

FOLLOWING SUBMISSION OF THE COMMISSION REPORT, TITLE IX POLICIES REMAIN IN GRAVE DANGER

The Secretary of Education's Commission on Opportunity in Athletics submitted its final report on February 26, 2003, but two Commissioners, Donna de Varona and Julie Foudy, submitted a strongly worded Minority Report that the Secretary refused to accept. While the Secretary announced that the Department will move forward only on the Commission's "unanimous" recommendations, thereby taking some of the Commission's worst proposals off the table, major threats to Title IX athletics policies remain. The Secretary's insistence that some dangerous recommendations are unanimous when they are not, and the ambiguous wording of other recommendations whose meaning could be misconstrued, are underscored by his refusal to accept the Minority Report and by his establishment of a process in which, among other things, Commissioners were denied the opportunity to meet to discuss the final Report before its submission.

The Secretary, while asserting an intention to act only where there is unanimity, has misstated where true unanimity lies, leaving Title IX vulnerable. The Minority Report specifically objects to two particularly harmful recommendations the Secretary persists in calling unanimous, and makes clear that others are so ambiguous that the Commissioners' consent is contingent on the Secretary's interpretations of them. The Minority Report further takes issue with the entire tone and thrust of the Commission's process and report, forming the backdrop for evaluating all of the recommendations, which emphasized the problem to be addressed as alleged losses to men's teams and not continuing discrimination against women.

The Secretary cannot accurately gauge which recommendations truly enjoy consensus when refusing to take the minority positions and concerns into account, let alone the concerns of other Commissioners that arise from the process and the final report as submitted.

The Secretary Has Mischaracterized As "Unanimous" Recommendations That Have Been Explicitly Disavowed By Commissioners, And His Adoption Of Them Would Seriously Weaken Title IX Standards.

- The Secretary erroneously claims that 15 recommendations are unanimous. But in advance notification to Department of Education staff and explicitly in their Minority Report, Commissioners de Varona and Foudy refused to consent to two of them – Recommendations 14 and 23. The Secretary's insistence on considering these proposals belies his commitment to proceed only on unanimous recommendations.

- These recommendations open the door to reversal of Title IX policies and significant decreases in athletic opportunities for women and girls.
 - ❖ **Recommendation 14** encourages the Secretary to allow for a “reasonable variance” from the current Title IX standards for equality. Because the language is open-ended, it is impossible to put a limit on the losses the Secretary could inflict on women and girls if he adopted this recommendation. Under this proposal, the Department of Education could deem schools in compliance with Title IX even where they fall far short of equal opportunity for women and girls – subject only to the Secretary’s subjective judgment about what is “reasonable.”
 - ❖ **Recommendation 23** urges the Secretary to explore “additional ways of demonstrating equity,” even though such ideas are not described in the report and were not even considered by the Commission. The Secretary can take this recommendation as a blank check to make any changes to Title IX policies other than those objected to in the recommendations, no matter how devastating, and claim they were pursuant to the Commission mandate and “consensus.”

The Secretary Could Misread The Language Of Ambiguously Worded Recommendations To Authorize Damaging Changes To Title IX Policies, And Erroneously Assert That These Interpretations Are Unanimous.

- In their Minority Report, Commissioners de Varona and Foudy specifically questioned the language of two ambiguously worded recommendations – Recommendations 19 and 9 -- and made their consent to them contingent on the Secretary’s interpretation of the proposals.
 - ❖ **Recommendation 19** advises the Secretary to study assessing compliance with the third prong of the three-part test by comparing a school’s ratio of male/female athletic participation to the “demonstrated interests and abilities” shown by high school and other participation rates or by interest levels shown in surveys of current or prospective students. But courts have rejected the idea that women’s interests in sports can fairly be assessed by interest surveys, as well as the notion that schools can comply with the third prong of the three-part test without fully accommodating women’s interests and abilities. Were the Secretary to use this recommendation to authorize allocation of opportunities based on interest surveys -- or less-than-full accommodation of women’s interests -- it would both violate any claim of consensus and gut long-standing interpretations of Title IX’s requirements.
 - ❖ **Recommendation 9** encourages redesign of the Equity in Athletics Disclosure Act. The Minority Report makes clear that Commissioners De Varona and Foudy support this recommendation only to the extent that it is used to authorize schools to supply additional information about their compliance with the three-part test – *not* to justify an overhaul that would delete key information from the reports.

- Commissioners de Varona and Foudy further made clear that they never consented to an interpretation of *any* recommendation that would reduce the protections in place, under current policies, to enable girls and women to achieve equal opportunities to participate in athletics. The Secretary cannot treat any recommendation as reflecting a unanimous viewpoint unless his interpretation of it incorporates that understanding.
- ❖ **Recommendation 3**, for example, advocates a national education effort on “clear, consistent and understandable written guidelines for implementation of Title IX.” The Minority Report shows that there is not unanimous support for any reading of this recommendation premised on the notion that any current Department policies must be revised to meet this standard.
- Moreover, because many of the recommendations are not explained in the Commission’s Report and were discussed in such a truncated and confusing way -- and because Commissioners were not offered an opportunity to meet to discuss or vote on the final report -- the Secretary has no way to determine whether Commissioners agree on the meaning of ambiguous recommendations such as Recommendation 3. The Secretary cannot use these ambiguously worded recommendations to make changes to Title IX policies under cover of “unanimity.”

Rather Than Asserting A Consensus For Changes To Title IX Athletics Policies Where None Exists, The Secretary Should Do The Following If He Seeks To Proceed On Recommendations That Enjoy Unanimous Commission Support.

- Educate schools and the public about the flexible way Title IX actually works, that there are three different ways to comply, and that there is no reason to cut men’s sports.
- Vigorously enforce Title IX standards, including implementing sanctions for schools that do not comply.
- Encourage schools and athletic organizations to rein in escalating athletics costs and agree on reforms so that more female and male athletes will have a chance to play.
- Encourage schools and athletic organizations to review whether some rules, like athletic association scholarship limits, make it more difficult for schools to provide equal participation opportunities to women.