Comments on the Proposed Common Rule

Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving Federal Financial Assistance[1]

The Regulatory Studies Program (RSP) of the Mercatus Center at George Mason University is dedicated to advancing knowledge of regulations and their impacts on society. As part of its mission, RSP produces careful and independent analyses of agency rulemaking proposals from the perspective of the public interest. Thus, the program's comments on the common rule providing for enforcement of Title IX of the Education Amendments of 1972, as amended, do not represent the views of any particular affected party or special interest group, but are designed to protect the interests of American citizens.

I. Background and Overview of Proposal

Title IX of the Education Amendments of 1972 provided that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681 (a). It was modeled after Title VI of the *Civil Rights Act* of 1964.

The Department of Education developed regulations and enforcement policies to ensure compliance with Title IX. The Department's rules subsequently stimulated several court cases. One of the more significant was a 1984 Supreme Court decision in *Grove City College v. Bell*, where the Court determined that the Department had defined "program or activity" too broadly. It concluded that Federal student financial assistance bestowed on colleges created Title IX jurisdiction only over the specific programs that received federal funds. In response to this decision, Congress amended Title IX with the *Civil Rights Restoration Act* of 1987, which broadened the statutory definition of "program or activity" to include all of the operations of an educational institution if any one part received federal aid.

A. Scope of Proposal

The Department of Justice has proposed common rules for 25 department and agencies, using the rules and enforcement policies of the Department of Education as a model. The proposed common rule would expand the coverage of Title IX in several important ways. First, by broadening the definition of "program or activity," the coverage of Title IX is:

> No longer limited to the exact purpose or nature of Federal funding. If, for example, a State or local agency receives Federal assistance for one of many functions of the agency, all of the operations of the entire agency are subject to the nondiscrimination provisions of Title IX.

[1] As appearing in the *Federal Register*, Vol. 64 No. 209, Friday, October 29, 1999, "Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving Federal Financial Assistance; Proposed Rule," pp. 58568—58606. Hereinafter referred to as the "Proposed Rule."

> With respect to educational institutions, it is critical to remember that all of the operations of the institution, whether or not an operation is educational or academic in nature, are subject to Title IX's prohibition on discrimination. Thus, for example, housing programs, a shuttle service, food service, and other commercial operations are covered by Title IX if any part of the entity is a recipient of Federal funds.[2]

Second, it appears that the proposal would extend the applicability of Title IX to areas outside the direct scope of educational institutions. The proposal states that the statute, as amended, "is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in these Title IX regulations."[3] Thus, any organization, whether or not it is educational in nature, would be subject Title IX requirements if it operated an educational program and received any funding from any of the 25 departments listed in the proposal, in addition to the Department of Education. Private activities that deal primarily with education, health care, housing, social services, or parks and recreation will also come under the rubric of Title IX.

The preamble to the proposed common rule illustrates the extent of the coverage:

> Thus, for example, these proposed Title IX regulations will apply to such diverse activities as a forestry workshop run by a state park receiving funds from the Department of Interior; a boater education program sponsored by a county parks and recreation department receiving funding from the Coast Guard; a local course concerning how to start a small business, sponsored by the state department of labor that receives funding from the Small Business Administration; and, state and local courses funded by the Federal Emergency Management Agency in planning how to deal with disasters. It will also apply to a museum lecture series when the museum receives a grant from the Institute for Museum and Library Services, or a lecture series on the history of dance given at a local school of ballet receiving funding from the National Endowment for the Arts. Vocational training for inmates in prisons receiving assistance from the Department of Justice is another example of the type of program this proposed regulation will cover. In short, these proposed regulations will apply to the educational programs or activities of any entity receiving financial assistance from the agencies promulgating this proposed regulation.[4]

Furthermore, the specific areas covered by the proposed rule include "housing, access to course offerings, access to schools operated by local education agencies, counseling, financial assistance, employment assistance to students, health and insurance benefits and services, consideration of marital and parental status, and athletics."[5] In addition, "receiving financial assistance" includes:

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[2] Proposed Rule, p. 58571.

[3] *ibid*, pp. 58574-58575.

[4] *ibid*., p. 58570.

[5] *ibid*., p. 58572.

(1) A grant or loan of Federal financial assistance, including funds made available for:
   (i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and
   (ii) Scholarships, loans, grants, wages, or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement that has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.[6]

Consistent with the statutory amendments, the common rule would offer explicit exemptions for (1) religious institutions whose tenets are not consistent with Title IX, (2) American Legion operations of Boys State, Girls State, Boys Nation, and Girls Nation programs, (3) father-son or mother-daughter activities *as long as comparable activities are provided for students of the opposite sex*, and (4) scholarships for beauty pageant winners.[7]

The proposed common rule thus covers the educational activities of educational institutions, the educational activities of non-educational institutions, and the non-educational activities of educational institutions. The only areas precluded from coverage are the non-educational activities of non-educational institutions.

B. Proposed Requirements

The diverse entities covered by the proposal would be subject to procedural requirements to ensure compliance with the law. Section ___.110 requires remedial action, affirmative action, and self-evaluation,[8] which includes:

- **A self-evaluation** to determine whether their policies and practices *and their effects,* comply with Title IX. The results of the self-evaluation must be kept and made available to any agency official for at least three years following any evaluation. In response to the self-

[6] *ibid*., p. 58575.

[7] *ibid*., pp. 58570-58571.

[8] *ibid*., p. 58575.

evaluation, entities must modify policies and practices that do not comply, and take remedial steps to eliminate effects of discrimination resulting from policies or practices.

- **Remedial action** to overcome discrimination., in the event that the designated agency official finds a violation;
- **Affirmative action** to overcome the effects of "conditions that resulted in limited participation … by persons of a particular sex", even if no "discrimination on the basis of sex in an education program or activity" is found;
- **Compliance assurance**, "satisfactory to the designated agency official that each education program or activity operated by the applicant or recipient and to which these Title IX regulations apply will be operated in compliance with these Title IX regulations."[9] (58576) However, the designated official may not be satisfied if "the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with Sec _____.110(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior to or subsequent to the submission to the designated agency official…"[10]
- **Designation** of a compliance officer within the organization.
- **Printed notification** to any and all individuals that the particular organization complies with or attempts to comply with Title IX. This includes notices in newspapers, alumni publications, and other promotional material.[11]

Key to implementing the proposed rules is the "designated agency official," to be defined by each agency. The designated agency official has broad powers and responsibilities. The "designated agency official" is mentioned throughout the proposal, and must be provided with information, or must approve certain activities of the institution. For example, Section ___.110 states that "if the designated agency official finds that a recipient has discriminated against on the basis of sex in an education program or activity, such recipient shall take such remedial action as the designated agency official deems necessary to overcome the effects of such discrimination."[12] This aspect of the rule could therefore make an institution subject to 25 separate interpretations of the proposed rule's applicability.

II. Title IX Falls Back on Quotas–Evidence from Collegiate Sports

The proposed common rule appears to reject quotas with the statement that "recipients may not impose numerical limits on the number or proportion of persons of either sex who may be admitted."[13] In addition, it is well known that the authors of the original Title IX legislation

[9] *ibid*., p. 58576.

[10] *loc. cit*.

[11] *ibid*., p. 58577.

[12] *ibid*., p. 58575.

[13] *ibid*., p. 58572.

explicitly rejected the use of quotas. However, in fact, Title IX has been implemented with quotas and proportions. One would therefore expect that the proposed rule will be enforced similarly, resulting in the increased use of quotas and proportions to achieve its goals.

The quota implications of Title IX's regulation and enforcement policies are most evident in its application to collegiate athletics. While individuals have not been denied admission to a sport, many colleges and universities have instead eliminated whole teams to achieve compliance. These actions have reduced opportunities for men, while many women still choose not to participate in sports. A brief history of the application of Title IX in collegiate athletics provides a case study of the enforcement policies of the Department of Education, and a good preview of what might be expected under the common rule being proposed.

The implementation of Title IX in college sports is dominated by *Cohen v. Brown.* Brown University has a history of promoting women's athletics; however, in 1991 Brown reduced two men's and two women's programs from varsity to club status to reduce costs. The women sued, arguing that because women comprised 51% of students and yet only 38% of varsity athletes, that fact constituted evidence of discrimination under Title IX. The courts agreed. In essence, the courts held that if a college has 55% women, its athletic program must also consist of 55% women.[14]

In order to comply with the court's prescription, a school may seek to increase women's participation on athletic teams, or reduce men's participation, or a combination of both strategies. The difficulty schools face is that women do not turn out for sports at the same rates as their male counterparts. Thus, many schools have had to cut to men's sports teams in order to comply. In some instances however, the tables have turned a bit. In Birdsboro, Pennsylvania for example, a male now plays on the women's field hockey team, and since no comparable men's team exists, he must be allowed to play.[15] However, such cases are the exception. What has generally happened instead is that some of the nation's most storied programs have been eliminated, including:

- UCLA men's swimming, which produced 22 Olympic gold medallists;
- UCLA men's gymnastics, which produced virtually all of the 1984 Olympic team;
- Boston University's ninety-year old football program; as well as
- Scores of men's golf teams, wrestling programs, men's tennis teams, men's cross country teams, indoor and outdoor men's track teams, and baseball teams.

The Independent Women's Forum has documented the loss of more than 350 men's athletic teams since 1992.[16] Moreover, according to the NCAA's 1997 *Gender-Equity Study,* between

[14] See, *Cohen v. Brown University*; 991 F. Second 888 (First Circuit, 1993); certiorari denied, 520 US 1186 (1997).

[15] See for example, *Herald Standard Tribune* (Uniontown, Pennsylvania), October 15, 1999, p. C2.

[16] Independent Women's Forum. *Issue Analysis: The Gender Quota Mega-Reg*. Arlington, Virginia: June 1999.

1992 and 1997, men lost 20,896 positions at the collegiate level. Women, by contrast, gained 5,816 new athletic positions. This translates into 3.6 men's positions lost for every one woman's position added.

During the debates of the original Title IX legislation the topic of quotas was raised. Senator Birch Bayh went so far as to state that quotas were "exactly what this amendment intends to prohibit. …What we are saying is that we are striking down quotas. The thrust of the amendment is to do away with every quota."[17] However, as is evident from the *Brown* case and the actual implementation of the rule by the Education Department, quotas and equality of outcomes are exactly what have evolved. Although the Department claims "recipients may not impose numerical limits on the number or proportion of persons of either sex who may be admitted,"[18] part of the mandated transition plan indicates that estimates of "the number of students, by sex, expected to apply for, be admitted to, and enter each class during the period covered by the plan" must be furnished.[19]

Not only must institutions collect data on compliance, but the proposed rule also mandates a tight time schedule for remedying potential problems. According to the terms of the proposed rule, within one year institutions are to have taken the "appropriate remedial steps to eliminate the effects of any discrimination that resulted or may have resulted from adherence to these policies and practices."[20] One year is not much time to institute new programs, nor is it time enough to recruit participants that bring a program into compliance with Title IX. The step that will avoid the most litigation therefore, is simply to eliminate some classes of programs.

A. The Costs and Benefits of Equality of Outcomes

Contrary to the Department of Justice's quick dismissal of costs to the Title IX common rule as inconsequential, our estimates show, that at least insofar as collegiate athletics and associated scholarships are concerned the costs of the Title IX common rule will be considerable. In fact, we estimate that achieving Title IX parity in collegiate sports will impose net costs of nearly $3.2 billion on American society.

Based on current attrition rates indicated above (i.e., the rate of elimination of men's teams to the rate of creation of women's teams), we expect that it will take roughly 14 years for men's and women's sports teams to achieve parity.[21] Over those 14 years, we expect nearly 8,800 minority male athletes will see their lifetime earnings reduced owing to foregone college athletic scholarships, at a cost to them of $865 million. Similarly, more than 26,000 white male athletes will forego a chance to attend college on a sports scholarship, at a cost to them of $3.8 billion in foregone lifetime earnings.

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[17] John Leo, "Gender Police: Pull Over!," *US New and World Report*, March 23, 1998, p. 11.

[18] Proposed Rule, p. 58572.

[19] *ibid*., p. 58578.

[20] *ibid*., p, 58576.

[21] This estimate is based on NCAA participation rates by men and women on sports teams at US colleges and universities as of 1996. See the NCAA "Fact Sheet" at www.ncaa.org/about/factsheet.html.

On the benefit side of the ledger, nearly 1,400 minority women athletes will receive athletic scholarships who might not have otherwise received them as athletic emphasis is redirected toward women's sports. Such scholarships will benefit the lifetime earnings of minority women to the tune of $150 million. White women athletes however, stand to gain the most by increasing their athletic scholarships by roughly 8,400 over the 14 years we expect it to take to achieve parity. Those 8,400 scholarships will benefit lifetime earnings of white women athletes by approximately $1.3 billion. The net of costs to men's college athletics and benefits to women's college athletics yields our expected cost estimate of the Title IX common rule of $3.2 billion.

The estimates above assume that men who currently receive scholarships but will not under new Title IX restrictions will not attend college without an athletic scholarship. The estimates also assume that college athletes' incomes after some attendance or graduation, will mirror the nation's median incomes for these classifications. Of course, these are simplifying assumptions. The cost estimate of Title IX will be smaller if a student is able to go to college even without a scholarship. The costs will larger if the lost opportunity to play sports not only prevents an athlete from attending college, but also eliminates the potential for playing professional sports or winning an Olympic medal.

It is important to point out that our estimates do not consider many other implications of changing the fabric of collegiate sports, nor the effects reduced funding may have on other student activities and scholarships. Neither do the estimates consider the far-reaching affects of Title IX on those who conduct business with American colleges and universities. We offer the estimate simply to illustrate the effects of the common rule on just one dimension, athletic scholarships and the associated earnings foregone. Our estimates support the conclusion that the costs of making Title IX more draconian will be substantial indeed. The Department of Justice should therefore reconsider its unsupported inference that the imposition of the Title IX common rule is nearly costless.

III. The Expanded Scope of the Regulation Could Have Far-Reaching Implications

The preamble to the proposed common rule states that while it is a "significant regulatory action," participating agencies have determined it is not "economically significant," as defined by Executive Order 12866 or "major," as defined by the *Small business Regulatory Enforcement Fairness Act* of 1996. The participating agencies also certify that the rules will not significantly affect small entities. These certifications are based on a determination that the rule will not have an annual effect on the economy of more than $100,000,000, and they allow the promulgating agencies to avoid quantifying the estimated costs and benefits of the proposal.

The basis for these certifications is twofold. First, the preamble states:

> All of the entities that are subject to these regulations are already covered by Title IX. While these regulations address standards of liability and require that recipients establish grievance procedures and take other action, a substantial number of entities already are subject to other agencies' Title IX regulations that impose the same

> requirements. Accordingly, these regulations will not impose new obligations on many recipients."[22]

It estimates that the "number of recipient educational institutions that have not previously complied or are required to comply is estimated as fewer than ten."[23]

Second, the preamble asserts:

> To the extent these requirements will be new for some entities, they are not burdensome. Indeed, Federal funding recipients are already required to have most of these procedures under other civil rights statutes, and would generally fulfill the requirements of the common rule by including Title IX within their existing processes. Similarly the common rule also requires a covered recipient to designate an employee to coordinate Title IX compliance efforts. In many, if not in most, cases, that person would be the same person currently responsible for handling complaints under the other antidiscrimination laws.[24]

Despite these certifications as to the limited impact of the proposal, however, the costs of the proposal may be significant and far reaching. Furthermore, whether Americans will benefit from the expanded rules is questionable.

A. The rule is not based on evidence of pervasive or continuing discrimination based on sex.

What problem are we seeking to address? According to a Congressional Research Service Report for Congress,

- Women now constitute majorities in college enrollment and are the majority of recipients of bachelor's and master's degrees. The proportion of women graduation from college today is equal to that of men, with both at 27%. In 1971, only 18% of women completed four or more years of college, compared to 26% of men. By 2006 women are projected to earn 55% of all bachelor's degrees.[25]
- In 1994, women earned 34% of all U.S. medical degrees, compared to 9% in 1972. Women also earned 39% of all dental degrees in 1994, as opposed to 1% in 1972. In 1994, women earned 43% of all law school degrees in the U.S., up from 7% in 1972. Finally, of all the doctoral degrees awarded in 1994, women received 44% compared to 25% in 1992.[26]

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[22] Proposed Rule, p. 58573.

[23] *loc. cit.*

[24] *loc. cit*.

[25] Educational data available from the Census Bureau, "Educational Attainment," on their website at www.census.gov/population/www/socdemo/educ-attn.html.

[26] *loc. cit.* If current trends continue, women will achieve professional parity with men in two to five years (depending on the profession) *without* the imposition of the proposed common rule.

- In the area of athletics, there has been a fourfold increase in the participation rates of women since 1971. Currently, women comprise 38% of all collegiate athletes, compared to 15% in 1972.[27] Even at the high school level the participation rate of women has increased, from 7.5% in 1971, to 39% in 1994.

Is the purpose of Title IX still to promote educational opportunities for women? If it is, why then is the expanded common rule necessary? The advancements of women in academics is apparent from the statistics noted above. What problem then does the proposed rule seek to address? The natural progression of Title IX seems to be elimination of disproportionate numbers of a particular sex in certain academic environments even though the proportions may be the result of choice rather than discrimination. Indeed, the evidence from collegiate sports offers little room for alternative interpretations.

The important point is that women now constitute the majority of college enrollments.[28] Educational opportunities for women clearly exist. Despite a strenuous objection to quotas in both the original 1972 legislation and the current proposal, there is little doubt that quotas will be the yardsticks used to measure Title IX compliance.

B. Subjective nature of compliance create uncertainty and increases costs.

The implementation of Title IX has been subjective and, under the proposed common rule, will continue to be. Compliance depends on satisfying "designated agency officials," and, since only broad concepts are articulated in the notice, enforcement is likely to be uncertain and uneven. The proposal states that if "the designated agency official finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial actions as the designated agency official deems necessary to overcome the effects of such discrimination."[29]

The difficulty for an institution is to assess accurately what may quell any problems, and such assessments may differ significantly from what the designated agency official may consider proper. This creates costs because the institutions cannot be sure that any given action will prevent an investigation. In response, institutions may over-invest in precautionary measures; or, as in the case of athletics, they may simply eliminate programs altogether to avoid the risk of noncompliance.

C. The Department of Justice appears to have understated paperwork costs

As required by the *Paperwork Reduction Act* of 1995, the Department of Justice has submitted estimates of the annual reporting burden associated with the proposed requirements. It estimates

[27] See the NCAA's "Fact Sheet," available on-line at www.ncaa.org.

[28] Indeed, as of 1998 according to Census Bureau data, women accounted for 55% of all matriculations at US colleges and universities. Are these gains disproportionate, or are 1979 levels "more approporiate" when men and women were last at parity in terms of matriculations?

[29] Proposed Rule, p. 58575.

that the requirement for self-evaluation to determine whether policies are "consistent with law" (a new phrase added by this rule) will only consume 30 hours of time nationally. This is based on an assumption that just five entities will undertake these activities, and that each will spend an average of 6 hours on the self-evaluation. This estimate severely understates costs for three reasons.

1. The number of self-evaluations (6) is based on the expectation that most entities already must conduct self-evaluations in compliance with Department of Education rules. However, given the expansion of coverage of the rule to non-education institutions, this is severely understated.

2. Even institutions that have conducted self-evaluations in the past are likely to incur additional costs to ensure continued compliance with the expanded rules. The preamble directs agencies to "consult with the Department of Justice regarding interpretations of this [self-evaluation] section," due to "recent, numerous decisions by the Supreme Court and lower courts concerning affirmative action." This suggests that compliance requirements are continually changing, and that any self-evaluation would have to reflect this fact.

3. Since compliance requirements are continually being revised suggests also that 6 hours per entity is a serious understatement. If enforcing agencies must consult with the Department of Justice, regulated entities are likely to require advice of lawyers and more than 6 hours to ensure their programs and activities comport with the latest interpretations of the Act. (Collecting compliance data alone is likely to take more than six hours.)

Another demand on schools is that in the first year after the rule goes into effect, they must:

> …evaluate its services, policies, and practices and the effects thereof concerning admission of students, treatment of students, and employment of both academic and non-academic personnel in connection with the recipient's education program or activity to determine whether they meet the requirements of Title IX, and to the extent the requirements are not met, to make the required modifications.[30]

This imposes costs not only in dollar terms, but also in terms of time. To be prudent and conscientious about complying with the proposed rule, institutions must reconsider all of their policies and personnel to make sure each is Title IX compliant. In the proposed rule, the Department of Justice assumes public reporting and record keeping for this activity for each institution will take just 6 hours in total. Assuming this figure is correct, and given 3,706 institutions of higher learning in the US,[31] the DOJ figure suggests that each school will spend

[30] *ibid*., p. 58573.

[31] See the *Statistical Abstract of the United States*, 1998, Table No. 306, "Higher Education—Summary: 1970 to 1996." There were 3,706 institutions of higher education in the US as of 1995.

roughly 5.8 seconds to evaluate its compliance with Title IX's new requirements. That hardly seems like enough time for careful and thoughtful consideration.[32]

While the proposal states that "nearly all educational institutions affected by this provision have already complied or are required to comply with this provision under Title IX regulations promulgated by the U.S. Department of Education", the fact that this is a new proposal with different applications will mean that all colleges and universities will need to reevaluate their current positions. Given that virtually all colleges and universities in the country receive some form of federal assistance and thus would be required to comply under the proposed common rule, a minimum estimate of one week (40 hours) seems more reasonable. At an estimated labor cost of $100.00 per hour (to account for legal oversight and executive labor costs) suggests that the barest minimum costs would be closer to $15 million.

The other reporting requirement examined under *Paperwork Reduction Act* requirements is the assurance of compliance that applicants for federal funding must periodically provide. The Department of Justice estimates that recipients will be able to read and complete the required form in ten minutes. With 107,000 applicants completing 1.25 forms per year, this results in an increased annual reporting burden of 22,292 hours. Even accepting the assumption that recipients would be able to read and complete a complex legal form in 10 minutes, an assumed cost of $100.00 per hour yields a total cost estimate for this aspect of the rule of more than $2.2 million. If the time required is more consistent with the six hours the Department of Justice elsewhere estimates, the cost of paperwork compliance balloons to more than $80 million.

D. Increased Litigation Risks, And Resulting Costs Are Not Considered.

There are also more indirect costs associated with the proposal. The preamble to the common rule states: "Upon the issuance of final regulations by the participating agencies, beneficiaries and affected parties will have more opportunities to file complaints or seek information regarding Title IX enforcement from various agencies."[33] The preamble later asserts that "by identifying a coherent scheme for resolving complaints administratively, this proposal may help prevent costly private litigation."[34] However, the proposal offers no solid rationale for this assumption, and thus, no reason to expect administrative resolution will be less costly.

Moreover, the rule states that a "recipient [institution] shall not administer or operate any test or other criterion for admission that has a disproportionately adverse effect on persons on the basis of sex unless the use of such at test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria that do not have such a disproportionately adverse effect are shown to be unavailable."[35] This approach shifts the burden of proof to the defendant in a lawsuit. It now becomes the defendant's responsibility to

[32] To be fair, the DOJ suggests that just five institutions will have to reconsider compliance under the new common rule. Even at that, less than one working day per school hardly seems sufficient.

[33] Proposed Rule, p. 58569.

[34] *ibid*., p. 58573.

[35] *ibid*., p. 58579.

prove that there is no "fairer" way to test so as to avoid the *appearance* of discrimination. Such a task is impossible, as it constitutes the attempt to prove a negative.

E. Participating agencies do not consider educational implications.

The proposed common rule does not address the issue of what the educational implications of the expanded coverage and requirements might be. According to the preamble, the "goal of Title IX is to ensure that Federal funds are not utilized for and do not support sex-based discrimination, and that individuals have equal opportunities, without regard to sex, to pursue, engage or participate in, and benefit from academic, extracurricular, research, occupational training, employment, or other educational programs and activities."[36] Yet, it assumes that its broad-ranging requirements will achieve that goal, without a thoughtful analysis of the possible ramifications of those requirements.

Evidence from the effect of Title IX regulations on college athletic program suggests that it has reduced the number of male athletes accepted at higher-education institutions. Minority men may be hurt by the reductions in scholarship programs or opportunities. For example, Blinn College's track team, 75% of the scholarship athletes were black. The program no longer exists due to Title IX. San Francisco University's football team, on which 34% of the scholarship athletes were black, was similarly eliminated. Trimming basketball and baseball teams also restricts opportunities for minorities to participate in athletics, and thereby decreases the number of minority opportunities to attend college, and by inference, reduces the number who may finish high school. Without a potential future in college athletics, incentives for some students to perform well and stay in high school diminish.

In an article for the *Journal of Economics and Finance*, Mark Thompson notes that the costs to society corresponding to low educational achievement is substantial—$727 billion in lost income annually.[37] His estimate was based solely on failure to finish high school, which he suggests "provides a distinct and recognizable gap in desired and actual performance which can be addressed."[38]

Greater levels of educational attainment correlate with greater incomes. In addition, there are positive spillovers to greater educational achievement, including attracting new firms to an area, lowering crime rates and reduction in dependence on some transfer payments. From Thompson's measure of the levels of income lost due to high school noncompletion, it is reasonable to assume there are decreased income opportunities that result from college noncompletion as well, and as indicated in Section II-A above.

As noted earlier, in order to comply with Title IX regulations as they apply to sports, some colleges have simply dropped men's teams, while others combined eliminating men's teams with

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[36] *ibid*., p, 58569.

[37] Mark A. Thompson, "Assessing the Economic Costs of High School Noncompletion." *Journal of Economics and Finance* 22 (2-3), Summer/Fall 1998, p. 110.

[38] *ibid*., p. 116.

increasing the number of sports teams available to women athletes. Evidence suggests that the women's sports being added benefit mainly white women. The percentages here are staggering. Leaving out women's basketball and track, in which minority women participate in higher percentages, 86% of women athletes are white.[39] The sports that have been added do not help to alter this disparity. Archery, golf, equestrian, crew, water polo and skiing simply do not attract minorities in large numbers. Universities in Cincinnati, Iowa, Minnesota, and even Arizona State—where ASU will flood a 2-mile dry gulch so the team can have somewhere to row— have followed the trend of adding crew. The reason for the explosion of the sport is that it requires large numbers of women to populate a crew team. Extending Title IX's rules to other funding agencies and institutions may generate similar unintended consequences.

Going beyond sports, how will the expansion of these rules affect the breakdown of individuals in the classroom? One of the crucial issues that has been overlooked is that women dominate certain fields, not only in the work place, but also in the classroom. Nursing, teaching, English, and the fine arts are all areas in which there disproportionately more women than men. If evidence from the application of Title IX to sports is suggestive, then these cases may too be targeted for elimination with the attendant opportunity losses to women. In fact, University of Chicago professor of law Richard Epstein observed during the *Brown* trial that "Title IX would be read to require a rough proportion of men and women in engineering and science on the one hand, and art and literature on the other, even though most certainly far more men are engaged in the former activities, and far more women students are engaged in the latter.

Though the original authors of the Title IX legislation did not intend for it to impose quotas, its implementation has clearly focused on ratios of men and women participating in different activities. As Title IX has been applied, it has resulted in fewer opportunities. If applied the same way in the future, it seems likely that fewer opportunities would be available for women in some areas as well.

F. Implications for non-educational institutions.

An important aspect of the proposed common rule is the expansion of Title IX to private businesses. According to the proposed rule, all "of the operations of private businesses that are principally engaged in education, health care, housing, social services, or parks and recreation are considered a 'program or activity' for purposes of Title IX." Additionally, in defining its terms, the proposal states that a "recipient" means:

> any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and that operates an education program or activity that receives such assistance, including any subunit, successor, assignee, or transferee thereof.[40]

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[39] Kimberly Schuld, "Remarks Before the Independent Women's Forum for the Wisconsin Association of Scholars," February 25-26, 1998.

[40] Proposed Rule, p. 58575.

The proposed regulatory language raises many questions regarding its effect on private sector. Numerous programs receive federal funds and employ some aspect of educational training, including training sessions held by the FBI for law enforcement, day-care training for from the Bureau of Indian Affairs, $109 million in annual assistance from the National Science Foundation to science, engineering and mathematics programs, $200 million annually to study disease from the National Institutes of Health, and $70 million annually to train nurses by the Department of Health and Human Services, and the women's outreach programs of the Small Business Administration. These would all fall under the requirements of this common rule, yet the preamble offers no evidence that the either the Department of Justice or the participating agencies have considered how they might be affected. These areas are traditionally dominated by one sex or the other and would be easy targets for lawsuits. The funding, and therefore the benefits accruing to such funding, could be jeopardized.

IV. Conclusion

Title IX has a worthy purpose: to prevent discrimination in educational programs by recipients of federal funding. However, in its application the rule has devolved into a crude quota system that considers neither the circumstances of individuals or institutions nor the costs that this one size fits all approach places on the US educational establishment and private companies that may be covered under the rule. The Department of Justice's unreflective approach is perhaps nowhere more vividly demonstrated than in collegiate athletics. Since women do not choose to enroll in sports programs in the same proportions as men—despite opportunities and scholarships to do so—the impact of Title IX has been the wholesale elimination of opportunities for men, including substantial numbers of minority men.

Beginning with the preamble, the Department fails to thoughtfully examine possible consequences of the expansion of Title IX. Rather, it simply asserts that the common rule will not impose costs of more than $100 million per year, focusing instead on reporting requirements, and failing to consider broader implications associated with increased litigation risks, and the affects on an institution's ability to offer educational programs. Our preliminary estimations even though incomplete indicate on the contrary that the costs of expanding Title IX may equate to more than a quarter of a million undergraduate educations lost simply due to reduced men's scholarships for athletics.

Of course, the burden of these costs falls unevenly as well. One must consider the costs resulting from high-school and college non-completion, in addition to the withdrawal of funding for programs that are disproportionately single-sex in the private sector, increased transactions costs, and litigation risks, all of which easily exceed $100 million per year—and indeed our cursory estimates indicate such costs will easily exceed several billion dollars per year.

In the final analysis, the enforcement of Title IX in the athletic programs of colleges and universities gives us an indication of the effect of this proposal. In fact, this proposed rule will result in a significant expansion of sex-based quotas throughout the economy with an accompanying reduction in opportunities for both men and women. We urge the Justice Department to withdraw the proposed rule.