

COMMENTS ON SINGLE-SEX SCHOOLS

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BY EMAIL (singlesexcomments@ed.gov) and First Class Mail

Kenneth L. Marcus
U.S. Department of Education
400 Maryland Avenue, SW, Room 5000
Mary E. Switzer Building
Washington, D.C. 20202-1100

Re: Single-Sex Proposed Regulations Comments

Dear Mr. Marcus:

The Women's Law Project submits the following comments on the Department's proposed amendments to the regulations implementing Title IX of the Education Amendments of 1972 seeking to expand opportunities for single sex education.

The Women's Law Project, a non-profit public interest law center with offices in Philadelphia and Pittsburgh, is dedicated to improving the legal and economic status of girls and women through litigation, public policy development, public education, and individual counseling. Achieving gender equity in education is a primary focus of our work. We represented the plaintiffs in *Newberg v. School Dist. of Phila.*, 26 Pa. D. & C. 3d 682 (Ct. C.P., Phila. Co.), *aff'd* 478 A. 2d 1352 (Pa. Super Ct. 1984), in which the court enjoined the exclusion of girls from Philadelphia's Central High School as unconstitutional. We are therefore familiar with the inequities that may result from single-sex education and strongly believe in the need to maintain strong protections against discrimination in education consistent with the U. S. Constitution. As outlined herein, however, the proposed regulations violate applicable constitutional standards and create open-ended, unregulated opportunities for discrimination in education based on parental preferences and stereotypical assumptions about the educational needs of male and female students that will harm girls and women. The Women's Law Project therefore urges the Department to withdraw the proposed amendments and keep the current regulations unchanged.

THE RATIONALE FOR EXPANDING SINGLE-SEX EDUCATION IS FLAWED.

The rationale for expanding opportunities for single-sex education is based on a series of flawed assumptions and conclusions. Starting from the premise that gender discrimination in education is less widespread today than when the Title IX regulations were originally written, the Department suggests that there is less reason to believe that discrimination would likely continue in single-sex classes. 69 F.R. 11276 (March 9, 2004). Having cited no authority for these initial assertions, the Department relies on them to conclude that it is reasonable to expand single sex educational opportunities because of research that it describes as suggesting that “in certain circumstances, single-sex education provides educational benefits for some students.” 69 F.R. 11276.

While education may have improved for girls in some ways, sex discrimination in education remains a serious problem. The 1992 report by the American Association of University Women (AAUW) Education Foundation, *How Schools Shortchange Girls*, describes gender gaps related to class enrollment in the areas of math and science that favor boys and gaps in the humanities favoring girls. It also highlights differences in testing, teacher treatment, and extracurricular activities, such as sports. Six years later, the AAUW’s 1998 follow up report, *Gender Gaps: Where Schools Still Fail Our Children*, while acknowledging some progress for girls on the math and science fronts, identifies new gaps in the area of technology, little progress on teacher treatment, and a serious failure by schools to prepare students for non traditional work and careers.

We also know from recent litigation, the leading example being *United States v. Virginia* 518 U.S. 515 (1996), that gender-based stereotypes continue to impact the way in which education is delivered to girls and, in particular, the inequities in single-sex educational programs. Thus, contrary to the Department’s assertion, the risk that single-sex education will perpetuate gender discrimination remains very likely.

Based on these faulty premises, the Department seeks to expand single-sex education to accomplish a very limited benefit “suggested” by research - “for some students in certain circumstances.” 46 F.R. 11276. In fact, the research is even less promising. In its 1998 report *Separated by Sex* summarizing the results of a roundtable it convened to review the research on single-sex education, the AAUW made this point, among others, but qualified it by stating that “researchers do not know for certain whether the benefits derive from factors *unique* to single-sex programs, or whether these factors also exist or can be reproduced in coeducational settings.” Further undermining the argument for single-sex education, AAUW reported a consensus on the following points:

There is no evidence that single-sex education in general “works” or is “better” than coeducation.

The long-term impact of single-sex education on girls or boys is unknown.

No learning environment, single-sex or coed, provides a sure escape from sexism.

Single-sex education covers so broad a gamut as to defy *most* generalizations

AAUW Educational Fund, *Separated by Sex: A Critical Look at Single-Sex Education for Girls* 2-3 (1998). Thus, there is no basis to recommend broadening the opportunities for same-sex education and much at risk if such opportunities are broadened.

THE PROPOSED AMENDMENTS VIOLATE CONSTITUTIONAL STANDARDS.

1. The Proposed Amendments Permit Single-Sex Programs Without An “Exceedingly Persuasive Justification.”

In *Virginia*, the Supreme Court held that under the Constitution’s Equal Protection Clause all sex-based classifications must be based on an “exceedingly persuasive justification” and must be “substantially related to the achievement” of the government’s important objectives. 518 U.S. at 531. The Court made clear that any justification for gender-based classifications must “be genuine, not hypothesized,” *id.* at 533; may not rely on “overbroad generalizations about the different talents, capacities, or preferences of males and females”; and may not rest on premises that serve to “perpetuate the legal, social, and economic inferiority of women.” *Id.* at 531, 533, 534; *see also Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) (striking down the exclusion of men from a state-run nursing school).

Applying these standards in *Virginia*, the Supreme Court subjected the state’s asserted justifications for separate gender education to heightened scrutiny. The two reasons asserted by Virginia for restricting admission to Virginia Military Institute to males - the state’s interest in diversity in educational opportunities and the tailoring of educational methods to differences in the sexes, 518 U.S. at 534-35 - were explicitly rejected as unconstitutional by the Supreme Court in *Virginia*. The Supreme Court found the proffered reason of diversity to be disingenuous. *Id.* at 539. Likewise, Virginia’s argument that physical training, absence of privacy, and the adversative approach were suitable only for men was rejected as based on overbroad generalizations and “fixed notions” about the roles and abilities of men and women. *Id.* at 541-43.

Although the proposed amendments mimic the language of *Virginia* and purport to comply with the standards for determining equality under the Equal Protection Clause of the U. S. Constitution, a closer look reveals a clear divergence from the protections of the Constitution. In fact, the proposed regulations appear to be an unlawful attempt to circumvent the constitutional standards enunciated by the Supreme Court.

Notwithstanding the Supreme Court's fact-specific scrutiny of the state's asserted reasons in *Virginia*, the Department's proposed amendments fail to require such scrutiny to determine whether an "exceedingly persuasive justification" has been articulated. Rather, the proposed amendments codify the justifications for gender segregated education rejected in *Virginia* as *per se* acceptable governmental justifications. As set forth in proposed 34 C.F.R. § 106.34(b) single sex classes are permitted based on two possible objectives which sound strikingly similar to those asserted by Virginia: "to provide a diversity of educational options to parents and students" and "to meet the particular, identified educational needs of students." Cloaked in the Supreme Court language of "substantial relationship" and "substantially equal," these rationales are codified in the proposed amendments in such a way as to evade the scrutiny required by the Constitution and authorize unlimited justifications for single-sex education.

Of significant concern to the Women's Law Project, is that the objectives authorized by proposed 34 C.F.R. § 106.34(b) appear to be no more than student and parent preferences. This conclusion is buttressed not only by the language of the provision, but also by the example given in the Department's explanatory preface to the proposed amendments, where it states that "a recipient may determine that students and parents would prefer the option of single-sex classes because they believe they would provide a benefit not available in coeducational classes." 69 F.R. 11278. Further support is found in the Department's revision of the Supreme Court's standard prohibiting reliance on "overbroad generalizations about the different talents, capacities, or preferences of males and females." Making clear the Department's intent, the restatement of this standard in proposed 34 C.F.R. § 106.34(b)(ii)(4) leaves out the term "preferences." Far from abiding by the exceedingly persuasive justification required by the Constitution, this proposed regulation sanctions a free-for-all based solely on personal preference.

The Department takes its disregard for the Constitution even further in proposed 34 C.F.R. § 106.34(c)(1) with regard to single-sex schools, permitting the creation of single-sex schools without even the pretense of requiring a justification. While Title IX does not explicitly cover admissions to non-vocational elementary and secondary schools, 20 U.S.C. § 1681(a)(1), Title IX still demands equal treatment in the school system, 34 C.F.R. § 106.31(b)(2), and the Constitutional standards still apply to public schools.

In the absence of a requirement that schools have the appropriate justification for single-sex programs and schools, the further requirement that the single sex nature of the class be "substantially related to meeting that objective" or "needs" is rendered meaningless. To the extent that a preference for single-sex education is an acceptable justification, the means and the ends are identical, and neither comport with the standards demanded by the Constitution.

2. The Proposed Amendments Do Not Require Equality For The Excluded Sex.

The proposed amendments do not require schools that create single-sex classes to offer an equal single-sex option to the excluded gender. Pursuant to the proposed amendments, a school that provides a single-sex class is required only to provide a substantially equal coeducational class to the excluded sex. Proposed 34 C.F.R. § 106.34(b)(1)(ii). Public nonvocational schools that deny admission based on sex may provide the other sex substantially equal opportunities in one of three ways, at the recipient's choice: a single sex school, single-sex unit, or coeducational school. Proposed 34 C.F.R. § 106.34(c)(1). This approach contravenes both Title IX, which prohibits giving students different aid, benefits, or services because of their sex, 34 C.F.R. § 106.31(b)(2), and the Constitution, which demands "genuine" equality. *Virginia*, 518 U.S. at 557. A single-sex equivalent must, at a minimum, be offered to the excluded sex to meet these standards.

Moreover, the standard for measuring whether the programs or schools offered the excluded sex are "substantially equal" falls short of the constitutional mandate requiring equality of both tangible and intangible qualities. Proposed 34 C.F.R. § 106.34(b)(3), (c)(3) includes a list of tangible factors, but fails to include those intangible factors which the Supreme Court considered "[m]ore important than the tangible features" . . . 'those qualities which are incapable of objective measurement but which make for greatness' in a school, including 'reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige.'" *Virginia*, 518 U.S. at 554, 557.

THE PROPOSED AMENDMENTS PROVIDE NO MEANS FOR HOLDING SCHOOLS ACCOUNTABLE.

The lack of protection in the broad authority granted by the proposed amendments is compounded by the absence of any accountability in the amendments. Schools are not required to report to the Department of Education, to maintain data on the results of single-sex programs, or to identify or reach measurable goals. The self-policing through periodic evaluation justifications for single-sex schooling set forth in proposed 34 C.F.R. § 106.34(b)(ii)(4) is not sufficient.

THE CURRENT REGULATIONS PROVIDE APPROPRIATE OPPORTUNITIES FOR SINGLE SEX EDUCATION.

Current law permits single sex education where appropriate and does not need to be changed. Title IX authorizes affirmative action to "overcome the effects of conditions which resulted in limited participation . . . by persons of a particular sex . . ." 34 C.F.R. § 106.3. This provision authorizes single-sex classes and schools that are compensatory

and that help to address barriers to equal educational opportunity and historic gender stereotypes; it does not, however, allow sex-segregation for other purposes. Thus, while schools may offer both sex-segregated athletics teams, 34 C.F.R. § 106.41, and physical education classes that involve contact sports, 34 C.F.R. § 106.34(c), sex-segregated physical education classes are otherwise prohibited. Similarly, the regulations' authorization for single-sex sex education classes is carefully limited to those portions of elementary and secondary classes that deal exclusively with human sexuality. 34 C.F.R. § 106.34(e). The regulations also permit educational institutions to set requirements based on vocal range or quality that result in a chorus of one or predominantly one sex, 34 C.F.R. § 106.34(f); offer separate programs for pregnant girls (with requirements of voluntariness and comparability), 34 C.F.R. § 106.40(a)(3); target financial aid to members of one sex as long as, overall, the award of financial aid is not discriminatory, 34 C.F.R. § 106.37(b); and provide separate housing for male and female students on a non-discriminatory basis. 34 C.F.R. § 106.32(b).

For all of the foregoing reasons, the Women's Law Project urges the Department to withdraw the proposed amendments to Title IX regulations and allow the current regulatory scheme to remain untouched. The continuing inequities in single-gender education require retention of the protections provided by the current regulations. Without evidence demonstrating any benefit derived from the single-sex nature of existing programs the regulations should not permit educational formats that will increase opportunities for sexism in schools rather than reduce them.

Thank you for your consideration.

Sincerely

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Women's Law Project