

**BRIEFING PAPER NO. 2**

**Title IX Commission— Inequities in the Process**

By

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Government commissions are required to operate under a mandate of transparency and are appointed with the intent of rising above self-interest, special interest, and bias to a higher level of analysis of major concerns. When commissions are operated with bias, under the guise of objectivity, they violate the public trust, undermine the public's belief in good government and create the reality and perception of a prejudiced examination of the issues. This has been the case with the Commission on Opportunity in Athletics.

**1. The Department of Education's appointments to the Commission were not balanced, and disproportionately represented those with an institutional interest in weakening Title IX.**

- 10 of 15 Commissioners are from Division IA schools, the largest schools in the NCAA, the ones with the biggest football and men's basketball programs, and the ones with the greatest interest in lessening the amount of regulation to which they are subject.
- The Commission has no representatives of Division II and Division III colleges, or of junior colleges or high school athletics programs, even though the concerns of those schools can be markedly different from those of Division I schools.

**2. The Department of Education has exhibited extraordinary bias against Title IX in the selection of panelists invited to testify before the Commission. Although the Department has not revealed its criteria for selection of speakers, a disproportionate number of the invited panelists were opposed to Title IX policies and promoted the use of interest surveys, counting opportunities rather than participants, and changing the proportionality standard.**

- **Of the 52 invited panelists, opponents of Title IX outnumbered supporters by more than two to one: 15 in favor-31 against-6 neutral**
  - Atlanta. (4 in favor; 9 against, 2 neutral)
  - Chicago. (4 in favor; 6 against; 2 neutral)
  - Colorado Springs. (2 in favor; 9 against, 1 neutral)
  - San Diego. (5 in favor; 7 against, 1 neutral)

- **Repeated panelist opportunities went to organizations and individuals affiliated with the highest numbers of men’s discontinued teams:**
    - Wrestling (6)
    - Swimming (2)
    - Gymnastics (2)
  - **Four invited panelists were football coaches or representatives of football organizations seeking to protect their advantaged positions.**
  - **No panelists represented organizations with a large number of discontinued women’s sports or new women’s Olympic sports that benefited from Title IX.**
  - **At least five of the panelists represented schools sued for compliance problems, with no panelists called who represented plaintiffs against institutions in Title IX court cases.**
- 3. Commissioners themselves expressed a desire at their Chicago and Colorado Springs meetings for expert witnesses rather than disenfranchised sport representatives to appear before the Commission. These repeated requests were ignored by Department of Education staff, who consistently obstructed these requests.**
- The Commissioners called for a full explanation of the Title IX athletics policies, but received testimony only from a very junior lawyer who could not explain the 1996 policy clarification.
  - Department of Education staff ignored repeated requests to hear from Marney Shaul of the General Accounting Office, who oversaw the most accurate research on participation and discontinued teams. The GAO is a non-partisan government agency that produced an authoritative study of changes in participation that showed that *both* men's and women's opportunities have increased overall in the last 20 years.
  - Repeated calls to address the arms race and the most accurate financial data from researcher Daniel Fulks were not granted.
  - Repeated calls for experts on the validity of interest surveys were ignored.
  - As a result, the Commissioners were left with unanswered questions about all the data brought before the Commission and even about the law itself.
- 4. The procedures established by the Department of Education, and the conduct of Department of Education staff members in conducting the hearings, were obstructionist.**

- **The initial question posed to the Commission was misleading with regard to the purpose of Title IX. Rather than asking the Commission to evaluate whether Title IX policies appropriately implement Title IX’s requirements for equal participation opportunities – a question that would necessitate an examination of the needs of the historically disadvantaged population of female athletes – the first question instead focused on the needs of a small disadvantaged group within the majority male athlete population.**
  - Question 1: Are Title IX standards for assessing equal opportunity in athletics working to promote opportunities for male and female athletes?
  - This question is framed incorrectly. The correct question should be: “Are Title IX standards working to promote equal opportunity in athletics?”
- **The six-month timetable for Commission study is unrealistic given the volume of testimony received and the complexity of the issues. At the Commission’s recent meeting in Philadelphia, it was clear that neither Commission members nor Department of Education staff understand the existing law and extensive policy documents issued over 25 years by the Department.**
  - For example, when one Commissioner requested that the staff explain the 1996 clarification letter, she was told that there was not time. Without any review of the document, therefore, the Commissioners went on to recommend changes to a policy that they did not fully understand.
  - The Commission convened to present its initial recommendations only six working days after the final Town Hall meeting in San Diego. Last minute instructions for the Philadelphia meeting were provided that several commission members did not get a chance to read.
- **During the conduct of the hearings, open mike speakers were selected on a first come/first served basis with no effort to alternate between pro and con speakers. In the initial meetings, wrestling interests were repeatedly heard without an opportunity to hear from others with different experiences.**
- **The locations of the hearings were not announced until the last moment permitted by administrative regulations governing the conduct of federal commissions.**
- **Sites selected were at expensive hotels with costly or limited parking for the public.**
- **Staff waited until shortly before the hearings (a week to 10 days maximum) to invite speakers, which resulted in potential speakers having schedule conflicts or limited preparation time.**

- **OCR staff members serving as Ex-officio Commission members frequently dominated and directed the questioning of panelists, reducing Commissioners' opportunities during time allotted to question panelists.**
- **Staff members also inappropriately inserted themselves into the decision-making process, making repeated recommendations for changes to Title IX policies that went beyond even those suggested by the Commissioners themselves.**