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Education - Single Sex Schools

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001. memo	Eddie Correia to Charles Ruff re: Title IX and Single Sex Schools [partial] (6 pages)	08/12/1998	P5

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Education - Single Sex Schools

2009-1006-F
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RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
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b(1) National security classified information [(b)(1) of the FOIA]
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b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Educ - single sex schools

3/4/99

Peter,

Here's the stuff you requested on single-sex education. I've pulled some drafts from my computer as well as hard copies of the key documents. The talking points re Hutchison from last year and the draft options memo that Justice is reviewing are the key pieces.

My take is that when all is said and done, the Secretary and Deputy Secretary are likely to strongly favor Option 4 in the memo; we're meeting later this week with Mike Smith to discuss, generally, and hope to have some conversation with Justice before then.

Yell when you want to talk or need more information.

Art

Q's and A's on Single-Sex Educational Institutions

Suggested overall message: While some research indicates that single-sex education may be beneficial for some, findings have been inconclusive overall. We should always remain open to instructional approaches that will help improve student academic achievement, provided that equal, high quality educational opportunities are guaranteed for all.

ELEMENTARY AND SECONDARY EDUCATION

It has been argued that single-sex schools have been shown to be effective and that we ought to have more such schools in the District and elsewhere. Some say that such schools put more emphasis on academics than co-ed schools, and may help to reduce teen pregnancy. Do you agree that we should have more single-sex schools?

There is some research that suggests single-sex secondary schools may be helpful to some students, in particular girls. However, it is difficult to separate out the effects of the type of school from other factors, such as family background. I agree with Ms. Ravitch that we should always remain open to instructional approaches that may improve student academic achievement, including single-gender schools, so long as we can guarantee that girls and boys are receiving genuinely equal (and high quality) educational opportunities.

Is it true that single-sex elementary and secondary schools are not illegal, as long as there are equal provisions for girls and boys.

The Title IX regulations do permit single-sex schools, so long as comparable facilities, courses, and services are made available to both boys and girls. However, whether single-sex public elementary and secondary schools are allowable under the Constitution has never been determined by the U.S. Supreme Court.

Single-sex classrooms in co-ed schools, on the other hand, are generally prohibited by the Title IX regulations, with a few exceptions (such as to address lack of previous educational opportunities, or for contact sports in physical education classes).

How many students are currently attending single-sex schools?

Data from 1987-88 suggest that fewer than 1% of public school students attend single-sex elementary or secondary schools. Less than 5% of private school students overall attend single-sex schools, although in private high schools the number is approximately one-third.

POST-SECONDARY EDUCATION

Some have cited Hillary Clinton and others as evidence that single-sex colleges may give women the confidence and leadership skills they need for achievement in later life. What does the research show about that?

Clearly many alumni of single-sex colleges, such as the First Lady, have gone on to

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE UNDER SECRETARY

FEB 12 1999

Honorable Arlen Specter
Senate Appropriations Committee on Labor, Health
and Human Services, Education, and Related Agencies
711 Hart Senate Office Building
Washington, D.C. 20510-6034

Dear Mr. Chairman:

Enclosed is a report on single sex education requested by your Committee in Senate Report No. 105-300, accompanying the 1999 Omnibus Appropriations Act. If you or your staff have questions about the report, please do not hesitate to call me at 401-1700.

Sincerely,

Thomas P. Skelly

Thomas P. Skelly, Director
Budget Service

Enclosure

cc: Senator Harkin
Senator Hutchison
Representative Porter
Representative Obey

REPORT TO THE SENATE APPROPRIATIONS COMMITTEE ON REVIEW OF TITLE IX REGULATIONS AND POLICIES REGARDING SINGLE SEX PROGRAMS

In accordance with S. Rep No. 105-300 at 258-59 (1998), the report of the Senate Appropriations Committee on S. 2440, the 1999 Omnibus Appropriations Act, this report addresses the Department of Education's review of its regulations and policies under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq.. The Senate Committee report urged the Department ". . . to review its regulations and policies to ensure that if funds are used for students to participate in any education reform projects that provide same gender schools or classrooms, comparable educational opportunities are offered to students of both sexes." The Senate Committee report directed the Department to report on this review within 90 days of enactment of the appropriations act.

Both the Title IX statute and current Title IX regulations do not apply to single-sex admissions practices of non-vocational elementary and secondary schools. However, consistent with the statute's general prohibition of sex-based discrimination, the regulations require a local educational agency that operates a school for one sex to provide the other sex – "pursuant to the same policies and criteria of admission" – with comparable courses, services, and facilities. 34 CFR 106.35. With respect to classes, the regulations generally prohibit coeducational schools from denying access to courses, or carrying out any program or activity separately, on the basis of sex. Limited exceptions are provided for, such as contact sports or courses on human sexuality. 34 CFR 106.34.

The Department of Education is examining whether there is a legal basis for interpreting Title IX to permit single sex classrooms as well as schools where they are justified on educational grounds and do not involve stereotyping or stigmatizing students based on gender and where comparable educational opportunities are afforded to students of both sexes. The issues presented are sensitive and complex, including consideration of the constitutional implications of any change, but we believe that we have made substantial progress in our review.

As part of our review, we have initiated consultations with other Federal agencies, including the Department of Justice. Those consultations are incomplete, but are being given very high priority. Assuming that our further review and consultations support a change in the Title IX regulations, we will formulate a proposal in light of those consultations. We will then need to consult with interested educational organizations, both to be sure that they are aware of where we are headed and to be sure that our proposal is sound, comprehensive in addressing practical educational situations, and understandable. We would be pleased to consult with the Senate Appropriations Committee at that time. If we proceed with a regulatory change, we will also issue a notice of proposed rulemaking to be published in the Federal Register. Our estimate is that any such notice of proposed rulemaking would be published this spring or summer.

We will further advise the Committee if these plans should change.

Talking Points Regarding
Sen. Hutchison's proposed Amendment to Title VI of the Elementary and Secondary Education Act[1]
Re: Single-Sex Schools and Classes
8/26/98 11:00 a.m. draft

1. We support the goal of increased educational opportunity in a range of public education contexts, including single sex educational schools and classes, provided that there is no discrimination when such opportunities are provided.

2. The Hutchison Amendment is unnecessary because Title IX currently allows for comparable single-sex schools.

3. The Hutchison Amendment also is unnecessary because the U.S. Department of Education is currently working on modifications to its Title IX regulations (which date back to 1975) in order to provide more flexibility for schools that seek to offer single-sex classes and programs.

4. The Hutchison Amendment is unwise and confusing.

    - The Amendment will create an anomaly in which schools could use Title VI federal—but not other federal or state and local—funds when establishing certain single sex classes and programs.

    - The Amendment will create significant administrative burdens on courts and ED's OCR to "trace" funds as a condition of determining whether schools, classes and programs are established in accordance with federal law.

5. A change in the long-standing civil rights standard governing the establishment of single-sex classes and programs should be the product of careful deliberation. It should not be addressed as a rider to an appropriations act.

    - The regulatory process—which includes the opportunity for extensive notice and comment by interested parties—can ensure a thoughtful approach to an emerging issue.

    - If Congress is not satisfied with the regulatory result, Congress may pursue legislative options, at that point with the benefit of input received through the regulatory process.

[1] The ESEA is a state-administered block grant program.

Question and Answer

Q1. What does comparability mean in the context of establishing "comparable" single-sex opportunities for girls and boys?

A1. Comparability involves an assessment of the kind and quality of facilities, courses, and services provided to students of both genders. As part of its effort to provide more meaningful guidance to schools in this area, ED contemplates further clarification of this term as part of its regulatory proposal, which will be subject to public notice and comment in the near future.

DELIBERATIVE PROCESS PRIVILEGE **DRAFT**
ATTORNEY WORK PRODUCT August 24, 1998

ANALYSIS OF PROPOSED HUTCHISON "SAME GENDER" AMENDMENT

The Amendment

> "Nothing in Public Law 93-318, as amended, shall be construed to prohibit the use of funds made available under this title for education reform projects that provide same gender schools or classrooms, as long as comparable educational opportunities are offered for students of both sexes."

Overview of Proposed Amendment

1. Such a Significant Proposal Warrants Careful Consideration.

   - Proposal could have significant implications for Title IX, and raises issues that are too important to be attached merely as a rider to an appropriations bill.

2. The Proposal Does Not Provide For Evaluation of Project Results.

3. The Proposal Applies Only to Title VI ESEA Funds Appropriated in this Appropriations Act—Not to Other Federal Funds or State and Local Funds.

4. The Scope of the Amendment is Unclear.

   - The Hutchison amendment purports to permit school systems to use Federal funds to support "education reform projects" that involve single sex classrooms, but provides no definition of an "education reform project," leaving the scope of the authority unclear for local, State, and Federal administrators.

Strategic Options

1. Oppose the amendment.
   - Inappropriately attached to an appropriations bill
   - Insufficient time for thoughtful debate and consideration

2. Support the amendment.
   - Provides for limited experimentation with single-sex programs

3. Substitute legislation that would establish funding for research and a pilot program under ED programs.
   - Provides for experimentation with single-sex programs under controlled circumstances with opportunity to evaluate effectiveness of programs

4. Substitute legislation that would modify Title IX and import constitutional protections.
   - Addresses the issue forthrightly, and establishes a comprehensive legislative standard to address an emerging issue

The Framework for this amendment

The amendment is intended to apply only to Title VI, ESEA funds, even though the ultimate effect would alter Title IX law.

- Use of Title VI ESEA funds.
  - Advantages:
    - Would allow schools to experiment with single sex education in a more limited manner.
  - Disadvantages:
    - Would create an anomaly in which schools could use Title VI federal, but not other federal or state and local funds for such purposes; could raise questions about the use of Title VI funds (which were intended only for supplementary activities).
    - Questionable in light of Administration position that Title VI program should terminate.
    - Would create significant administrative burdens on courts and ED OCR to "trace" funds as a condition of determining whether schools implementing such programs were in compliance with Title IX.

- It is not clear how useful the authority would be to school districts because of the statutory prohibition on "supplanting." Title VI funds may be used only for "supplementary" activities and services, and it is not clear that merely educating boys and girls in separate programs is supplementary to the school system's obligation to educate them in the first place.

- Title VI—a state-administered block grant—is not an appropriate vehicle for establishing a program to experiment and study single-sex education.

- Amending Title IX.

  - Advantages:

    - Would provide maximum flexibility for experimentation by authorizing schools to use state and local funds (and other federal funds) as well.

    - Analytically, the cleanest and easiest to understand. Avoids difficult interpretive issues that amending Title VI would present.

    - Eliminates a Title IX interpretation that (as to classes) is believed by some to be breached, causing disrespect for the law.

    - Eliminates across-the-board prohibitions (as to classes) that prevent the examination of a particular situation and decisions about the legal sufficiency of such programs.

  - Disadvantages:

    - Would constitute a sweeping change in the meaning of Title IX; could pose the risk of opening up Title IX to further amendment in less constructive ways.

Funding Research and Limited Pilot Projects

- Advantages:

  - Conveys interest in pursuing single-sex education opportunities, while ensuring a more deliberative approach in resolving the issue.

- Disadvantages:

  - Unlikely to arrive at one comprehensive research-based answer to the question about the value of single-sex education. Existing research is

mixed, and the fact-specific contexts in which the issue arises suggests the difficulty of arriving at any one conclusion for all circumstances.

Specifications for Alternative Language:

Possible language to amend Title IX:

A single sex program may be offered by any public elementary or secondary school, except for vocational classes, if:

[a] It is not based on and does not further stereotyping based on sex and does not stigmatize students of either gender; and

[b] It is:

1. part of diverse educational programs, and school/district provides opportunity for comparable single-sex programs for the other gender; or

2. there are educational needs/problems particular to students of one gender in the school/district, the single-sex program is designed to address those needs/problems, and the single-sex program does not adversely affect the educational opportunities of students of the excluded gender.

- Under [b][1], the school's offering of equal options to promote diversity would provide the basis for establishing "an exceedingly persuasive justification."

- Under [b][2], the school must be able to show that it has "an exceedingly persuasive justification" for setting up single-sex programs and that the separation by sex was "substantially related" to achieving the educational objectives. E.g., school would have to demonstrate that one sex was performing poorly when compared to the other sex or otherwise had particular needs not experienced by the other sex ; that the school tried or considered other educational options to address the unequal learning; and that establishing a single-sex classroom does not have an adverse effect on students of the other sex .

Students have the option of a co-ed program.

Parents must provide authorization for their children to be placed in a single-sex program.

Any school offering single-sex programs must evaluate the effectiveness of the program.

U.S. Department of Justice

Office of Legal Counsel

Office of the Deputy Assistant Attorney General Washington, D.C. 20530

December 29, 1998

Mr. Frank W. Hunger
Assistant Attorney General
Civil Division
U. S. Department of Justice
950 Pennsylvania Avenue
Washington, D.C. 02530

Dear Frank:

We have received a request from the Department of Education for our legal opinion on regulatory proposals pertaining to the operation of single-sex elementary and secondary school programs now under consideration by the Department of Education's Office for Civil Rights (OCR). In particular, they have asked whether Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq., or the Constitution would prohibit a state or local educational agency receiving federal financial assistance from establishing single-sex schools or offering single-sex courses under any of the following circumstances:

Scenario 1: a single-sex school and/or course alternative is 1) offered to one sex on a voluntary basis, 2) as part of an array of educational options that includes a comparable coeducational alternative, and 3) there is a comparable single-sex program for the other sex;

Scenario 2: a single-sex school and/or single-sex course within a coeducational school is 1) made available to each sex, but 2) neither sex is offered a comparable coeducational option;

Scenario 3: single-sex courses for each sex are 1) offered on a voluntary basis and 2) as part of an array of educational options that includes comparable coeducational courses, but 3) comparable single-sex schools (as opposed to courses) are offered to students of each sex as part of an array of educational options that does not include a comparable coeducational alternative.

Scenario 4: single-sex schools and/or courses are 1) offered to one sex, and 2) the other sex is offered a comparable coeducational program or activity, but is not provided a comparable single-sex alternative.

In accordance with our usual procedures, I am writing to request that your office provide us with a written statement of its position on this question.

On our preliminary review of this matter, we have identified three related questions that bear on the analysis we have been asked to provide. We would appreciate it if, in providing your views on the Department of Education's request, you would also give your views on these questions. The first question concerns whether Title IX incorporates a constitutional standard or employs a definition of "discrimination" that differs from that of the Equal Protection Clause. If you conclude that the Title IX standard is different, we would appreciate your views on what that standard is. The second question raised by the request concerns the level of scrutiny that applies in sex discrimination cases in the wake of the U. S. Supreme Court's decision in United States v. Virginia, 116 S. Ct. 2264 (1996). Should the VMI Court be understood to have rejected strict scrutiny in favor of intermediate scrutiny or a new type of heightened scrutiny, and, if not, what should the United States's position be on the level of scrutiny that applies in sex discrimination cases in light of the strict-scrutiny position that it took in VMI? Finally, we are interested in your views on whether there are circumstances under which the United States would be liable for funding a recipient that offers a single-sex school or activity as part of its educational program. (E.g., would there be federal government liability only if the United States itself had an unconstitutional purpose, Washington v. Davis, 426 U.S. 229 (1976); or if the United States provided "significant aid" that had the effect of supporting and perpetuating an unconstitutional program, Norwood v Harrison, 413 US 455, 467 (1973); or if the United States had knowledge of an unconstitutional program's existence?). In connection with this latter question, you may want to review the government's submissions in Virginia, 116 S. Ct. at 2264; Bob Jones University v. United States, 461 U.S. 574 (1983); Vorcheimer v. School Dist. of Philadelphia, 430 U.S. 703 (1977); Norwood, 413 US at 455; and National Black Police Ass'n v. Velde, 712 F.2d 569 (D.C. Cir.1983), cert. denied, 466 U. S. 963 (1984).

The Department of Education has stated that it has an urgent need for our opinion. We would therefore appreciate a response from your office by January 18, 1999. If you are unable to respond by that date or you or your staff have any questions, please contact me at (202) 514-3744 or Robin Lenhardt, the Attorney Advisor working on this project, at (202) 514-1762.

Sincerely,

Nina Pillard
Deputy Assistant Attorney General
Office of Legal Counsel

U.S. Department of Justice

Office of Legal Counsel

Office of the Deputy Assistant Attorney General *Washington, D.C. 20530*

December 29, 1998

Mr. Seth P. Waxman
Solicitor General
Office of the Solicitor General
U. S. Department of Justice
950 Pennsylvania Avenue
Washington, D.C. 02530

Dear Seth:

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> Scenario 3: single-sex courses for each sex are 1) offered on a voluntary basis and 2) as part of an array of educational options that includes comparable coeducational courses, but 3) comparable single-sex schools (as opposed to courses) are offered to students of each sex as part of an array of educational options that does not include a comparable coeducational alternative.
>
> Scenario 4: single-sex schools and/or courses are 1) offered to one sex, and 2) the other sex is offered a comparable coeducational program or activity, but is not provided a comparable single-sex alternative.

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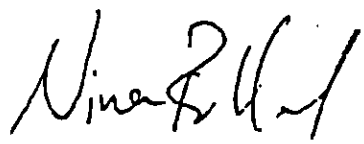
Sincerely,



Nina Pillard
Deputy Assistant Attorney General
Office of Legal Counsel

U.S. Department of Justice

Office of Legal Counsel

Office of the Deputy Assistant Attorney General *Washington, D.C. 20530*

December 29, 1998

Mr. Bill Lann Lee
Acting Assistant Attorney General
Civil Rights Division
U. S. Department of Justice
950 Pennsylvania Avenue
Washington, D.C. 02530

Dear Bill:

We have received a request from the Department of Education for our legal opinion on regulatory proposals pertaining to the operation of single-sex elementary and secondary school programs now under consideration by the Department of Education's Office for Civil Rights (OCR). In particular, they have asked whether Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq., or the Constitution would prohibit a state or local educational agency receiving federal financial assistance from establishing single-sex schools or offering single-sex courses under any of the following circumstances:

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Sincerely,

Nina Pillard

Nina Pillard
Deputy Assistant Attorney General
Office of Legal Counsel

Talking Points Proposed Amendment to Title IX Single-Sex Regulations

The Secretary's interest in providing increased flexibility to school districts and elementary and secondary schools in order to support them with educational reform and provide parents with multiple educational options was a catalyst for a policy review of our Title IX regulations regarding single-sex programs.

Based on our experience with single sex programs in our case investigations, we were also concerned that existing Title IX regulations may be too rigid and prevent educators from experimenting with educational approaches designed to help both boys and girls. In addition, we believe that more guidance on a "comparable program" would be useful to schools. Our experience has shown that the current definition of comparable programs was lacking in clarity and completeness.

Our policy review is based on our experience with single-sex programs and schools through our case investigations, research, recent developments in the law and state legislation, and Title IX legislative history. We will ensure that any proposed amendments to Title IX are consistent with the intent and spirit of Title IX.

This policy review also provides the Department with the opportunity to clarify and refine its existing definition for comparable programs. The new definition is intended to provide schools with additional and more detailed factors used by OCR in order to Prior to issuance of any proposed amendments for comment to the public, analyze the comparability of programs under the regulation.

In conjunction with our policy review, we will consult, through focus groups and informal consultation, with educational advocacy groups, civil rights groups, women's groups, educators as well as the athletics community.

Our Office of Legislation and Congressional Affairs will ensure that interested legislators are consulted throughout the process. Congressional support for increased flexibility regarding single-sex programs appears favorable based on the recurring congressional proposals regarding single-sex programs as well as the Senate Appropriations Committee Report directive to review our policy and regulations regarding single-sex schools and classrooms.

After final consultation with the White House, and other interested Departments or agencies, any proposed amendments will be issued for comment to the public. After analyzing any comments received during the public comment period, we will make any appropriate modifications and issue the final regulation. By statute, the final regulation becomes effective 60 days after issuance, subject to Congressional action.

We will ensure that any proposed amendments to the Title IX regulation satisfy equal protection requirements and are subject to appropriate safeguards against discrimination.

PROPOSED SINGLE-SEX REG. AMENDMENT OPTIONS[1]

PROPOSAL	REGULATORY LANGUAGES	PROS	CONS
Option 3	Single-sex school permitted if: ❖ Comparable single-sex program for opposite sex A comparable co-education option is not required No voluntary requirement Single-sex activity permitted if: ❖ Comparable single-sex course for opposite sex ❖ Coeducational alternative ❖ Voluntary	Treats single-sex schools same as current reg. Clarifies that comparability means a single-sex school for each sex.	Does not have voluntary requirement for schools Raises EEOA problems with schools[2] Treats schools and classes differently
Option 4	Single-sex school or activity permitted if: ❖ Comparable co-educational alternative Single-sex alternative not required Proposal strengthened if: • Required to show particular non stereotypical educational need • Insufficient need or interest in single sex program for opposite sex. May require an assessment of needs or interest of sex	May benefit smaller district because not required to offer single-sex school or activity for excluded sex	Raises constitutional issue i.e. denial of equal opportunity claim.

[2] Can interpret reg consistent with the EEOA

PROPOSED SINGLE-SEX REG. AMENDMENT OPTIONS[1]

PROPOSAL	REGULATORY LANGUAGES	PROS	CONS
Options 1	Single sex school or activity permitted if: ❖ Comparable single-sex school for opposite sex ❖ Comparable co-educational alternative ❖ Voluntary	Requires full array of educational choices - both single-sex and co-ed program	Current reg does not require single-sex schools to have a comparable co-ed option . Costly for small districts
Option 2	Single-sex school or activity permitted if: ❖ Comparable single-sex program for opposite sex A comparable, co-educational option is not required No voluntary requirement	Aligns single-sex courses and activities reg with current single-sex school reg	Could violate EEOA because it permits the assignment of students based on sex. Eliminates parental choice for co-ed option possibly pushing them out of system

[1] All options provide for no change to regulation regarding remedial or affirmative action. All options also retain existing prohibition against single-sex programs and activities at vocational schools.

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE GENERAL COUNSEL

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DEC 17 1999

Ms. Nina Pillard
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Dear Bill and Nina:

Enclosed is a draft paper that discusses a number of options for changing the Department of Education's Title IX regulations to give local school districts more flexibility in establishing single sex schools and classes. The legal and policy issues presented by these options are very difficult, and the Department does not have a firm position at this time on which options would be preferable. In previous discussions, Secretary Riley has expressed a strong interest in providing school districts with more flexibility in this area. However, we want to have the benefit of your advice before we present specific options to the Secretary.

Our Office for Civil Rights and Office of the General Counsel have worked together to develop these options. Norma Cantú and I and our staffs would appreciate an opportunity to meet with your offices to discuss these options on an informal, preliminary basis as soon as possible. Our staffs previously met with staff of the Civil Rights Division and have altered the options presented based in part on that meeting.

I should also note that we have not enclosed specific regulatory language for the options. If it would be helpful to your review, we would be happy to supply that language.

We greatly appreciate your assistance in this matter and look forward to hearing from you. Thank you.

Sincerely,

Jamienne S. Studley
Acting General Counsel

Enclosure

cc: Norma Cantú
Leslie Thornton

*** FOR DISCUSSION PURPOSES ONLY ***
12/16/98 Draft

ANALYSIS OF THE DEPARTMENT'S PROPOSED AMENDMENTS TO ITS TITLE IX REGULATION TO PERMIT SINGLE-SEX PROGRAMS AND ACTIVITIES

Issue

The issue is whether to amend the Department's Title IX regulation to provide greater flexibility for school districts and other elementary and secondary schools to have single-sex schools and classrooms, subject to appropriate safeguards against discrimination. The Office for Civil Rights (OCR) has been considering this proposal based on its concern that existing Title IX regulations are overly rigid, particularly with respect to classes. This regulatory action also provides the Department with the opportunity to clarify and refine its existing definition for when a program available to one sex is "comparable" to a program available to the other sex. Recent developments -- including a Senate Committee Report directive that we review our policy in this area -- underscore the need to address these issues at this time.

Background

Legislative and regulatory framework

Title IX of the Education Amendments of 1972 prohibits sex-based discrimination in education programs or activities receiving federal financial assistance. 20 U.S.C. § 1681. It does not specifically forbid single-sex classes or programs in coeducational schools. When Title IX was passed, Congress was concerned with sex-based policies and practices of educational institutions that reflected out-dated and stereotyped notions of the differences between the sexes. See e.g., 118 Cong. Rec. 5804-08 (comments of Sen. Bayh on the need for the Title IX legislation).[1] In particular, it was concerned that, based on unfounded notions regarding girls' and women's temperament or limited abilities, girls and women were relegated only to certain kinds of vocational education courses, (e.g., home economics, but not auto shop) and career paths (e.g., homemaker, teacher or nurse, but not doctor or mechanic.) Id. At the same time, the Title IX statute does not apply to admissions to nonvocational elementary and secondary schools nor does it apply to admissions to private undergraduate institutions or to public undergraduate institutions that have been single-sex from their establishment. This reflects congressional concern not to forbid single-sex schools in all contexts.

Title IX is effectuated by regulations promulgated by federal agencies providing assistance to education programs and activities.[2] The Department's regulation was issued by its predecessor agency, the Department of Health, Education, and Welfare (HEW), and became effective July 21, 1975.[3] It has been revised only once, in 1982, in order to revoke the provision which

prohibited discrimination in the application of codes of personal appearance.[4] The Title IX regulation contains specific provisions regarding single-sex education.

Based on the Title IX statute, the Title IX regulation does not apply to single-sex admissions practices of non-vocational elementary and secondary schools, among others, 34 CFR Part 106.15, and in these circumstances recipients can establish single-sex schools. Consistent with the statute's general prohibition of sex-based discrimination, the regulation requires, however, that where a local educational agency (LEA) operates a school for one sex, it must provide the other sex, pursuant to the same polices and criteria of admission, with comparable courses, services and facilities. 34 CFR Part 106.35.

Consistent with the legislative history regarding stereotyped tracking of students based on gender, the Title IX regulation generally prohibits all recipients, once they have admitted students of both sexes, from denying access to courses, or carrying out any educational program or activity, separately on the basis of sex. 34 CFR Part 106.34.[5] Thus, recipients operating coeducational schools cannot conduct single-sex classes, courses or activities. The regulation specifically identifies "industrial," "business," "vocational," "technical," "home economics," "physical education", "health," "music," and "adult education," as the type of classes that cannot be sex-segregated. There are limited exceptions to this general rule: the separation based on sex (1) results from the application of objective standards of physical ability, or vocal range or ability;[6] (2) involves contact sports or human sexuality; [7] (3) is offered to pregnant students on a voluntary basis; [8]or (4) constitutes permissible remedial or affirmative action.[9]

In sum, at the elementary and secondary education level, under the current Title IX regulation, schools districts can operate nonvocational single-sex schools for one sex, although school districts that do so must offer a comparable educational program to the other sex. On the other hand, coeducational elementary and secondary schools cannot now in most circumstances offer single-sex classes or programs.

Recent Developments In Single-Sex Education

In recent years some school districts have established single-sex schools and classes. Many of these programs represent efforts to provide public school parents with the same diversity of options available to parents whose children attend private schools that do not receive federal financial assistance, and to improve educational outcomes for children who are not succeeding in the existing school program. As an example, California recently passed legislation permitting up to ten individual school districts to establish single-sex academies, if comparable single-sex academies are provided for members of each sex. Single-sex schools may be established in reliance on research and evidence that in some settings and for some areas of study, some children appear to learn better in a single-sex environment. It should be noted that the available research regarding the effect of single-sex programs is limited, and research conclusions are often inconsistent.[10]

Attempts to establish or experiment with single-sex classes have been limited by the Title IX regulation. For instance, according to Education Week on the Web: News in Brief for November 24, 1998, the New Jersey State Department of Education required one of its townships to close a voluntary, middle school, single-sex, pilot program for girls and boys. The program was designed to learn whether boys and girls perform better in math and science classes in a single-sex environment. The State found that the school violated Title IX. On the other hand, single-sex classes continue to exist in some districts, notwithstanding the Title IX prohibition, either because no one has challenged their legality under Title IX, or because, when challenged, schools have been willing to open the classes to the excluded sex. (As a practical matter, these classes often remain single-sex because the classes are focused on the perceived special needs or interests of one sex and no one from the other sex wants to take the class.) Single-sex classes that restrict admission, however, remain vulnerable to challenge under Title IX. Where such classes are not challenged, there may be a harmful perception that the law is being ignored.

In December 1993, The Department's Office of Educational Research and Improvement (OERI) organized a conference with researchers and practitioners to examine single-sex education. The result was a special report from OERI: *Single-Sex Schooling: Perspectives From Practice and Research*. The report summation noted the equivocal nature of the research evidence regarding the benefits of single-sex education. The conclusion drawn was that the research does not indicate that all single-sex schools are consistently positive for particular groups of students, but that "some single-sex schools stand out as more productive learning environments for girls and minority men than other single-sex or coeducational schools." OERI Report at 73. In light of the research evidence, and the demand for alternative approaches to educate youth at risk of failure, the Report recommended a reassessment of the Title IX regulation, noting that it lacks flexibility in two regards. First, it requires school districts to establish two schools, one for girls and one for boys, when there may not be equal demand for both, or there is not compelling evidence of a need for both. Second, it provides no flexibility to schools to explore the effectiveness of single-sex classrooms. Id. at 76.

In recent years, proposed legislation was introduced permitting single-sex classes, but Congress did not pass these provisions. In 1995, Senator Danforth proposed legislation that would have authorized the Department to assist up to four school districts in establishing experimental single-sex classes (with same-sex teachers) within coed elementary and secondary schools serving low income/educationally disadvantaged students. The school districts would have been required to provide similar single-sex classes for students of each sex and to provide similar coeducational classes. In addition, under the Danforth bill, assignment had to be voluntary and data had to be provided to the Department in order to assess the effectiveness of the single-sex classes.[4]

Senator Hutchison recently proposed adding a rider to the 1999 Omnibus Appropriations Act that would permit school districts to use federal funds, under Title VI of the Elementary and Secondary Education Act, to support "educational reform projects" that involve single-sex schools or classrooms as long as "comparable educational opportunities are offered for students

of both sexes." The Administration raised concerns with this legislation, not because the legislation would permit single-sex education programs, but because, among other things, it was inappropriately linked to a limited appropriations bill, and was limited to Title VI funds.[12]

The Hutchison Amendment did not pass. However, the Senate Appropriations Committee, in reporting out the Omnibus Appropriations Act (S. 2440), expressed concern about the Department's interpretation of Title IX as it applies to "same gender education programs." In its Report (No. 105-300) the Committee "urges the Department to review its regulations and policies to ensure that if funds are used for students to participate in any education reform projects that provide same gender schools or classrooms, comparable educational opportunities are offered to students of both sexes." The report directs the Department to report on this review within 90 days of the enactment of the appropriations act. However, it does not specifically call for a regulatory change.

Legal Basis for Regulatory Change

Because 34 CFR Part 106.34 will be revised, this action is subject to judicial review. 20 U.S.C. §§ 1682, 1683; 5 U.S.C. § 701, et seq. The modification of a regulation, like its promulgation, is subject to the "arbitrary and capricious standard". Motor Vehicles Manufacturers Ass. v. State Farm, 463 U.S. 29, 103 S.Ct. 2856 (1983). An agency changing its course by rescinding a regulation (here, among other things, the Department will be rescinding its prohibition against single-sex classes) is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first place. Id. at 41. However, the agency must be given ample latitude to adapt its rules to the demands of changing circumstances. Under this standard, the Department must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." Id. at 43.[13] We believe that the Department's proposals to amend the Title IX regulation meet this test because the proposals, as discussed in detail below, are consistent with both the legislative purpose and the spirit of Title IX, and allow schools and school districts the flexibility to respond to the education needs of their students.

Consistency with Title IX Statute

The proposed options to amend the Title IX regulation are crafted to be consistent with the intent and spirit of Title IX. The legislative history indicates that Senator Bayh, when discussing the proposed Title IX, stated that regulations prohibiting sex discrimination were to be drafted and implemented to "allow enforcing agencies to permit differential treatment by sex only [in] very unusual cases where such treatment is absolutely necessary to the success of the program such as in classes for pregnant girls or emotionally disturbed students, in sports facilities or other instances where personal privacy must be preserved." 118 Cong. Rec. 5807. While this would seem to raise a very high bar to permitting single-sex activities, Senator Bayh made clear that the statute was directed at areas where discrimination had been shown in hearings before Congress. Id.[14] The enactors were also concerned that classifications would be based on improper

stereotypes and generalizations about the sexes. 118 Cong. Rec. 5804-5808. By the same token, the enactors' exclusion of certain single-sex schools from the statute, and subsequent amendments to Title IX, including exemptions for voluntary youth service organizations (e.g., Boy Scouts and Girl Scouts), boy and girl conferences, and father-son and mother-daughter activities indicate that, particularly at the elementary and secondary level, Congress recognized the benefit of, and intended to permit, single sex activities in some circumstances. For instance, when passing the mother-daughter, father-son exemption, Senator Bayh stated: "Certainly it was the intention of those of us who got Title IX enacted into law to say that those additional functions, which add significant contributions to the lives of our sons and daughters, should be exempt from Title IX." 122 Cong. Rec. 27983. See also United States v. Virginia, 116 U.S. 2264, 2276-77.

The proposed amendments respond to this legislative history by limiting the circumstances under which single-sex classes are permitted to those at elementary and secondary schools that satisfy equal protection requirements, among other specific requirements, that ensure that the single-sex program is not discriminatory.

One remaining issue under the statute is whether any or all of the proposals -- as to schools, though ***not as to courses or activities in coeducational schools*** -- are ultra vires in that we are dictating the admissions policies and practices of schools whose admission practices are exempt from Title IX. The same argument can be made about the Department's existing, twenty-five year old regulation. The Department has not publicly expressed its interpretation, but believes the current regulation would require an LEA -- that chooses to offer a single-sex school to one sex -- to offer a comparable single-sex school to the other sex. We believe that the regulation, as so interpreted, is not ultra vires because it does not tell schools that they cannot have single-sex schools. Instead, the current regulation merely defines the obligations of a school district to provide equal educational opportunity/comparable programs, for the other sex, that flow from the district's decision to restrict admissions to a school based on sex. We note that to take the position that Title IX denies OCR jurisdiction to investigate cases involving single-sex admissions polices or to expect a comparable single sex school as the measure of equal educational opportunity may result in Title IX permitting an unconstitutional educational program. One goal of the proposed regulatory change is to clarify that Title IX's prohibition of discrimination is coextensive with the Equal Protection Clause of the Constitution. This is consistent with the legislative history of Title IX which indicates that admission and membership type exemptions in Title IX were to permit single-sex activities, but not to permit the denial of equal educational opportunity for the other sex.[15] As to the current proposals, however, the ultra vires argument may raise particular concerns regarding Proposal 1. This is discussed in the "Pros and Cons" section below.

Constitutionality of Single-Sex Programs

We also anticipate that these proposed regulatory changes may be challenged under the Equal Protection Clause of the Constitution. While we cannot predict the outcome of such a challenge

with certainty,[16] we believe there are reasonable arguments that the Department's proposals are consistent with the Supreme Court's analysis regarding the appropriate use of gender-based programs.

The United States Supreme Court has, on several occasions, specifically addressed single-sex education programs in light of the Fourteenth Amendment's equal protection guarantee. Single-sex education, like all classifications based on sex whether intended to be invidious or beneficial, must be supported by an "exceedingly persuasive justification." United States vs. Virginia (VMI) 116 S.Ct. 2264, 2275 (1996) (citing Mississippi v. Hogan, 458 U.S. 718, 728 (1982)). Accordingly, the classification must serve an important governmental interest and the means employed must be substantially related to that purpose. Id. The justification must be genuine, not hypothesized, and it must not rely on overly broad generalizations or stereotypes about the different talents, capacities, or preferences of males and females. Id. Below, we analyze the case law and evidence in support of the Department's justifications for authorizing elementary or secondary schools or LEAs to implement a single-sex program.

In the VMI case, Virginia attempted to justify offering a unique military education only to men on the basis that the school contributed to educational diversity in the State. Id. at 2276. The Court rejected this argument in part because "a purpose genuinely to advance an array of educational options ... is not served by VMI's historic and constant plan ... to afford "'a unique educational benefit only to males." Id. at 2279. Regarding whether single-sex educational opportunities could ever be supported by a diversity rationale, the Court specifically noted: "We do not question the State's prerogative ***evenhandedly*** to support ***diverse*** educational opportunities." Id. at 2276 n. 7 (emphasis added). Moreover, the Court seemed to acknowledge that single-sex education affords pedagogical benefits to at least some students. Id. at 2276-77 and n.8 (noting that Virginia and the district court recognized beneficial effects of single-sex education and noting that the United States did not challenge this finding). Thus, after VMI, it appears that schools can offer single-sex programs based on a diversity rationale.

However, several key issues were left undecided by the Court. First, it is unclear whether the Court's use of the word "diverse" means that the Constitution requires single-sex options to be offered as part of an array of options that includes a comparable coeducational option. Arguably, however, an ordinary reading of the term "evenhandedly" can be satisfied by offering only a single-sex option to each sex.

Second, it is unclear whether "evenhandedness" requires that a school district or school must offer a single-sex program to members of each sex, or whether a comparable coeducational program for the other sex is sufficient. In other words, will a denial of equal opportunity claim fail where members of one sex are offered a coeducational program that is equivalent in quality, resources, and stature to a single-sex program offered to the other sex, or, instead, is the denial of the "single-sexness" itself a denial of equal opportunity. This issue was not squarely addressed in VMI because the unique military type education offered at VMI was offered ***only*** at the all-male school. It is also unclear after VMI whether it is "evenhanded" to offer a single-sex program only

to members of one sex -- as part of an array of options that includes a comparable coeducational program – even if it is established that there is a particular educational need for that single sex program and/or insufficient interest by members of the other sex in a single-sex program.

Regarding the issue of "how comparable" the single-sex programs must be, the VMI Court did not fully outline what an "evenhanded" or comparable program must look like. However, in holding that Virginia's proposed "parallel" military school for women was not comparable, the Court found that the school's methodology was based on stereotypes and generalizations about women, id. at 2284, and that it could be fairly appraised as a "pale shadow" of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence. Id. at 2285. Thus, the Court left unaddressed whether the comparable programs have to be identical, but at a minimum it seems that the single-sex programs must be genuinely equivalent.

Proposed Amendments to the Title IX Regulation

We believe that the actions of many school districts to establish single-sex programs, as well as congressional proposals in this area, reflect legitimate efforts to improve educational outcomes for all students. We also believe that single-sex programs and activities, in certain, narrowly tailored circumstances, can be consistent with the purposes of Title IX, particularly where they are not driven by impermissible stereotypes. In addition, permitting single-sex programs and activities is consistent with this Administration's efforts to strengthen public school education by promoting an array of educational options within public schools, and to give schools increased flexibility to undertake educational reform so that schools can achieve better results for students. Accordingly, we propose amending the Title IX regulation to permit single-sex programs and activities in certain clearly defined circumstances. There are several ways to accomplish this objective. These are discussed below.

At present, the regulation prohibits coeducational schools from conducting any single-sex courses and activities subject to very limited exceptions -- in particular, if there is a remedial justification (Parts 106.3 and106.34). It permits LEAs to operate single-sex schools only if comparable opportunities are provided the other sex or if there is a remedial justification (Parts 106.3 and 106.35).

None of the proposals would change the regulatory provision regarding remedial and affirmative action. Thus, the regulation would continue to permit both single-sex schools, and single-sex courses and activities in a coeducational school, based on a remedial justification. All the proposals, however, would repeal the current blanket prohibition against nonremedial, single-sex classes and programs and would replace it with authorization to conduct such classes in certain situations. All of the proposals build on the rationale that single-sex education may be provided if it is part of an evenhanded array of diverse educational options, and each would prohibit the single-sex program or activity from being predicated on sex-based stereotypes or stigmatization:

Proposal 1

Proposal 1 would permit a single-sex program or activity -- including both a single sex school and a course or activity in a coeducational school -- only if (1) there is a ***comparable single-sex program*** for the other sex; and (2) the program is offered as part of an array of educational options, ***that includes a comparable coeducational option;*** and (3) assignment to the single-sex program is voluntary.

Proposal 2

Proposal 2 would permit an elementary and secondary school or school district to offer single-sex program and activities -- including both single sex schools and courses or activities in a coeducational school -- if there are comparable single-sex program or activities for each sex, ***but would not require it to offer a comparable coeducational option.*** (The current regulation does not require an LEA that establishes comparable single-sex schools to offer a comparable coeducational school.) This proposal is based on the understanding (discussed in more detail below) that under the Constitution an array of options need only be "evenhanded." Thus, a school's array could be limited to offering single-sex education as long as both girls and boys are offered a comparable single-sex program.

Proposal 3

Proposal 3 ***would treat classes and schools differently.*** Single-sex courses or activities in coeducational schools would be permitted under the circumstances outlined in Proposal 1, e.g., only where they are voluntary, provide single-sex options for each, and are in addition to a comparable coeducational classroom. Single-sex schools, by contrast, would be permitted where each sex is offered a comparable single-sex school, as under the current regulation, and as outlined in proposal 2.

Proposal 4

Proposal 4 would permit an elementary or secondary school or school district to offer a single-sex program or activity for one sex -- including both single sex schools and courses and or activities in a coeducational school -- as part of an array of educational options, ***but it would not have to establish a comparable single-sex program or activity for the other sex if a comparable coeducational program or activity is available to members of the other sex.*** Legal support for this proposal would be strengthened if the school or district is required to show either a particular educational need for -- that is not based on stereotypes and is, in fact, being addressed by -- the single-sex program, or insufficient need for or interest in a single-sex program by members of the other sex. This may require an assessment of the needs or interests of the other sex.

In addition, all of the proposals retain the existing prohibition against single-sex programs and activities at institutions of vocational education, professional education, and graduate education -

- except where necessary to remedy discrimination. The Title IX statute specifically stated that admissions to these institutions were subject to the statute's prohibitions. Moreover, the Title IX legislative history and the debate surrounding the enactment of these regulatory provisions indicate a strong concern about continuing discrimination in these areas. We believe that at this education level, and in these types of education programs, the potential for harmful sex stereotyping regarding, for instance, career goals and aspirations, outweighs any countervailing objective to grant recipients flexibility for reform.[17] In addition, the Department has not received information that there is a significant educational need to amend the Title IX regulation beyond the elementary and secondary level.

It remains to be decided whether the proposals should retain the existing regulatory prohibition against single-sex physical education classes (with certain exceptions found in the existing regulation, including for contact sports). The provision requiring coeducational physical education classes was the subject of much debate when the Title IX regulations were issued. See 108 Fed. Reg. 24133 (June 4, 1975). Moreover, there is some risk that such a proposal could open up a more general debate regarding the regulation's treatment of athletics. On the other hand, to exclude single-sex physical education classes from the proposed regulatory change -- where the segregation is not based on stereotypes or stigmatization and where comparable activities are offered both sexes -- limits flexibility regarding the range of single-sex options that can be considered by the school.

Consistent with the Title IX statute, none of the proposals would regulate the admissions policies of any nonvocational elementary and secondary schools, private single-sex undergraduate institution, or public post-secondary schools that have been traditionally single-sex.

Finally, since all of the proposals require that, in some circumstances, a comparable program must be provided to girls and boys, all of the proposals would include a new, clearer regulatory definition of comparability. The new definition is intended to provide investigators and schools with additional and more detailed factors that are used by OCR, and should be used by schools, to analyze the comparability of programs under the regulation. It is our experience that the current definition is lacking in this regard.

We believe that even more guidance, including examples of comparable programs, would be useful to schools and school districts. Examples will be particularly helpful in demonstrating the key issue regarding comparability: how far from identical can a comparable program be? The regulatory definition of comparability can result in increasing amounts of flexibility for schools depending on the extent that it permits comparability to mean something other than absolutely identical programs. On the other hand, the less identical programs are, the more likely they are to raise denial of access claims under the equal protection clause. In addition, examples may be useful because this analysis may change depending on whether we are analyzing an entire single-sex school or one single-sex class or activity. OCR plans, in the near future, to hold focus group discussions on these proposed regulatory changes. We believe that these discussions will assist us in understanding, and thus providing a more thorough definition of, comparability, which then

can be incorporated into the final regulation.

Pros and Cons

The most significant benefit of the proposals -- though some offer more of it than others -- is the increased flexibility given districts and schools. Current attempts to create single-sex options show the broad appeal of single-sex schools and classes to many parents looking to improve their childrens' ability to succeed in school. Providing parents with multiple educational options is critically important to the effort to strengthen public education. Similarly, the Department believes it is important to eliminate overly rigid rules that restrict the ability of public schools to offer options that appeal to parents, cannot align with real educational needs and educational research, and prevent educators from experimenting with educational approaches designed to help both boys and girls.

All of the proposals would eliminate the regulatory anomaly in the treatment of single-sex schools and single-sex classes in areas where the distinction no longer responds to the types of discrimination facing girls and women today. The present broad prohibition against single-sex classes unnecessarily limits flexibility and education reform in particular situations where single-sex programming does not reflect discrimination. In addition, unlike the Hutchison legislative proposal, amending the Title IX regulation permits a comprehensive standard for permissible single-sex classes, that would apply to all of a recipient's education programs, and that would clearly define the circumstances under which such programs are permissible. Thus, for instance, it would not allow single-sex classes that are justified on stereotyped or stigmatized notions regarding differences between the sexes. In addition, the proposed language regarding comparability, that would apply to all of the options, gives recipients and investigators a much clearer idea of what is necessary to establish comparability of programs.

There are, however, risks associated with each of the proposals, and risks in choosing one option over another. The proposals are based on the assumption that there can be "separate, but equal" educational programs for boys and girls. Congress seemed to recognize the viability of this concept when it exempted single-sex admissions policies from the Title IX statute. Moreover, the concept is already embodied in the existing regulatory provision permitting LEAs to offer separate but comparable schools for girls and boys. We know, however, that civil rights organizations strongly believe that the history of gender relations since the passage of Title IX in 1972 -- for instance the continuing inequitable treatment of female athletes -- undercuts this assumption, and shows, instead, that with gender, as with race, separate continues to be unequal. Thus, the benefits of giving flexibility with the hope of improving educational outcomes, must be balanced against the risk that unequal educational opportunities for girls and boys will result.

In addition, it is likely that many single-sex programs may involve sex stereotyping or some element of stigma. Although the regulation would prohibit this, the stereotyping may be subtle and very difficult to assess. Moreover, depending on how broadly or tightly we define comparability, it is possible that particular opportunities will be denied based on sex for some

individual. Finally, in those circumstances where coeducational programs are permitted, but most members of one sex choose the single-sex program, the needs of members of that sex that remain in the coeducation program may not be effectively addressed.

Another "con" relates to the not insignificant risk that this action will open Title IX for further, less constructive amendments (e.g., changes relating to intercollegiate athletics that could exacerbate continuing discrimination against women athletes). We should be clear that the Department's proposal to amend specific provisions of the regulations would not invite comments on any other provisions of the regulation. Nevertheless, since this would be the Department's first major revision to the Title IX regulation in 25 years, interested parties may see the proposed changes as a signal that they can press the Department for other changes to the regulation. Finally, it is highly likely that any of the proposals, if implemented, would be subject to a legal challenge. Thus, full implementation of the regulation may be delayed until the issue of its legality under Title IX and the Constitution is resolved by the courts.

Proposal 1 is the least likely to be challenged by students or parents because it requires for all types of single-sex programs that parents be given a full array of educational choices -- i.e, a comparable single-sex program for boys and girls, and a comparable coeducational program. Arguably, this is more than is required by the Constitution after VMI. Thus, Proposal 1, in effect, recognizes as a policy matter that offering multiple options is the best practice. Proposal 1, however, has several major drawbacks. First, it is even less flexible than our current regulation which neither requires an LEA that offers comparable ~~coeducational~~ single sex schools to offer a comparable coeducation school as well, nor requires that assignment to the single-sex school be voluntary. Because it requires multiple options, it also may be prohibitively costly for small schools and school districts. In addition, Proposal 1 -- as to single-sex schools -- squarely raises the issue that such a requirement is ultra vires. If, as we argue above, constitutional "evenhandedness" does not require a comparable coeducational program, then such an option is not required to ensure equal educational opportunity. Thus, it may be difficult to argue that we are not regulating admissions, but only the obligation to provide equal opportunity for the excluded sex that flows from the establishment of a single-sex program.

Proposal 2 expands flexibility in that it permits single-sex courses and activities in coeducational schools to the same extent that single-sex schools are now permitted by the regulation. It clearly makes single-sex educational options more attainable for small schools and school districts because it does not require the school to offer all three types of comparable programs, e.g., two single-sex and one coeducational. We believe that, arguably, such a scenario is constitutional, because the school would be evenhandedly providing a comparable educational program to members of each sex. Moreover, as with our current regulation, we believe that requiring comparable single-sex classes for one sex -- as a means of ensuring equal educational opportunity when a school chooses to offer single-sex classes to the other sex -- is not ultra vires. However, it eliminates parents' choice of a coeducational option for children. Thus, while it gives some parents an option they desire, it could push other parents out of the school system. Under Proposal 2 students would be assigned to single-sex programs on a nonvoluntary basis.

Thus, Proposal 2 also may raise problems -- only as to single-sex schools -- under the Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1703, which in certain circumstances prohibits the assignment of students to schools on the basis of race, national origin, or sex. Of course, this potential problem exists under our current regulation as well, since it does not require the LEA to offer a coeducational option.

Proposal 3 represents a compromise to resolve the pros and cons of Proposals 1 and 2. Proposal 3 treats single-sex schools as they are now treated in the regulation -- with the exception that we would clarify that comparability means a single-sex school for each sex. Thus, the new regulation would not increase the cost or decrease the feasibility of offering single-sex schools by requiring that a comparable coeducation school also be offered. If a school wants to implement single-sex courses or activities within a coeducational school, however, it would have to offer, not only a single-sex alternative for each sex, but a comparable coeducational program as well.

This alternative proposal would still increase flexibility over the current regulation, which simply prohibits single-sex classes. We do not believe -- as to courses and activities within a coeducational school -- that requiring multiple options is as likely to be prohibitively expensive for smaller schools. Moreover, imposing this admission requirement does not raise ultra vires arguments in the context of single-sex classes in coeducational schools, because the Title IX statute only exempts the admission practices of single-sex schools. However, this proposal also raises the issue noted above under the EEOA.

Finally, we believe that we can support a regulation that treats schools and classes differently. This is what we have been doing since 1975, and it is supported by the Title IX statute which only exempts admission requirements of schools, but not courses or activities within coeducational schools. We also believe the difference is justified by the different societal perceptions associated with single-sex schools and single-sex classes. Historically, there has not been a negative stigma attached to attending a single-sex school. Rather, it is often seen by parents as a favorable choice. However, when separate courses or activities are established within a school, there is often a negative stigma attached because they are not the norm, and may imply that students in those classes need extra help. Thus, it may be particularly important that parents be given a choice of a coeducational option for classes.

Proposal 4, like proposal 2, may benefit smaller schools and school districts because a school would only have to offer two options, i.e., it may offer a single-sex program and a comparable coeducational program, without the need to offer a single-sex program for the other sex. Thus, for instance, if a need or interest in single-sex education for one sex is brought to the school's attention, it can respond to that need or interest, as long as it is not based on stereotypes and members of the other sex are provided a comparable coeducational program. However, Proposal 4, more so than the other proposals, raises constitutional issues that have not been squarely resolved by the Court. While nothing in VMI explicitly requires a school to offer a single-sex program for each sex, the Court may find the VMI footnote permitting an "evenhanded" diversity of options inapplicable where there is no single-sex option for one gender. Moreover, to the

extent that there is a perceived benefit to single-sex education, Proposal 4 places us in the difficult position of arguing that the benefit can be achieved by the other sex in a coeducational setting. Thus, Proposal 4 seems highly likely to raise a denial of equal opportunity claim.

One way arguably to strengthen Proposal 4 is to require schools or school districts to show a particular educational need for -- that is not based on stereotypes and is, in fact, being addressed by -- the single-sex program, or insufficient need for or interest in a single-sex program by members of the other sex. Arguably, there are limited, fact-specific circumstances where a school could articulate such an educational justification for offering a single-sex program only to one sex, thus establishing that it is acting in an evenhanded fashion -- as long as the other sex is offered a comparable coeducational program. This would not permit schools to offer a single-sex program only to one sex without sufficient justification. However, it would not predetermine that such a situation is based on stereotypes, or otherwise inequitable. Moreover, this approach may shore up the proposed regulation against certain legal challenges. To the extent that it only creates a framework under which a school can demonstrate a particular set of facts to support offering a single-sex program only to one gender, the regulation should not be vulnerable to a challenge that it is facially unconstitutional.

Political and Stakeholder Reaction

The recurring congressional proposals regarding single-sex programs, as well as the specific directive in the 1999 appropriations report, would seem to indicate congressional support for increased flexibility regarding single-sex programs. In fact, a previous version of the Hutchison Amendment passed the Senate as part of legislation that ultimately was not enacted.

We know that women's groups and civil rights groups are strongly opposed to any attempts by the Department to make single-sex education more viable except in the limited context of remedial programs for women. These groups opposed the Hutchison Amendment, not only for the reasons that the Department opposes it, but also because they do not believe that single-sex education programs are the appropriate or effective way to improve educational outcomes. Since the vast majority of students will continue to attend coeducational schools, they believe that educational reform efforts within coeducational schools should be the priority of States and the federal government. Women's and other civil rights groups will also oppose the proposed regulation based on a similar belief that sex-segregation in schools, like race-segregation, never results in separate but equal educational opportunities. Finally, to the extent that the regulation permits single-sex physical education classes, we anticipate that it would incite strong opinions in the sports community and that such groups would need to be part of any focus groups convened to discuss the proposed regulation.

Based on our knowledge of schools already experimenting with single-sex programs, and because of the added flexibility it gives to schools, we expect that educators will support the regulatory change.

ENDNOTES

1. For instance, Senator Bayh noted that:

> We are all familiar with the stereotype of women as pretty things who go to college to find a husband, go on to graduate school because they want a more interesting husband, and finally marry, have children and never work again. The desire of many schools not to waste a "man's place" on a woman stems from such stereotyped notions. But the facts absolutely contradict these myths about the "weaker sex" and it is time to change our operating assumptions"

118 Cong. Rec. 5804. Similarly, the Senator noted:

> Admissions to vocational programs and institutions is another area where discrimination on the basis of sex can be documented.... The discriminatory effect of sex segregation in vocational education is that many fields which are designated for females such as cosmetology or food handling are less technical and therefore less lucrative than fields such as TV repair and auto mechanics "reserved" for males. And yet it is only tradition which keeps women out of these fields.

Id. at 5806.

2. To date, only four federal agencies have promulgated Title IX regulations. However, pursuant to an Executive Order issued by the President in 1997, every agency that provides financial assistance to education programs or activities must promulgate such regulations if they have not already done so. The Department of Justice is presently drafting a proposed common regulation to be adopted as a unified action by all affected agencies. The common rule is closely aligned with the Department's Title IX regulation. Thus, any changes to our regulation would presumably affect the common rule as well.

3. HEW received and considered over 9,700 comments to its proposed Title IX regulation. The revised final regulation became effective 45 days after it was transmitted to Congress, pursuant to section 431(d)(1) of GEPA, which gave Congress authority to disapprove final regulations of the Department.

4. The Department revoked this provision in order to permit the Department to concentrate its resources on cases involving more serious allegations of sex discrimination and because enforcement

of appearance codes is an issue for local determination. 47 Fed. Reg. 32526 (July 28, 1982).

5. In this regard the regulation is consistent with the legislative history of Title IX. For instance, Senator Bayh (the original sponsor of Title IX) stated, when discussing the admissions exemption for elementary and secondary schools, that "all educational institutions without exception, must treat their faculty and students once they have been admitted without discrimination." 120 Cong. Rec. 39992.

6. See 34 CFR Parts 106.34(b), (d) and (f)

7. See 34 CFR Part 106.34(c) and (e).

8. See 34CFR Part 106.40 (b). The program for pregnant students must be comparable to that offered non-pregnant students.

9. See 34 CFR Part 106.3. In addition, pursuant to an OCR policy determination, recipients may offer sex-segregated classes for students who object to coeducational classes on religious grounds. 43 Fed. Reg. No. 84 (May 1, 1978).

10. Some researchers believe that the limited research already conducted may be problematic because many of the studies do not control for important variables such as the teacher, curriculum, and student self-selection.

11. The Department had concerns with the Danforth proposal because it included a provision waiving Title IX and Title VII of the Civil Rights Act of 1964 (relating to equal employment opportunities). The Department believed that this waiver was unnecessary as to the single-sex classes and set an inappropriate precedent. The Department also had concerns about the constitutionality of waiving these requirements in order to ensure same-sex teachers in the single-sex classrooms.

12. This would have created inconsistent treatment of non-discrimination issues depending on whether State or federal funds were used as well as unnecessary administrative questions and difficulties related to tracing funds.

13. An agency rule is arbitrary and capricious if it relies on factors Congress has not intended it to consider; entirely failed to consider an important aspect of the problem; offered an explanation for its decision that runs counter to the evidence before it, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. State Farm., 463 U.S. at 43-44.

14. According to Senator Bayh, "This portion of the amendment covers discrimination in all areas where abuse has been mentioned." 118 Cong. Rec. 5807.

15. For instance, when passing the father-son, mother-daughter activities exemption, Senator Bayh recognized that, while the sex-segregated activity was appropriate, unless the amendment was

drafted to ensure that the opportunity was available to both sexes "it would be a significant departure from what we had intended to do in Title IX." 122 Cong. Rec 27983. Similarly, in 1975 when introducing a provision that would prohibit HEW from using funds to enforce its regulations requiring integrated physical education classes, Cong. Casey acknowledged that the Title IX statute and regulation were intended to ensure equal opportunity even where schools could restrict admissions based on sex. He stated: "My amendment does not affect the equal opportunity requirements of Title IX, it does not change the subject content of gym class.... The only issue involved is compulsory integration by sex....Yet the equal opportunity requirements in [] gym classes [] remain." **[cite]**

16. Gender discrimination cases are often decided by the narrowest margin, and have gone both ways on the ultimate question. See e.g., Michael M., 450 U.S. 464 (1980) (plurality opinion upholding gender classification); Orr v. Orr, 440 U.S. 267 (1979)(plurality opinion striking down gender classification); Frontiero v. Richardson, 411 U.S. 677 (1973) (same); Mississippi v. Hogan, 458 U.S. 718 (1982) (5/4 decision striking down gender classification); Schlesinger v. Ballard, 419 U.S. 572 (1975) (5/4 decision upholding gender classification). In addition, the outcomes in these cases seemingly can be contradictory. For instance, in the same month in 1977, the Court first struck down a Social Security provision that gave widows more favorable treatment than widowers because it was based on "archaic" assumptions about women. Two weeks later, it upheld a Social Security provision that allowed women to exclude more lower earning years on the basis that historic discrimination and "socialization" resulted in women earning less wages.

17. In addition, because Congress intended to permit single-sex activities where personal privacy is important, see e.g., 117 Cong. Rec. 30407 (Statement of Sen. Bayh that proposed amendment is not intended to "desegregate" men's locker rooms), the regulation retains the provision permitting separate sex classes which deal exclusively with human sexuality, and such classes would not have to meet the other requirements of the proposed amendment.

Educ - single sex schools

5-17-99 Single Sex MH EE/DOT/Counsel

DOT — No firm conclusions Not looked at EEOA at all.
Framework
T. IX — 1681a - gen'l prohibition — as directive
1681ai - exceptions for admissions policies
standard not defined.
reas to adopt VMI std -
TIX std becomes
so/ same as const std

Med ops
Diversity not constitute authic justif
under VMI - ct didn't decide
More than div for div's sake -
have to show how There are
sensible choices for parents to
make

SS is benefit
Why only 1 sex sch?
need exceedingly persuasive justif
+ can't generalize about sex diffs.

single-sex
school

1)
2)

Educ-single sex schools

PROPOSED SINGLE-SEX REG. AMENDMENT OPTIONS[1]

PROPOSAL	REGULATORY LANGUAGES	PROS	CONS
Options 1 NO	Single sex school or activity permitted if: ❖ Comparable single-sex school for opposite sex ❖ Comparable co-educational alternative ❖ Voluntary	Requires full array of educational choices - both single-sex and co-ed program	Current reg does not require single-sex schools to have a comparable co-ed option . Costly for small districts
Option 2 NO	Single-sex school or activity permitted if: ❖ Comparable single-sex program for opposite sex A comparable, co-educational option is not required No voluntary requirement	Aligns single-sex courses and activities reg with current single-sex school reg	Could violate EEOA because it permits the assignment of students based on sex. Eliminates parental choice for co-ed option possibly pushing them out of system

[1] All options provide for no change to regulation regarding remedial or affirmative action. All options also retain existing prohibition against single-sex programs and activities at vocational schools.

PROPOSED SINGLE-SEX REG. AMENDMENT OPTIONS[1]

PROPOSAL	REGULATORY LANGUAGES	PROS	CONS
Option 3 NO	Single-sex school permitted if: ❖ Comparable single-sex program for opposite sex A comparable co-education option is not required No voluntary requirement Single-sex activity permitted if: ❖ Comparable single-sex course for opposite sex ❖ Coeducational alternative ❖ Voluntary	Treats single-sex schools same as current reg. Clarifies that comparability means a single-sex school for each sex.	Does not have voluntary requirement for schools Raises EEOA problems with schools[2] Treats schools and classes differently
Option 4	Single-sex school or activity permitted if: ❖ Comparable co-educational alternative Single-sex alternative not required Proposal strengthened if: • Required to show particular non stereotypical educational need • Insufficient need or interest in single sex program for opposite sex. May require an assessment of needs or interest of sex	May benefit smaller district because not required to offer single-sex school or activity for excluded sex	Raises constitutional issue i.e. denial of equal opportunity claim.

[2] Can interpret reg consistent with the EEOA

U.S. Department of Justice

Office of Legal Counsel

Office of the Deputy Assistant Attorney General Washington, D.C. 20530

December 29, 1998

Mr. Seth P. Waxman
Solicitor General
Office of the Solicitor General
U. S. Department of Justice
950 Pennsylvania Avenue
Washington, D.C. 02530

Dear Seth:

We have received a request from the Department of Education for our legal opinion on regulatory proposals pertaining to the operation of single-sex elementary and secondary school programs now under consideration by the Department of Education's Office for Civil Rights (OCR). In particular, they have asked whether Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq., or the Constitution would prohibit a state or local educational agency receiving federal financial assistance from establishing single-sex schools or offering single-sex courses under any of the following circumstances:

Scenario 1: a single-sex school and/or course alternative is 1) offered to one sex on a voluntary basis, 2) as part of an array of educational options that includes a comparable coeducational alternative, and 3) there is a comparable single-sex program for the other sex;

Scenario 2: a single-sex school and/or single-sex course within a coeducational school is 1) made available to each sex, but 2) neither sex is offered a comparable coeducational option;

Scenario 3: single-sex courses for each sex are 1) offered on a voluntary basis and 2) as part of an array of educational options that includes comparable coeducational courses, but 3) comparable single-sex schools (as opposed to courses) are offered to students of each sex as part of an array of educational options that does not include a comparable coeducational alternative.

Scenario 4: single-sex schools and/or courses are 1) offered to one sex, and 2) the other sex is offered a comparable coeducational program or activity, but is not provided a comparable single-sex alternative.

In accordance with our usual procedures, I am writing to request that your office provide us with a written statement of its position on this question.

On our preliminary review of this matter, we have identified three related questions that bear on the analysis we have been asked to provide. We would appreciate it if, in providing your views on the Department of Education's request, you would also give your views on these questions. The first question concerns whether Title IX incorporates a constitutional standard or employs a definition of "discrimination" that differs from that of the Equal Protection Clause. If you conclude that the Title IX standard is different, we would appreciate your views on what that standard is. The second question raised by the request concerns the level of scrutiny that applies in sex discrimination cases in the wake of the U. S. Supreme Court's decision in United States v. Virginia, 116 S. Ct. 2264 (1996). Should the VMI Court be understood to have rejected strict scrutiny in favor of intermediate scrutiny or a new type of heightened scrutiny, and, if not, what should the United States's position be on the level of scrutiny that applies in sex discrimination cases in light of the strict-scrutiny position that it took in VMI? Finally, we are interested in your views on whether there are circumstances under which the United States would be liable for funding a recipient that offers a single-sex school or activity as part of its educational program. (E.g., would there be federal government liability only if the United States itself had an unconstitutional purpose, Washington v. Davis, 426 U.S. 229 (1976); or if the United States provided "significant aid" that had the effect of supporting and perpetuating an unconstitutional program, Norwood v Harrison, 413 US 455, 467 (1973); or if the United States had knowledge of an unconstitutional program's existence?). In connection with this latter question, you may want to review the government's submissions in Virginia, 116 S. Ct. at 2264; Bob Jones University v. United States, 461 U.S. 574 (1983); Vorcheimer v. School Dist. of Philadelphia, 430 U.S. 703 (1977); Norwood, 413 US at 455; and National Black Police Ass'n v. Velde, 712 F.2d 569 (D.C. Cir.1983), cert. denied, 466 U. S. 963 (1984).

The Department of Education has stated that it has an urgent need for our opinion. We would therefore appreciate a response from your office by January 18, 1999. If you are unable to respond by that date or you or your staff have any questions, please contact me at (202) 514-3744 or Robin Lenhardt, the Attorney Advisor working on this project, at (202) 514-1762.

Sincerely,

Nina Pillard
Deputy Assistant Attorney General
Office of Legal Counsel

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE GENERAL COUNSEL

THE GENERAL COUNSEL

Honorable Bill Lann Lee
Acting Assistant Attorney General
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

DEC 17 1999

Ms. Nina Pillard
Deputy Assistant Attorney General
Office of Legal Counsel
U.S. Department of Justice
633 Indiana Avenue, N.W.
Washington, D.C. 20531-0001

Dear Bill and Nina:

Enclosed is a draft paper that discusses a number of options for changing the Department of Education's Title IX regulations to give local school districts more flexibility in establishing single sex schools and classes. The legal and policy issues presented by these options are very difficult, and the Department does not have a firm position at this time on which options would be preferable. In previous discussions, Secretary Riley has expressed a strong interest in providing school districts with more flexibility in this area. However, we want to have the benefit of your advice before we present specific options to the Secretary.

Our Office for Civil Rights and Office of the General Counsel have worked together to develop these options. Norma Cantú and I and our staffs would appreciate an opportunity to meet with your offices to discuss these options on an informal, preliminary basis as soon as possible. Our staffs previously met with staff of the Civil Rights Division and have altered the options presented based in part on that meeting.

I should also note that we have not enclosed specific regulatory language for the options. If it would be helpful to your review, we would be happy to supply that language.

We greatly appreciate your assistance in this matter and look forward to hearing from you. Thank you.

Sincerely,

Jamienne S. Studley
Acting General Counsel

Enclosure

cc: Norma Cantú
Leslie Thornton

*** FOR DISCUSSION PURPOSES ONLY ***
12/16/98 Draft

ANALYSIS OF THE DEPARTMENT'S PROPOSED AMENDMENTS TO ITS TITLE IX REGULATION TO PERMIT SINGLE-SEX PROGRAMS AND ACTIVITIES

Issue

The issue is whether to amend the Department's Title IX regulation to provide greater flexibility for school districts and other elementary and secondary schools to have single-sex schools and classrooms, subject to appropriate safeguards against discrimination. The Office for Civil Rights (OCR) has been considering this proposal based on its concern that existing Title IX regulations are overly rigid, particularly with respect to classes. This regulatory action also provides the Department with the opportunity to clarify and refine its existing definition for when a program available to one sex is "comparable" to a program available to the other sex. Recent developments -- including a Senate Committee Report directive that we review our policy in this area – underscore the need to address these issues at this time.

Background

Legislative and regulatory framework

Title IX of the Education Amendments of 1972 prohibits sex-based discrimination in education programs or activities receiving federal financial assistance. 20 U.S.C. § 1681. It does not specifically forbid single-sex classes or programs in coeducational schools. When Title IX was passed, Congress was concerned with sex-based policies and practices of educational institutions that reflected out-dated and stereotyped notions of the differences between the sexes. See e.g., 11ß Cong. Rec. 5804-08 (comments of Sen. Bayh on the need for the Title IX legislation).[1] In particular, it was concerned that, based on unfounded notions regarding girls' and women's temperament or limited abilities, girls and women were relegated only to certain kinds of vocational education courses, (e.g., home economics, but not auto shop) and career paths (e.g., homemaker, teacher or nurse, but not doctor or mechanic.) Id. At the same time, the Title IX statute does not apply to admissions to nonvocational elementary and secondary schools nor does it apply to admissions to private undergraduate institutions or to public undergraduate institutions that have been single-sex from their establishment. This reflects congressional concern not to forbid single-sex schools in all contexts.

Title IX is effectuated by regulations promulgated by federal agencies providing assistance to education programs and activities.[2] The Department's regulation was issued by its predecessor agency, the Department of Health, Education, and Welfare (HEW), and became effective July 21, 1975.[3] It has been revised only once, in 1982, in order to revoke the provision which

prohibited discrimination in the application of codes of personal appearance.[4] The Title IX regulation contains specific provisions regarding single-sex education.

Based on the Title IX statute, the Title IX regulation does not apply to single-sex admissions practices of non-vocational elementary and secondary schools, among others, 34 CFR Part 106.15, and in these circumstances recipients can establish single-sex schools. Consistent with the statute's general prohibition of sex-based discrimination, the regulation requires, however, that where a local educational agency (LEA) operates a school for one sex, it must provide the other sex, pursuant to the same polices and criteria of admission, with comparable courses, services and facilities. 34 CFR Part 106.35.

Consistent with the legislative history regarding stereotyped tracking of students based on gender, the Title IX regulation generally prohibits all recipients, once they have admitted students of both sexes, from denying access to courses, or carrying out any educational program or activity, separately on the basis of sex. 34 CFR Part 106.34.[5] Thus, recipients operating coeducational schools cannot conduct single-sex classes, courses or activities. The regulation specifically identifies "industrial," "business," "vocational," "technical," "home economics," "physical education", "health," "music," and "adult education," as the type of classes that cannot be sex-segregated. There are limited exceptions to this general rule: the separation based on sex (1) results from the application of objective standards of physical ability, or vocal range or ability;[6] (2) involves contact sports or human sexuality; [7] (3) is offered to pregnant students on a voluntary basis; [8]or (4) constitutes permissible remedial or affirmative action.[9]

In sum, at the elementary and secondary education level, under the current Title IX regulation, schools districts can operate nonvocational single-sex schools for one sex, although school districts that do so must offer a comparable educational program to the other sex. On the other hand, coeducational elementary and secondary schools cannot now in most circumstances offer single-sex classes or programs.

Recent Developments In Single-Sex Education

In recent years some school districts have established single-sex schools and classes. Many of these programs represent efforts to provide public school parents with the same diversity of options available to parents whose children attend private schools that do not receive federal financial assistance, and to improve educational outcomes for children who are not succeeding in the existing school program. As an example, California recently passed legislation permitting up to ten individual school districts to establish single-sex academies, if comparable single-sex academies are provided for members of each sex. Single-sex schools may be established in reliance on research and evidence that in some settings and for some areas of study, some children appear to learn better in a single-sex environment. It should be noted that the available research regarding the effect of single-sex programs is limited, and research conclusions are often inconsistent.[10]

Attempts to establish or experiment with single-sex classes have been limited by the Title IX regulation. For instance, according to Education Week on the Web: News in Brief for November 24, 1998, the New Jersey State Department of Education required one of its townships to close a voluntary, middle school, single-sex, pilot program for girls and boys. The program was designed to learn whether boys and girls perform better in math and science classes in a single-sex environment. The State found that the school violated Title IX. On the other hand, single-sex classes continue to exist in some districts, notwithstanding the Title IX prohibition, either because no one has challenged their legality under Title IX, or because, when challenged, schools have been willing to open the classes to the excluded sex. (As a practical matter, these classes often remain single-sex because the classes are focused on the perceived special needs or interests of one sex and no one from the other sex wants to take the class.) Single-sex classes that restrict admission, however, remain vulnerable to challenge under Title IX. Where such classes are not challenged, there may be a harmful perception that the law is being ignored.

In December 1993, The Department's Office of Educational Research and Improvement (OERI) organized a conference with researchers and practitioners to examine single-sex education. The result was a special report from OERI: *Single-Sex Schooling: Perspectives From Practice and Research*. The report summation noted the equivocal nature of the research evidence regarding the benefits of single-sex education. The conclusion drawn was that the research does not indicate that all single-sex schools are consistently positive for particular groups of students, but that "some single-sex schools stand out as more productive learning environments for girls and minority men than other single-sex or coeducational schools." OERI Report at 73. In light of the research evidence, and the demand for alternative approaches to educate youth at risk of failure, the Report recommended a reassessment of the Title IX regulation, noting that it lacks flexibility in two regards. First, it requires school districts to establish two schools, one for girls and one for boys, when there may not be equal demand for both, or there is not compelling evidence of a need for both. Second, it provides no flexibility to schools to explore the effectiveness of single-sex classrooms. Id. at 76.

In recent years, proposed legislation was introduced permitting single-sex classes, but Congress did not pass these provisions. In 1995, Senator Danforth proposed legislation that would have authorized the Department to assist up to four school districts in establishing experimental single-sex classes (with same-sex teachers) within coed elementary and secondary schools serving low income/educationally disadvantaged students. The school districts would have been required to provide similar single-sex classes for students of each sex and to provide similar coeducational classes. In addition, under the Danforth bill, assignment had to be voluntary and data had to be provided to the Department in order to assess the effectiveness of the single-sex classes.[4]

Senator Hutchison recently proposed adding a rider to the 1999 Omnibus Appropriations Act that would permit school districts to use federal funds, under Title VI of the Elementary and Secondary Education Act, to support "educational reform projects" that involve single-sex schools or classrooms as long as "comparable educational opportunities are offered for students

of both sexes." The Administration raised concerns with this legislation, not because the legislation would permit single-sex education programs, but because, among other things, it was inappropriately linked to a limited appropriations bill, and was limited to Title VI funds.[12]

The Hutchison Amendment did not pass. However, the Senate Appropriations Committee, in reporting out the Omnibus Appropriations Act (S. 2440), expressed concern about the Department's interpretation of Title IX as it applies to "same gender education programs." In its Report (No. 105-300) the Committee "urges the Department to review its regulations and policies to ensure that if funds are used for students to participate in any education reform projects that provide same gender schools or classrooms, comparable educational opportunities are offered to students of both sexes." The report directs the Department to report on this review within 90 days of the enactment of the appropriations act. However, it does not specifically call for a regulatory change.

Legal Basis for Regulatory Change

Because 34 CFR Part 106.34 will be revised, this action is subject to judicial review. 20 U.S.C. §§ 1682, 1683; 5 U.S.C. § 701, et seq. The modification of a regulation, like its promulgation, is subject to the "arbitrary and capricious standard". Motor Vehicles Manufacturers Ass. v. State Farm, 463 U.S. 29, 103 S.Ct. 2856 (1983). An agency changing its course by rescinding a regulation (here, among other things, the Department will be rescinding its prohibition against single-sex classes) is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first place. Id. at 41. However, the agency must be given ample latitude to adapt its rules to the demands of changing circumstances. Under this standard, the Department must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." Id. at 43.[13] We believe that the Department's proposals to amend the Title IX regulation meet this test because the proposals, as discussed in detail below, are consistent with both the legislative purpose and the spirit of Title IX, and allow schools and school districts the flexibility to respond to the education needs of their students.

Consistency with Title IX Statute

The proposed options to amend the Title IX regulation are crafted to be consistent with the intent and spirit of Title IX. The legislative history indicates that Senator Bayh, when discussing the proposed Title IX, stated that regulations prohibiting sex discrimination were to be drafted and implemented to "allow enforcing agencies to permit differential treatment by sex only [in] very unusual cases where such treatment is absolutely necessary to the success of the program such as in classes for pregnant girls or emotionally disturbed students, in sports facilities or other instances where personal privacy must be preserved." 118 Cong. Rec. 5807. While this would seem to raise a very high bar to permitting single-sex activities, Senator Bayh made clear that the statute was directed at areas where discrimination had been shown in hearings before Congress. Id.[14] The enactors were also concerned that classifications would be based on improper

stereotypes and generalizations about the sexes. 118 Cong. Rec. 5804-5808. By the same token, the enactors' exclusion of certain single-sex schools from the statute, and subsequent amendments to Title IX, including exemptions for voluntary youth service organizations (e.g., Boy Scouts and Girl Scouts), boy and girl conferences, and father-son and mother-daughter activities indicate that, particularly at the elementary and secondary level, Congress recognized the benefit of, and intended to permit, single sex activities in some circumstances. For instance, when passing the mother-daughter, father-son exemption, Senator Bayh stated: "Certainly it was the intention of those of us who got Title IX enacted into law to say that those additional functions, which add significant contributions to the lives of our sons and daughters, should be exempt from Title IX." 122 Cong. Rec. 27983. See also United States v. Virginia, 116 U.S. 2264, 2276-77.

The proposed amendments respond to this legislative history by limiting the circumstances under which single-sex classes are permitted to those at elementary and secondary schools that satisfy equal protection requirements, among other specific requirements, that ensure that the single-sex program is not discriminatory.

One remaining issue under the statute is whether any or all of the proposals -- as to schools, though ***not as to courses or activities in coeducational schools*** -- are ultra vires in that we are dictating the admissions policies and practices of schools whose admission practices are exempt from Title IX. The same argument can be made about the Department's existing, twenty-five year old regulation. The Department has not publicly expressed its interpretation, but believes the current regulation would require an LEA -- that chooses to offer a single-sex school to one sex -- to offer a comparable single-sex school to the other sex. We believe that the regulation, as so interpreted, is not ultra vires because it does not tell schools that they cannot have single-sex schools. Instead, the current regulation merely defines the obligations of a school district to provide equal educational opportunity/comparable programs, for the other sex, that flow from the district's decision to restrict admissions to a school based on sex. We note that to take the position that Title IX denies OCR jurisdiction to investigate cases involving single-sex admissions polices or to expect a comparable single sex school as the measure of equal ecucational opportunity may result in Title IX permitting an unconstitutional educational program. One goal of the proposed regulatory change is to clarify that Title IX's prohibition of discrimination is coextensive with the Equal Protection Clause of the Constitution. This is consistent with the legislative history of Title IX which indicates that admission and membership type exemptions in Title IX were to permit single-sex activities, but not to permit the denial of equal educational opportunity for the other sex.[15] As to the current proposals, however, the ultra vires argument may raise particular concerns regarding Proposal 1. This is discussed in the "Pros and Cons" section below.

Constitutionality of Single-Sex Programs

We also anticipate that these proposed regulatory changes may be challenged under the Equal Protection Clause of the Constitution. While we cannot predict the outcome of such a challenge

with certainty,[16] we believe there are reasonable arguments that the Department's proposals are consistent with the Supreme Court's analysis regarding the appropriate use of gender-based programs.

The United States Supreme Court has, on several occasions, specifically addressed single-sex education programs in light of the Fourteenth Amendment's equal protection guarantee. Single-sex education, like all classifications based on sex whether intended to be invidious or beneficial, must be supported by an "exceedingly persuasive justification." United States vs. Virginia (VMI) 116 S.Ct. 2264, 2275 (1996) (citing Mississippi v. Hogan, 458 U.S. 718, 728 (1982)). Accordingly, the classification must serve an important governmental interest and the means employed must be substantially related to that purpose. Id. The justification must be genuine, not hypothesized, and it must not rely on overly broad generalizations or stereotypes about the different talents, capacities, or preferences of males and females. Id. Below, we analyze the case law and evidence in support of the Department's justifications for authorizing elementary or secondary schools or LEAs to implement a single-sex program.

In the VMI case, Virginia attempted to justify offering a unique military education only to men on the basis that the school contributed to educational diversity in the State. Id. at 2276. The Court rejected this argument in part because "a purpose genuinely to advance an array of educational options ... is not served by VMI's historic and constant plan ... to afford "'a unique educational benefit only to males." Id. at 2279. Regarding whether single-sex educational opportunities could ever be supported by a diversity rationale, the Court specifically noted: "We do not question the State's prerogative ***evenhandedly*** to support ***diverse*** educational opportunities." Id. at 2276 n. 7 (emphasis added). Moreover, the Court seemed to acknowledge that single-sex education affords pedagogical benefits to at least some students. Id. at 2276-77 and n.8 (noting that Virginia and the district court recognized beneficial effects of single-sex education and noting that the United States did not challenge this finding). Thus, after VMI, it appears that schools can offer single-sex programs based on a diversity rationale.

However, several key issues were left undecided by the Court. First, it is unclear whether the Court's use of the word "diverse" means that the Constitution requires single-sex options to be offered as part of an array of options that includes a comparable coeducational option. Arguably, however, an ordinary reading of the term "evenhandedly" can be satisfied by offering only a single-sex option to each sex.

Second, it is unclear whether "evenhandedness" requires that a school district or school must offer a single-sex program to members of each sex, or whether a comparable coeducational program for the other sex is sufficient. In other words, will a denial of equal opportunity claim fail where members of one sex are offered a coeducational program that is equivalent in quality, resources, and stature to a single-sex program offered to the other sex, or, instead, is the denial of the "single-sexness" itself a denial of equal opportunity. This issue was not squarely addressed in VMI because the unique military type education offered at VMI was offered ***only*** at the all-male school. It is also unclear after VMI whether it is "evenhanded" to offer a single-sex program only

to members of one sex -- as part of an array of options that includes a comparable coeducational program – even if it is established that there is a particular educational need for that single sex program and/or insufficient interest by members of the other sex in a single-sex program.

Regarding the issue of "how comparable" the single-sex programs must be, the VMI Court did not fully outline what an "evenhanded" or comparable program must look like. However, in holding that Virginia's proposed "parallel" military school for women was not comparable, the Court found that the school's methodology was based on stereotypes and generalizations about women, id. at 2284, and that it could be fairly appraised as a "pale shadow" of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence. Id. at 2285. Thus, the Court left unaddressed whether the comparable programs have to be identical, but at a minimum it seems that the single-sex programs must be genuinely equivalent.

Proposed Amendments to the Title IX Regulation

We believe that the actions of many school districts to establish single-sex programs, as well as congressional proposals in this area, reflect legitimate efforts to improve educational outcomes for all students. We also believe that single-sex programs and activities, in certain, narrowly tailored circumstances, can be consistent with the purposes of Title IX, particularly where they are not driven by impermissible stereotypes. In addition, permitting single-sex programs and activities is consistent with this Administration's efforts to strengthen public school education by promoting an array of educational options within public schools, and to give schools increased flexibility to undertake educational reform so that schools can achieve better results for students. Accordingly, we propose amending the Title IX regulation to permit single-sex programs and activities in certain clearly defined circumstances. There are several ways to accomplish this objective. These are discussed below.

At present, the regulation prohibits coeducational schools from conducting any single-sex courses and activities subject to very limited exceptions -- in particular, if there is a remedial justification (Parts 106.3 and106.34). It permits LEAs to operate single-sex schools only if comparable opportunities are provided the other sex or if there is a remedial justification (Parts 106.3 and 106.35).

None of the proposals would change the regulatory provision regarding remedial and affirmative action. Thus, the regulation would continue to permit both single-sex schools, and single-sex courses and activities in a coeducational school, based on a remedial justification. All the proposals, however, would repeal the current blanket prohibition against nonremedial, single-sex classes and programs and would replace it with authorization to conduct such classes in certain situations. All of the proposals build on the rationale that single-sex education may be provided if it is part of an evenhanded array of diverse educational options, and each would prohibit the single-sex program or activity from being predicated on sex-based stereotypes or stigmatization:

Proposal 1

Proposal 1 would permit a single-sex program or activity -- including both a single sex school and a course or activity in a coeducational school -- only if (1) there is a ***comparable single-sex program*** for the other sex; and (2) the program is offered as part of an array of educational options, ***that includes a comparable coeducational option;*** and (3) assignment to the single-sex program is voluntary.

Proposal 2

Proposal 2 would permit an elementary and secondary school or school district to offer single-sex program and activities -- including both single sex schools and courses or activities in a coeducational school -- if there are comparable single-sex program or activities for each sex, ***but would not require it to offer a comparable coeducational option***. (The current regulation does not require an LEA that establishes comparable single-sex schools to offer a comparable coeducational school.) This proposal is based on the understanding (discussed in more detail below) that under the Constitution an array of options need only be "evenhanded." Thus, a school's array could be limited to offering single-sex education as long as both girls and boys are offered a comparable single-sex program.

Proposal 3

Proposal 3 ***would treat classes and schools differently***. Single-sex courses or activities in coeducational schools would be permitted under the circumstances outlined in Proposal 1, e.g., only where they are voluntary, provide single-sex options for each, and are in addition to a comparable coeducational classroom. Single-sex schools, by contrast, would be permitted where each sex is offered a comparable single-sex school, as under the current regulation, and as outlined in proposal 2.

Proposal 4

Proposal 4 would permit an elementary or secondary school or school district to offer a single-sex program or activity for one sex -- including both single sex schools and courses and or activities in a coeducational school -- as part of an array of educational options, ***but it would not have to establish a comparable single-sex program or activity for the other sex if a comparable coeducational program or activity is available to members of the other sex***. Legal support for this proposal would be strengthened if the school or district is required to show either a particular educational need for -- that is not based on stereotypes and is, in fact, being addressed by -- the single-sex program, or insufficient need for or interest in a single-sex program by members of the other sex. This may require an assessment of the needs or interests of the other sex.

In addition, all of the proposals retain the existing prohibition against single-sex programs and activities at institutions of vocational education, professional education, and graduate education -

- except where necessary to remedy discrimination. The Title IX statute specifically stated that admissions to these institutions were subject to the statute's prohibitions. Moreover, the Title IX legislative history and the debate surrounding the enactment of these regulatory provisions indicate a strong concern about continuing discrimination in these areas. We believe that at this education level, and in these types of education programs, the potential for harmful sex stereotyping regarding, for instance, career goals and aspirations, outweighs any countervailing objective to grant recipients flexibility for reform.[17] In addition, the Department has not received information that there is a significant educational need to amend the Title IX regulation beyond the elementary and secondary level.

open Q:

It remains to be decided whether the proposals should retain the existing regulatory prohibition against single-sex physical education classes (with certain exceptions found in the existing regulation, including for contact sports). The provision requiring coeducational physical education classes was the subject of much debate when the Title IX regulations were issued. See 108 Fed. Reg. 24133 (June 4, 1975). Moreover, there is some risk that such a proposal could open up a more general debate regarding the regulation's treatment of athletics. On the other hand, to exclude single-sex physical education classes from the proposed regulatory change -- where the segregation is not based on stereotypes or stigmatization and where comparable activities are offered both sexes -- limits flexibility regarding the range of single-sex options that can be considered by the school.

Consistent with the Title IX statute, none of the proposals would regulate the admissions policies of any nonvocational elementary and secondary schools, private single-sex undergraduate institution, or public post-secondary schools that have been traditionally single-sex.

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Finally, since all of the proposals require that, in some circumstances, a comparable program must be provided to girls and boys, all of the proposals would include a new, clearer regulatory definition of ~~comparability~~. The new definition is intended to provide investigators and schools with additional and more detailed factors that are used by OCR, and should be used by schools, to analyze the comparability of programs under the regulation. It is our experience that the current definition is lacking in this regard.

Work it?

We believe that even more guidance, including examples of comparable programs, would be useful to schools and school districts. Examples will be particularly helpful in demonstrating the key issue regarding comparability: how far from identical can a comparable program be? The regulatory definition of comparability can result in increasing amounts of flexibility for schools depending on the extent that it permits comparability to mean something other than absolutely identical programs. On the other hand, the less identical programs are, the more likely they are to raise denial of access claims under the equal protection clause. In addition, examples may be useful because this analysis may change depending on whether we are analyzing an entire single-sex school or one single-sex class or activity. OCR plans, in the near future, to hold focus group discussions on these proposed regulatory changes. We believe that these discussions will assist us in understanding, and thus providing a more thorough definition of, comparability, which then

can be incorporated into the final regulation.

Pros and Cons

The most significant benefit of the proposals -- though some offer more of it than others -- is the increased flexibility given districts and schools. Current attempts to create single-sex options show the broad appeal of single-sex schools and classes to many parents looking to improve their childrens' ability to succeed in school. Providing parents with multiple educational options is critically important to the effort to strengthen public education. Similarly, the Department believes it is important to eliminate overly rigid rules that restrict the ability of public schools to offer options that appeal to parents, cannot align with real educational needs and educational research, and prevent educators from experimenting with educational approaches designed to help both boys and girls.

All of the proposals would eliminate the regulatory anomaly in the treatment of single-sex schools and single-sex classes in areas where the distinction no longer responds to the types of discrimination facing girls and women today. The present broad prohibition against single-sex classes unnecessarily limits flexibility and education reform in particular situations where single-sex programming does not reflect discrimination. In addition, unlike the Hutchison legislative proposal, amending the Title IX regulation permits a comprehensive standard for permissible single-sex classes, that would apply to all of a recipient's education programs, and that would clearly define the circumstances under which such programs are permissible. Thus, for instance, it would not allow single-sex classes that are justified on stereotyped or stigmatized notions regarding differences between the sexes. In addition, the proposed language regarding comparability, that would apply to all of the options, gives recipients and investigators a much clearer idea of what is necessary to establish comparability of programs.

There are, however, risks associated with each of the proposals, and risks in choosing one option over another. The proposals are based on the assumption that there can be "separate, but equal" educational programs for boys and girls. Congress seemed to recognize the viability of this concept when it exempted single-sex admissions policies from the Title IX statute. Moreover, the concept is already embodied in the existing regulatory provision permitting LEAs to offer separate but comparable schools for girls and boys. We know, however, that civil rights organizations strongly believe that the history of gender relations since the passage of Title IX in 1972 -- for instance the continuing inequitable treatment of female athletes -- undercuts this assumption, and shows, instead, that with gender, as with race, separate continues to be unequal. Thus, the benefits of giving flexibility with the hope of improving educational outcomes, must be balanced against the risk that unequal educational opportunities for girls and boys will result.

In addition, it is likely that many single-sex programs may involve sex stereotyping or some element of stigma. Although the regulation would prohibit this, the stereotyping may be subtle and very difficult to assess. Moreover, depending on how broadly or tightly we define comparability, it is possible that particular opportunities will be denied based on sex for some

individual. Finally, in those circumstances where coeducational programs are permitted, but most members of one sex choose the single-sex program, the needs of members of that sex that remain in the coeducation program may not be effectively addressed.

Another "con" relates to the not insignificant risk that this action will open Title IX for further, less constructive amendments (e.g., changes relating to intercollegiate athletics that could exacerbate continuing discrimination against women athletes). We should be clear that the Department's proposal to amend specific provisions of the regulations would not invite comments on any other provisions of the regulation. Nevertheless, since this would be the Department's first major revision to the Title IX regulation in 25 years, interested parties may see the proposed changes as a signal that they can press the Department for other changes to the regulation. Finally, it is highly likely that any of the proposals, if implemented, would be subject to a legal challenge. Thus, full implementation of the regulation may be delayed until the issue of its legality under Title IX and the Constitution is resolved by the courts.

Proposal 1 is the least likely to be challenged by students or parents because it requires for all types of single-sex programs that parents be given a full array of educational choices -- i.e, a comparable single-sex program for boys and girls, and a comparable coeducational program. Arguably, this is more than is required by the Constitution after VMI. Thus, Proposal 1, in effect, recognizes as a policy matter that offering multiple options is the best practice. Proposal 1, however, has several major drawbacks. First, it is even less flexible than our current regulation which neither requires an LEA that offers comparable ~~coeducational~~ schools to offer a comparable coeducation school as well, nor requires that assignment to the single-sex school be voluntary. Because it requires multiple options, it also may be prohibitively costly for small schools and school districts. In addition, Proposal 1 -- as to single-sex schools -- squarely raises the issue that such a requirement is ultra vires. If, as we argue above, constitutional "evenhandedness" does not require a comparable coeducational program, then such an option is not required to ensure equal educational opportunity. Thus, it may be difficult to argue that we are not regulating admissions, but only the obligation to provide equal opportunity for the excluded sex that flows from the establishment of a single-sex program.

Proposal 2 expands flexibility in that it permits single-sex courses and activities in coeducational schools to the same extent that single-sex schools are now permitted by the regulation. It clearly makes single-sex educational options more attainable for small schools and school districts because it does not require the school to offer all three types of comparable programs, e.g., two single-sex and one coeducational. We believe that, arguably, such a scenario is constitutional, because the school would be evenhandedly providing a comparable educational program to members of each sex. Moreover, as with our current regulation, we believe that requiring comparable single-sex classes for one sex -- as a means of ensuring equal educational opportunity when a school chooses to offer single-sex classes to the other sex -- is not ultra vires. However, it eliminates parents' choice of a coeducational option for children. Thus, while it gives some parents an option they desire, it could push other parents out of the school system. Under Proposal 2 students would be assigned to single-sex programs on a nonvoluntary basis.

Thus, Proposal 2 also may raise problems -- only as to single-sex schools -- under the Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1703, which in certain circumstances prohibits the assignment of students to schools on the basis of race, national origin, or sex. Of course, this potential problem exists under our current regulation as well, since it does not require the LEA to offer a coeducational option.

Proposal 3 represents a compromise to resolve the pros and cons of Proposals 1 and 2. Proposal 3 treats single-sex schools as they are now treated in the regulation -- with the exception that we would clarify that comparability means a single-sex school for each sex. Thus, the new regulation would not increase the cost or decrease the feasibility of offering single-sex schools by requiring that a comparable coeducation school also be offered. If a school wants to implement single-sex courses or activities within a coeducational school, however, it would have to offer, not only a single-sex alternative for each sex, but a comparable coeducational program as well.

This alternative proposal would still increase flexibility over the current regulation, which simply prohibits single-sex classes. We do not believe -- as to courses and activities within a coeducational school -- that requiring multiple options is as likely to be prohibitively expensive for smaller schools. Moreover, imposing this admission requirement does not raise ultra vires arguments in the context of single-sex classes in coeducational schools, because the Title IX statute only exempts the admission practices of single-sex schools. However, this proposal also raises the issue noted above under the EEOA.

Finally, we believe that we can support a regulation that treats schools and classes differently. This is what we have been doing since 1975, and it is supported by the Title IX statute which only exempts admission requirements of schools, but not courses or activities within coeducational schools. We also believe the difference is justified by the different societal perceptions associated with single-sex schools and single-sex classes. Historically, there has not been a negative stigma attached to attending a single-sex school. Rather, it is often seen by parents as a favorable choice. However, when separate courses or activities are established within a school, there is often a negative stigma attached because they are not the norm, and may imply that students in those classes need extra help. Thus, it may be particularly important that parents be given a choice of a coeducational option for classes.

Proposal 4, like proposal 2, may benefit smaller schools and school districts because a school would only have to offer two options, i.e., it may offer a single-sex program and a comparable coeducational program, without the need to offer a single-sex program for the other sex. Thus, for instance, if a need or interest in single-sex education for one sex is brought to the school's attention, it can respond to that need or interest, as long as it is not based on stereotypes and members of the other sex are provided a comparable coeducational program. However, Proposal 4, more so than the other proposals, raises constitutional issues that have not been squarely resolved by the Court. While nothing in VMI explicitly requires a school to offer a single-sex program for each sex, the Court may find the VMI footnote permitting an "evenhanded" diversity of options inapplicable where there is no single-sex option for one gender. Moreover, to the

extent that there is a perceived benefit to single-sex education, Proposal 4 places us in the difficult position of arguing that the benefit can be achieved by the other sex in a coeducational setting. Thus, Proposal 4 seems highly likely to raise a denial of equal opportunity claim.

One way arguably to strengthen Proposal 4 is to require schools or school districts to show a particular educational need for -- that is not based on stereotypes and is, in fact, being addressed by -- the single-sex program, or insufficient need for or interest in a single-sex program by members of the other sex. Arguably, there are limited, fact-specific circumstances where a school could articulate such an educational justification for offering a single-sex program only to one sex, thus establishing that it is acting in an evenhanded fashion -- as long as the other sex is offered a comparable coeducational program. This would not permit schools to offer a single-sex program only to one sex without sufficient justification. However, it would not predetermine that such a situation is based on stereotypes, or otherwise inequitable. Moreover, this approach may shore up the proposed regulation against certain legal challenges. To the extent that it only creates a framework under which a school can demonstrate a particular set of facts to support offering a single-sex program only to one gender, the regulation should not be vulnerable to a challenge that it is facially unconstitutional.

Political and Stakeholder Reaction

The recurring congressional proposals regarding single-sex programs, as well as the specific directive in the 1999 appropriations report, would seem to indicate congressional support for increased flexibility regarding single-sex programs. In fact, a previous version of the Hutchison Amendment passed the Senate as part of legislation that ultimately was not enacted.

We know that women's groups and civil rights groups are strongly opposed to any attempts by the Department to make single-sex education more viable except in the limited context of remedial programs for women. These groups opposed the Hutchison Amendment, not only for the reasons that the Department opposes it, but also because they do not believe that single-sex education programs are the appropriate or effective way to improve educational outcomes. Since the vast majority of students will continue to attend coeducational schools, they believe that educational reform efforts within coeducational schools should be the priority of States and the federal government. Women's and other civil rights groups will also oppose the proposed regulation based on a similar belief that sex-segregation in schools, like race-segregation, never results in separate but equal educational opportunities. Finally, to the extent that the regulation permits single-sex physical education classes, we anticipate that it would incite strong opinions in the sports community and that such groups would need to be part of any focus groups convened to discuss the proposed regulation.

Based on our knowledge of schools already experimenting with single-sex programs, and because of the added flexibility it gives to schools, we expect that educators will support the regulatory change.

ENDNOTES

1. For instance, Senator Bayh noted that:

> We are all familiar with the stereotype of women as pretty things who go to college to find a husband, go on to graduate school because they want a more interesting husband, and finally marry, have children and never work again. The desire of many schools not to waste a "man's place" on a woman stems from such stereotyped notions. But the facts absolutely contradict these myths about the "weaker sex" and it is time to change our operating assumptions"

118 Cong. Rec. 5804. Similarly, the Senator noted:

> Admissions to vocational programs and institutions is another area where discrimination on the basis of sex can be documented.... The discriminatory effect of sex segregation in vocational education is that many fields which are designated for females such as cosmetology or food handling are less technical and therefore less lucrative than fields such as TV repair and auto mechanics "reserved" for males. And yet it is only tradition which keeps women out of these fields.

Id. at 5806.

2. To date, only four federal agencies have promulgated Title IX regulations. However, pursuant to an Executive Order issued by the President in 1997, every agency that provides financial assistance to education programs or activities must promulgate such regulations if they have not already done so. The Department of Justice is presently drafting a proposed common regulation to be adopted as a unified action by all affected agencies. The common rule is closely aligned with the Department's Title IX regulation. Thus, any changes to our regulation would presumably affect the common rule as well.

3. HEW received and considered over 9,700 comments to its proposed Title IX regulation. The revised final regulation became effective 45 days after it was transmitted to Congress, pursuant to section 431(d)(1) of GEPA, which gave Congress authority to disapprove final regulations of the Department.

4. The Department revoked this provision in order to permit the Department to concentrate its resources on cases involving more serious allegations of sex discrimination and because enforcement

of appearance codes is an issue for local determination. 47 Fed. Reg. 32526 (July 28, 1982).

5. In this regard the regulation is consistent with the legislative history of Title IX. For instance, Senator Bayh (the original sponsor of Title IX) stated, when discussing the admissions exemption for elementary and secondary schools, that "all educational institutions without exception, must treat their faculty and students once they have been admitted without discrimination." 120 Cong. Rec. 39992.

6. See 34 CFR Parts 106.34(b), (d) and (f)

7. See 34 CFR Part 106.34(c) and (e).

8. See 34CFR Part 106.40 (b). The program for pregnant students must be comparable to that offered non-pregnant students.

9. See 34 CFR Part 106.3. In addition, pursuant to an OCR policy determination, recipients may offer sex-segregated classes for students who object to coeducational classes on religious grounds. 43 Fed. Reg. No. 84 (May 1, 1978).

10. Some researchers believe that the limited research already conducted may be problematic because many of the studies do not control for important variables such as the teacher, curriculum, and student self-selection.

11. The Department had concerns with the Danforth proposal because it included a provision waiving Title IX and Title VII of the Civil Rights Act of 1964 (relating to equal employment opportunities). The Department believed that this waiver was unnecessary as to the single-sex classes and set an inappropriate precedent. The Department also had concerns about the constitutionality of waiving these requirements in order to ensure same-sex teachers in the single-sex classrooms.

12. This would have created inconsistent treatment of non-discrimination issues depending on whether State or federal funds were used as well as unnecessary administrative questions and difficulties related to tracing funds.

13. An agency rule is arbitrary and capricious if it relies on factors Congress has not intended it to consider; entirely failed to consider an important aspect of the problem; offered an explanation for its decision that runs counter to the evidence before it, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. State Farm., 463 U.S. at 43-44.

14. According to Senator Bayh, "This portion of the amendment covers discrimination in all areas where abuse has been mentioned." 118 Cong. Rec. 5807.

15. For instance, when passing the father-son, mother-daughter activities exemption, Senator Bayh recognized that, while the sex-segregated activity was appropriate, unless the amendment was

drafted to ensure that the opportunity was available to both sexes "it would be a significant departure from what we had intended to do in Title IX." 122 Cong. Rec 27983. Similarly, in 1975 when introducing a provision that would prohibit HEW from using funds to enforce its regulations requiring integrated physical education classes, Cong. Casey acknowledged that the Title IX statute and regulation were intended to ensure equal opportunity even where schools could restrict admissions based on sex. He stated: "My amendment does not affect the equal opportunity requirements of Title IX, it does not change the subject content of gym class.... The only issue involved is compulsory integration by sex....Yet the equal opportunity requirements in [] gym classes [] remain." [cite]

16. Gender discrimination cases are often decided by the narrowest margin, and have gone both ways on the ultimate question. See e.g., Michael M., 450 U.S. 464 (1980) (plurality opinion upholding gender classification); Orr v. Orr, 440 U.S. 267 (1979)(plurality opinion striking down gender classification); Frontiero v. Richardson, 411 U.S. 677 (1973) (same); Mississippi v. Hogan, 458 U.S. 718 (1982) (5/4 decision striking down gender classification); Schlesinger v. Ballard, 419 U.S. 572 (1975) (5/4 decision upholding gender classification). In addition, the outcomes in these cases seemingly can be contradictory. For instance, in the same month in 1977, the Court first struck down a Social Security provision that gave widows more favorable treatment than widowers because it was based on "archaic" assumptions about women. Two weeks later, it upheld a Social Security provision that allowed women to exclude more lower earning years on the basis that historic discrimination and "socialization" resulted in women earning less wages.

17. In addition, because Congress intended to permit single-sex activities where personal privacy is important, see e.g., 117 Cong. Rec. 30407 (Statement of Sen. Bayh that proposed amendment is not intended to "desegregate" men's locker rooms), the regulation retains the provision permitting separate sex classes which deal exclusively with human sexuality, and such classes would not have to meet the other requirements of the proposed amendment.

Educ - single sex schools

[redacted]

Edward W. Correia

03/18/99 12:44:13 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Charles F. Ruff/WHO/EOP, Peter Rundlet/WHO/EOP
Subject: Re: Single Sex Education and Admissions

You asked me where the agencies are on single sex and college admissions. On the single sex issue, ED is delaying action on all three tracks -- the NYC Leadership School investigation, their modifications to Title IX regs, and their response to Hutchinson's amendment -- until it receives legal and policy guidance. They asked OLC for its views and OLC has been analyzing the constitutional issues for several months. As I mentioned, Chuck would like to meet on both this and the admissions issue with a group similar to the one at the earlier meeting -- DOJ (I suppose including OLC) as well as ED's General Counsel and anyone else you want to include.

On college admissions, the main investigation is the University of California law school. OCR's drift seems to be against a formal complaint, either administrative or judicial, though the possibility remains that there could be some type of voluntary settlement. That, in turn, could (and in my view probably would) be viewed as a broader statement of adminstration policy on the use of standardized tests in admissions. It is worth discussing alternatives to enforcement action, such as elevating the Administration's message to encourage a more individualized approach to admissions. On a related issue, the recent case involving the NCAA's Prop. 16 standard will be appealed to the Third Circuit. We have the opportunity to file an amicus on two issues -- the coverage of the NCAA under Title VI and the challenge to the standardized test. I think the first issue is easy -- we should get involved -- the second issue is much harder. That is worth discussing, too.

NCWGE NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUCATION

Educ - single sex schools

October 8, 1998

Dear Appropriations Committee Members:

Attached is a letter signed by 28 organizations opposed to Senator Kay Bailey Hutchison's (R-TX) amendment to allow local education agencies to offer single-sex schools or classes which was expected to be offered to the FY99 Labor, Health and Human Services, and Education Appropriations bill (S 2440). This amendment lacks important safeguards to ensure that these public schools and classes comply with anti-discrimination laws and constitutional standards. In addition, we have serious procedural concerns regarding this provision.

At present, the Department of Education is working on modifications of the Title IX regulations regarding single-sex classes. The Department anticipates drafting revised regulations that would provide more flexibility for schools that seek to offer single-sex classes and programs while still being in compliance with anti-discrimination laws and constitutional standards. In addition, next year the 106th Congress will be reauthorizing the Elementary and Secondary Education Act (ESEA). Therefore, now is not the time to make changes to Title VI of ESEA and Title IX.

Again, we urge you to oppose the inclusion of Senator Hutchison's single-sex schools and classes amendment in the omnibus appropriations bill. If you have any questions please contact any one of the following:

Nancy Zirkin, American Association of University Women, 202/785-7720
Cindy Brown, American Association of University Women, 202/785-7730
Leslie Annexstein, National Women's Law Center, 202/588-5180

September 30, 1998

Dear Senator:

The undersigned organizations urge you to oppose Senator Kay Bailey Hutchison's (R-TX) amendment to the Labor, Health and Human Services, and Education Appropriations bill (S 2440) to allow local education agencies to offer single-sex schools or classes. We oppose this amendment because it allows single-sex schools and classes to be established without requiring that they be designed to inform and improve the coeducational public school system. Further, this amendment lacks safeguards to ensure that these public schools and classes conform to constitutional standards.

Over 90 percent of America's children attend co-educational public schools. Therefore, any education reform effort should be designed to improve student achievement in a coeducational setting. While single-sex education experiments do produce some positive results for some students in some cases, much of the research indicates that it is the properties of a good education, not a sex-segregated environment, that make the difference. These properties include: small classes, a rigorous curriculum, high standards, discipline, good teachers, and attention to eliminating gender bias.

The Hutchison amendment offers no assurances that participating local education agencies will offer equal educational experiences for both boys and girls, nor does it ensure compliance with constitutional law. Unless single-sex programs are carefully designed to remedy particular sex-based disadvantages, such programs can deny equal educational opportunities and reinforce harmful stereotypes. For example, in the mid-1980s, Philadelphia's sex-segregated magnet schools were found to shortchange girls in everything from course offerings and faculty credentials to recreation facilities and library resources.

The Hutchison amendment is unnecessary because Title IX already allows for same-sex programming under certain circumstances. Title IX's regulations allow for single-sex programming as long as such programs are carefully crafted to adhere to anti-discrimination requirements.

Again, the undersigned organizations strongly urge you to oppose the Hutchison amendment because resources and funds should be allocated to achieve educational reform for all students. If you have any questions, or need more information, please contact Nancy Zirkin, Director of Government Relations for the American Association of University Women (AAUW), at 202/785-7720, or Cindy Brown, Government Relations Manager at AAUW, 202/785-7730.

Sincerely,

American Association of University Women
American Civil Liberties Union
American Civil Liberties Union/Women's Rights Project
American Federation of School Administrators
Association of Teacher Educators

Business and Professional Women/USA
Center for Advancement of Public Policy
Coordinating Center for Women, United Church of Christ
Council of Chief State School Officers
Feminist Majority
Girls Scouts of the USA
Locq Haven University of Pennsylvania
Myra Sadker Advocates for Gender Equity
National Association of College Women Athletics Administrators
National Association of Women in Education
National Coalition for Sex Equity in Education
National Coalition for Women and Girls in Education
National Council of Administrative Women in Education
National Council of Jewish Women
National Education Association
National Organization for Women
National Partnership for Women and Families
National Women's Conference
National Women's History Project
National Women's Law Center
NOW Legal Defense and Education Fund
Wider Opportunities for Women
Women's Sports Foundation

Educ-single-sex schools

DRAFT
September 22, 1998

MEETING ON HUTCHISON AMENDMENT

Possible Positions

- Advocate specific proposal
  - Hutchison Amendment.
  - Other proposal.
  - Speak in favor of the concept, but not a proposal (favor flexibility; intended revision of Dept's regulations).
- Oppose
  - The concept.
  - The specific Hutchison Language (Title VI; specific language).
- Stay silent
  - Hutchison proposal (application to Title VI; comparable educational opportunities; relationship to proposed revision of regulations).

Alternative Legislative Proposals

- Short general proposal.
- Amendment that spells out the test for offering single sex classes.
- NWLC proposal.

SINGLE SEX CLASSROOMS

SEC. _____. In accordance with regulations of the Secretary of Education relating to equal educational opportunities[, including access to courses, services, and activities,] for students of both sexes, nothing in Title IX of the Education Amendments of 1972 (20 U.S.C. 1681, et seq.) shall be construed to prohibit an elementary or secondary school, other than a school of vocational education, from providing one or more single-sex classrooms attended by students whose parents have chosen such a classroom.

Specifications for Alternative Language:

Possible language to amend Title IX:

A single sex program may be offered by any public elementary or secondary school, except for vocational classes, if:

[a] It is not based on and does not further stereotyping based on sex and does not stigmatize students of either gender; and

[b] It is:

1. part of diverse educational programs, and school/district provides opportunity for comparable single-sex programs for the other gender; or

2. there are educational needs/problems particular to students of one gender in the school/district, the single-sex program is designed to address those needs/problems, and the single-sex program does not adversely affect the educational opportunities of students of the excluded gender.

- Under [b][1], the school's offering of equal options to promote diversity would provide the basis for establishing "an exceedingly persuasive justification."

- Under [b][2], the school must be able to show that it has "an exceedingly persuasive justification" for setting up single-sex programs and that the separation by sex was "substantially related" to achieving the educational objectives. E.g., school would have to demonstrate that one sex was performing poorly when compared to the other sex or otherwise had particular needs not experienced by the other sex ; that the school tried or considered other educational options to address the unequal learning; and that establishing a single-sex classroom does not have an adverse effect on students of the other sex .

Students have the option of a co-ed program.

Parents must provide authorization for their children to be placed in a single-sex program.

Any school offering single-sex programs must evaluate the effectiveness of the program.

Hutchison amendment

Sen. Hutchison's amendment would amend Section 6301(b) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7351) by adding to the list of eight authorized uses of local funds for "innovative assistance" the following use:

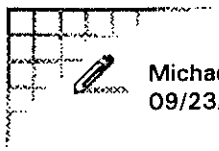
"(9) education reform projects that provide same gender schools and classrooms, as long as comparable educational opportunities are offered for students of both sexes."

(AW/LC)

Proposed modification of Hutchison amendment [italics indicate new language]

"(9) education reform projects that provide same gender schools and classrooms, as long as comparable educational opportunities are offered for students of both sexes *and the exclusion of one sex is justified to overcome barriers in accordance with constitutional equal protection principles articulated by the Supreme Court and Title IX of the Education Amendments of 1972, and as long as parents retain comparable co-educational opportunities for their children. Comparable educational opportunities are educational opportunities that are of equal educational quality and caliber in all respects, including but not limited to the range, quality and availability of curricular and extracurricular programs; the quality and availability of facilities, services, resources, and other benefits; faculty and staff quality and distribution; treatment and privileges of participants; and funding. All enforcement mechanisms under Title IX shall be available to ensure that these requirements are satisfied.*"

educ- single-sex schools



Michael Cohen
09/23/98 10:09:59 AM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Laura Emmett/WHO/EOP
Subject: single sex schools update

Here's what Scott Fleming learned since our meeting yesterday:

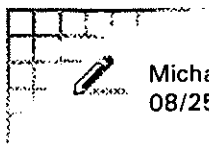
1. Kennedy's goal is to draft an amendment that he can use to "get back" the women Dem's who voted with Hutchinson the last time, and then go with them to Hutchinson to work out a deal (Scott and I think this is a very unlikely scenario). While Kennedy's education staff (Donica Petrovich) says that Kennedy feels strongly about this, it appears that he is mainly being moved by the women's groups. Donica admitted that she is having a hard time getting the women Dem's very interested in this issue.

2. Patty Murray's staff (Murray voted and worked against Hutchinson the last time) also reports that there is little interest among women Dem's on this amendment. And while he confirmed Murray's opposion, she doesn't feel that strongly about this either.

3. In short, as we suspected yesterday,the women's groups are the big issue here. In all liklihood, if they weren't pushing this one, there would not be much opposition among Dems. So, a meeting with them still seems like a necessary step. Any word from Podesta on this issue?

4. In addition, I continue to think it might be helpful if Kennedy, the female Dems and Dems on the Ed and Labor committee had good information on the NYC school. This won't directly help with the women's groups, but may give the Dems some addition comfort if they decide to part ways with them on this issue.

Educ - single sex



Michael Cohen
08/25/98 05:41:48 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Laura Emmett/WHO/EOP
Subject: Kay Bailey Hutchinson single sex schools amendment

I had a meeting with ED and Justice staff (Rob Weiner was also there for part of it) to consider how to respond to the Hutchinson amendment that would permit school districts to use ESEA Title VI funds for the purpose of establishing single sex schools, by "clarifying" that title IX does not prohibit the use of these funds for single sex schools or classes, as long as comparable opportunities are provided to students of both genders.

Hutchinson's office has asked for ED's views on her amendment by this Thursday.

Here is where we ended up:
1. We will indicate to Hutchinson that we support the goal of permitting single sex schools and classrooms, but do not support her amendment, because:

- **It's unnecessary.** ED's Title IX regs already recognize that single sex schools are permissible, as long as there are comparable opportunities. ED is working on new regs, to be issued in the Fall, that will also indicate that single sex classrooms are also acceptable under Title IX (ED previously believed that they were not). Since all Hutchinson's amendment does is say that single sex is permissible if there are comparable opportunities, ED is taking care of this administratively.
- **It will create confusion rather than clarity at the local level.** Because the amendment centers on the use of Title VI funds, in its current form it would create confusion about whether single sex schools funded from other sources are also subject to the same interpretation of Title IX.

2. Art Coleman is drafting some talking points on this, which could also form the basis of a SAP if needed. These will be worded carefully enough to leave us room to propose or support legislation down the road if we decide we want to. ED and Justice understand that you and Chuck Ruff must have a shot at this before anything is finalized.

Here is why we ended up with this position:

- **There are significant downsides to proposing real improvements in the Hutchinson bill.** The Hutchinson language is quite vague--it leaves the definition of "comparable opportuity" up to the Secretary, and therefore doesn't really create any greater clarity than current law and (soon to be revised) regulations. If we really want to provide greater clarity and reassurance to local communities on this issue through legislation, the most effective way would be to amend Title IX itself. ED had proposed language to do this, but nobody, including ED, thinks it is a good idea to propose amending Title IX, certainly not now. And we do not want to say anything to Hutchinson that will lead her in this direction.
- **We don't want to support riders to the approptions bill in any event--and neither does Spector.** Even if we liked the bill as drafted, we would argue that this is not the right time or bill to which a single-sex schools amendment should be attached. But we don't want to see it on any other bill either.
- **While our policy position is in favor of single sex schools, this is not the position that a number**

of our friends support. This doesn't seem to be the time to start a battle on this issue.

Withdrawal/Redaction Marker
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Eddie Correia to Charles Ruff re: Title IX and Single Sex Schools [partial] (6 pages)	08/12/1998	P5

COLLECTION:
Clinton Presidential Records
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Elena Kagan
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FOLDER TITLE:
Education - Single Sex Schools

2009-1006-F
ke667

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Educ - single sex schools

August 12, 1998

MEMORANDUM TO: CHARLES RUFF

FROM: EDDIE CORREIA

SUBJECT: Title IX and Single Sex Schools

The Department of Education is nearing the conclusion of its investigation of a possible violation of Title IX by New York City in its operation of a school limited to girls. In addition, Senator Kay Bailey Hutchison has requested OCR's views on her legislation to create an exemption from Title IX for certain types of single sex educational programs. Both these developments suggest that we review the administration's policy in this area.

Background

In 1997 P5 established the P5 P5 a single sex school for girls in grades 7-12 located in P5 The stated purpose of the school is to create an environment in which some girls will have a better chance to improve their academic performance. Math and science are emphasized; tutors are made available; and there is an emphasis on increasing self-esteem. There is an open admissions policy, and the students represent a wide range of academic abilities. The school is one of a number of specialized alternative public schools in P5 such as those for the performing arts and math and science. The establishment of the school was prompted by a grant from a private individual. While there has been no formal assessment of the program, there are indications that attendance is high and the students perform better than comparable students across the city.1 The concern is that, unlike all other public schools in P5 the school admits only girls.

OCR has had extensive discussions with city officials about the fact that the school might violate Title IX. In the course of these discussions, OCR has obtained information about the city's justification for the school and its rationale in establishing the school only for one gender. Secretary Riley intends to talk directly with the New York Superintendent of Schools, and he would like our guidance as to the applicable legal standards and administration policy generally. This memorandum summarizes the key legal and policy issues.

What Law Applies?

There is no doubt that the Equal Protection Clause applies. However, there is some uncertainty whether Title IX applies, since it does not cover the admissions policies of elementary and secondary schools. OCR's position is that this provision excludes institutions only if equivalent or comparable opportunities are made available for each gender, e.g., two equivalent high schools, one for each sex. If, on the other hand, a state operates a well-funded, well-staffed high school open only to boys, and a poorly funded, poorly-staffed high school open only to girls, OCR concludes that Congress did not intend to preclude application of Title IX's basic bar on gender discrimination. I agree with this analysis. Since we face the question of a possible constitutional violation whether or not Title IX applies, the answer to this statutory interpretation question is not dispositive.

Our Approach to Gender Classifications

The issues raised by this investigation require an examination of our fundamental approach to gender classifications. In VMI the administration advocated that the Court apply the same level of scrutiny to race and gender classifications. However, the Court declined the invitation and used the phrase exceedingly persuasive justification to describe justifications for gender classifications. It also cited the traditional formulation of intermediate scrutiny -- a classification must advance an important state interest and be substantially related to the state's goal.

Whatever the precise standard adopted by the Court in VMI, there is no doubt that the city would have a substantial burden to justify the single sex policy in litigation. However, we are not a court. We are not obligated to impose the same burden now that a court would if it had to apply the Equal Protection Clause. Instead, as in any decision involving prosecutorial discretion, our obligation is to advance the public interest, given all the relevant considerations. Consequently, we can decide not to sue the city even if it has not "proven" certain facts, or if they cannot be established one way or the other. If we take the position that the city must definitively establish the answer to certain questions about education policy -- when the experts tell us there are no clear answers -- we could be preventing local governments from conducting valuable educational experiments. Not only could we be depriving the students in these institutions from excellent educational opportunities, we would be depriving educators all over the country from learning what works.

The leading cases in this area are United States v. Virginia (VMI) and Mississippi University for Women v. Hogan. In Hogan, the state ran two coed nursing schools and a third one limited to

women. In VMI, the state prevented women from having access to a unique form of education. In both cases, the state policy was struck down. Together, however, these cases suggest two possible justifications for gender classifications: 1) a comparable opportunities rationale; and 2) a compensatory rationale.

The Comparable Opportunity Rationale

A comparable opportunity rationale means that neither gender is significantly disadvantaged by a gender classification because comparable benefits are offered to both. The state is acting even-handedly. One variation of a comparable benefits rationale emphasizes the value of diversity (institutional and program diversity, not diversity in a student body). For example, the state may offer a variety of programs, one of which is available to only one gender, but argue that members of the other gender are not disadvantaged because comparable coed programs are available. We do not yet have a case upholding a single sex school on that ground. It is clear that a diversity rationale is unacceptable if the benefit offered to one gender is viewed as unique, and the value of the benefit to one gender is not undermined if it is offered to both.

The comparable opportunities rationale must be evaluated in the context of the underlying goals of equal protection. Heightened scrutiny ensures that the state is not making decisions on the basis of animus toward one gender or stereotypes, which could lead to irrational decisions or to a stigma imposed on one gender. These concerns arise differently in race and gender cases. For example, "separate but equal" programs almost always create a stigma in the race context, but they do so less frequently in the gender context. While separate but equal programs for different races has been thought to be impermissible since Brown, the Court has never said that a "separate but equal" program for both genders violates the Equal Protection Clause. In addition, the Court has never said that a comparable alternative to an education program offered to one gender in a single sex setting must also be offered to the other gender in a single sex setting.

The Compensatory Rationale

A compensatory rationale means that the state is attempting to remedy past burdens that have fallen particularly on one gender and the remedy is sufficiently related to these past burdens. We can assume that a remedy for past discrimination must meet the basic standard for all gender classifications, i.e., there is an exceedingly persuasive justification. However, the requirements for meeting that standard are more flexible on those applied to race classifications. In Croson and Adarand, the Court rejected basing remedies for race discrimination on "societal discrimination." The Court's concern was that the "amorphous" nature of societal discrimination means that it is difficult to

determine when remedies are sufficiently narrowly tailored. However, this need to narrowly tailor remedies has not been applied to gender classifications. Several cases have upheld gender classifications on the basis that they remedy what amounts to societal discrimination.2

Title IX regulations have specific standards for the remedial justification.3 While there may be some differences with the constitutional standards, they do not appear to be significant in this case.

Applying these Rationale to the Leadership School

In Hogan, the comparable opportunities rationale was rejected because the Court felt males were significantly disadvantaged. The male plaintiff living near the school was forced to travel a long distance for a comparable program. Moreover, the asserted benefits of admitting only women were inconsistent with the state's own policy of allowing men to audit the classes. The Court rejected a compensatory rationale because it was not related to past discrimination. Women already dominated nursing, so a nursing school limited to women could not be said to compensate for past discrimination. Instead, it simply reinforced the stereotype that nursing is a women's profession.

In VMI, the compensatory rationale was obviously not a possibility. (It rarely will be when women are disadvantaged.) The diversity argument was rejected on two grounds. First, most of the Court concluded that diversity was not the actual purpose of the state in establishing VMI. Second, even aside from the actual purpose, one way diversity is not enough. If the opportunity is truly unique, then the members of the other gender are disadvantaged unless they can take advantage of something comparable. The state's proffered comparable alternative, Mary Baldwin, was far inferior in staffing, funding and other characteristics.

In contrast to VMI and Hogan, P5 has a much better argument for the comparable opportunities rationale. The city offers many educational opportunities that are open to boys with the same basic objectives -- improving academic performance, increasing self esteem, and increasing the likelihood of successfully entering the workforce. While these programs for boys do not take place in a single sex setting, it is clear that the city is not motivated by an animus against boys, that boys are disadvantaged in any significant sense, and that the school does not impose a stigma on girls. Instead, the city offers a program that appears to benefit girls, that does not burden boys, and that could be undermined if boys were admitted.

There is also an argument for the compensatory rationale in this case, though I think it is a weaker one. The requirements for assessing compensatory gender classifications are more flexible than in race cases. Moreover, there is considerable evidence that many girls do have problems learning math and science in traditional settings. We do not know whether this is because of long-term discrimination, rigid teaching techniques, or some other factors. It is conceivable that the city has traditionally used educational approaches that disadvantaged female students, but we have little or no evidence on this point. Thus, if we endorse a remedial rationale for this school, the remedy is really addressing a host of institutional and social factors for which the city is not responsible.

We should not take the position that the demanding requirements of Adarand should apply to remedies for gender classification. (For example, some of the strongest arguments against I-200 in Washington are that it would end certain education and training programs for women that might not be viewed as narrowly tailored to address specific past discrimination.) However, under the circumstances presented here, I do not believe we would be wise to emphasize the compensatory rationale given the lack of evidence on this point. Trying to justify the school as remedial could require stretching the concept of substantially related remedies too far.

Conclusion

There are several possible outcomes of single sex educational programs. They can benefit mostly girls, and not boys, or vice versa. They can work well for both genders, or they can work poorly for both. In fact, we know very little about which of these possibilities is correct. It is likely that some programs work for some members of each gender under different circumstances, but this is simply an area where we need to know much more. (One thing we can have confidence about -- current coed programs, particularly in large city districts, are often abysmal.)

Assume there is evidence that a single sex educational program works well for many girls, but not particularly well for many boys. A state decides to use its scarce resources to establish the program only for girls and that the program seems to work well. It cannot (or refuses) to establish a similar program for boys but it attempts to offer the same basic benefits to boys in a coed setting. Assume also that there is no stigma associated with the program, and that there is no stereotype associated with the school because girls attend by choice. Under these circumstances, would we insist that the state close the school for girls? What would we be accomplishing? In an effort to vindicate some abstract (and incredibly rigid) view of equal protection, we would have succeeded in depriving girls of a

program that could benefit them without helping boys, or anyone else for that matter.

This may very well be the case here. Arguably, the only "unique" aspect of the P5 is that education is offered in a single sex setting. Not only do we have research that shows that single sex education may provide a particular benefit to girls, we have actual experience with this school that shows it is working. Given the state of knowledge, P5 could reasonably conclude that it prefers to devote scarce resources to offering a program to girls that appears to work, and to attempt to achieve the same basic goals for boys in some other way. Again, we are not a court. We do not have to subject the city to the same burden of proof requirements that it would face in litigation. Instead, we can consider the benefits of this program to the girls themselves and the benefit to everyone else from the experiment.

I recommend that the Secretary make an effort to resolve this matter with the city by suggesting that it take steps to establish a more directly comparable program for boys in a coed setting. If it agrees, I recommend that we simply close the case and commend the city for its actions. If it disagrees, I recommend that we still close the case. Our explanation should be that, under all the circumstances, boys are not disadvantaged and the program offers promising academic benefits for girls. Therefore, we have decided to evaluate the school and take no further action at this time. The nation has a stake in learning what works, and the P5 provides an opportunity for us to do just that.

Educ – single sex schools

Audrey T. Haynes 04/17/98 07:30:23 PM

Record Type: Record

To: Sylvia M. Mathews/WHO/EOP, Maria Echaveste/WHO/EOP, Elena Kagan/OPD/EOP

cc: See the distribution list at the bottom of this message
Subject: Single Sex Edu.

Nancy Zirkin called late on Friday and wanted us to know that Kay Bailey Hutchinson is planning to introduce a bill supporting single sex classrooms and schools. The bill includes language that allows local education agencies to utilize public monies to set these up if they are "comparable" to other public schools, but Nancy says comparable has not yet been defined!.

AAUW will fight aganist this. They are trying to get Carol M. Braun to be the point aganist , but due to the school construction bill, she has not said yes yet.

Nancy is faxing information to me on Monday. Tania will get a copy to each of you.

Since I will be gone Mon., Tues and Wed., I wanted to pass this on. THANKS

Message Copied To:

Robin Leeds/WHO/EOP
Tania I. Lopez/WHO/EOP
Laura Emmett/WHO/EOP
Marjorie Tarmey/WHO/EOP
June G. Turner/WHO/EOP

Educ-single sex schools

April 16, 1998

Dear Senator:

AMERICAN ASSOCIATION OF UNIVERSITY WOMEN

On behalf of the 160,000 members of the American Association of University Women (AAUW), I urge you to oppose Senator Kay Bailey Hutchison's amendment to allow local education agencies to offer single-sex schools or classes. AAUW opposes this amendment because it lacks safeguards to ensure that these public schools and classes conform to constitutional standards. In addition, AAUW believes that these schools and classes should only be initiated in response to demonstrated need and be designed to inform and improve the coeducational school system.

The Hutchison amendment offers no assurances that the public schools will offer equal educational experiences for both boys and girls. Unless single-sex programs are carefully designed to remedy particular sex-based disadvantages, such programs can deny equal educational opportunities and reinforce harmful stereotypes. For example, in the mid-1980s, Philadelphia's sex-segregated magnet schools were found to shortchange girls in everything from course offerings and faculty credentials to recreation facilities and library resources. "Separate but equal" has often meant separate and unequal for girls and women, just as it has for African-Americans.

Presently, there is little research that examines the effectiveness of single-sex schools and classes. This spring, the AAUW Educational Foundation released the first compilation of research, *Separated by Sex*, which challenges the popular generalization that single-sex education is better for girls than coeducation. The report indicates that elements of a good education -- such as smaller classes; attention to eliminating gender bias; focus on core curriculum; and discipline -- can lead to the success of all public schools and not just sex-segregated classes and schools. The Hutchison amendment has no requirements that these public single-sex schools and classes will be rigorously and systematically researched and evaluated to gain new insights into successful educational practices that would be applicable to all schools.

Again, I strongly urge you to oppose the Hutchison amendment because it lacks the safeguards necessary to ensure compliance with constitutional law and offers no requirements for evaluation to determine the effectiveness of these public schools and classes. AAUW believes that resources and funds should be allocated to achieve educational reform for all students, since 95 percent of our children attend co-educational public schools. Please contact Nancy Zirkin, Director of Government Relations, at 202/785-7720, or Cindy Brown, Senior Legislative Associate, at 202/785-7730 if you have any questions.

Sincerely,

Sandy Bernard

Sandy Bernard
President

1111 SIXTEENTH STREET NW, WASHINGTON, DC 20036 202/785-7700 FAX: 202/872-1425 TDD: 202/785-7777
e-mail: info@mail.aauw.org http://www.aauw.org

NATIONAL WOMEN'S LAW CENTER

OPPOSE THE "EQUAL EDUCATIONAL OPPORTUNITY ACT": A RETURN TO SEPARATE AND UNEQUAL

Misnamed the "Equal Educational Opportunities Act," Senator Kay Bailey Hutchison's amendment to H.R. 2646, the Parent and Student Savings Account PLUS Act sponsored by Senators Coverdell and Torricelli, would actually legalize discrimination against women and girls in schools. This amendment would allow local education agencies to spend federal dollars to fund "education reform projects that provide same gender schools and classrooms, as long as comparable educational opportunities are offered for students of both sexes." It would permit a return to the separate and unequal education programs to which girls and women have too often been relegated, and which the Supreme Court has found to be unconstitutional.

- *The amendment's provision that "comparable" programs must be offered for both sexes does not protect women and girls from the harms of separate and unequal programs.* Comparability is an insufficient standard to ensure meaningful equality – weaker even than "separate but equal". For example, in the recent court challenge the exclusion of women from VMI, Virginia claimed, and a lower court found, that Virginia's all-female program was "comparable" to VMI, despite clear differences that disadvantaged women, such as the lack of any engineering courses or Bachelor of Science degrees. Moreover, the amendment does not provide for any enforcement of its comparability standard, nor does it indicate how or by whom comparability would be determined. As such, it paves the way for sex-segregated programs to perpetuate discrimination against women and girls.

- *Separate programs have often meant unequal programs for girls and women, just as they have for African-Americans.* One need not look far back in our Nation's history for proof of these dangers. In 1996, the Supreme Court found that Virginia's separate women's leadership program, created as a counterpart to the all-male VMI, had significantly inferior facilities and academic curricula, a small fraction of the endowment of VMI, fewer highly trained faculty, and none of the access to valuable alumni connections – not to mention the absence of VMI's prestige and reputation. In short, it was a "pale shadow" of VMI.[1] Similarly, at the

[1] United States v. Virginia, 116 S. Ct. 2264, 1996 U.S. LEXIS 4259, at *65-*66 (1996).

secondary level, in the mid 1980s, Philadelphia's supposedly equal sex-segregated academic magnet schools were found to shortchange girls in everything from course offerings and faculty credentials to recreation facilities and library resources.[2]

- *The amendment would allow sex segregation based on limiting stereotypes that reinforce harmful notions of girls' and women's abilities.* For example, schools could establish separate, less challenging math classes for girls based on the stereotype that girls are not as good at math, or less competitive science classes that promote feel-good discussion groups instead of the more rigorous approach of the "comparable" boys' class. The exclusion of women from VMI was based in part on such stereotypes, including the belief that women are more emotional, less aggressive, and less able to withstand stress. Similar outdated notions about women historically have been used to discriminate against women in a variety of ways, such as blocking their access to higher education or tracking them into vocational training for lower-paying fields.

- *The amendment does not include any of the legal protections the Supreme Court has applied to ensure that single-sex programs do not discriminate against women.* In the VMI case, the Supreme Court suggested that only those single-sex programs that are narrowly tailored to remedy sex-based barriers faced by the persons who will benefit from such programs can survive constitutional scrutiny. But such protections are not in this legislation, which would permit schools to conduct single-sex schools or programs that are based on sex stereotypes that hurt girls and women.

- *Some gender schools and classrooms are not a substitute for ending gender bias or improving schools.* The vast majority of children will continue to be educated in co-educational settings, and innovative educational programs should focus on ensuring that both girls and boys receive a valuable education in such settings. Moreover, the problems of gender bias and sex stereotyping in the classroom will not be solved simply by providing a single-sex environment. Other alternatives exist to address these problems, including: training of teachers in gender equity issues; vigorous outreach efforts to increase the diversity of teachers; and support for community-based mentoring and after-school programs that will engage and enrich all students.

For more information, please contact Deborah L. Brake at the National Women's Law Center at 202/588-5180.

The National Women's Law Center is a nonprofit organization that has been working since 1972 to advance and protect women's legal rights. The Center focuses on major policy areas of importance to women and their families, including employment, education, reproductive rights and health, family support and income security, with special attention given to the concerns of low income women.

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[2] Newberg v. School Dist. of Pa. (Pa. Ct. of C.P., Philadelphia County, Aug. 30, 1983), aff'd, 478 A.2d 1352 (Pa. Super. Ct. 1984).

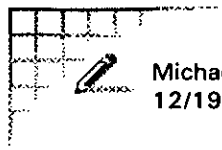
proposed amendment to the Equal Educational Opportunity Act:

[authorizing ESEA funding for:]

(9) education reform projects that provide same gender schools and classrooms, as long as equal [delete "comparable"] educational opportunities are offered for students of both sexes and the exclusion of each sex is justified by constitutional equal protection principles as articulated by the Supreme Court.

Educ – Single sex schools

EK –
Any Progress?
BR



Michael Cohen
12/19/97 03:32:12 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc:
Subject: Single Sex schools

I stayed for a while after the meeting and talked to Riley and Leslie. They get the message clearly. Riley placed a call to Rudy Crew while I was there--but Rudy is in Mexico for two weeks. It wouldn't surprise me if Crew and Riley connect anyway before the new year.

Riley has also told Leslie to head up a team including her, Mike Smith, Terry Peterson, Paul Schwartz (a principal-in-residence at ED, who is good) and Norma. Riley wants Norma on the team and in the loop; Leslie understands what needs to be done with Norma.

Mike –

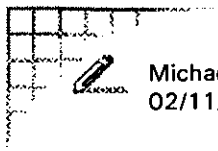
Could you check in w/ Riley/Leslie this week to find out if the conversation took place?

Thanks.

Elena

cc: Bruce
Jen

Educati- - single sex schools



Michael Cohen
02/11/98 07:20:07 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc:
Subject: education stuff

1. Leslie Thornton and team were in NYC today meeting on single-sex schools. Both she and Norma Cantu report that the meeting went well--Leslie says there is genuine openness to both an all boys school (apparantly Crew has been thinking about this for some time, just doesn't want to do it in response to OCR) and to a remedial justification. Leslie says the atmospherics were quite good, though the NYC lawyers are at least as much of a problem as ours, if not more so.

Norma says the the ACLU is po'd at ED because it isn't proceeding on the complaint. I take this to be a good sign.

There were some small items in the NYTimes and the NYPost indicating that a federal team was coming up, and there may be some press tomorrow as well.

I've asked Leslie to e-mail you, Chuck and me a summary of what happened.

2. Pauline Abernathy is setting up a briefing for a few ED staff on tobacco with Josh Gottbaum; the impetus is to make sure they can brief Riley before the NGA meeting on general tobacco issues. He will be dealing with gov's all weekend and wants to be prepared. Do you think you, Bruce or Tom need to be a part of that in any way?

Mike - let's do a weekly item this week - both about the hurdles we're encountered in "operationalizing" the President's views and about the progress we now seem to be making.

Elena

cc: Bruce

Educ - single-sex schools.

Mike - One other thought. Whether the lawyers like it or not, the all-boys school approach will get us into real trouble with our women's group friends - at a time when we're likely to need them. This is especially so if they know that we've pushed NYC toward this approach. Tell your friends at education that finding a remedial justification would be much better - and that they should not press the all-boys school too hard.

Elena

cc: Bruce

Leslie_Thornton @ ed.gov
02/11/98 06:39:00 PM

Record Type: Record

To: Michael Cohen, Elena Kagan, Charles F. Ruff

cc:

Subject: Single Sex Schools Case

February 11, 1998

NOTE TO: CHUCK RUFF
MICHAEL COHEN
ELENA KAGAN

FROM: LESLIE T. THORNTON

RE: FEB. 10 SINGLE SEX SCHOOLS MEETING

As you know, a small group of ED officials met with representatives from Chancellor Rudy Crew's office yesterday in New York. Overall, the meeting went well and there appears to be a strong willingness on the part of Crew's office to pursue options, particularly the affirmative action/remedial option. Also, there seems to be a willingness to look at, on grounds that relate to educational need, an option of opening a "boys" school. Crew feels strongly against offering that option in response to a complaint, but Kent McGuire, our nominated assistant secretary for our research branch, helped Crew's folks to view it as an educational sound idea separate from the case. He was quite indispensable, I believe. Rudy Crew is absolutely opposed to any discussion of any option involving opening the present school to boys.

The next step is for Lynne (Crew's COS) and I to figure out the best complement of folks for the next meeting and begin discussions regarding what type of information the school board has/could get which could help make a "remedial" case. I suggested it is probably NOT the complement of folks at yesterday's meeting (while a number of educators/policy makers, still too many lawyers). Also, I believe Crew's folks will also be exploring the "boys" option.

You should know that in the days prior to the meeting, the New York Times and Newsday each ran a very short piece (more of a paragraph) announcing "federal officials" were to be meeting with school board officials. Though Crew's COC assured us that this was not a public event for them and they would not be speaking to the press, there may be press generated from the very impatient complainants.

Let me know if you have questions or suggestions.

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE ASSISTANT SECRETARY FOR CIVIL RIGHTS

MEMORANDUM

DATE: December 5, 1997

SUBJECT: Draft Talking Points Regarding Young Women's Leadership School

Attached for your information are the draft talking points for the Secretary to use in his conversation with Chancellor Crew. These talking points are currently being reviewed by the Department's Chief of Staff, Leslie Thornton.

Please call me, at 202-205-8162, if you have any comments or questions.

Kelly A. Saunders

Kelly A. Saunders

Chief of Staff
Office for Civil Rights

Attachment

Young Women's Leadership School Complaint

TALKING POINTS: Conversation with Chancellor Crew

I. THE CALL -- Points to Make

- The ***purpose of this call*** is to help get the negotiations back on track between the Board and OCR in the Young Women's Leadership School case.

- I know that your lawyers have spoken to our OCR office in NY, but I hope that our conversation today can help to ensure that OCR and the Board address the issues in a positive fashion -- one that meets all our interests -- and that is educationally sound and lawful.

- I respect and fully support your strong commitment to innovative educational strategies, and support the reforms you have accomplished in New York City. We at the Department of Education share your sense of commitment and urgency to ensure that all students have access to high quality educational opportunities.

- OCR believes in working directly with school districts to address civil rights concerns because school districts are in the best position to help their students succeed. OCR and your staff have worked together successfully before, for instance in developing a "Memorandum of Understanding" regarding minorities and special education. I would like OCR and the Board to be able to work cooperatively again to address the issues raised in this case. I know that Norma Cantu, the Assistant Secretary for Civil Rights, is deeply committed to working with you to resolve this complaint. [She is prepared to come to New York and meet with you and your staff to discuss ways to resolve this case.]

- OCR and I are sensitive to the need for providing the Board, and all school districts, the broadest ***flexibility for experimentation*** with innovative educational methodology; and for choosing and developing ***diverse options*** -- including single-sex education -- for providing high quality education to students. At the same time, we need to ensure that the Board's actions ***do not deny equal opportunity based on sex*** in violation of Title IX and 14th Amendment.

- I believe these are your objectives as well. So, I would like to find a way to bring the resolution discussions back on track, and I would like to offer my help in doing this. I believe that if we work on this together, we can find a solution that meets these objectives and preserves the benefits of the Leadership School.

(If Crew agrees to meet with OCR, this might end the call. If he wants to discuss the law and issues raised by the case, the following short discussion may be useful.)

II. DISCUSSION OF OPTIONS (Short analysis if the Superintendent requests that the Secretary outline the options available)

A. Background -- The following facts may help place OCR's concerns in perspective:

- The complaint filed with OCR alleges that the Board discriminates on the basis of sex by establishing and operating the Leadership School.
- Under Title IX and the 14th Amendment, single-sex schools are permissible as long as a school district provides members of the other sex with the opportunity to participate in a single-sex school. The exception to this rule is if there is a remedial justification for the school. (If there is a remedial purpose, the school district can operate a school only for the disadvantaged sex).
- The Leadership School is the only public school limited to members of one sex in NYC.

B. Options

(1) Maintaining the all-girl Leadership School -- Without establishing a boys school

I understand that the Board's preference is to maintain the all-girl Leadership school without having to establish a comparable school for boys. This would be difficult to do.

- The Leadership School for girls could be operated, without establishing a comparable school for boys, if the Board provided sufficient evidence that girls have had limited opportunities to participate in the District's programs, and the Leadership School is needed to remedy this limited participation.
- Information gathered by OCR has not identified evidence that girls suffer a disadvantage in the District's programs, although that may not tell the whole story. Nevertheless, preliminary evidence inidcates that serious educational problems in the immediate district may disproportionately affect boys.
- ***However, if the Board believes it can make a remedial showing, then OCR can provide guidance as to the level and types of information the Board should gather, analyze, and present in order to meet that standard.***

(2) Reasons to Consider an All-Boys School

Another option to comply with Title IX and the Constitution would be to establish an all-boys leadership school in order to provide students a diversity of educational options. There are many reasons to support both the Leadership School and a comparable school for boys in NYC:

- The Leadership School's students are almost exclusively African American and Latino girls. Information shows that in NYC, ***all African American and Latino students -- and males even more so than females -- are underrepresented in AP courses, and as awardees of high school diplomas.***

- Of course, the Board has the option of developing a boys leadership school at a reasonable pace. Like the girls Leadership School, it could be phased in one grade at a time.

(3) Making the Leadership School Coed

The Board could also satisfy the requirement that it provide equal educational opportunity to boys and girls by opening the Leadership School to boys. It is possible that the school -- particularly if it focuses on educational issues of concern to female students -- would not appeal to boys. NYC would satisfy the law by opening the school to boys, regardless of whether boys choose to attend.

III. HISTORY OF OCR -BOARD NEGOTIATIONS TO DATE

- In September, the NY OCR Office met with members of the Board's legal staff to discuss these concerns and possible resolutions (co-ed school, all-boys school).

- OCR has since been informed that the Board does not believe that a coed school is an option and that the Board does not wish to pursue the implementation of an all-boys school solely to resolve this case.

IV. IF CREW ARGUES THAT OCR HAD NOT BUSINESS INVESTIGATION THE IS CASE BECAUSE TITLE IX DOES NOT APPLY TO ADMISSIONS

- We disagree. The Department is *not* investigating the admissions policies of the Leadership School but, instead, it is investigating whether boys are being denied equal educational opportunities.

- If OCR receives a complaint directed at a single-sex school, it must look at whether comparable opportunities are provided to the excluded sex or, alternatively, whether there is a remedial basis for the single-sex school.

Education - class size initiative

From Mike

CLASS SIZE REDUCTION COST ESTIMATES

All these options assume:

Class Size Reduction initiative for two grades
Current average class size of 22.5 in grades K-3

The estimates below reflect the cummulative cost of phasing class size reduction in over 5 years.

Option 1: Class size reduced to a ceiling of 18:

New teachers:	89,000
Salaries & benefits:	$9.6 billion
Quality add-on:	$1.9 billion
80% federal share:	$9.2 billion
70% federal share:	$8 billion
60% federal share:	$6.9 billion

Option 2: Class size reduced to a ceiling of 20 with an average class size of 18:

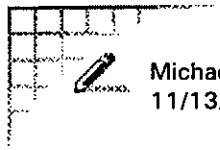
New teachers:	74,000
Salaries & benefits:	$8 billion
Quality add-on:	$1.6 billion
80% federal share:	$7.7 billion
70% federal share:	$6.7 billion
60% federal share:	$5.8 billion

Option 3: Class size reduced to a ceiling of 20:

New teachers:	66,000
Salaries & benefits:	$7.1 billion
Quality add-on:	$1.4 billion
80% federal share:	$6.8 billion
70% federal share:	$6 billion
60% federal share:	$5.1 billion

An average class size of 20 would reduce option 3 costs by about 50% - We'd need about 33,000 new teachers rather than 66,000.

Educati- - single-sex schools



Michael Cohen
11/13/97 09:05:08 AM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc:
Subject: Single-sex schools

Did I behave well in Chuck's meeting?

I thought Chuck did an outstanding job in moving ED along, especially since the ED position appears to be (have been?) that single sex schools are not permitted if they offer opportunities beyond what other schools do, and just as impermissible if they don't.

At the next meeting, we need to make sure that we have a clear agreement about what kinds of understandings and arrangements we can reach with NYC--and need to capture that in a page or so that everybody agrees to.

I also think we ought to push for Riley, rather than Norma, to call Rudy Crew and begin the next round of discussions. We probably ought to suggest that Riley invite Crew to come and meet with him for the first conversation, with Norma there. And Riley ought to Crew that he should feel free to call him personally if follow-up conversations appear to be heading off track.

[redacted]

Education –
Single sex schools

White House News Report

T. IX –
serious Q
whether T IX reaches
elem + sec. educ.

– Single - sex school –

– affirm action

Justice
Doesn't apply
OCR/Ed regs shouldn't
apply – ultra
vires.

Arguably OCR has no
business in these
cases.

(diff in class)

↓

OCR could decline authority

Justice
exceedingly persuasive
just

1) – remedial / compens –
no one wants to
make showing

2) diversity of ed ops
approach – benefits
of single - sex
per se.

If there is only this –
then must have for
other sex.
+ have to be =

Erskine Bowles
Chief of Staff
1FL WW

Thursday, October 16, 1997
Produced by the White House Press Office
Room 161 OEOB (Ext. 6-5757)

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4.