

U.S. COMMISSION ON CIVIL RIGHTS

+ + + + +

BRIEFING AND MEETING

+ + + + +

FRIDAY,
MAY 11, 2007

+ + + + +

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
 DAAVID 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

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

COMMISSIONER ASSISTANTS PRESENT:

LISA NEUDER
DOMINIQUE LUDVIGSON
RICHARD SCHMECHEL
KIMBERLY SCHULD

PANELISTS PRESENT:

DANIEL A. COHEN, ESQ., Senior Associate, Rogers &
Hardin LLP
JESSICA L. GAVORA, 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

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

I N D E X

Meeting Agenda:

I. Approval of Agenda	4
II. Approval of Minutes of April 13, Meeting	12
III. Announcements	13
IV. Staff Director's Report	13
V. State Advisory Committee Issues	174
Virginia SAC	
Michigan SAC	
VI. Future Agenda Items	16
VII. Adjourn	

Briefing Agenda:

Title IX Athletics: Accommodating Interests and Abilities	16
Introductory Remarks by Chairman	16
Speakers' Presentation	26
Questions by Commissioners and Staff Director	64

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

P-R-O-C-E-E-D-I-N-G-S

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.)

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 CHAIRPERSON REYNOLDS: Thank you. Any in
2 opposition? Any abstentions? The motion passes
3 unanimately.

4 **V. State Advisory Committee Issues**

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

11 Is there a second?

12 COMMISSIONER KIRSANOW: Second.

13 CHAIRPERSON REYNOLDS: Discussion?

14 COMMISSIONER YAKI: Yes, I have
15 discussion.

16 CHAIRPERSON REYNOLDS: Yes?

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

20 VICE CHAIRPERSON THERNSTROM: Because?

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

24 CHAIRPERSON REYNOLDS: Well, we have two
25 letters. The first we received from Conyers. We

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 responded to that letter. We received a second
2 letter, I believe it was yesterday, is that right?

3 STAFF DIRECTOR MARCUS: Last night, yes.

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

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

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

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

21 COMMISSIONER YAKI: Well, I think that the
22 first part of the letter, as I read it, certainly goes
23 to a more general question about SAC appointments in
24 general. We can discuss that, if you want to later,
25 but just in terms of this motion, I would say that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 that can be discussed. I don't know what the intent
2 of the chairman is. Perhaps a meeting might
3 facilitate clarification on that because I don't know
4 what it means, but I do think that if Virginia is
5 being postponed and Michigan is the subject of the
6 same letter as Virginia in the chairman's letter, I
7 believe that we should postpone it.

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

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

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

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

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 consider these additional individuals.

2 VICE CHAIRPERSON THERNSTROM: Why not?
3 Why can't we consider them later?

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

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

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

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

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

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

24 Is there a second for Commissioner Yaki's
25 motion?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 VICE CHAIRPERSON THERNSTROM: Mr.
2 Chairman, there doesn't seem to be.

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

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

9 VICE CHAIRPERSON THERNSTROM: That is
10 correct.

11 CHAIRPERSON REYNOLDS: Yes.

12 COMMISSIONER HERIOT: Withdrawn?

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

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

23 STAFF DIRECTOR MARCUS: I can't think of
24 any downside. We haven't been doing it in the past,
25 but we can certainly charter the state now and then

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 add the names later. That's within our rules.
2 There's no procedural reason we can't do it that way.

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

5 (Pause.)

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

11 (Ayes.)

12 CHAIRPERSON REYNOLDS: Any opposition?

13 COMMISSIONER YAKI: Yes.

14 CHAIRPERSON REYNOLDS: Any abstentions?

15 COMMISSIONER HERIOT: I abstain.

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

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

23 CHAIRPERSON REYNOLDS: Yes.

24 COMMISSIONER YAKI: I'd like to move to
25 postpone consideration of this item until Commissioner

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 Melendez joins. I'd like to amend the agenda to
2 postpone consideration of the Michigan SAC until
3 Commissioner Melendez joins --

4 CHAIRPERSON REYNOLDS: Commissioner Yaki,
5 we just voted.

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

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

14 Discussion?

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

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

22 COMMISSIONER HERIOT: We're expecting him
23 any minute?

24 CHAIRPERSON REYNOLDS: That is my
25 assumption. If that's not the case, the bottom line

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 is we will vote on this today unless the majority of
2 us decide --

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

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

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

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

12 CHAIRPERSON REYNOLDS: Did he intend to
13 participate by phone?

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

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

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

24 **II. Approval of the Minutes of the April 13, 2007**

25 **Meeting**

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 CHAIRPERSON REYNOLDS: May I have a
2 motion?

3 COMMISSIONER KIRSANOW: So moved.

4 CHAIRPERSON REYNOLDS: Is there a second?

5 COMMISSIONER BRACERAS: Second.

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

8 (Chorus of ayes.)

9 CHAIRPERSON REYNOLDS: Any in opposition?
10 Any abstentions? The motion passes unanimously.

11 CHAIRPERSON REYNOLDS: Next up we have the
12 announcements.

13 III. Announcements

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

24 Next we have the Staff Director's Report.

25 IV. Staff Director's Report

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

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

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

24 Last, I have to announce that in addition
25 to some of the retirements that we discussing during

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 the last month, we have another long-serving employee
2 who will be retiring from the Commission. I don't
3 know if she's here today. Barbara Fontana has served
4 as a Librarian of the Commission since April 1988 and
5 served as the Records Officer since 1994. She began
6 her library career at the U.S. Department of the
7 Interior Library and has worked as an independent
8 researcher for the Congressional Research Service at
9 the Library of Congress. We will miss her. She's
10 done a wonderful job here and will be retiring after
11 many years of service.

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

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

22 (Laughter.)

23 VICE CHAIRPERSON THERNSTROM: You're
24 getting a dollar.

25 COMMISSIONER KIRSANOW: You moved up. It

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 was 50 cents before.

2 (Laughter.)

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

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

8 **VI. Future Agenda Items**

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

13 **Briefing: Title IX Athletics:**

14 **Accommodating Interest and Abilities**

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

24 Beginning in 1979, the educational
25 institutions receiving funds had demonstrated

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 compliance with the Act's athletic requirements by
2 having a program that fully and effectively
3 accommodates the interests and abilities of a sex
4 that's under represented. In March of 2005, the U.S.
5 Department of Education's Office for Civil Rights
6 issued further guidance to assist schools in complying
7 with the athletic requirements.

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

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

25 I am going to introduce -- well, I'm going

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

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

7 (Laughter.)

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

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

25 VICE CHAIRPERSON THERNSTROM: I was just

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 going to say.

2 (Pause.)

3 CHAIRPERSON REYNOLDS: Okay, since 2005,
4 Mr. Cohen has studied the legal implications of the
5 Office for Civil Rights 2005 additional clarification
6 and its model survey. He co-authored an article
7 regarding compliance with prong three of the three-
8 part tests. The Law Review article was published in
9 2005 in the Vanderbilt Journal of Entertainment and
10 Technology Law. The article is titled, "Navigating in
11 the New Safe Harbor, Model Interest Surveys as a New
12 Tool for Title IX Compliance Programs."

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

18 Jocelyn Samuels is President for Education
19 and Employment at the National Women's Law Center
20 where she supervises an active litigation docket of
21 Title IX cases. Prior to joining the Center, Ms.
22 Samuels was labor counsel to Senator Kennedy. She
23 also worked for a decade as a senior policy attorney
24 at the Equal Employment Opportunity Commission where
25 she specialized in issues of sex and race

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 discrimination. Ms. Samuels received her law degree
2 from Columbia University and her bachelor's degree
3 from Middlebury College.

4 Ms. Sweet joined the NCAA as Vice
5 President for Championships and Senior Woman
6 Administrator in 2001 and in 2003 she was promoted to
7 Senior Vice President for Championships and Education
8 Services. Prior to her work with the NCAA, Ms. Sweet
9 served as Director of Athletics at the University of
10 California at San Diego beginning in 1975, when she
11 became one of the first women in the nation selected
12 to direct a combined men's and women's intercollegiate
13 athletic program. While at the University of
14 Wisconsin at Madison, she majored in physical
15 education and mathematics and served as President of
16 the Women's Recreation Association and National
17 President of the Athletic and Recreation Federation of
18 College Women. She was also elected to a two-year
19 term as Membership President of the NCAA in January of
20 1999 and was Secretary-Treasurer of the NCAA from 1989
21 to 1991.

22 Finally, we have David Black. Mr. Black
23 joined the Department of Education on November 1 of
24 2004. He is currently the Deputy Assistant Secretary
25 for Enforcement in the Department's Office for Civil

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 Rights. In this capacity, Mr. Black acts as the
2 principal advisor to the Secretary, Assistant
3 Secretary on civil rights enforcement to further the
4 mission of OCR. That mission is to ensure equal
5 access to education and to promote educational
6 excellence throughout the nation through vigorous
7 enforcement of civil rights.

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

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

25 (Pause.)

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

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

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

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

10 (Laughter.)

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

14 PANELIST: Yes.

15 (The panel was sworn.)

16 CHAIRPERSON REYNOLDS: Thank you very
17 much.

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

21 CHAIRPERSON REYNOLDS: That is correct.

22 COMMISSIONER YAKI: I have one question I
23 can address later, but usually we strive in these
24 meetings to have an equally-balanced panel and I have
25 asked prior to this meeting with the addition of Mr.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 Black, that the panel seems to be imbalanced and I
2 just wanted to know if any attempts were made to add
3 an additional witness to the other side?

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

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

14 CHAIRPERSON REYNOLDS: Mr. Staff Director?

15 STAFF DIRECTOR MARCUS: Well, first, I
16 would agree with the Chairman's assessment which is to
17 say that we have a balanced panel, but not strictly
18 numerically balanced and that the reason is that we
19 had a last minute change in availability of a witness
20 and considering that the last minute change was within
21 48 hours it was embarrassingly short notice to bring
22 someone in.

23 COMMISSIONER YAKI: Perhaps we're
24 quibbling over semantics here because just on my
25 observation I would say that not always numerically

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 imbalanced, but it's imbalanced in terms of viewpoint,
2 but I guess it just depends on the way you view it.

3 CHAIRPERSON REYNOLDS: Yes, indeed. Mr.
4 Black?

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

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

16 CHAIRPERSON REYNOLDS: Be nice,
17 Commissioner Yaki.

18 Commissioner Braceras?

19 COMMISSIONER BRACERAS: Also, I don't
20 sense an imbalance. I mean just from reviewing the
21 statements that were submitted it's not clear to me
22 that these witnesses and we'll hear from them, but
23 it's not clear to me that these witnesses are
24 necessarily going to agree one way or the other on the
25 issue presented to them. So while it may be that we

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 don't have 50 percent of the panel on one side and 50
2 percent of the panel on another side of the issue, I
3 think there will be a wide range of views and a good
4 range of views without any bias one way or the other.

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

12 CHAIRPERSON REYNOLDS: Vice Chair
13 Thernstrom?

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

19 COMMISSIONER KIRSANOW: It's a slightly
20 different department.

21 VICE CHAIRPERSON THERNSTROM: Yes,
22 slightly different department.

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

25 (Laughter.)

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

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

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

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

24 That said, I do generally favor the use of
25 the model survey approach for schools that are

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 attempting to comply with Prong Three. The additional
2 clarification has been criticized, but much of that
3 criticism I contend is unfair. By that I mean that
4 it's actually criticism of Title IX as a whole or it's
5 policy-based criticism. The result is is that the
6 additional clarification itself has been given a bad
7 name and I think undeservedly so.

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

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

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 competition in the region.

2 In measuring interest, Title IX has always
3 been concerned only with a school's current and
4 admitted students, not its future, potential students.

5 For example, the 1996 clarification; in the very
6 first paragraph introducing the discussion of Prong
7 Three, it says that Title IX "does not require an
8 institution to accommodate the interests and abilities
9 of potential students." Nonetheless, since 1996, the
10 OCR also recommended monitoring the athletic interests
11 of local nonstudents and high school students as a way
12 of gauging future, potential interest in a sport. Or
13 as the test provides, perhaps that relates to the
14 sustainability of the team.

15 Now it's good policy to keep nonstudents'
16 interests in mind. But technically, it's not a part
17 of the interest measurement requirement under the test
18 and that's a distinction we need to focus on. Of
19 course, the 1996 clarification went much farther. It
20 recommended that schools monitor a number of direct
21 indicators of interest among current and admitted
22 students. The list provided in the 1996 clarification
23 was thorough, but it's not particularly helpful. It's
24 too vague for schools to know when they've actually
25 reached compliance. No indicators were considered

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 more persuasive than others and it was not at all
2 clear when a showing of some interest might rise to
3 the level of sufficient unmet interest so as to
4 require the addition of another team.

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

16 Title IX and the 1996 guidance were
17 studied at length in 2002 and 2003 by Secretary of
18 Education Rod Paige's Commission on Opportunity in
19 Athletics. They held meetings across the country.
20 They collected as much information as possible. And
21 they were repeatedly told by collegiate athletic
22 administrators that the OCR's 1996 guidance, while it
23 had its merits, was so ambiguous that they didn't know
24 how to comply with Prong Three. Thus, many schools
25 resorted to proportionality, simply because it was

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 measurable - they could know when they had reached
2 compliance with the law. Thus, the Commission
3 unanimously recommended that OCR study the possibility
4 of allowing institutions to use surveys to measure
5 compliance with Prong Three. This idea was adopted by
6 the OCR and it was specifically mentioned in the 2003
7 further clarification.

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

18 Then, in the additional clarification, the
19 OCR gave guidance and built in safeguards for how to
20 administer the model survey - to ensure reliable data
21 and how to measure the responses. One of the key
22 safeguards built into the additional clarification for
23 how to administer the model survey - and this is the
24 key safeguard that's almost always overlooked - is
25 that the model survey must be administered "in a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 manner that is designed to generate high response
2 rates." If this is not satisfied, the OCR will not
3 assume that the model survey results are reliable, and
4 they will consider other indicia of interest,
5 including those listed in the 1996 clarification. But
6 most direct indicia of interest will be picked up by a
7 well-administered model survey, which is why the
8 additional clarification is not inconsistent with the
9 1996 guidance. The model survey simply provides a
10 more direct way to measure the same thing.

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

19 Moreover, the preferred method of Model
20 Survey administration is one in which students must
21 complete the survey or purposefully choose to bypass
22 it. That generates a 100 percent response rate. The
23 OCR recommends making the model survey a part of the
24 student's mandatory class registration process. I
25 know of another school that instead has integrated the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 model survey into its on-line application process.
2 But even if a school instead decides to initially
3 distribute the model survey via email, which is
4 permitted under the additional clarification, the OCR
5 continues to require that sufficient follow-up efforts
6 be made with an eye toward generating that high
7 response rate. Now that is another area that's gotten
8 some criticism. When has the school engaged in
9 sufficient follow-up efforts so as to ensure the
10 reliability of the model survey? I don't know.
11 That's an area of subjectivity. And that's one that's
12 open for debate. But it's important to keep in mind
13 that the preferred method of administration is not via
14 email. The preferred method of administration is via
15 a mandatory response methodology.

16 As I mentioned, the additional
17 clarification also gives guidance on a largely
18 objective way to measure the responses. And if the
19 responses indicate that there is sufficient interest
20 on campus, then the additional clarification provides
21 further guidance on the assessment process that must
22 take place to gauge whether there is sufficient
23 ability on campus and the other factors. Now it's
24 important to keep in mind the model survey truly only
25 relates to the interest part of the test. Ability,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 sustainability, competition in the region, that still
2 need to be measured, even if there is a showing of
3 interest. And that's under any scheme.

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

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

25 Now on the other hand, if a school does

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 not properly administer the model survey, the OCR will
2 not defer to its results. We instead go back to the
3 1996 scheme. But in any event, even under the
4 additional clarification, there's nothing to prevent a
5 school from continuing to monitor other indicia of
6 interest, and I encourage schools to do that.

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

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

21 CHAIRPERSON REYNOLDS: Thank you, Mr.
22 Cohen.

23 Ms. Gavora?

24 MS. GAVORA: Thanks. Thank you for the
25 opportunity to be here. My statement has changed

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 slightly, but substantially from the statement that I
2 believe is in your briefing books, but it's been
3 redistributed to you.

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

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

18 As you know, statistical proportionality
19 demands that schools manipulate their athletic
20 programs so that their gender ratios match that of
21 their undergraduate student population. In this way,
22 proportionality ignores student interests in favor of
23 an arbitrary numerical formula. No other opportunity
24 in education, be it in the engineering department or
25 the drama or dance programs is apportioned in this

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 way, even opportunities that are apportioned, that are
2 segregated by sex, like student housing, are
3 apportioned according to student interest.

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

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

20 For decades schools have complained that
21 the government's guidance is subjective and so in
22 2005, the Department of Education provided this
23 guidance, but the reaction of the model test critics
24 has been curious to say the least. Groups like the
25 Women's Sports Foundation and the National Women's Law

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 Center have long insisted that there are three equally
2 valid ways to comply with Title IX and that assessing
3 the interests of women is one of them. And yet, their
4 reaction to the model survey has been to refute
5 interest as a measure of compliance on two fronts.
6 They have argued first that women's interests cannot
7 be discerned, and second, even when they are
8 discerned, fulfilling the interest of women on campus
9 is insufficient to comply with Title IX.

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

20 The critics' second objection to the model
21 survey is that surveying current students' interest in
22 athletics only serves to freeze the school's sports
23 program in the status quo. The theory is that women
24 who are interested in a particular sport will not
25 attend an institution that does not already offer that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 sport. Critics do not explain, however, why this same
2 phenomenon does not likewise adversely impact men's
3 college choices.

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

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

25 And like these groups, the NCAA has

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

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

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

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

22 Which brings me to the Commission's second
23 question, no school, to my knowledge, has used the
24 model survey to demonstrate compliance with Title IX.
25 They haven't because the NCAA, which periodically

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 examines its member institutions for their commitment
2 to gender equity, has told them expressly not to. And
3 they haven't because the interest groups which
4 routinely sue colleges and universities under Title
5 IX, have publicly deemed the model survey an
6 illegitimate and illegal tool, promising still more
7 law suits for the brave administrator who dare uses
8 the survey.

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

19 So if a school has reached statistical
20 proportionality and it surveys its students and finds
21 some unmet interest among women and massive unmet
22 interest among men, it is obligated only to fully
23 accommodate the women's interest. What's more, a
24 school that is not proportional and has a women's club
25 team, that requests varsity status, regardless of how

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 many men's club teams request the same, must
2 accommodate that interest and that interest only.

3 James Madison University is a perfect case
4 in point. Last fall, James Madison offered 28
5 athletic teams to its students, 13 for men and 15 for
6 women. Only six schools in Division I offered more
7 opportunities, but JMU's female student population was
8 61 percent and growing and its athletic rosters
9 couldn't keep pace. JMU was in no position to add
10 women's teams, but the model survey offered no
11 protection for its existing teams. And when two women
12 club teams petitioned for varsity status, JMU had no
13 recourse but to achieve statistical proportionality by
14 cutting ten teams.

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

24 Prong Three should be modified from its
25 current requirement that only the interest of the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 under represented sex be accommodated to a requirement
2 that schools equally accommodate the interests of both
3 sexes. Under this approach, the results of the model
4 survey become the qualified pool against which an
5 equal accommodation standard is measured. So if a
6 school finds that 40 percent of its students who are
7 interested in athletics are women, it would apportion
8 40 percent of its opportunities to women. In this
9 way, students who shouldn't be considered in a
10 disparate impact determination of discrimination like
11 older students, students with families, students who
12 simply lack the interest and ability to compete in
13 sports would rightly be excluded

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

23 CHAIRPERSON REYNOLDS: Thank you, Ms.
24 Gavora.

25 Ms. Samuels?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MS. SAMUELS: Thank you very much. I
2 appreciate the opportunity to appear before you today.

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

9 We call on the Department to rescind this
10 clarification and return to prior policies for the
11 reasons that I'll discuss in my testimony. As you all
12 know, compliance with Title IX's participation
13 requirements is assessed by means of a three-part
14 test. Frequent attacks on the three-part test have
15 been resoundingly rejected. The test has been
16 uniformly upheld by nine out of nine Federal Appellate
17 Courts that have considered it, and uniformly applied
18 by prior Administrations. In fact, in July of 2003,
19 the Department of Education reaffirmed its commitment
20 to applying long standing Department interpretations
21 of the law, rejecting in the wake of a massive public
22 outcry recommendations made by the Commission on
23 Opportunity in Athletics that would have dramatically
24 reduced and undermined women's rights to equal
25 opportunity.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 I'd like to discuss several specific
2 reasons that the 2005 clarification is so inconsistent
3 with the law and with prior policies. The first is
4 this, it impermissibly allows schools to rely on
5 surveys alone to measure student interest. The 2005
6 clarification permits schools that haven't offered
7 equal opportunity to their students and haven't been
8 able to show that they have been continuously
9 improving opportunities for their under represented
10 sex, to measure the interests of those students by
11 results of an email survey alone to evaluate whether
12 they've satisfied their obligation to provide equal
13 opportunity.

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

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 in athletics.

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

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

21 Here's the second problem. The 2005
22 clarification allows schools to restrict the surveys
23 to admitted and enrolled students. This approach
24 ignores the reality that students interested in a
25 sport not offered by a school are unlikely to attend

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 that school. By failing to require schools to look
2 beyond their own campuses to, for example, the high
3 schools from which they typically draw students, the
4 clarification rewards schools with a presumption of
5 compliance, that OCR will not look behind for in
6 effect wearing blinders -- that is, for restricting
7 their sports offerings and then claiming that they are
8 satisfying the interests of those who attend the
9 school and are therefore content with those restricted
10 sports offerings.

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

20 As the Fifth Circuit has noted, the heart
21 of this contention is that "an institution with no
22 coach, no facilities, no varsity team, no scholarships
23 and no recruiting in a given sport must have on campus
24 enough national caliber athletes to field a
25 competitive varsity team in that sport before a Court

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 can find sufficient interest and abilities to exist.
2 It should go without saying that adopting this
3 criteria would eliminate an effective accommodation
4 claimed by any plaintiff at any time." That's
5 precisely what the 2005 clarification has done.

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

19 To treat nonresponses as evidence of lack
20 of interest is methodologically unsound and unfair.
21 It also violates basic principles governing survey
22 response rates. One Court has said that a 39 percent
23 response rate was insufficient to justify a school's
24 reliance on a survey purporting to measure athletic
25 interest. The NCAA guidelines say that response rates

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 below 60 percent are suspect. But what the
2 clarification does effectively is to allow schools to
3 create the fiction that 100 percent of surveyed
4 students have, in fact, responded. That should not be
5 allowed to obscure the reality that the clarification
6 permits schools to deny opportunities to students
7 based on actual response rates that would likely be
8 rejected by a court that examined the evidence.

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

20 Another problem is that the clarification
21 shifts the burden to female students to prove that
22 they are interested in sports. We never asked women
23 whether they were interested in voting before we
24 passed the amendment giving them the right to do so.
25 To say that a person's civil rights are dependent on

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 their carrying the burden of proving that they are
2 interested in and entitled to them, is an inversion of
3 basic civil rights principles and a real change from
4 prior law.

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

21 Finally, the 2005 clarification provides
22 for absolutely inadequate oversight by the Department
23 of Education. As Mr. Cohen has noted, the Department
24 will presume compliance and so if schools have
25 questions or thoughts about what is sufficient follow

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 up, there is no mechanism in place under the
2 clarification for OCR to go behind a school's
3 assertion that it has, in fact, done enough to satisfy
4 itself that the interest survey was representative and
5 in fact delivered to an adequate number of students
6 and that efforts were made to gain an adequate
7 response rate. That is an inadequate response by an
8 enforcement agency the role of which is not to make it
9 easy for regulated entities to comply, not to set
10 bright line rules so that schools can be certain of
11 when they are treading close to the line, but to
12 enforce the law and to ensure that all students get
13 their equal opportunity to participate in sports and
14 are entitled to the civil rights that the law gives
15 them.

16 Thank you very much.

17 CHAIRPERSON REYNOLDS: Thank you, Ms.
18 Samuels.

19 Ms. Sweet?

20 MS. SWEET: Thank you, Mr. Chairman.
21 Thank you Commissioners. Before I share my statement
22 with you, I do want to point out that I am probably
23 the only panelist who has had the experience of being
24 on a college campus prior to Title IX and post-Title
25 IX. I have experienced campus life without

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 opportunities and after Title IX's enactment have had
2 an opportunity to provide opportunities. I can tell
3 you first hand that post-Title IX is a lot better than
4 it was prior to the passage of Title IX.

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

16 I have been involved in inter-collegiate
17 athletics and higher education for more than 30 years
18 as an athletics director, faculty member, and in
19 leadership roles within the NCAA. During my tenure in
20 the field of intercollegiate athletics, I have worked
21 extensively on matters involving growth of
22 opportunities and advancement of both men and women in
23 athletics. Through my work, I have seen first hand
24 the commitment of the NCAA and many universities to
25 promote equity and consequently the resulting strides

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 that have been made in the pursuit of gender equity on
2 campuses and NCAA programs. I'm pleased with the
3 progress, but wary of efforts to undo more than three
4 decades of work.

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

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

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

25 The Department of Education's previous

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 clarification in 1996 acknowledged that surveys are to
2 be one element of several measures that provide a
3 thorough and complete evaluation of interest by women
4 in sports participation. By contrast, the 2005
5 clarification allows the survey to be a sole method of
6 measurement and appears contrived to show that females
7 are not interested in participation. These are
8 strikingly different approaches. The 2005 survey
9 methodology permits institutional manipulation to
10 prove disinterest, an approach contrary to the spirit
11 and the 35 year history of Title IX.

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

24 At the high school level, participants
25 have increased ten fold and six fold at the college

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 level as new opportunities have been provided and
2 societal attitudes toward female participation in
3 sports has improved. In 2005-06, there were close to
4 three million female high school student athletes and
5 180,000 NCAA collegiate female student athletics.

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

17 The 2005 additional clarification provides
18 an easy way for noncompliant institutions to claim
19 compliance with Prong Three by merely administering an
20 electronic survey that by its nature measures
21 inattention or neglect as disinterest. The effect of
22 the survey approach potentially would be to freeze
23 participation opportunities at their current level, or
24 worse, to roll back the progress made over the last 35
25 years.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 One of the greatest weaknesses of this
2 electronic survey approach is counting a nonresponse
3 as a lack of interest. Researchers have repeatedly
4 stated that a nonresponse is just that, a nonresponse,
5 and should not be interpreted in any other way. I've
6 submitted a report from the NCAA data analysis
7 research network which consists of university faculty
8 researchers throughout the country identifying the
9 flaws in the 2005 clarification. The overall tenor of
10 that report is that the 2005 clarification allows for
11 the use of a survey method that does not meet accepted
12 professional standards for conducting this type of
13 study. In addition, students have consistently
14 indicated that they rarely, if ever, respond to on-
15 line surveys. Oftentimes such surveys are filed in
16 spam folders and/or totally ignored.

17 The NCAA leadership and its membership
18 strongly support the 1996 clarification which
19 considers many factors in determining interest of the
20 under represented sex and has urged the withdrawal of
21 the 2005 additional clarification. Under the 2005
22 guidance, even if there was a favorable response from
23 the under represented sex, indicating interest in
24 sports not currently sponsored by the college or
25 university, there would be many other conditions that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 would need to be present, including a demonstration of
2 acceptable skill before an institution might add the
3 identified sport team.

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

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

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

23 The 2005 clarification is cumbersome,
24 confusing and unprecedented in length, detail and
25 method of dissemination. It covers one part of one

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 program component of the 13 program components
2 reviewed for compliance under Title IX, but exceeds
3 the length of OCR's 166-page 1990 Title IX Athletics
4 Investigators Manual which addresses all 13 program
5 components.

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

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

24 In addition, OCR's clarification
25 acknowledges that the model survey narrows the scope

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 of OCR's analysis for interests and abilities. My
2 understanding of the creation of the three-part test
3 is that it was intended to provide institutions
4 flexibility in meeting the goals of Title IX, but not
5 to make one prong a means for easier compliance,
6 especially when the results are not consistent with
7 the true spirit of providing equal opportunity.

8 In a perfect world Title IX would not be
9 necessary.

10 CHAIRPERSON REYNOLDS: Please sum up.

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

17 CHAIRPERSON REYNOLDS: Thank you, Ms.
18 Sweet.

19 Mr. Black?

20 MR. BLACK: Mr. Chairman, before I deliver
21 my opening remarks, let me thank the Commission for
22 sponsoring this hearing on Title IX. Regardless of
23 the views of Title IX, I think such open, public
24 discussion of Title IX brings attention to the issue
25 which hopefully furthers compliance with Title IX.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 I also want to thank the other panel
2 members. Clearly from the remarks we've had you see
3 that we have a number of experts here on Title IX and
4 I think it's going to further the spirited discussion
5 when it comes to questions and hopefully help clarify
6 some of your questions, both the additional
7 clarification.

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

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

24 As you know, Congress entrusted OCR with
25 the responsibility of enforcing Title IX, one of the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 nation's landmark civil rights laws. In response to
2 growing concern about disparities in educational
3 experiences of male and female students, Congress
4 enacted the law to eliminate sex discrimination in all
5 aspects of education; in the classroom, in class
6 offerings, in employment, and all extracurricular
7 activities. It was also clear as early as 1974 that
8 Congress intended for this prohibition to extend to
9 athletics programs as well.

10 Although Title IX prohibits a broad range
11 of discriminatory actions, it is perhaps this later
12 context, intercollegiate athletics, for which it is
13 best known. Thanks to Title IX, more women than ever
14 are participating in sports and attending and
15 excelling in college and graduate programs. For
16 example, when Title IX was enacted, women comprised 43
17 percent of college enrollment, but only accounted for
18 15 percent of intercollegiate athletic participants.
19 Nearly 35 years later, female participation in
20 intercollegiate athletics has increased by over 400
21 percent and women account for well over 50 percent of
22 students enrolled in college.

23 Despite the significant progress, no one
24 disputes discrimination continues to exist across the
25 nation in education programs and activities.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 Discrimination occurs in access to programs and
2 activities in the classrooms and in opportunities for
3 participation in athletics. The Department is working
4 diligently to address complaints of Title IX
5 violations in all areas, and in particular athletics.

6 To ensure that students are not discriminated against
7 in athletics, we also provide technical assistance and
8 tools to institutions so that they can determine for
9 themselves without an investigation whether they are
10 in compliance with the law. I believe the additional
11 clarification furthers that mission.

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

22 The intercollegiate athletics policy
23 interpretation, which the Department issued in 1979,
24 established a three-part test as a standard that OCR
25 would use to determine if post-secondary institutions

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 are providing nondiscriminatory athletic opportunities
2 to their male and female athletes. The test
3 identified three separate methods of complying and
4 permitted schools to choose any one of those methods
5 to choose Title IX compliance.

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

15 An important principle of OCR's
16 enforcement is that schools have the flexibility to
17 select the means they will use to achieve compliance
18 with the three-part test. One method schools have
19 chosen to use for a number of years in the past is
20 athletic interest surveys. In fact, the model survey
21 and user's guide and accompanying additional
22 clarification are based on the statistical analysis of
23 OCR cases involving the use of surveys under the
24 three-part test during a ten-year period, specifically
25 1992 to 2002.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 NCES evaluated 130 of OCR's cases. Two-
2 thirds of those institutions used part three to comply
3 with the three-part test. And more than half of those
4 used interest surveys. After an extensive review and
5 analysis of these cases, the National Center for
6 Education Statistics concluded in the user's guide
7 that survey instruments used by these schools were
8 flawed and often were administered to limited pools of
9 students and resulted in very low response rates.

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

24 I believe the additional clarification
25 promotes compliance with Title IX by clarifying the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 obligations of educational entities under the three-
2 part test, a commitment which OCR made both in the
3 1996 clarification and the 2003 Dear Colleague letter.

4 We know that schools have faced a number of
5 challenges in their efforts to ensure that they do not
6 discriminate in the athletics programs that they offer
7 and how they operate those programs. This guidance
8 and additional clarification promotes Title IX
9 compliance by making it easier for schools to assess
10 whether their own athletic programs are in compliance
11 with part three and how they can bring themselves into
12 compliance.

13 Thank you.

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

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

21 I just want to clarify the record, some
22 technical matters. I think Mr. Cohen indicated that
23 in terms of the model survey, simple -- and correct me
24 if I'm wrong, simple email solicitation of responses
25 may not be sufficient to comply with the third prong

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 insofar as there has to be some method used to
2 increase the probability of response. I think you
3 used the term a mandatory response methodology. And
4 that very often these kinds of surveys were done in
5 conjunction with registration or application to ensure
6 the greatest or maximize the response rate.

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

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

21 What follow-up efforts are sufficient to
22 comply with the law, to satisfy the OCR that the
23 follow-up efforts have been sufficient? Should a
24 school send follow-up emails to the entirety of the
25 student body? If so, how many? Does the school have

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 the capability of targeting only those students who --

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

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

16 COMMISSIONER KIRSANOW: Do you know what
17 the practice is?

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

24 If a school administers the model survey,
25 for example, as part of its application process, (that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 didn't come from the OCR, that came from a school that
2 made it part of the application process) every student
3 must respond to the survey. Or they can click on a
4 button to say no, I'm not interested, after -- and
5 again, this comes back to the requirements of the OCR:

6 A nonresponse is only treated as an actual lack of
7 interest if all students have been given easy access
8 to respond to the census, if the purpose of the census
9 has been made clear, and if students have been
10 informed that the school will take nonresponses as an
11 indication of lack of interest.

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

24 MS. SAMUELS: I wonder if I might follow
25 up on what Mr. Cohen said on a couple of fronts. The

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 first is I am not a statistician and in fact, I'd like
2 to submit for the record a report done by the National
3 Coalition for Women and Girls in Education which
4 contains a statistical analysis and a methodological
5 analysis of what we perceive to be the flaws with the
6 survey methodology. But my understanding is that
7 there are statistical problems with administering a
8 survey in a mandatory form. They are different from
9 the ones that OCR has adopted by allowing the survey
10 to be done in this discretionary way.

11 I think there are several problems with
12 the email survey. It is true that the additional
13 clarification calls for schools to undertake effort to
14 ensure that there is a reasonable response rate. But
15 as Mr. Cohen notes, there's no guidance as to how that
16 should be done. It can be done by the same methods
17 that students have disregarded in ignoring or not
18 receiving the initial email. So if a school sends an
19 email and it gets caught in someone's spam filter or
20 the student deletes it because they think it's a virus
21 or because they get 400 emails a day from different
22 parts of the school or from their friends, there is
23 nothing that will enable the school to -- or there's
24 nothing that would require the school to follow up
25 with that student to find out why she or he has not

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 responded. If they send another email saying we
2 really meant it, you should really respond this time,
3 that is liable to end up in the same recycling trash
4 bin that the original email did. And a significant
5 gap in the additional clarification is that there is
6 no oversight or monitoring by OCR to evaluate whether
7 schools have engaged in a sufficient effort to ensure
8 that students respond.

9 CHAIRPERSON REYNOLDS: Commissioner
10 Braceras?

11 COMMISSIONER BRACERAS: I wanted to ask
12 another question.

13 MS. SWEET: I'd like to respond. Based on
14 practical experience that I have had, first of all, I
15 have had an opportunity to talk with students,
16 undergraduate and graduate students. Almost all of
17 them have had some interest in sports or are current
18 student athletes. When I've asked them the question
19 how many of you respond to an email survey, I spoke to
20 200 undergraduates students. Not one hand went up. I
21 spoke with 50 graduate students and asked the same
22 question. One hand went up and she immediately stated
23 I'm in marketing and I understand that it's important
24 to respond to surveys. So based on those 250
25 students, the conclusion would be none of them have an

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 interest in athletics participation, even though they
2 currently are participating.

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

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

24 MS. SWEET: You make a very good point and
25 that's really what the concern is. If an institution

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 is fully committed to Title IX compliance, I believe
2 that they would use a variety of approaches to
3 determining interest. But if an institution is
4 looking for as one of the questions asked an easy way
5 to meet the three prong test, this is an easy way
6 because it doesn't require them to go any further.

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

9 CHAIRPERSON REYNOLDS: Yes.

10 MR. BLACK: The Department has looked at a
11 number of universities' handbooks and most
12 universities have email policies. A lot of
13 universities, such as Purdue, University of Texas,
14 Syracuse, New York University, have email policies
15 that require students to read their email. They tell
16 students it's a presumed mode of communication. And
17 this email survey or notice of the survey is not going
18 to come from OCR. It's not going to come from a
19 private vendor. It's going to come from the
20 university in the form of an official email. The
21 universities also have email policies regarding spam.
22 Stanford University, which I looked at recently, has
23 the ability to turn on a spam filter or turn off a
24 spam filter to recognize a university email. It is
25 not going to end up in a spam folder.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 And in order to use the model survey
2 again, the preferred method, as Mr. Cohen pointed out,
3 is a mandatory event such as registering for classes,
4 getting your grades, being admitted to the university.
5 But email is an option, but only if you follow the
6 strict guidance of the user's guide: one, that it's a
7 census; two, that students are informed of the purpose
8 of the survey; three, they're informed of the fact
9 that if they do not respond, it will be recognized as
10 a lack of response and then fourth, that there is a
11 reasonable effort to follow up, and it could be an
12 additional email, official email. It could be
13 contacting those students who haven't responded.

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

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

25 I also want to clarify what this survey

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 is. There's a lot of confusion of what we're
2 measuring here. This is not a survey to identify the
3 extent to which women are interested in sports or to
4 measure whether they continue to be interested in
5 sports or even interested in sports to the same degree
6 as men. This is only meant as a way of identifying
7 those women on campus that are interested in
8 additional opportunities.

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

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 and look at ability. So we want a high response rate,
2 but this is only looking for an X number of students
3 interested in a particular sport.

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

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

13 CHAIRPERSON REYNOLDS: Go ahead.

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

24 So the assumption that schools can simply
25 send out one email and then just response rates will

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 be what they may be, it's not accurate. The OCR will
2 not defer if it's not administered in a context in
3 which most students would complete it.

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

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

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

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

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

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

25 MS. SAMUELS: I do not. I think Ms. Sweet

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 knows of one. Research shows --

2 COMMISSIONER BRACERAS: That's the first
3 question.

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

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

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

16 CHAIRPERSON REYNOLDS: It's an empirical
17 question.

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

20 CHAIRPERSON REYNOLDS: As opposed to
21 predicting the problems that could unfold in the
22 future, we're trying to get at what the data says now
23 and the fact that this is such a new approach and also
24 the fact that the NCAA has urged colleges not to use
25 it. Some time may go by, I suspect some time will go

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 by before we have data, but the question that Vice
2 Chair Thernstrom asked is still on the table. Any one
3 is welcome to respond.

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

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

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

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

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

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

22 We ask all institutions when they receive
23 federal funds to sign an assurance that they will
24 comply with federal civil rights laws, but we don't
25 ask them how they are going to comply with Title VI,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 504, the ADA, and we don't ask them how they're going
2 to comply with Title IX.

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

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

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

21 CHAIRPERSON REYNOLDS: Mr. Black, would --

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

25 CHAIRPERSON REYNOLDS: Okay. Mr. Black,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 OCR does have the capability, say, through a
2 compliance review to gather this data, I would
3 imagine?

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

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

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

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

22 CHAIRPERSON REYNOLDS: Okay. Commissioner
23 Thernstrom?

24 VICE CHAIRPERSON THERNSTROM: I think Mr.
25 Cohen has something to say on the subject.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. COHEN: I did just have a brief
2 response to the Commissioner's prior question with
3 respect to response rates. Response rates are going
4 to depend on the method of administration. And, as I
5 believe I said before, I'm not aware of a single
6 school that has administered the model survey via
7 e-mail.

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

13 COMMISSIONER BRACERAS: What school does
14 that?

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

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

22 MR. COHEN: Well, if the school feels like
23 disclosing it, I'll leave that to the school to
24 disclose. That's not a situation I'm going to get
25 into here.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 COMMISSIONER BRACERAS: I don't know why.

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

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

21 It's a school that I have not worked with.
22 I don't have any information beyond the media
23 reports. But what I have is a school that I'm aware
24 of that implemented a survey. And the first response
25 that came back from one of the groups was a quote

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 something akin to, chomping at the bit to make this
2 school its "test case" for litigation over the model
3 survey.

4 This was a school that was looking to
5 comply with the law in a legal method. It turns out
6 that this school was not even using the model survey.

7 Rather, it had already decided to add a women's team.

8 It was looking to comply with proportionality and add
9 additional teams. But, yet, here it was subject to
10 attack. For that reason, schools do not go public
11 with what their compliance efforts are.

12 CHAIRPERSON REYNOLDS: Okay. Commissioner
13 Yaki?

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

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

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

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

25 But I would like to preface my questioning

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 by saying that I'm privileged to sit on the Board of
2 Trustees of the University of Massachusetts, where I
3 am a member of the Athletic Committee. So I'm very
4 much aware of these issues and aware of the fact that
5 schools are trying mightily to comply with Title IX
6 and looking for as much guidance as they can get from
7 the Department of Education.

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

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

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

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

24 MS. SAMUELS: Well, I think, for the
25 reasons that I described in my testimony, surveys are

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 inherently unreliable as the sole means to evaluate
2 whether there is sufficient interest to provide
3 additional opportunities for women because they tend
4 to measure not whether there would be interest had
5 women been fully exposed and had they had
6 nondiscriminatory opportunities to participate in the
7 past but the lack of exposure.

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

10 MS. SAMUELS: That's why --

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

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

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

24 COMMISSIONER BRACERAS: Okay. If that is
25 --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 MS. SAMUELS: Under the '96 clarification,
2 which we believe sets forth the appropriate and lawful
3 standards under Title IX, surveys are permissible as
4 long as --

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

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

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

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

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

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

23 COMMISSIONER BRACERAS: Okay.

24 MS. SAMUELS: The law asks schools to
25 comply --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 COMMISSIONER BRACERAS: I guess I would
2 like -- I would like --

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

5 COMMISSIONER BRACERAS: Oh, I understand
6 that.

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

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

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

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

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

22 COMMISSIONER BRACERAS: Can I --

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

25 COMMISSIONER BRACERAS: Excuse me. I want

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

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

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

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

14 MS. SAMUELS: Yes.

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

18 MS. SAMUELS: I do.

19 COMMISSIONER BRACERAS: -- in your policy
20 --

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

25 COMMISSIONER HERIOT: I'm confused now.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 Exactly how do you think one could comply with prong
2 three? What's the preferred way that you would see?

3 MS. SAMUELS: The 1996 clarification sets
4 forth a very detailed road map for that very question.

5 It says you can do surveys. You also must do other
6 things, including talking to your coaches and
7 administrators, looking at what high schools in your
8 area and in your recruiting area do, looking at what
9 rec leagues in the area from which you recruit do,
10 looking at the kinds of requests you have gotten from
11 female students with --

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

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

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

24 CHAIRPERSON REYNOLDS: Hold on now. Let
25 me play traffic cop here. Ms. Gavora, you are next

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 and then Mr. Black and then Vice Chair Thernstrom.

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

4 CHAIRPERSON REYNOLDS: I'm sorry.
5 Commissioner Yaki.

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

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

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

17 MS. GAVORA: I took a look at this. I
18 heard this two-thirds number bantied about, two-thirds
19 of schools choosing prong three to comply with the
20 law. And when I was writing my book, I took a look at
21 this because this runs contrary to every statement of
22 every athletic director on the record, the Commission,
23 the President's Commission on Title IX. It runs
24 contrary to the advice of every Title IX consultant
25 out there that they use prong three.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 And what happens is I FOIA'd the
2 Department of Education's investigations, compliance
3 reviews at schools under Title IX athletic and found
4 out that, in fact, around 64 percent of these
5 institutions chose prong three, but they ended up.
6 These investigations were all to the letter ended with
7 agreements between the schools and the Department of
8 Education to add women's teams or to eliminate men's
9 teams to move further towards proportionality.

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

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

21 CHAIRPERSON REYNOLDS: Okay.

22 MS. SAMUELS: Could I just respond to the
23 -- my testimony speaks for itself. Proportionality
24 means that every student on campus, whatever his or
25 her gender, has an equal chance of participating in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 sports. That's why it is in the law. That's why it
2 is a permissible means of compliance.

3 MS. GAVORA: That's proportionality.

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

6 MS. GAVORA: You define it as equal
7 participation. You do not define it as opportunity.
8 The 1996 policy clarification says that opportunities
9 in teams will not be considered, only students on the
10 field.

11 MS. SAMUELS: Well, that is because --

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

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

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

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 appealing.

2 VICE CHAIRPERSON THERNSTROM: Did you --

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

5 COMMISSIONER BRACERAS: I'm not done.

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

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

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

20 And in '96, all it did is talk about some
21 things OCR may look at, but it doesn't say any of them
22 are required. It doesn't say one is preferred over
23 another. The only language is, really, is that it is
24 still up to the university. They don't need to do any
25 expensive survey methods. And there has been a lot of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 attention paid to high schools. That's important,
2 again, to plan for your athletic department.

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

10 I want to also talk about the two-thirds.

11 That two-thirds have been batted around. It was
12 recognized through looking at OCR cases that
13 two-thirds complied with part three, but you have to
14 understand the context of an OCR investigation.

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

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

24 MS. GAVORA: But were they as Commissioner
25 Braceras said? Did they prove themselves in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 compliance with the law with the 43 percent
2 participation rate with a 60 percent female student
3 body? Were they able to prove their compliance with
4 the law as their programs existed? That was
5 emphatically not what I found.

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

8 MS. GAVORA: Yes.

9 CHAIRPERSON REYNOLDS: Okay.

10 COMMISSIONER BRACERAS: Could I just ask
11 one more question?

12 CHAIRPERSON REYNOLDS: Commissioner
13 Braceras? Yes.

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

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

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 opportunities to women.

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

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

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

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

20 I mean, we believe that as a New England
21 university, that it would be a travesty for us not to
22 have a women's ice hockey program. All we have to do
23 is pick up the newspapers to see that female youth
24 hockey is growing every day in our own state, tripling
25 year after year the numbers of enrollees.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 The fact that we don't have one now is not
2 reflective of discrimination. It's reflective of the
3 fact that the interest is percolating up from the
4 bottom. We observe it. We're working on it.

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

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

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

20 The context of my comments was based on
21 the fact that we know that there is interest. And you
22 gave a perfect example. And I applaud the University
23 of Massachusetts for looking and hopefully adding a
24 women's ice hockey team. That's what we would like
25 for all institutions to do.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 And I want to go on record because there
2 has been some reference to the NCAA perhaps
3 misdirecting its membership, the NCAA is committed to
4 opportunity for both men and women. The NCAA has
5 repeatedly stated that we do not favor institutions
6 dropping men's sports.

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

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

20 CHAIRPERSON REYNOLDS: Okay. Commissioner
21 Yaki?

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

25 My general question, we have been seeing

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 here rather -- and forgive me if I describe it as such
2 -- dryly discussing e-mail surveys, three-prong tests.

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

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

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

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

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 MS. SAMUELS: This is Jocelyn Samuels.

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

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

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

20 And when we are in a climate, which the
21 report that I would like to submit for the record
22 shows that we are, where football and men's basketball
23 are consuming three-quarters of the budgets for men's
24 sports, there is very little left over for schools to
25 offer the broad-based opportunities that I think

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 everybody at this table would like to see them do.

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

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

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

14 COMMISSIONER KIRSANOW: But that's not
15 really my point. Schools make assessments as to where
16 they are going to direct revenue for a variety of
17 reasons, not necessarily to make a profit. But you
18 have Ohio State, stadium of 100,000, a team that maybe
19 should have won the national championship. And they
20 --

21 PARTICIPANT: Where are you from?

22 COMMISSIONER KIRSANOW: I'm not from
23 Florida.

24 (Laughter.)

25 COMMISSIONER KIRSANOW: And they make a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

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

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

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

21 I know, for example, that there are a lot
22 of alumni out there for a variety of schools that if
23 their football or basketball or whatever their chosen
24 sports program goes downhill, they start withholding
25 donations. And that is where the real money is, not

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 the ticket revenue. That's chump change.

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

4 COMMISSIONER KIRSANOW: Sure.

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

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

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

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

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

25 COMMISSIONER KIRSANOW: No. I'm simply

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 talking about in terms of --

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

4 COMMISSIONER KIRSANOW: No, not at all.

5 COMMISSIONER YAKI: -- among sports
6 budgets?

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

14 MS. SWEET: Actually --

15 COMMISSIONER YAKI: I'm not too sure
16 that's exactly where Ms. Sweet or Ms. Samuels was
17 coming from. I think that what they were saying is
18 that -- I don't think they were going into the area of
19 saying that this is a perfect issue. I think what
20 they're saying is that we have a program in place now
21 that is working and, instead, continuing a program
22 that the NCAA endorses and others endorse and the NCAA
23 includes all those campuses and universities that do
24 the alumni and do -- I think the point they are trying
25 to make is that why are we taking this work and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 fiddling with it to make it work less better. I think
2 that's a different point than what you are trying to
3 make here.

4 CHAIRPERSON REYNOLDS: Okay. Ms. Gavora?

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

11 The NCAA except for limited circumstances
12 when it's measuring men's and women's participation
13 does not correct for new institutions entering the
14 NCAA. When the GAO corrected for that, they found a
15 12 percent decline in men's opportunities for the late
16 '80s and to the mid '90s.

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

24 Men's opportunities in track, men's
25 opportunities for minority male athletics are

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 declining precipitously. And big-time football, NCAA
2 football, the kinds of football that we have been
3 talking about raising or not raising revenue, counts
4 for 11 percent of NCAA teams, 11 percent.

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

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

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

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

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

17 CHAIRPERSON REYNOLDS: Yes, that is true.

18 (Laughter.)

19 CHAIRPERSON REYNOLDS: I hear you.

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

23 COMMISSIONER YAKI: I just tried calling
24 his office. He is just leaving a speech or something
25 and is on his way to the airport. I have no idea.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 VICE CHAIRPERSON THERNSTROM: Okay.

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

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

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

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

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 They will go someplace else.

2 Bottom line is the 2005 clarification is
3 not complete.

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

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

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

17 And what we see in some of our cases, we
18 may have a viable club team at a university, but those
19 students don't want to be elevated to a varsity
20 status. So it's not necessarily the best indicator of
21 unmet interest. And the reason they don't want to be
22 elevated is because then most of them are going to
23 lose their opportunity to compete because you are
24 going to recruit in the premier athlete that is going
25 to replace them.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 So a student could work hard to elevate
2 their club team or intramural team to varsity status
3 when they are a freshman. By the time they are a
4 junior, hopefully it is a varsity team. But then they
5 will see most of their teammates eliminated from
6 competition that senior year because they aren't good
7 enough.

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

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

23 OCR just requires that you can't take them
24 away because we don't want a situation where the
25 university is just going to ask if you are interested

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 in tennis. We require that you ask if they are
2 interested in all the sports recognized by the
3 athletic associations.

4 Schools can add to it, thereby capturing
5 high school participation rates, national trends,
6 coaches' opinions and athletic directors' opinions.
7 So a lot of the factors that we are talking about in
8 '96, which, again, are not required, are rolled into
9 this survey.

10 CHAIRPERSON REYNOLDS: Mr. Cohen?

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

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

22 And, again, I'm a textualist. Let me go
23 back to what the actual experts have said about this.

24 I'm going to quote out of the users' guide, which was
25 designed by the NCES, the expert statisticians that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 the OCR commissioned.

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

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

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

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

23 The additional clarification simply tracks
24 the law in regards to meeting the interests and
25 abilities of your current students and your admitted

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 students. It's been that way since 1979.

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

7 VICE CHAIRPERSON THERNSTROM: No, no.

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

17 There's an unfortunate real life
18 experience not too far from here, where now the issue
19 being discussed is that e-mail alerts are not the way
20 to go. Text message alerts are much better in terms
21 of informing the population about a problem that may
22 be going on in any one time. And e-mail is taking a
23 much bigger back seat among young men and women than
24 what they can do with their cell phone, Sidekicks, and
25 things like that.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 But for Ms. Samuels -- and this does
2 follow on Mr. Black. And I know this probably
3 occurred well before you were there, sir, but this to
4 define clarification is not the first time that the
5 current administration has tried to make changes to
6 the three-prong test.

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

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

20 After a series of regional hearings, where
21 the witnesses opposed to Title IX vastly outweighed
22 the witnesses in support of it, the commission came up
23 with 22 recommendations, a significant number of which
24 would have brought really damaging changes in the
25 longstanding athletics policies, which had been

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 applied by prior administrations and accepted by every
2 court that had looked at them.

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

11 We regard this 2005 clarification, which,
12 by the way, was issued on a Friday afternoon without
13 notice and without any opportunity for public comment
14 --

15 COMMISSIONER YAKI: You mean trash day?

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

23 COMMISSIONER BRACERAS: Okay. Can I just
24 interject for a second? You referred to schools that
25 you believe have an incentive to weaken Title IX. Do

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 you honestly believe that universities are attempting
2 to weaken Title IX? Because in my experience,
3 universities want only to expand opportunities for
4 women and are grappling with how to do so in a time of
5 limited budgets.

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

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

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

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

21 I think that that is an extreme accusation
22 to make, one that is a little bit different than
23 saying they have a vested interest in preserving
24 football, which is, whether it's true or not, a
25 nonpartisan, non-accusatory statement.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 When you say that you believe there are
2 universities out there that wish to undermine the
3 civil rights of women, that is an extremely strong
4 accusation. You had better be prepared to back that
5 up.

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

8 COMMISSIONER BRACERAS: That is what you
9 were suggesting.

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

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

18 But it begs a question and one that
19 continues to nag me through the course of this
20 hearing, which is why, then, are we attempting -- not
21 "we." Why is the administration putting into place
22 clarification and procedures that would make it easier
23 on institutions they say to comply with Title IX,
24 which advocates believe would result in a weakening of
25 the program?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 CHAIRPERSON REYNOLDS: I agree. Quick
2 question -- well, statement. It seems to me that with
3 a survey, it could increase the burdens on schools if
4 over time the interest and ability of women continue
5 to increase.

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

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

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

23 CHAIRPERSON REYNOLDS: Vice Chair
24 Thernstrom?

25 MS. SAMUELS: Excuse me. Schools that are

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 in compliance with the proportionality prong do not
2 need to add any teams. The third prong occurs when
3 schools have not met either substantial
4 proportionality or been able to show that there is a
5 continuing pattern of adding teams for the
6 under-represented sex.

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

9 MS. SAMUELS: Not at all.

10 CHAIRPERSON REYNOLDS: Well, a university
11 --

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

14 CHAIRPERSON REYNOLDS: Okay.

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

18 MS. SAMUELS: If they are offering --

19 MS. GAVORA: -- is what you are saying.

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

22 MS. GAVORA: Again, they will be --

23 COMMISSIONER BRACERAS: If they offered no
24 sports, that would be proportional opportunity. But
25 there would be greater interest than was being met.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 MS. SAMUELS: Unfortunately, no college
2 athletics program is likely to be able to satisfy the
3 universe of interest that exists among both men and
4 women.

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

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

11 COMMISSIONER KIRSANOW: High school is
12 different than college.

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

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

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

21 There are three opportunities for
22 compliance with the participation aspect of Title IX.

23 If you start with prong one and if you meet
24 proportionality, you don't have to go any further.
25 That's what safe harbor means. It doesn't mean it's

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 the only place that you can be safe.

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

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

11 MS. SWEET: Prong one.

12 CHAIRPERSON REYNOLDS: That's right.

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

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

23 And prong one, substantial
24 proportionality, that provides a way of complying
25 without incurring too many transaction costs. Prongs

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 two and three prior to the model survey were
2 approaches where you could not get a high level of
3 comfort. Many athletic directors would hire lawyers
4 in their departments to provide them with advice and
5 counsel on when they satisfied two or three.

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

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

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

18 Prong two really is what Title IX is
19 about. You're adding opportunities. If you go back
20 to 1972, when Title IX was passed as law, if
21 institutions were adding sports, which we have good
22 documentation that that is what has happened over the
23 last 35 years, they would be in compliance with Title
24 IX because they have been adding sports, which is what
25 we should be trying to do to meet the unmet interests.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 If you're fully meeting all of the
2 interests and abilities of your student population,
3 you would meet prong three. So you have three very
4 flexible ways.

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

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

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

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

25 CHAIRPERSON REYNOLDS: I wasn't referring

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 to --

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

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

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

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

20 MS. SAMUELS: Well, I guess what I would
21 say in response to that is what I alluded to in my
22 testimony, which is I am all for providing technical
23 assistance and guidance and help to schools that want
24 to figure out how to comply with Title IX within the
25 context of the three-part test. I think what the 2005

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 clarification does is to elevate ease of compliance
2 over fair adherence to the standards of equal
3 opportunity.

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

7 MS. SAMUELS: I beg to differ since we
8 think that, in fact, a huge loophole is opened by this
9 2005 clarification. It is not necessarily that every
10 school will administer a survey in a way that would be
11 inadequate, not that every school will inappropriately
12 act on findings. But the clarification authorizes and
13 allows schools to deny additional opportunity for
14 women in circumstances where interest would exist
15 under prong three properly administered.

16 CHAIRPERSON REYNOLDS: Okay. Vice Chair
17 Thernstrom?

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

23 There are enormous incentives here to
24 institute policies that will ensure proportionality.
25 And it does seem to me that Ms. Samuels in her

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 previous comment had collapsed the whole notion of
2 result and opportunity, two very different concepts.
3 And you have simply merged them. And the definition
4 of equity, of gender equity, has become
5 proportionality. I mean, I think that is the running
6 theme through what you have had to say.

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

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

14 MS. SAMUELS: If I could just respond?

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

19 Ms. Sweet, you said earlier that Title IX
20 has resulted in a huge increase in women's interest in
21 sports. Now, I mean, lots of things have, including
22 an entire cultural change in this country with respect
23 to the status of women, the definition of being female
24 and so forth has, resulted in much more participation
25 in athletics on the part of young women. So to say

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 that we know exactly how much Title IX has
2 contributed, as opposed to a whole lot of other
3 factors, seems to me ridiculous.

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

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

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

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

24 COMMISSIONER BRACERAS: Equally
25 interested?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 MS. SAMUELS: There is no reason to assume
2 that they are not.

3 PARTICIPANT: What are the data?

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

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

8 COMMISSIONER BRACERAS: It's a very --

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

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

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

22 PARTICIPANT: It's an empirical question.

23 MS. SAMUELS: Could I finish? The notion
24 --

25 COMMISSIONER BRACERAS: But not everybody

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 is entitled to --

2 MS. SAMUELS: The notion --

3 COMMISSIONER BRACERAS: Everybody is
4 entitled to --

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

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

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

22 MS. SAMUELS: That is true.

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

25 MS. SAMUELS: And there are a lot of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 little boys who do and don't want to play.

2 COMMISSIONER BRACERAS: Well, no, no, no.

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

6 COMMISSIONER BRACERAS: I'm sorry.

7 MS. SAMUELS: -- geared toward male
8 participation.

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

15 And, yes, there are double the number of
16 girls out there playing than there were ten years ago.

17 And I applaud that. And there probably will be even
18 more in the future, but there are still many, many
19 girls that don't want to play. And that is fine.
20 That is their choice.

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

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 the law can't change that.

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

4 COMMISSIONER BRACERAS: The opportunities
5 are exactly the same.

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

15 MS. SAMUELS: I think fundamentally I --

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

20 COMMISSIONER BRACERAS: No, absolutely
21 not.

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

24 MS. SAMUELS: Can I just respond?

25 COMMISSIONER YAKI: Simply because, again,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 I'm getting this idea about market-based Title IX, and
2 I don't quite understand. We're talking about, again,
3 a civil rights issue, which is not based on the
4 market, is not based on ability, is based on one
5 access to that.

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

8 CHAIRPERSON REYNOLDS: Okay.

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

11 CHAIRPERSON REYNOLDS: Hold on. Hold on.
12 Mr. Cohen, are you aware of data that discusses the
13 relative interests between boys and girls with respect
14 to athletics?

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

20 CHAIRPERSON REYNOLDS: Welcome to Title
21 IX.

22 MR. COHEN: Well, what does the model
23 survey do? It asks them. If you want to get
24 empirical evidence on whether or not women are
25 interested at the same level, more or less, ask them.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 That's what a well-administered model survey is
2 designed to do.

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

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

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

19 MS. GAVORA: And there are data. There
20 are data. The University of California system
21 surveyed its members as part of the consent agreement
22 with the National Organization for Women. And they
23 found about a 60/40 split. Sixty percent of the
24 people interested in athletics in colleges were men,
25 40 percent women.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 And that's the same data that Brown
2 presented in defending itself in the lawsuit, the
3 landmark lawsuit, that they found on their campus.
4 It's the same basic breakdown that the College Board
5 finds when it asks people that take the PSAT and the
6 SAT about their interest in sports, the gender
7 breakdown.

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

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

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

18 MS. GAVORA: No.

19 MS. SAMUELS: Can I --

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

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

24 MS. SAMUELS: Thank you.

25 I vehemently disagree with the notion that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 there is evidence that women are inherently less
2 interested in sports than men.

3 COMMISSIONER BRACERAS: Nobody said
4 anything --

5 MS. SAMUELS: Excuse me.

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

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

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

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

19 CHAIRPERSON REYNOLDS: And so if --

20 MS. SAMUELS: Can I just finish? But the
21 bottom line is I disagree with the premise. And I
22 believe that it will be disproved in circumstances
23 where surveys and analyses are done in an appropriate
24 way. But if it is right that on a particular campus
25 women, in fact, are satisfied with less than

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 proportional opportunities, that is what the third
2 prong is all about.

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

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

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

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

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

23 VICE CHAIRPERSON THERNSTROM: And I
24 suppose you think that if you survey men and women on
25 how many hours of sports competition that they watch

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 on television, that there would be equal interests
2 between men and women. I mean, that's ridiculous.

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

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

14 VICE CHAIRPERSON THERNSTROM: That's
15 empirical evidence.

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

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

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

24 COMMISSIONER YAKI: We can't go by what
25 someone says in the beauty parlor --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 VICE CHAIRPERSON THERNSTROM: I'm just
2 saying, Michael --

3 CHAIRPERSON REYNOLDS: You could rely on
4 surveys.

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

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

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

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

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

24 And that requires you to go beyond simply
25 asking the students on your campus, but you have to go

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 to their communities to determine whether or not they
2 were exposed to the sport in their community. And if
3 they weren't exposed to the sport in their community,
4 then you can come back to campus and say, "Well, you
5 found insufficient interest, but let's now substitute
6 a cohort for lack of exposure to move that number."
7 Is that accurate?

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

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

23 It would be foolish and I think ignoring
24 the fact that there is very clearly an interest in
25 playing ice hockey that would be subscribed to were

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 the university to offer a team to say, "We're just
2 going to look exclusively at what exists now."

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

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

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

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

23 Prong three says, "If you are fully
24 satisfying the interests that exist on your campuses,
25 you are in compliance." But under the 1996

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 clarification, schools were under an obligation to
2 regularly make that assessment and to evaluate on an
3 ongoing basis whether interest is developing or
4 whether they are still continuing to fully accommodate
5 that interest.

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

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

14 MS. SAMUELS: That's correct.

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

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

21 COMMISSIONER TAYLOR: This is my question.
22 If all three are equal; that is, proportionality is
23 no better or no worse in prong two and prong three, if
24 you eliminate prong one, why do you freeze the status
25 quo?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 MS. SAMUELS: Because prong one embodies
2 the notion that every student on campus will have an
3 equal opportunity to play sports.

4 COMMISSIONER BRACERAS: Of course not.

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

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

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

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

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

23 COMMISSIONER TAYLOR: Yes. You know, is
24 it first among equals or are they all three equal? If
25 they're all three equal, I'm just having a difficult

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 time understanding why if you eliminate one prong and
2 they're all --

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

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

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

16 COMMISSIONER BRACERAS: But expansion
17 stops --

18 MS. GAVORA: That's right.

19 COMMISSIONER BRACERAS: -- once you reach
20 proportionality.

21 MS. GAVORA: That was my point.

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

25 VICE CHAIRPERSON THERNSTROM: That's

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 results, not opportunities.

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

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

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

11 PARTICIPANT: But there are more
12 opportunities --

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

18 COMMISSIONER TAYLOR: Right.

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

23 MS. SAMUELS: There is no time limit on
24 two and three. They are the law. If you can show
25 that you have a history and continuing practice of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 improving opportunities for the under-represented sex
2 or that you are fully satisfying the interest that
3 exists, you are in compliance.

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

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

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

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

22 Now, interestingly, since the enrollment
23 of females on campuses has shifted to the larger
24 percentage, now suddenly it doesn't make any more
25 sense.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 CHAIRPERSON REYNOLDS: Hold on.
2 Commissioner Heriot was next.

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

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

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

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

17 (Laughter.)

18 CHAIRPERSON REYNOLDS: You have a
19 challenger.

20 COMMISSIONER HERIOT: My question is, what
21 is so special about sports? Title IX, of course,
22 isn't specific about sports. It talks about
23 nondiscrimination generally. And I'm getting the
24 feeling from your argument -- let me back up a little
25 bit here.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 It seemed to me the reason that the
2 Department of Education would be interested in sports
3 in particular is the notion that sports are
4 sex-segregated on campus and, therefore, you really
5 just can't opt in easily.

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

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

24 What does that say about going back and
25 rethinking the fact that there is not just one area of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 the curriculum and extracurricular activities are
2 under-represented but there are lots of them, like
3 science classes, math classes? Is that something that
4 the Department of Education should be issuing
5 regulations on?

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

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

24 In chemistry, in engineering, in English,
25 in drama, there are not the same prior decisions by

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 schools to offer those opportunities on the basis of
2 sex. They are --

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

10 How can those be consistent if we're going
11 to go down the road of not taking people at their word
12 when adults say, "I don't want to play field hockey"?

13 If we're going to go down that road, how are we going
14 to trust them when they say, "I don't want to register
15 for chemistry" or when the men say, "I don't want to
16 be in the chorus"?

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

22 There's nothing, absolutely no activity,
23 other than perhaps going to the bathroom that
24 everybody does in the same sex ratio. Different
25 sports attract --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 MS. SAMUELS: I see that Ms. Sweet wants
2 to say something. And I will turn to her in just a
3 moment. I would simply say there is a fundamental
4 difference in that chemistry is an opportunity that is
5 available to men and to women without regard to their
6 gender. Athletics is not.

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

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

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

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

25 If I may, I believe that Commissioner

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 Thernstrom had asked me a couple of questions. And I
2 don't want to miss the opportunity.

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

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

10 VICE CHAIRPERSON THERNSTROM: Anyway, go
11 on.

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

14 VICE CHAIRPERSON THERNSTROM: Right.

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

21 Last year the NCAA celebrated its
22 centennial anniversary. The NCAA has only sponsored
23 opportunities for females for 25 years. So the men
24 had a 75-year head start in the collegiate athletic
25 arena.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 I can speak from personal experience.
2 Prior to Title IX, I was discouraged from
3 participating in sports. Even though I loved sports,
4 there were no high school opportunities. I attended
5 the University of Wisconsin, which I like to think is
6 fairly progressive. There were no collegiate
7 opportunities.

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

18 The same is true in athletics. Prior to
19 Title IX, there were 30,000 female athletes on our
20 college campuses. Now there are over 200,000. And
21 why has that happened? It has happened because
22 colleges have made a commitment to trying to provide
23 new opportunities. And as those new opportunities
24 have been provided, there have been young women that
25 have been clamoring to fill those spots.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 So to say that the interest is different,
2 don't forget that the history is different. We're not
3 talking about apples and apples. We're talking about
4 apples and oranges. And we just need to accept that.

5 But we also need to accept that there are glowing
6 disparities that we need to address.

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

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

20 MS. SWEET: I agree. There are multiple
21 factors, but I feel very strongly without Title IX, we
22 would not have the number of women in law school, the
23 number of women in medical school, the number of women
24 that are participating on sports teams.

25 VICE CHAIRPERSON THERNSTROM: And I just

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 don't know that on medical school or law school
2 without -- I mean, I don't think you can say that.
3 But, anyway, go on.

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

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

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

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

25 MS. GAVORA: Yes.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

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

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

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

16 I just want to say again the decisions
17 that are made on campuses to eliminate men's
18 opportunities are institutional decisions, though men
19 still have more actual opportunities, but it's true
20 there have been men's teams in certain sports that
21 have been dropped. That is not something that Title
22 IX states should happen, something that the NCAA
23 emphatically has said should not happen, but,
24 unfortunately, those are institutional decisions that
25 are being made because it's easier. It's easier to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 administer a smaller program than it is a larger, more
2 broad-based program in the same way --

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

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

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

16 MS. SWEET: You're telling them that they
17 need to provide equity. And you're not telling them
18 --

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

21 MS. SWEET: I had an institution that had
22 23 sports. We had several years of budget cuts. We
23 never dropped a sport.

24 COMMISSIONER BRACERAS: And that's great.

25 MS. SWEET: We took the --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 COMMISSIONER BRACERAS: I applaud that.

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

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

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

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

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

25 MS. GAVORA: And signing up for the PSAT

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 and the SAT.

2 COMMISSIONER BRACERAS: Right.

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

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

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

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

21 COMMISSIONER BRACERAS: Well, see, again,
22 that is very revealing to me because we started off
23 today with critiques of this particular survey, of the
24 particular survey that the department has put forward
25 as a model for universities to use.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 But what I am really hearing is that you
2 don't like surveys --

3 MS. SWEET: No.

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

6 MS. SWEET: In isolation.

7 COMMISSIONER BRACERAS: Can I finish?

8 MS. SWEET: In isolation.

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

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

18 MS. SWEET: What do you think the result
19 would have been if you had administered that survey in
20 1971?

21 COMMISSIONER BRACERAS: I think it would
22 have been different.

23 MS. SWEET: And so then it would have been
24 okay to have 90 percent of the opportunities going to
25 10 --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 COMMISSIONER BRACERAS: No, no, no, no.
2 At that time.

3 CHAIRPERSON REYNOLDS: Are you --

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

7 CHAIRPERSON REYNOLDS: Right.

8 COMMISSIONER BRACERAS: -- now that the
9 interest level is higher, the opportunities need to be
10 higher for women. And in five years from now, if the
11 survey isn't 60/40 but, rather, 70 -- the other way
12 around -- I'm sorry -- closer to proportionality,
13 50/50, then the opportunities would be divided that
14 way.

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

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

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

22 COMMISSIONER BRACERAS: Okay.

23 MS. SWEET: I have talked to so many high
24 school and college students who have indicated that if
25 they don't see females participating, then they don't

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 know that that is an opportunity that they could have.

2 And that goes down into high school. That goes down
3 into elementary schools.

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

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

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

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

19 COMMISSIONER YAKI: That's not what she is
20 saying at all, Commissioner Braceras. What she is
21 saying is that surveys in and of themselves are
22 inherently limited. They are backward-looking. They
23 are dependent on historical concepts. If you take a
24 --

25 COMMISSIONER BRACERAS: A survey of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 students taking the PSAT is forward-looking to where
2 they want to be in college.

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

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

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

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

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 JESSICA GAVORA: I really object to this
2 character assassination.

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

10 COMMISSIONER BRACERAS: No.

11 COMMISSIONER YAKI: -- opportunities for
12 young --

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

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

23 But, as I've said several times, I have
24 three athletic daughters. And they certainly didn't
25 get that way from watching their mother. I mean,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 they're not athletic because of Mia Hamm or because of
2 any of these. They don't even know who Mia Hamm is.
3 Okay? They are athletic because it's what they like,
4 because their father enjoys it, for whatever reason.

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

10 VICE CHAIRPERSON THERNSTROM: In what --

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

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

25 I mean, that is sort of where the rubber

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 meets the road in terms of the fact that there are
2 some of them, some people, such as myself, who believe
3 that you need to continue to take affirmative steps
4 and affirmative action to remediate past
5 discrimination, notwithstanding the fact that other
6 people believe -- and I'm not criticizing anything at
7 this point -- that you simply take away the
8 nondiscriminatory factors and things will somehow
9 level on their own.

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

17 PARTICIPANT: But in the --

18 CHAIRPERSON REYNOLDS: Okay. Okay, folks.

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

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

24 CHAIRPERSON REYNOLDS: We could go on for
25 several days, but we are going to have to wrap this

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 up. Two last opportunities here.

2 VICE CHAIRPERSON THERNSTROM: Yes.

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

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

8 CHAIRPERSON REYNOLDS: Good luck.

9 (Laughter.)

10 CHAIRPERSON REYNOLDS: Give it a try.

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

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

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

24 And that's a distinction that helps
25 explain Commissioner Bracer's "differences of world

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 views." If you focus down on purely what is required
2 under the law, under prong three, that sets up a
3 different scheme than these kind of global concerns
4 that we're talking about, which, yes, is part of Title
5 IX, expanding opportunities for women. But it doesn't
6 quite fit in where we started this discussion.

7 CHAIRPERSON REYNOLDS: Commissioner
8 Kirsanow?

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

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

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

25 There is a question on the model survey

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 that asks students to self-identify their level of
2 ability. Beyond that -- and maybe this is a question
3 better asked of Mr. Black -- I'm not sure what weight
4 that receives.

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

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

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

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

25 MS. GAVORA: Prong three requires only the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 under-represented sex.

2 COMMISSIONER BRACERAS: Right.

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

7 MS. GAVORA: Because of proportionality,
8 exactly.

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

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

16 COMMISSIONER KIRSANOW: Yes.

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

22 COMMISSIONER KIRSANOW: Right.

23 MR. COHEN: So if through adding women's
24 sports, through a lack of showing of unmet interest,
25 if you reach a point where the women on campus are

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 receiving adequate opportunities under the law, then
2 there would be an opportunity to add on the men's
3 side, but --

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

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

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

11 COMMISSIONER KIRSANOW: Okay.

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

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

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

24 MR. BLACK: If we get a compliance and we
25 go and check data and it's proportional --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 COMMISSIONER TAYLOR: Right.

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

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

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

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

19 MS. GAVORA: Yes.

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

25 Do you have any further data or is that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 data that is pointedly directed toward Title IX? Is
2 there anything that points to the fact that Title IX
3 had some impact on that?

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

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

8 COMMISSIONER BRACERAS: Oh, sure.

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

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

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

20 MS. GAVORA: -- that aren't proportional.
21 So the only place schools can go is to men's teams.

22 MS. SWEET: I have a number for you.

23 MS. GAVORA: I am not arguing against the
24 fact that money doesn't have something to do with
25 this. Of course, it does. Resources are limited.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 But where does the law push forth the university's
2 hand when it has to cut back? It forces it on the
3 men's teams. That's where the --

4 COMMISSIONER KIRSANOW: I had one more
5 question for --

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

8 COMMISSIONER KIRSANOW: Yes.

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

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

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

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

25 So in terms of assessing the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 opportunities, isn't there going to necessarily be a
2 distortion in the numbers? Because there are going to
3 be more participants in certain sports than in others.

4 MS. GAVORA: Title X makes provision for
5 that.

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

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

15 COMMISSIONER KIRSANOW: I guess my
16 question is -- and I don't know this, and I'm asking.

17 If, let's say, in a given university you have got 100
18 female participants across all sports and 100 male
19 participants across all sports but all the male
20 participants are congregated in football --

21 COMMISSIONER BRACERAS: That's okay.

22 COMMISSIONER KIRSANOW: Okay?

23 MS. GAVORA: Yes.

24 COMMISSIONER KIRSANOW: Now, let's say
25 that doesn't meet the interests, though. The

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 interests are simply not met as a result of that. You
2 still have much unmet interest. Is the metric still
3 determined based on the 100 participants on the one
4 male sport? Is that how it works?

5 MS. GAVORA: Yes, bodies on the field.

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

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

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

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

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 complaints and based on case law.

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

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

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

11 MS. SAMUELS: I'm done.

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

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

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

21 **V. STATE ADVISORY COMMITTEE ISSUES**

22 CHAIRPERSON REYNOLDS: Folks, we have one
23 issue left. And here it goes. At the April 13th
24 meeting, the motions to approve the rechartering of
25 Virginia and the Michigan State Advisory Committees

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 were tabled in order to have an opportunity to respond
2 to a letter received from Congressman Conyers,
3 Chairman of the House Judiciary Committee, and
4 Congressman Nadler, Chairman of the Subcommittee on
5 the Constitution, Civil Rights, and Civil Liberties,
6 regarding the Commission's process for selecting SAC
7 members and SAC chairs.

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

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

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

23 I move that we recharter the Michigan
24 State Advisory Committee. Under this motion, the
25 Commission appoints the following --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 COMMISSIONER YAKI: Mr. Chair?

2 CHAIRPERSON REYNOLDS: Yes?

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

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

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

20 Is there a second?

21 VICE CHAIRPERSON THERNSTROM: Second.

22 CHAIRPERSON REYNOLDS: Discussion?

23 COMMISSIONER YAKI: Yes.

24 CHAIRPERSON REYNOLDS: Okay.

25 COMMISSIONER YAKI: One, I would like to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 make a motion to send this back to the Staff Director
2 for reconsideration. I think that there are questions
3 of genuine imbalance, political affiliation imbalance,
4 diversity of viewpoint imbalance that I believe need
5 to be better addressed.

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

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

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

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

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

24 COMMISSIONER YAKI: Well, that may be so,
25 but the fact is that I just spoke with Commissioner

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 Melendez, whose plane is just about to take off.

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

5 COMMISSIONER HERIOT: Your motion fails
6 for a second.

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

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

25 CHAIRPERSON REYNOLDS: Commissioner Yaki?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

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

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

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

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

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

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

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

24 CHAIRPERSON REYNOLDS: Well, call them
25 what you will. I don't think --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 COMMISSIONER YAKI: I am simply stating
2 the fact that I see based on --

3 CHAIRPERSON REYNOLDS: If you want to be
4 effective --

5 COMMISSIONER YAKI: -- my years on Capitol
6 Hill.

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

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

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

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

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

25 COMMISSIONER HERIOT: You were simply out

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 of order. It's a question of when you talk about a
2 motion, you have to wait for a second. They could
3 have asked for a second.

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

7 COMMISSIONER HERIOT: Not too well
8 evidently.

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

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

15 COMMISSIONER YAKI: I don't know what
16 threat you're talking about, Mr. Chairman. I am
17 simply saying that this has been a frustrating issue.

18 This has been an issue where I have attempted to say
19 quietly and privately that we need to figure out a way
20 to move forward and work forward on this issue, rather
21 than simply shoving it down the road right here.

22 CHAIRPERSON REYNOLDS: Do you think it
23 would be appropriate -- well, it would have been
24 helpful had we received this document with a little
25 notice so that we would have an opportunity to review

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 it.

2 COMMISSIONER YAKI: I would have liked to
3 have reviewed the response to Mr. Nadler, but I have
4 never seen that document either.

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

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

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

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

22 Now, that to me is completely
23 disingenuous. And I find it rather offensive for
24 someone who is not there, then, to hide behind the
25 idea that "Oh, well. I'm sorry we didn't e-mail it

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 because we're only going to put it out in front of the
2 commissioners."

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

9 CHAIRPERSON REYNOLDS: Commissioner Yaki?

10 COMMISSIONER YAKI: These things went out
11 4:18 p.m. Washington time yesterday afternoon.

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

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

25 And I would find it rather -- I think it

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

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

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

16 I think if we are to have a productive
17 relationship with that, rather than return to the days
18 of preceding times before you, Mr. Chair, before STAFF
19 DIRECTOR MARCUS, when Commissioner Braceras talked
20 about it, Commissioner Kirsanow talked about it,
21 during the days when hostility between the Commission
22 and the Oversight Committee resulted in reams and
23 reams of documents, all that kind of stuff went on
24 that hampered the impact of this Commission. I would
25 rather not see us return to those days.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 I understand you are in the majority. I
2 understand you have a point of view that you are going
3 to go across. But there is, as they say, no harm in
4 dialogue, no harm in talking, and no harm certainly in
5 following what I would think some protocol and respect
6 in the situation where another set of questions has
7 come over and you know part of it is because the
8 chairman has a keen interest in the State of Michigan,
9 that we resolve that as we go forward.

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

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

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

24 CHAIRPERSON REYNOLDS: Commissioner Yaki,
25 we received the letter. We responded to the letter.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 The letter did not ask us to place a moratorium in
2 place in terms of rechartering. I'm sure that we will
3 continue this conversation, but unless there is
4 support around the table to table this. I guess
5 that's what we -- I guess I can ask the question. Is
6 there support around the table to table the vote on
7 the Michigan SAC?

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

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

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

25 COMMISSIONER YAKI: Well, if you want my

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

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

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

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

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

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 things take a little bit longer because it should be.

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

18 CHAIRPERSON REYNOLDS: Vice Chair
19 Thernstrom?

20 VICE CHAIRPERSON THERNSTROM: Commissioner
21 Yaki, it seems to me you are posing here a picture of
22 some warm and fuzzy relationship between this
23 Commission as it's currently composed and Chairman
24 Conyers. And I don't think that that is in the
25 offing.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 COMMISSIONER YAKI: Commissioner, I think
2 you are misunderstanding me. There is a difference
3 between having warm and fuzzy and ensuring that, for
4 lack of a better word, you are not unduly baiting the
5 bear. That's all I'm going to say. Does that make it
6 any clearer?

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

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

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

24 There definitely is going to be an
25 agreement to disagree between the majority and the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 Oversight Committee. I just don't think we need to do
2 anything that would be seen as escalating it at all.

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

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

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

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

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

24 Outside of that communication, I think
25 there is a vast difference in how it can be perceived

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 and what it means to future relations with our
2 oversight committee. That is all I am saying.

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

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

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

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

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

24 STAFF DIRECTOR MARCUS: We're in varying
25 states. I mean, there are a number that are very far

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 along. I don't know whether it's a half or some
2 number. There are certainly a lot of them that are
3 very far along. And then there are a bunch where
4 we're in an early stage.

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

8 VICE CHAIRPERSON THERNSTROM: Virginia.

9 COMMISSIONER TAYLOR: Well, other than
10 Virginia.

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

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

21 CHAIRPERSON REYNOLDS: Comments?

22 (No response.)

23 CHAIRPERSON REYNOLDS: Okay. Is there --

24 COMMISSIONER TAYLOR: Let's stop. Can we
25 get five minutes off the record?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 CHAIRPERSON REYNOLDS: Okay. Commissioner
2 Yaki, we are going to go off the record for five
3 minutes.

4 (Whereupon, the foregoing matter went off
5 the record at 1:26 p.m. and went back on the record at
6 1:32 p.m.)

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

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

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

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

19 COMMISSIONER HERIOT: Second.

20 CHAIRPERSON REYNOLDS: Discussion?

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

25 CHAIRPERSON REYNOLDS: Can you provide us

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 with some details? Could you lay out your concerns?

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

8 CHAIRPERSON REYNOLDS: Was he convicted?

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

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

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

22 (Pause.)

23 COMMISSIONER YAKI: I have a New York
24 Times article dated March 27th, 1989, Chairman of the
25 United States Civil Rights Commission, William Barclay

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 Allen. And that is the day that he formally
2 apologized. There was an Indian trial.

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

5 (Whereupon, the foregoing matter went off
6 the record at 1:37 p.m. and went back on the record at
7 1:44 p.m.)

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

12 COMMISSIONER HERIOT: And whatever else is
13 ready.

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

16 (Laughter.)

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

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

24 CHAIRPERSON REYNOLDS: Okay. I think
25 that's good enough. So we are going to table the vote

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 on both the Virginia and Michigan SACs. And we will
2 take up the vote at our next meeting.

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

5 CHAIRPERSON REYNOLDS: Do we have to?

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

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

12 COMMISSIONER KIRSANOW: Second.

13 CHAIRPERSON REYNOLDS: Discussion?

14 (No response.)

15 CHAIRPERSON REYNOLDS: All in favor?

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

17 CHAIRPERSON REYNOLDS: Any opposition?

18 (No response.)

19 CHAIRPERSON REYNOLDS: Any abstentions?

20 (No response.)

21 CHAIRPERSON REYNOLDS: The motion carries.

22 Thank you, everyone. We are done.

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

25

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701