it.

COMMISSIONER BRACERAS: Okay. So let's
say, for example, that in a given year the College
Board asks people when they are signing up for the
PSAT or the SAT their interest in sports and that
information reflects a 60/40 percent disparity in
interest levels with 60 percent of the men expressing
interest, 60 percent of those expressing interest
being men and 40 percent of those expressing interest
being women.

Why would a school not comply with Title
IX if their participation rates mirrored that survey
data?

MS. SWEET: First of all, I am not
familiar with that survey. And based on what you just
said, again, you're freezing what has been a bias in
the past.

COMMISSIONER BRACERAS: Well, see, again,
that is very revealing to me because we started off
today with critiques of this particular survey, of the
particular survey that the department has put forward
as a model for universities to use.
But what I am really hearing is that you don't like surveys --

MS. SWEET: No.

COMMISSIONER BRACERAS: -- because surveys freeze. What you just said was --

MS. SWEET: In isolation.

COMMISSIONER BRACERAS: Can I finish?

MS. SWEET: In isolation.

COMMISSIONER BRACERAS: What you just said was that a survey that reflected a disparity in interest would freeze discrimination. Now, that disparity in interest is real. It's out there. I'm not saying what caused it.

But if you believe that the disparity in interest is caused by discriminatory factors in society, then you don't really support the third prong.

MS. SWEET: What do you think the result would have been if you had administered that survey in 1971?

COMMISSIONER BRACERAS: I think it would have been different.

MS. SWEET: And so then it would have been okay to have 90 percent of the opportunities going to 10 --
COMMISSIONER BRACERAS: No, no, no, no.

At that time.

CHAIRPERSON REYNOLDS: Are you --

COMMISSIONER BRACERAS: Let me finish. At that time because as the interest level changes over time, --

CHAIRPERSON REYNOLDS: Right.

COMMISSIONER BRACERAS: -- now that the interest level is higher, the opportunities need to be higher for women. And in five years from now, if the survey isn't 60/40 but, rather, 70 -- the other way around -- I'm sorry -- closer to proportionality, 50/50, then the opportunities would be divided that way.

MS. SWEET: And a good part of what influences interest is what people see. I have talked to so many college students --

COMMISSIONER BRACERAS: But again you're revealing your hand here because --

MS. SWEET: I would like to finish what I was saying.

COMMISSIONER BRACERAS: Okay.

MS. SWEET: I have talked to so many high school and college students who have indicated that if they don't see females participating, then they don't
know that that is an opportunity that they could have. And that goes down into high school. That goes down into elementary schools.

VICE CHAIRPERSON THERNSTROM: I don't know how --

MS. SWEET: So based on what you have said, if you don't see females participating, then how are you going to know that that is an opportunity that should be available to you?

COMMISSIONER BRACERAS: Well, I'll tell you. You have revealed your hand because what you have really said is that the current interest and ability of students, not only at the college level but those in the pipeline, those taking the PSATs several years before they go to college, is insufficient to satisfy your sociological world view of where you want to be in ten years.

MS. SWEET: I think what we're --

COMMISSIONER YAKI: That's not what she is saying at all, Commissioner Braceras. What she is saying is that surveys in and of themselves are inherently limited. They are backward-looking. They are dependent on historical concepts. If you take a --

COMMISSIONER BRACERAS: A survey of
students taking the PSAT is forward-looking to where they want to be in college.

CHAIRPERSON REYNOLDS: One at a time. One at a time.

COMMISSIONER YAKI: If you are in an environment where you do not see young women playing ice hockey, if you are not in an environment where you see Lisa Fernandez -- I went to Cal; so I can say this -- throw a 95-mile-an-hour softball curve ball past someone and strike out 15 people in a row, you don't know about this stuff.

So when you say that they're revealing their hand, they're revealing their hand only in one sense. And that is they have a strong bias, as would any under-represented group, to ensure that opportunities are available and access to those opportunities are available.

I do not understand why you're trumping this reveal the hand. Of course, this is what Title IX is all about. It has been, unfortunately, now and I've seen here a victim of its own success because there's this backlash by people who believe that now, oh, my God, they cut the boys' ping pong club and we're not going to Tech. But we all know when we go into --
JESSICA GAVOR: I really object to this character assassination.

COMMISSIONER YAKI: -- the Commission, that we make decisions based on whole different reasons other than what people perceive them to be. And I just cannot sit back here and have anyone sort of -- how should I put it? -- trying to undercut the motives of someone who I believe are aimed at increasing --

COMMISSIONER BRACERAS: No.

COMMISSIONER YAKI: -- opportunities for young --

COMMISSIONER BRACERAS: No. I'm sorry. I have to step in here. Nobody is trying to undercut anything. What I'm trying to ascertain is a difference, frankly, in world view.

And I think all of us here are committed to increasing opportunities for women. I want more opportunities for my daughter. I mean, I, like Commissioner Heriot, am a complete nerd when it comes to sports and never played sports and, frankly, have no interest in playing sports.

But, as I've said several times, I have three athletic daughters. And they certainly didn't get that way from watching their mother. I mean,
they're not athletic because of Mia Hamm or because of any of these. They don't even know who Mia Hamm is. Okay? They are athletic because it's what they like, because their father enjoys it, for whatever reason.

But the bottom line is I think we have a difference in world view here. And one world view posits that if you were to strip away all aspects of discrimination, that things would eventually be equal in terms of 50/50 proportional representation.

**VICE CHAIRPERSON THERNSTROM:** In what --

**COMMISSIONER BRACERAS:** And another world view posits that, even in the absence of any discriminatory factors, there will be disparities in life amongst different subgroups. And if you can't bridge that gap in the way we see the world, then the discussion about what type of survey is best or what prong of the test is best is never going to be resolved.

**COMMISSIONER YAKI:** Well, I understand that, Commissioner. But in setting up this dichotomy, all you have simply done, as far as I'm concerned, is set the dichotomy between the philosophy of the majority on the Commission, the philosophy of the minority on the Commission.

I mean, that is sort of where the rubber
meets the road in terms of the fact that there are some of them, some people, such as myself, who believe that you need to continue to take affirmative steps and affirmative action to remediate past discrimination, notwithstanding the fact that other people believe -- and I'm not criticizing anything at this point -- that you simply take away the nondiscriminatory factors and things will somehow level on their own.

I just don't happen to support that point of view. I support something that is much more proactive, much more affirmative in nature, and one that seeks to use the good role and power of the law and government to create a better society and not simply hope that some magic hand will come out and make it all better.

PARTICIPANT: But in the --

CHAIRPERSON REYNOLDS: Okay. Okay, folks.

COMMISSIONER YAKI: All you're doing is distinguishing between the two world views that the --

JESSICA GOVORA: In the end, there is the law. There is the law that we are here to discuss and the text of the law.

CHAIRPERSON REYNOLDS: We could go on for several days, but we are going to have to wrap this
up. Two last opportunities here.

VICE CHAIRPERSON THERNSTROM: Yes.

CHAIRPERSON REYNOLDS: Commissioner Kirsanow and Mr. Cohen and --

MR. COHEN: I just have a very brief thing that I want to say that might help focus the discussion where we have kind of gone to.

CHAIRPERSON REYNOLDS: Good luck.

(Laughter.)

CHAIRPERSON REYNOLDS: Give it a try.

MR. COHEN: There is a distinction. And I think it might help illustrate why seemingly folks are talking past each other. And, actually, it is a point that Ms. Gavora just made.

Title IX is generally about improving opportunities for women, but the three-prong test is a little bit narrower. You are talking about different aspects of the global concept that is Title IX.

Globally, you know, from a policy perspective, yes, opportunities for women should be increased. But once you focus down on the test itself, the law since 1979, you're talking only about the interests of current or admitted students.

And that's a distinction that helps explain Commissioner Braceras' "differences of world
views.” If you focus down on purely what is required under the law, under prong three, that sets up a different scheme than these kind of global concerns that we’re talking about, which, yes, is part of Title IX, expanding opportunities for women. But it doesn't quite fit in where we started this discussion.

CHAIRPERSON REYNOLDS: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Yes. I have more than two questions but not too many. They're very specific and narrow. I think most of them go to Mr. Cohen.

In part three, it talks about a survey with respect to interest but also ability. How is ability determined? Who makes that judgment? Is it the respondent or is it the respondent and coaches or someone else?

MR. COHEN: There is an assessment process that is laid out in the additional clarification that relates to ability. Recall again that the test under prong three has the different aspects. There must be interest. And those people who are interested must have ability, and there must be the likelihood of competition.

There is a question on the model survey
that asks students to self-identify their level of ability. Beyond that -- and maybe this is a question better asked of Mr. Black -- I'm not sure what weight that receives.

I know that if there is a showing of requisite interest according to the model survey interest results, the school is required to move into that assessment phase. And during that assessment phase, the additional clarification lays out a number of different ways that ability can be measured.

And it's subjective. A lot of it comes down to coaches' opinions and a number of different factors.

COMMISSIONER KIRSANOW: Okay. Second question is, what happens if the survey presuming it's administered broadly to all students demonstrates an increase in men's interests or an increase that exceeds that of females in terms of unmet interests? Is there a mandate, then, or do you know if there has ever been an instance where that has happened in which the colleges then increased men's sports?

COMMISSIONER BRACERAS: I think that they would never increase men's sports under that circumstance. It would be too risky.

MS. GAVORA: Prong three requires only the
under-represented sex.

COMMISSIONER BRACERAS: Right.

COMMISSIONER KIRSANOW: But that is the question. What is the definition of under-represented? Is it simply because of proportionality?

MS. GAVORA: Because of proportionality, exactly.

COMMISSIONER KIRSANOW: Okay. Because we have no empirical data as to what the broad societal interest is.

MR. COHEN: Well, let me try to answer your question. The reason I hesitated is because it is true that prong three is concerned about the under-represented sex.

COMMISSIONER KIRSANOW: Yes.

MR. COHEN: But once you reach the point of complying with the law, no matter whether it's prong one, prong two, once you're in compliance with the law, then you are free to add sports on either side.

COMMISSIONER KIRSANOW: Right.

MR. COHEN: So if through adding women’s sports, through a lack of showing of unmet interest, if you reach a point where the women on campus are
receiving adequate opportunities under the law, then there would be an opportunity to add on the men's side, but --

COMMISSIONER BRACERAS: No. They'll throw it out of proportion. If you're on either side, it will throw you out of proportion.

MS. SWEET: Prong three, you don't have to be in proportion. You met prong three.

MR. BLACK: You've got to stay with prong three, then.

COMMISSIONER KIRSANOW: Okay.

MR. BLACK: You can choose to add a men's team.

COMMISSIONER TAYLOR: Nobody's going to do that, you all, because you will end up with an OCR investigation, which you can preclude and completely eliminate if you are in proportion.

I mean, that is the test. Isn't that really the test, you all? You determine when an investigation is open and how it is resolved and how many times someone using prong three has satisfied OCR's concerns or worked on an agreement with OCR? That is the real test.

MR. BLACK: If we get a compliance and we go and check data and it's proportional --
COMMISSIONER TAYLOR: Right.

MR. BLACK: -- it's probably an insufficient complaint. We have to investigate whether --

COMMISSIONER TAYLOR: You just tell me how many times there has been a complaint and there is the no proportionality. And then someone is in agreement with OCR. You tell me that. Then I'll tell you the real road.

And if the answer is, well, most folks use prong three and trying to use prong three as an affirmative defense, for lack of a better term, enter into an agreement, then that tells me what is really going on relative to prong one and prong three. They are not interchangeable. They actually work together.

COMMISSIONER KIRSANOW: Ms. Gavora, you indicated that there are only 17 men's gymnastic teams. Is that true?

MS. GAVORA: Yes.

COMMISSIONER KIRSANOW: Okay. The GAO report indicated, at least by my reading, 170 wrestling teams eliminated and 90 men's gymnastic teams eliminated, 80 tennis teams eliminated, 45 track teams eliminated, swim teams, football teams even.

Do you have any further data or is that
data that is pointedly directed toward Title IX? Is there anything that points to the fact that Title IX had some impact on that?

And, second, are there any female teams that have been eliminated at any point over the same survey period, if you know?

MS. GAVORA: Oh. Well, there certainly --

COMMISSIONER BRACERAS: Oh, sure.

MS. GAVORA: -- have been female teams eliminated. And I can't say with any certain beyond continuing ongoing anecdotal evidence of schools eliminating teams and saying it's because of Title IX.

And the way the law is currently being complied with, schools unless they are proportional cannot eliminate women's teams. It's illegal. Ms. Samuels' group brings lawsuits routinely against schools that eliminate and --

MS. SAMUELS: When you say we do it routinely --

MS. GAVORA: -- that aren't proportional.

So the only place schools can go is to men's teams.

MS. SWEET: I have a number for you.

MS. GAVORA: I am not arguing against the fact that money doesn't have something to do with this. Of course, it does. Resources are limited.
But where does the law push forth the university's hand when it has to cut back? It forces it on the men's teams. That's where the --

COMMISSIONER KIRSANOW: I had one more question for --

MS. SWEET: I just wanted to give you some numbers in response to your question.

COMMISSIONER KIRSANOW: Yes.

MS. SWEET: For gymnastics, in the same time period that 60 men's gymnastic teams were dropped, 80 women's gymnastic teams were dropped.

MS. GAVORA: Okay. And there are over 100 women's teams today and 17 for boys.

COMMISSIONER KIRSANOW: Okay. And this was for Mr. Black and/or Mr. Cohen. What are the metrics by which unmet interests are made in this context? Because it's interesting. We've been talking about sports as if it's kind of generic in terms of the number of participants.

Again, you look at the sidelines of Ohio State, Michigan, and there are 100 guys out there on a football team. But for a basketball team, there would only be 15. There are no female football teams that I'm aware of that are not club teams.

So in terms of assessing the
opportunities, isn't there going to necessarily be a distortion in the numbers? Because there are going to be more participants in certain sports than in others.

    MS. GAVORA: Title X makes provision for that.

    COMMISSIONER KIRSANOW: Okay. And how does it? That's my question.

    MS. SAMUELS: Title IX looks at individual participation opportunities, not at teams. Schools are free to structure their sports programs as they choose. They can have different numbers of men's and women's teams, the same number of men's and women's teams. They can allocate those sports opportunities across any structure of teams that they want.

    COMMISSIONER KIRSANOW: I guess my question is -- and I don't know this, and I'm asking. If, let's say, in a given university you have got 100 female participants across all sports and 100 male participants across all sports but all the male participants are congregated in football --

    COMMISSIONER BRACERAS: That's okay.

    COMMISSIONER KIRSANOW: Okay?

    MS. GAVORA: Yes.

    COMMISSIONER KIRSANOW: Now, let's say that doesn't meet the interests, though. The
interests are simply not met as a result of that. You still have much unmet interest. Is the metric still determined based on the 100 participants on the one male sport? Is that how it works?

MS. GAVOR: Yes, bodies on the field.

COMMISSIONER KIRSANOW: Okay. Good enough. That's what I wanted to know.

CHAIRPERSON REYNOLDS: Okay. Vice Chair Thernstrom? And then we'll wrap it up.

VICE CHAIRPERSON THERNSTROM: Just one comment. Ms. Sweet and Ms. Samuels both seem to believe that if you're a woman in America in 2007, it is possible to think, to believe, that women can't play sports, that they've got this 1950s image of women in their heads and, therefore, Title IX is needed to deliver the message that women as well as men are potential athletes. And, you know, it just seems to me out of whack with the reality of the whole cultural message that is pervasive.

MS. SAMUELS: If I could just respond? Title IX has been enormously successful in communicating to women that they have opportunities and in opening the doors to those opportunities. But there is still pervasive discrimination, as I think Mr. Black would say, based on an analysis of OCR
complaints and based on case law.

There are too many circumstances still in which women are not getting the opportunities they deserve and in which their teams are getting second-class treatment when they are allowed to play.

COMMISSIONER BRACERAS: That's a different issue, though. That's a very different issue.

CHAIRPERSON REYNOLDS: Hold it. Hold it. We are trying to stumble toward the finish line. Let's give Ms. Samuels the last word on this.

MS. SAMUELS: I'm done.

CHAIRPERSON REYNOLDS: Thank you very much. It was a spirited exchange. It was quite helpful to hear the array of views on this issue. Thank you.

Now for the commissioners, let's take a five-minute break.

(Whereupon, the foregoing matter went off the record at 12:51 p.m. and went back on the record at 1:01 p.m.)

V. STATE ADVISORY COMMITTEE ISSUES

CHAIRPERSON REYNOLDS: Folks, we have one issue left. And here it goes. At the April 13th meeting, the motions to approve the rechartering of Virginia and the Michigan State Advisory Committees
were tabled in order to have an opportunity to respond to a letter received from Congressman Conyers, Chairman of the House Judiciary Committee, and Congressman Nadler, Chairman of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, regarding the Commission's process for selecting SAC members and SAC chairs.

We shared with Chairmen Conyers and Nadler the dramatic improvements that the Commission has made in ensuring balance and quality of the SAC since rechartering began in 2006 under our guidelines.

The Commission responded on May 10th, 2007 to the letter from the two congressmen. Earlier today we voted to table discussion of the rechartering of the Virginia SAC. So that the only other state advisory committee to be rechartered is the Michigan SAC.

At the last meeting, Commissioner Yaki requested that we divide the motion to appoint the SAC members from the motion to appoint the SAC chair. As a response to that request, we will vote on these motions separately today.

I move that we recharter the Michigan State Advisory Committee. Under this motion, the Commission appoints the following --
COMMISSIONER YAKI: Mr. Chair?

CHAIRPERSON REYNOLDS: Yes?

COMMISSIONER YAKI: I will withdraw the motion on this one to divide the question.

CHAIRPERSON REYNOLDS: Okay. Under this motion, the Commission appoints the following individuals to that committee based on the recommendations of the Staff Director. The first individual is William Allen. It has been recommended that he also serve as chair. We also have Lawrence Almeda, Marion Brown, Donna Budnick, Leon Drolet, James Fett, Imad Hamad, Kary Moss, Howard Schwartz, Arthur White, Levon Yuille, Gerald Zandstra.

These members will serve as uncompensated government employees. And the Commission appreciates the hard work that they will no doubt contribute to this State Advisory Committee. Under this motion, the Commission authorizes the Staff Director to execute the appropriate paperwork for the appointment.

Is there a second?

VICE CHAIRPERSON THERNSTROM: Second.

CHAIRPERSON REYNOLDS: Discussion?

COMMISSIONER YAKI: Yes.

CHAIRPERSON REYNOLDS: Okay.

COMMISSIONER YAKI: One, I would like to
make a motion to send this back to the Staff Director for reconsideration. I think that there are questions of genuine imbalance, political affiliation imbalance, diversity of viewpoint imbalance that I believe need to be better addressed.

In light of the fact that we responded to the chairman of the Judiciary at 4:18 p.m. yesterday so they only responded back last night, I think that I renew my motion to recommit this back to the Staff Director. I renew my objection and would like to recommit this back to the Staff Director.

And there are two very particular reasons why I think we should. One, I am a little uncomfortable about the person selected as chair, someone who was on the Commission, who resigned under interesting circumstances. That is all I will say.

COMMISSIONER HERIOT: Don't you need a second before you can make your argument?

COMMISSIONER YAKI: Well, I'm making my argument for the motion while waiting for the second.

COMMISSIONER HERIOT: Well, you're supposed to get a second once you stated the motion. You're starting discussion prematurely.

COMMISSIONER YAKI: Well, that may be so, but the fact is that I just spoke with Commissioner
Melendez, whose plane is just about to take off.

VICE CHAIRPERSON THERNSTROM: Well, but he's not here. That's irrelevant, Michael. It really is.

COMMISSIONER HERIOT: Your motion fails for a second.

COMMISSIONER YAKI: Well, in that case, you can cut off my microphone right now if you want to, but I am going to talk about the fact that I asked Richard Schmechel to release to all of you a gender disparity analysis that I have done on the state advisory committees for the Commission on Civil Rights and the recent appointment to show that we are at a three to two male to female ratio on our staff.

I am doing this because we actually now have an oversight committee that actually -- the Commission. I want to see it fulfill its statutory mandate. And I am concerned about the consequences to us and to this Commission should we continue to go along this pathway, where we have already had a new one here, Professor Heriot, when 35 SAC chair people wrote the letter in June of 2006 expressing their concern about the SAC process and the administration of SAC. You were not here when --

CHAIRPERSON REYNOLDS: Commissioner Yaki?
Commissioner Yaki, we have always bent over backwards. And we have not been sticklers for the Robert's Rules of Order, but if you don't have a second here, I think that we should move on.

COMMISSIONER YAKI: Well, you see, I am concerned that there are only two in the minority and we are going to require a second because the second, Mr. Chair, I find the lack of a courtesy second to be extremely hostile.

And I think that in that case, I understand what my next steps are going to be. And we are going to proceed forward on a path that is not going to be pleasant on the Commission if they choose to simply stifle what I have to say --

CHAIRPERSON REYNOLDS: Michael, no one is trying to --

COMMISSIONER YAKI: -- because Commissioner Melendez could not be here.

CHAIRPERSON REYNOLDS: Michael, nobody is trying to stifle you. And, you know, my two cents also is that threats are generally unhelpful. Now --

COMMISSIONER YAKI: Mr. Chairman, I don't make threats.

CHAIRPERSON REYNOLDS: Well, call them what you will. I don't think --
COMMISSIONER YAKI: I am simply stating the fact that I see based on --

CHAIRPERSON REYNOLDS: If you want to be effective --

COMMISSIONER YAKI: -- my years on Capitol Hill.

CHAIRPERSON REYNOLDS: That's fine. If you want to be effective, threats aren't the way to go. I think that your powers of persuasion are strong. And in the past, you have convinced us to deviate from rules by making arguments, as opposed to threats.

COMMISSIONER YAKI: Well, Mr. Chairman, if someone is trying to cut me off from making my argument, then what am I supposed to do? Am I supposed to simply say, "Okay. I will shut up and not" --

CHAIRPERSON REYNOLDS: Well, before the threat came along, I was going to see if there was support to suspend the requirement of a second.

COMMISSIONER YAKI: Well, Ms. Heriot made it very clear that was not where she was going.

CHAIRPERSON REYNOLDS: That's fine, but we could --

COMMISSIONER HERIOT: You were simply out
of order. It's a question of when you talk about a
motion, you have to wait for a second. They could
have asked for a second.

COMMISSIONER YAKI: Ms. Heriot, I've been
a commissioner way longer than you. I understand
Robert's Rules very well. And so --

COMMISSIONER HERIOT: Not too well
evidently.

COMMISSIONER YAKI: If the Chairman wishes
to suspend the rule, that's fine. If he doesn't,
that's fine. But it seemed clear to me that I did not
see the assistance forthcoming.

CHAIRPERSON REYNOLDS: Well, the
assistance would have materialized but for a threat.

COMMISSIONER YAKI: I don't know what
threat you're talking about, Mr. Chairman. I am
simply saying that this has been a frustrating issue.
This has been an issue where I have attempted to say
quietly and privately that we need to figure out a way
to move forward and work forward on this issue, rather
than simply shoving it down the road right here.

CHAIRPERSON REYNOLDS: Do you think it
would be appropriate -- well, it would have been
helpful had we received this document with a little
notice so that we would have an opportunity to review
COMMISSIONER YAKI: I would have liked to have reviewed the response to Mr. Nadler, but I have never seen that document either.

CHAIRPERSON REYNOLDS: The document wasn't distributed, Ken?

STAFF DIRECTOR MARCUS: It just went out yesterday. During the last meeting, Commissioner Yaki made a specific request that if we distribute materials within a few days prior to a Commission meeting, that the way we should distribute it to commissioners was by putting it in front of their place during the next meeting. We followed his request.

COMMISSIONER YAKI: Oh, no. STAFF DIRECTOR MARCUS, please. I'm not there. So what is my alternative?

I was talking about the fact that frequently when I travel from the West Coast, I leave on a Wednesday or a Thursday. And these e-mails come over, and I have no way of printing them out.

Now, that to me is completely disingenuous. And I find it rather offensive for someone who is not there, then, to hide behind the idea that "Oh, well. I'm sorry we didn't e-mail it
because we're only going to put it out in front of the commissioners."

It was not an either/or scenario. It was simply to say there are times when traveling I don't have access to a printer in order to see something, nor do I have access to a computer when I am at the Commission hearing. I can't read it unless I have a hard copy there.

CHAIRPERSON REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: These things went out 4:18 p.m. Washington time yesterday afternoon.

CHAIRPERSON REYNOLDS: Commissioner Yaki, I am not sure of this, but if you are suggesting that we have a moratorium on rechartering SACs until we reach some type of compromise, it's not clear to me that there is sufficient support amongst the commissioners to have this moratorium. And it sounds like that is what you are asking for.

COMMISSIONER YAKI: I never said that I asked for a moratorium. I was saying that in this instance, we have a particular question about a particular SAC, one which happens to be important to the Chair of the House Judiciary Committee, if not Oversight Committee.

And I would find it rather -- I think it
would be wiser if these questions and discussions could be dealt with so that we can move forward, rather than engaging in, for lack of a better term, engagementship on when things go out and when things get returned and when these things get distributed because I believe that there should be for this -- look, we had the votes on changing the SAC rule. That was done openly. That was done deliberately. I voted no against it, but I continue to have questions about it.

And that was a different environment in which we were dealing with it. We have a new environment here, a new Committee chair, new members of jurisdiction with concerns and questions about what it is that we are doing.

I think if we are to have a productive relationship with that, rather than return to the days of preceding times before you, Mr. Chair, before STAFF DIRECTOR MARCUS, when Commissioner Braceras talked about it, Commissioner Kirsanow talked about it, during the days when hostility between the Commission and the Oversight Committee resulted in reams and reams of documents, all that kind of stuff went on that hampered the impact of this Commission. I would rather not see us return to those days.
I understand you are in the majority. I understand you have a point of view that you are going to go across. But there is, as they say, no harm in dialogue, no harm in talking, and no harm certainly in following what I would think some protocol and respect in the situation where another set of questions has come over and you know part of it is because the chairman has a keen interest in the State of Michigan, that we resolve that as we go forward.

Having to say let him have his say and then we vote, that means, well, you know, I know you have additional questions, but we're not going to bother and we're going to vote. That is my concern.

CHAIRPERSON REYNOLDS: Michael, we can always have this conversation. In terms of extending a courtesy to the committee that oversees the Commission, we did that.

COMMISSIONER YAKI: Well, just to be perfectly honest with you, Mr. Chair, sending over the answer at 4:18 in the afternoon the day before the Commission meeting in which it is going to be taken up is not going to be seen in quite the same light as you might seem to think it.

CHAIRPERSON REYNOLDS: Commissioner Yaki, we received the letter. We responded to the letter.
The letter did not ask us to place a moratorium in place in terms of rechartering. I'm sure that we will continue this conversation, but unless there is support around the table to table this. I guess that's what we -- I guess I can ask the question. Is there support around the table to table the vote on the Michigan SAC?

COMMISSIONER TAYLOR: Let me ask a question, if I may. Commissioner Yaki, would we be having this same discussion if this were not the Michigan SAC, if it were just another state SAC? Would your recommendation be that in light of the questions that they have posed that we postpone voting on the SAC or is this particular to the fact that the chairman comes from the state?

VICE CHAIRPERSON THERNSTROM: Well, it can't. You would have posed the same questions with respect to Virginia. So presumably it isn't --

COMMISSIONER TAYLOR: That's why I thought I would ask. And I'm trying to determine whether or not -- my point in asking the question is to determine whether or not if we did postpone it and another question is asked next month, are we going to be back at the same position?

COMMISSIONER YAKI: Well, if you want my
answer based upon my years of writing these letters
and staffing and people who did these letters and they
mean, I would refer back to the first letter that
Representative Chairman Conyers sent forth to us,
which says, last paragraph, "We will follow this
letter with a more detailed inquiry concerning the
Commission's actions. In the interim, we would hope
that the Commission consider with great care any
further action in this regard to ensure that the
integrity of the SAC system is preserved."

Now, they are not asking for a moratorium,
but they are clearly asking that we think about how we
go moving forward before we answer the question that
is set forth by the committee.

Now, in any dialogue between an agency and
a member, you can ask "If we answer these questions,
if we engage in dialogue, we have compelling reasons
to move on. There is chartering that needs to be
done. We are behind in a chartering system. Those
are issues that can be brought up and raised and
discussed."

But I think that in the life span of how
things work in government, unfortunately, not just in
Congress but also with us, you know, sometimes things
take a little longer than they should. Sometimes
things take a little bit longer because it should be.

I think this is a situation where the chairman has in his first letter said a detailed inquiry of what's coming. That has come in response to our first letter that we sent back to them. And there is a request that we consider with great care further action. And given the fact that this is the chair of whose state we are considering, I think taking it all together, it would make one think twice about moving forward until some discussion has occurred, not just an exchange of letters, because I really truly do not want to see relations deteriorate between the two sides such that we end up how we did in the penultimate regime, where there was just a series of document requests, subpoenas, and stuff going back and forth, which serves, really, nobody's purpose whatsoever.

CHAIRPERSON REYNOLDS: Vice Chair Ternstrom?

VICE CHAIRPERSON THERNSTROM: Commissioner Yaki, it seems to me you are posing here a picture of some warm and fuzzy relationship between this Commission as it's currently composed and Chairman Conyers. And I don't think that that is in the offing.
COMMISSIONER YAKI: Commissioner, I think you are misunderstanding me. There is a difference between having warm and fuzzy and ensuring that, for lack of a better word, you are not unduly baiting the bear. That's all I'm going to say. Does that make it any clearer?

COMMISSIONER KIRSANOW: Michael, I will convey your description of Mr. Conyers to him next time I meet him.

VICE CHAIRPERSON THERNSTROM: You know, there is going to be a fundamental difference between our conception of the composition of these SACs and Chairman Conyers' conception. I don't know how we are going to bridge that difference. I don't think we're out to bait him. I think that there is a problem of different politics, different viewpoints here.

COMMISSIONER YAKI: Well, I think, as I was saying, this is a situation where we do have some differences. I have no illusions that I'm going to lose on those differences, as I have on every single vote on the SACs to date, but to the extent that our Oversight Committee does get involved, I just think it behooves us to at least engage in some dialogue.

There definitely is going to be an agreement to disagree between the majority and the
Oversight Committee. I just don't think we need to do anything that would be seen as escalating it at all.

And I can just tell you that as much as someone remarked on the earlier panel that the clarifications came out on a Friday afternoon, which is trash day in Washington, D.C., our response coming at 4:18 p.m. the day before this, I am pretty sure will not be seen in quite the same kind of light as we would hope it to be, no matter how responsive or complete that answer was.

VICE CHAIRPERSON THERNSTROM: Then suppose it had arrived two days before. What would be different?

COMMISSIONER YAKI: Two days before would give an opportunity for some discussion.

VICE CHAIRPERSON THERNSTROM: But we would be at the same loggerheads. I mean, that --

COMMISSIONER YAKI: I would be much more at a disadvantage in asking for those if I had known that the discussion had occurred and there was an agreement to disagree and a problem to follow up on these with the statement made that, you know, despite this, we're going to need a report.

Outside of that communication, I think there is a vast difference in how it can be perceived.
and what it means to future relations with our oversight committee. That is all I am saying.

People would come out all the time. I mean, when I worked on the Hill, we had the first two or three years that I was working, we had a Republican administration. And they would come in. And we would disagree. And they would tell us how it was going forward, and we would argue a little bit. But in the end, we knew that that had occurred.

No one could say to the other in the end, "Obey me. And this is what is going to happen." I have no illusions that is going to happen. But there is just a big thing that I'm concerned we're not following that has impressions beyond a policy difference between --

STAFF DIRECTOR MARCUS: I believe that counting both Michigan and Virginia, we will have chartered 14 of the recently expired, leaving the remainder, 37.

VICE CHAIRPERSON THERNSTROM: We have many more SACs down the road.

COMMISSIONER TAYLOR: How far along are we with the balance?

STAFF DIRECTOR MARCUS: We're in varying states. I mean, there are a number that are very far
along. I don't know whether it's a half or some number. There are certainly a lot of them that are very far along. And then there are a bunch where we're in an early stage.

COMMISSIONER TAYLOR: Were you anticipating offering some up for a vote at our next business meeting?

VICE CHAIRPERSON THERNSTROM: Virginia.

COMMISSIONER TAYLOR: Well, other than Virginia.

STAFF DIRECTOR MARCUS: The next scheduled business meeting is supposed to be July, as I recall, right? It's not June but July. I would say that it is certainly my hope to have them, but I can't say which one.

And I'm not sure. This far out it's hard to say because I would say there are a number of them that are advanced. But I can't tell yet how long the last minute is going to take. So my hope is yes, but I'm not sure.

CHAIRPERSON REYNOLDS: Comments?

(No response.)

CHAIRPERSON REYNOLDS: Okay. Is there -- COMMISSIONER TAYLOR: Let's stop. Can we get five minutes off the record?
CHAIRPERSON REYNOLDS: Okay. Commissioner Yaki, we are going to go off the record for five minutes.

(Whereupon, the foregoing matter went off the record at 1:26 p.m. and went back on the record at 1:32 p.m.)

CHAIRPERSON REYNOLDS: We're back on the record. After having a brief discussion, it is clear that there is not sufficient support to table the vote on the Michigan SAC. So we will be moving forward.

So at this time, unless there are additional comments or questions, I call the vote. All in favor?

COMMISSIONER YAKI: Wait, wait, wait, wait, wait. No. I will divide the question.

CHAIRPERSON REYNOLDS: Okay. The motion that is on the table now is I move that William Allen be chair of the Michigan SAC. Is there a second?

COMMISSIONER HERIOT: Second.

CHAIRPERSON REYNOLDS: Discussion?

COMMISSIONER YAKI: Yes. I will just simply say, as I repeated before, I am concerned about this nominee based on his previous activities and would urge the Commission to think about that.

CHAIRPERSON REYNOLDS: Can you provide us
with some details? Could you lay out your concerns?

COMMISSIONER YAKI: I believe that -- hang on a second. I can only go by published newspaper reports. But there was an incident involving him when he was the chair at the time of the Commission involving an alleged kidnapping of a Native American child.

CHAIRPERSON REYNOLDS: Was he convicted?

COMMISSIONER YAKI: And he was not convicted, but he then was invited to speak at an organization that apparently the Bush one administration was not exactly happy he was going to speak at. Shortly thereafter, he resigned for reasons that can only be speculated at.

But from those and apparently even the Republican colleagues on the Commission were reluctant to defend him with regard to the incident on the Indian reservation.

So I just think that there are some questions that need further investigation and discussion.

(Pause.)

COMMISSIONER YAKI: I have a New York Times article dated March 27th, 1989, Chairman of the United States Civil Rights Commission, William Barclay
Allen. And that is the day that he formally apologized. There was an Indian trial.

CHAIRPERSON REYNOLDS: Okay. Michael, we're going to take a five-minute break.

(Whereupon, the foregoing matter went off the record at 1:37 p.m. and went back on the record at 1:44 p.m.)

CHAIRPERSON REYNOLDS: Michael, if we were to table the vote on the Michigan SAC, would you be willing to support a vote at our next meeting on Michigan and Virginia?

COMMISSIONER HERIOT: And whatever else is ready.

COMMISSIONER YAKI: Who said the "Whatever else is ready"?

(Laughter.)

CHAIRPERSON REYNOLDS: Okay. If it is just those two SACs, would you be willing to support the vote?

COMMISSIONER YAKI: I would be willing to support a vote provided that we provided a timely response to Chairman Nadler's letter. And what I mean by "timely," not the day before.

CHAIRPERSON REYNOLDS: Okay. I think that's good enough. So we are going to table the vote.
on both the Virginia and Michigan SACs. And we will
take up the vote at our next meeting.

COMMISSIONER KIRSANOW: Do we have to
actually vote on this?

CHAIRPERSON REYNOLDS: Do we have to?

COMMISSIONER KIRSANOW: Yes. Wasn't there
a motion on the floor?

CHAIRPERSON REYNOLDS: Okay. Dot our
"i's." I move that we table the vote on both the
Michigan and Virginia SAC until next months. Is there
a second?

COMMISSIONER KIRSANOW: Second.

CHAIRPERSON REYNOLDS: Discussion?

(No response.)

CHAIRPERSON REYNOLDS: All in favor?

(Whereupon, there was a chorus of "Ayes.")

CHAIRPERSON REYNOLDS: Any opposition?

(No response.)

CHAIRPERSON REYNOLDS: Any abstentions?

(No response.)

CHAIRPERSON REYNOLDS: The motion carries.

Thank you, everyone. We are done.

(Whereupon, the foregoing matter was
concluded at 1:46 p.m.)