

To: Russlynn Ali, Assistant Secretary for Civil Rights, U.S. Department of Education  
From: National Coalition for Women and Girls in Education<sup>1</sup>  
Date: December 23, 2009  
Re: The Case for Rescission of the 2006 Single-Sex Education Regulations

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The Department of Education's 2006 single-sex education regulations,<sup>2</sup> and many of the classes, programs and schools created in response, have threatened the basic civil rights protected by Title IX of the Education Amendments of 1972 and the Equal Protection Clause of the U.S. Constitution. The regulations have allowed schools to open single-sex classes and programs, with little or no justification, and base them on unproven assertions about what works for some students. What's more, with little oversight and guidance from the Department, the regulations have been interpreted by some as an invitation to promote outmoded, stereotyped generalizations about the interests and abilities of boys and girls. In light of the flawed standards set forth in the regulations, the misguided application by schools, and the many unanswered questions about the impact of single-sex programs, the Department cannot in good faith rely on the regulations as appropriate interpretations of either Title IX or the Constitution.

To that end, the National Coalition for Women and Girls in Education (NCWGE) is united in its belief that ***the Department of Education's 2006 single-sex education regulations must be rescinded***. Moreover, NCWGE believes that a return to the pre-2006 regulations would address our coalition's concerns and protect Title IX's core value of equality of educational opportunity by prohibiting sex discrimination. Finally, a core framework of principles, set out in detail below, should inform any additional guidance to school districts on the permissibility and implementation of any single-sex education programs.

This memorandum sets out NCWGE's views on (1) the 2006 regulations, including a description of their practical impact, and (2) the legal standards against which single-sex education should be measured. In addition to the discussion below, for your convenience we are forwarding the comments submitted by NCWGE and its member organizations in 2004, on the proposed single-sex regulations ultimately adopted, with minor modifications, in 2006. We also direct your attention to the recommendations made by NCWGE in its discussion of single-sex education in the 2008 report on *Title IX at 35*, also attached.<sup>3</sup>

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<sup>1</sup> The primary author of this document was Emily Martin, formerly of the American Civil Liberties Union (ACLU) Women's Rights Project, and the ACLU is a member of NCWGE. In this context, it is necessary to note that while at the ACLU Emily Martin formerly represented plaintiffs and the plaintiff class in *A.N.A. v. Breckinridge County Board of Education*, Civ. Action No. 03:08-CV-4-S (E.D. Ky.), and plaintiffs in *Doe v. Vermilion Parish School Board*, Civ. Action No. 09-1565 (W.D. La.) and that Lenora Lapidus and other staff of the ACLU Women's Rights Project continue to represent plaintiffs in these cases. *A.N.A. v. Breckinridge County Board of Education* and *Doe v. Vermilion Parish School Board* are ongoing litigation challenging the lawfulness of 34 C.F.R. § 106.34 and the implementation of single-sex education in a Breckinridge County, Kentucky, middle school and a Vermilion Parish, Louisiana, middle school. The U.S. Department of Education and the Secretary of Education were named as defendants in *A.N.A. v. Breckinridge County Board of Education*. The claims against the federal defendants were dismissed by the district court in March 2009, but this dismissal could ultimately be appealed, following decision on the remaining pending claims.

<sup>2</sup> 34 C.F.R. § 106.34.

<sup>3</sup> The 2004 comments and the report *Title IX at 35* are also available on the NCWGE website. See, <http://www.ncwge.org/singlesex.html>.

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## I. Impact of the 2006 Amendments

It is impossible to know how many public schools have adopted sex-segregated programs since the current regulations were proposed and adopted. Although there is some limited information available about a select number of schools in the Civil Rights Data Collection, there is no general requirement that any school report its adoption of these programs and no federal office is responsible for monitoring their creation and implementation in the absence of an OCR complaint. When the Feminist Majority Foundation (FMF), a member of NCWGE, attempted to catalog the number of public schools with single-sex programs through queries to State Education Agencies, it found that most such agencies, including most Title IX coordinators, had very little knowledge of whether or how public schools in their state were segregating by sex.

In its forthcoming study, “The State of Public School Sex Segregation in the States,” FMF has identified 575 public schools that segregated by sex during school years from 2007 to 2009.<sup>4</sup> Of these, 64 were all-girl (35) or all-boy (29) schools. The remainder were coeducational schools with single-sex academic classes. The National Association for Single-Sex Public Education (NASSPE), a group that advocates for sex segregation, similarly concludes that while eleven public schools in the country used single-sex classrooms in 2002, over 500 do now.<sup>5</sup> NASSPE’s list is suggestive rather than authoritative, as it is apparently made up of those schools that have self-reported to NASSPE and schools identified in media reports.

In arriving at its estimates, FMF conducted web searches to identify sex-segregated programs described in news reports and in other sources, as well as those listed by NASSPE and the National Coalition of Single-Sex Public Schools; in some instances FMF visited the school’s website and followed up by contacting the school to confirm whether it was continuing to segregate by sex and the nature of the sex-segregated program.<sup>6</sup> FMF also asked state Title IX coordinators to help verify the status and nature of the sex segregation in the identified schools and to identify any additional sex-segregated schools. In those relatively few states (such as North Carolina) in which the Title IX coordinator has been helpful in systematically requesting information on schools with single-sex classes, the Title IX coordinator has found many more segregated schools than those originally identified through web research, suggesting that such web research alone will result in undercounts.

While an exact number is impossible to calculate, it is indisputable that sex-segregated classrooms and single-sex schools have become dramatically more common in public education since the 2006 regulations were adopted, though they still are a small proportion of the 97,000 public schools in the United States. As more and more schools implement these programs, several clear trends have emerged that should be kept in mind when reviewing the 2006 regulations.

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<sup>4</sup> This total comprises schools with sex-segregated academic classes. It does not include school segregating for such limited purposes as sexuality education or contact sports, as permitted by the Department’s regulations prior to the 2006 amendments. *See* 34 C.F.R. § 106.34 (2005).

<sup>5</sup> NASSPE’s state-by-state count of sex-segregated programs can be found at <http://www.singlesexschools.org/schools-schools.htm>.

<sup>6</sup> FMF’s research indicated that some schools identified on NASSPE’s website had ceased segregating by sex prior to 2007. Thus, these schools were not included in FMF’s totals.

***A. Pseudo-scientific, gender-stereotyped theories of brain differences and learning differences between boys and girls are driving many sex segregation programs.***

Some of today's most influential advocates for sex-segregated education argue segregation is necessary because girls' brains and boys' brains are so different that teachers must treat girls and boys very differently. While these theories are often couched in the language of gender equity, this is deceiving. In fact, these theories are based on notions of hard-wired, immutable gender differences that have little scientific basis and that instead reflect and reinforce traditional gender stereotypes.<sup>7</sup>

Writers Leonard Sax and Michael Gurian are perhaps the two most influential proponents of the argument that single-sex education is an appropriate and necessary response to brain differences between boys and girls. Sax is a clinical psychologist, retired M.D., and the founder of NASSPE; Gurian is a counselor, whose graduate education is in creative writing, and founder of the Gurian Institute, which conducts trainings on brain differences between the sexes. Both Sax and the Gurian Institute are in the business of training educators about the need to respond to gender differences through gender-specific teaching methods and sex segregation. As a result, many of those teaching in sex-segregated schools and classes have been trained in and rely on the theories and methods that Sax and Gurian promote to justify their programs.

Both Sax and Gurian make the dutiful caveat that neither all boys nor all girls learn in the same way. However, their arguments are directed toward proving, as the title of two of Gurian's books proclaim, that boys and girls learn differently, and that teachers should treat boys and girls very differently as a result.

In his book *Why Gender Matters* and in his teacher trainings, for instance, Sax claims:

- Teachers should smile at girls and look them in the eye, but must not look boys directly in the eye or smile at them.<sup>8</sup>
- In literature classes, boys should be asked about what has happened in a story, while girls should be asked about how the story made them feel.<sup>9</sup>
- Girls' hearing is far more sensitive than boys'. If a male teacher speaks in what he thinks is a normal voice to a girl, she will feel that he is yelling at her. Conversely, teachers should yell at boys, because of their lack of hearing sensitivity.<sup>10</sup>

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<sup>7</sup> See, Janet Shibley Hyde & Sara M. Lindberg, *Facts and Assumptions About the Nature of Gender Differences and the Implications for Gender Equity*, in HANDBOOK FOR ACHIEVING GENDER EQUITY THROUGH EDUCATION, 2d Ed. 19, 28, 30 (2007).

<sup>8</sup> LEONARD SAX, WHY GENDER MATTERS: WHAT PARENTS AND TEACHERS NEED TO KNOW ABOUT THE EMERGING SCIENCE OF SEX DIFFERENCES 86 (2005).

<sup>9</sup> *Id.* at 106-110.

<sup>10</sup> *Id.* at 18, 87-88.

- Boys do well under stress, and girls do badly. As a result, girls should not be given time limits on a test, but should be encouraged to take their shoes off in class because this helps them relax and think.<sup>11</sup>
- Blood rushes away from girls' brains when girls are under stress, while stress causes blood to rush to boys' brains, thus priming them to learn.<sup>12</sup>
- Teachers should ask girls to bring blankets from home to cuddle in during class and allow girls to take their shoes off in class, thus making class time less stressful and more comforting. Boys should not be allowed to sit in the classroom, because the stress of standing primes them to learn.<sup>13</sup>
- Boys should receive strict, authoritarian discipline and respond best to power assertion. Boys can be spanked. Girls must never be spanked.<sup>14</sup>
- A boy who likes to read, does not enjoy contact sports, and does not have a lot of close male friends should be firmly disciplined, required to spend time with "normal males," and made to play sports.<sup>15</sup>

Michael Gurian propounds similar theories. For instance, according to Gurian:

- Boys are better than girls in math because their bodies receive daily surges of testosterone, while girls have equivalent mathematics skills only during the few days in their menstrual cycle when they have an estrogen surge.<sup>16</sup>
- Boys are by nature abstract thinkers, and so are naturally good at things like philosophy and engineering, while girls are by nature concrete thinkers because of their brain structure.<sup>17</sup>
- Boys are more likely to play sports than girls because of differences between male and female brains. Full female participation in athletics is not "neurologically or hormonally realistic."<sup>18</sup>
- According to Gurian Institute trainer materials, "Pursuit of power is a universal male trait. Pursuit of a comfortable environment is a universal female trait."<sup>19</sup>

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<sup>11</sup> *Id.* at 88-92.

<sup>12</sup> *See*, Memo from Mary Catherine Roper, Staff Attorney, ACLU of Pennsylvania, to Emily Martin, Deputy Director, ACLU Women's Rights Project, re Single Sex Program for Philadelphia Public Schools: Notes From The Presentation of Dr. Leonard Sax (August 30, 2005) (on file with the ACLU); *see also* SAX, *supra* note 8, at 88-92.

<sup>13</sup> *Id.*

<sup>14</sup> SAX, *supra* note 8, at 180-81,

<sup>15</sup> *Id.* at 218-28.

<sup>16</sup> MICHAEL GURIAN, THE BOYS AND GIRLS LEARN DIFFERENTLY ACTION GUIDE FOR TEACHERS 100 (2003).

<sup>17</sup> *Id.* at 17, 90-92.

<sup>18</sup> *Id.* at 27.

<sup>19</sup> Gurian Institute, Teacher Training Materials, *How Boys and Girls Learn Differently* (2006) (on file with author).

While these assertions are presented as recent scientific discoveries, reputable scientists do not support these conclusions. For example, the Association for Psychological Science recently selected six independent experts in cognitive differences and similarities between the sexes to create a report addressing “The Science of Sex Differences in Science and Mathematics.” These experts concluded, “None of the data regarding brain structure or function suggests that girls and boys learn differently or that either sex would benefit from single-sex schools.”<sup>20</sup> As a further example, neuroscientist and Chicago Medical School professor Lise Eliot, who recently published a book entitled *Pink Brain, Blue Brain* exploring gender differences and their biological and social causes, concludes, “[T]he argument that boys and girls need different educational experiences because ‘their brains are different’ is patently absurd. The same goes for arguments based on cognitive abilities, which differ far more *within* groups of boys or girls than *between* the average boy and girl.”<sup>21</sup> Psychologist Janet Shibley Hyde, another recognized expert on gender differences and similarities, concludes that the available data suggest that the sexes are far more similar than different in terms of cognition and that “[t]hese findings of similarity . . . argue against the practice of gender-based modes of instruction, that is, different methods of instruction for boys and girls.” She further states, “Educators should be wary of arguments for single-sex education that rest on assumptions of large psychological differences between boys and girls. These assumptions are not supported by data.”<sup>22</sup> In other words, reputable scientists know that the differences among boys and the differences among girls are far larger than any average differences between boys and girls.

Nevertheless, the sex-stereotyped approaches advocated by Sax, Gurian, and others are having a real world impact in schools. For example, David Chadwell, a member of the board of directors of NASSPE, directs the Office of Single-Gender Initiatives in the South Carolina Department of Education. More sex-segregated schools and classes have been identified in South Carolina than in any other state in the country. Until recently, the South Carolina Department of Education publicized sample lesson plans on its website that emphasize physical activity, competition, and technology in classes for boys and friendship, team building, colorful decoration of assignments, and stress reduction in classes for girls. For example, one sample lesson plan for girls encouraged a musical chairs game that included math problems; however, it made clear an extra chair should be provided to reduce the stress that would otherwise be created by musical chairs, thus ensuring that it is a relaxed activity. The lesson plan further explained that the female students “are able to make eye contact and smile as they move around the room.” Another lesson plan regarding the Berlin Airlift involved the creation of parachutes: “The boys get to toss the chutes in a competitive manner, the girls get to decorate the chutes,” the plan

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<sup>20</sup> Diane F. Halpern *et al.*, *The Science of Sex Differences in Science and Mathematics*, 8 *Psychological Science in the Public Interest* 1, 30 (2007). Two of these experts are Camilla Benbow and Ruben Gur, whose work Michael Gurian cites in making his claims as to different learning needs between boys and girls. MICHAEL GURIAN, *THE MINDS OF BOYS: SAVING OUR SONS FROM FALLING BEHIND IN SCHOOL AND LIFE* 50-51, 95, 247 (2005); MICHAEL GURIAN, *BOYS AND GIRLS LEARN DIFFERENTLY!* 16-17, 29 (2001). Another is Diane Halpern, former president of the American Psychological Association, whom Leonard Sax cites in arguing that boys and girls have fundamentally different cognitive skills. Leonard Sax, *Six Degrees of Separation: What Teachers Need to Know About the Emerging Science of Brain Differences*, 84 *Educational Horizons* 190, 190 n.1 (2006). It seems the scientists disagree with the conclusions that Gurian and Sax draw from their work.

<sup>21</sup> LISE ELIOT, *PINK BRAIN, BLUE BRAIN* 305 (2009).

<sup>22</sup> Hyde & Lindberg, *supra* note 7, at 28, 30.

explained.<sup>23</sup> Like Sax and Gurian, Chadwell markets himself as a consultant to school districts across the country seeking to institute sex-segregated programs.<sup>24</sup>

Press accounts also indicate that school administrators around the country are adopting the notion that teachers should provide very different classroom experiences to boys and girls. To take only a few of many, many examples:

- A recent article on a sex-segregated program in a middle school in Alabama adopted based on brain difference theories (and since discontinued under threat of legal action) reported that a Language Arts exercise for sixth-grade girls involved describing their dream wedding cake using as many descriptive words as possible, while the students in the sixth-grade boys' Language Arts class were asked to list all the action verbs used in sports that they could think of.<sup>25</sup>
- A recent Michigan newspaper article described single-sex first grade classes in a Lansing charter school. Boys drew monsters while lying under their desks, played "quiet ball" wherein a teacher throws a ball to the quietest child, and were given stress balls to squeeze. Girls had "tea parties that teach social skills and manners, pink- and purple-themed days and princess dress-up day."<sup>26</sup>
- A South Carolina newspaper described a local sex-segregated middle school that allowed boy students to move around the classroom and toss a ball to determine whose turn it was to talk, while the girls raised their hands to talk in a room that smelled like flowers and were "taught to cooperate in different ways."<sup>27</sup>
- An article describing a program in Florida based on these theories reported that in the boys' class, math is taught through games that involve throwing a ball and other active, hands-on measures, while in the girls' class, students read quietly at their desks and had special teacher-led "girl talk" sessions several times a week on subjects like boys and parties.<sup>28</sup>
- A Wisconsin superintendent justified a plan to create sex-segregated high school science classes based on "research data" showing, "Males are not really interested in rote, repetitive, mundane exercises, compared with creative hands-on projects that culminate in something with a different level of understanding," while, in contrast, girls "doing a science lab . . . they're going to follow the directions, they're going to

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<sup>23</sup> Lesson Plans downloaded from <http://ed.sc.gov> (on file with ACLU).

<sup>24</sup> See, [www.chadwellconsulting.com](http://www.chadwellconsulting.com).

<sup>25</sup> Rena Havner, *Single-Sex, Different Opinions*, MOBILE PRESS-REG., Nov. 24, 2008, at A1.

<sup>26</sup> Kathryn Prater, *Tailoring Classes Capitalizes on Learning Differences, School Says*, LANSING ST. J., Oct. 19, 2009.

<sup>27</sup> Claudia Lauer, *Whittemore Park Middle/Separated by Sex: More Learning, Fewer Cooties*, MYRTLE BEACH SUN NEWS, Sept. 19, 2008, at C1.

<sup>28</sup> Sylvia Lim, *Closing the Gender Gap in Manatee County Schools*, BRADENTON (FLA.) HERALD, Aug. 26, 2007, at 1.

go through the process and may not even understand what happened in the science lab, but they got the right answers.’”<sup>29</sup>

- The New York Times Magazine described single-sex classes in one public school that used hunting analogies in a lesson for boys and dishwashing analogies in a lesson for girls.<sup>30</sup>

Unfortunately, these examples are not atypical. The New York Times Magazine identifies law professor Rosemary Salomone as a drafter of the 2006 regulations:

When Salomone revised the regulations, she thought they would usher in a flurry of schools of the [Young Women’s Leadership School of East Harlem]—not the Sax—variety. She was wrong. “As one of the people who let the horse out of the barn, I’m now feeling like I really need to watch that horse,” Salomone told me over lunch near her home in Rye, N.Y., last month. “Every time I hear of school officials selling single-sex programs to parents based on brain research, my heart sinks.”<sup>31</sup>

Teaching these stereotypes limits opportunities for both boys and girls and keeps both from learning the full range of skills necessary for future success in school, work, and life.

***B. The 2006 regulations are being misinterpreted and ignored by school districts implementing sex-segregated education.***

Again, an absence of comprehensive data on these programs makes it difficult to draw quantitative conclusions as to the percentage of schools and school districts that are failing to comply with the 2006 regulations, but the experience of NCWGE members indicates that many school districts across the country are ignoring many of the regulatory safeguards, including such fundamental requirements as the rule that participation in any sex-segregated class be completely voluntary.<sup>32</sup>

For example, in November 2008, spurred by complaints from parents in one school district, the ACLU issued Open Records Act requests to the ten school districts in Alabama identified on NASSPE’s website or in local press accounts as having single-sex classrooms. Of those ten, four reported that contrary to these reports, they were no longer operating single-sex classrooms. Among the six school districts currently utilizing sex segregation:

- At least four and possibly five of the six school districts were assigning students to sex-segregated classes without parental consent, in clear violation of the 2006 regulations’ voluntariness requirement.

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<sup>29</sup> Kay Nolan, *School to Explore Science of Gender*, MILWAUKEE J. SENTINEL, March 9, 2006.

<sup>30</sup> Elizabeth Weil, *Teaching to the Testosterone*, N.Y. TIMES MAG., March 2, 2008, at 38.

<sup>31</sup> *Id.*

<sup>32</sup> Moreover, the FMF study cited above found that Title IX coordinators in state education agencies generally do not have information on sex segregation in public schools in their states and in many cases have done nothing to prevent sex segregation programs that are illegal under Title IX or state law.



- One school district was assigning female middle school students in its vocational program to “family consumer science classes” and male students to “agri-science classes” in clear violation of the voluntariness requirement, the prohibition on sex-segregated vocational classes, the requirement that substantially equal classes be provided to each sex, and the prohibition of reliance on overly broad generalizations about different capacities or interests of either sex.
- A middle school in one school district was providing an all-girls’ drama class but no drama class for boys, and several all boys’ computer applications classes but no computer applications class for girls, in clear violation of the rule that substantially equal courses be offered to each sex and the prohibition of reliance on overly broad generalizations about different capacities or interests of either sex. (This middle school was providing no coeducational classes at all.)
- Only one school district produced evaluations of even the minimal sort required by the 2006 regulations.

There is no reason to believe that Alabama school districts are somehow unique in their frequent failure to comply with the mandates set out in the 2006 regulations. Indeed, the evidence indicates otherwise. To take only a few examples:

- Until attorneys intervened in response to parental complaints days before the first day of school, Vermilion Parish, Louisiana, intended to assign students to sex-segregated classes in two middle schools and one elementary school in the 2009-2010 school year, providing no coeducational options.
- A 2008 Open Records Act request in Escambia County, Florida, revealed that a local middle school had segregated all sixth and seventh grade classes other than physical education and provided no coeducational options, while a local high school was assigning “low-achieving” ninth graders to sex-segregated classes without providing any coeducational option.
- A 2008 article described a K-8 school in Newark, New Jersey, that had recently entirely segregated grades six through eight by sex, with no coeducational options available. According to the article, the school reasoned that participation was voluntary because a parent could always transfer a student to a coeducational school.<sup>33</sup>
- In 2008, the Boston Superintendent of Schools proposed creating an all-boys school “to help prepare boys for careers as police officers, firefighters, and emergency medical technicians,” while not specifying what program would be offered at a parallel proposed girls’ school.<sup>34</sup>

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<sup>33</sup> Kasi Addison, *School Divides and Conquers*, STAR-LEDGER, Nov. 3, 2008, at 11.

<sup>34</sup> James Vaznis, *School Revamp Hits a Snag*, BOSTON GLOBE, Oct. 29, 2008, at 1.

- In 2008, Greene County, Georgia, announced its intention to provide only sex-segregated public education beginning in the 2008-2009 academic year and modified this plan only in the face of community outcry.
- According to a 2008 press account, a South Carolina middle school implemented mandatory sex-segregated classes and parents who didn't want their children to participate were forced to send them to other schools in the district.<sup>35</sup>
- A 2006 newspaper article announced that a St. Paul, Minnesota, middle school intended to impose mandatory sex segregation in all seventh grade academic classes: the principal explained he "didn't want to dabble with an optional class here or there."<sup>36</sup>
- Reports suggest that some school districts are assigning male teachers to teach only male students and female teachers to teach female students, in violation of Title VII as well as Title IX.

The evidence compels the conclusion that in many school districts across the country, educators have read the revision of the regulations as a green light to create any type of sex-segregated program they please and have ignored the restrictions those regulations set out.

***C. The 2006 regulations have opened the door to significant unintended consequences.***

Even assuming that a school district adopting sex-segregated classes is conscientious in attempting to comply with the regulations, the experience on the ground demonstrates that the 2006 regulations have led to significant unintended consequences, in part because the regulations do not give clear guidance to school districts. For example:

- While the 2006 regulations require schools to "conduct periodic evaluations to ensure that single-sex classes or extracurricular activities are based on genuine justifications and do not rely on overly broad generalizations about the different talents, capacities, or preferences of either sex,"<sup>37</sup> they provide no guidance to school districts as to how to distinguish between permissible sex segregation to meet the "particular, identified educational needs" of students and impermissible sex segregation based on overly broad generalizations about gender differences, nor has the Department otherwise provided such guidance. As set out above, a rash of "gender-based" teaching techniques reflecting traditional gender stereotypes have swept through sex-segregated schools and classrooms as schools look to pseudo-science about the differences between boys and girls as justification for their classes. Indeed, a desire to treat boys and girls very differently from each other in the classroom appears to be motivating many of the forays into sex-segregated education, even though sex,

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<sup>35</sup> Claudia Lauer, *Whittemore Park Middle/Separated by Sex: More Learning, Fewer Cooties*, MYRTLE BEACH SUN NEWS, Sept. 19, 2008, at C1.

<sup>36</sup> Doug Belden, *His & Her Classrooms*, ST. PAUL PIONEER PRESS, Jan. 30, 2006, at 1A.

<sup>37</sup> 34 C.F.R. § 106.34(b)(4)(1).

generally, will be a very imperfect proxy for the educational needs of individual students that schools seek to address. The lack of clarity in the 2006 regulations has had pernicious real world consequences in schools across the country.

- While the 2006 regulations require “periodic evaluations,” they prescribe no standards, requirements, or methods for this evaluation. Schools are not required to examine whether sex segregation has in fact advanced any educational goal. If they nevertheless choose to evaluate their programs for effectiveness, the regulations do not require that any methodological rigor be brought to these evaluations.
- While the 2006 regulations require schools to provide a “substantially equal” coeducational class when they provide a single-sex one, and in some instances require that a “substantially equal” single-sex class also be provided for the other sex,<sup>38</sup> given that differences in class make-up will lead to classes proceeding at different rates, it can be difficult or impossible to ensure equality between an all-boys, all-girls, and coeducational class. For example, the ACLU is currently litigating a case challenging single-sex education in Breckinridge County, Kentucky,<sup>39</sup> which alleges that the most advanced math class taught in the local middle school in a particular school year was an all-girls’ Algebra class. It is not surprising that when a school offers multiple math classes, one will end up covering more advanced material than the others, but this phenomenon becomes far more disturbing when half the student body is ineligible to participate in that class regardless of aptitude, simply because of their sex. Perhaps equally disturbing, however, was the school district’s response: it apparently attempted to rectify this inequality by ceasing to provide meaningful instruction to the girls’ class in the final weeks of the school year, while redoubling the pace of the boys’ class. While in the context of sex-segregated classes, it is appropriate and necessary to monitor classes closely to ensure real equality between all-boys’, all-girls’, and coeducational offerings, the artificial restraints on the classroom that such policing would require suggests that sex segregation will tend to introduce a number of systemic problems.
- The regulations fail to specify teaching methods as a factor relevant to determining whether a substantially equal class or school is being offered to the excluded sex. By excluding teaching methods, the regulations open the door to sharply divergent classroom experiences for boys and girls, as the examples set out above show. In the VMI case, the Supreme Court made clear that pedagogical methods can be key to determining whether the educational opportunities offered to the sexes are truly equal, when it rejected arguments that a women’s school focusing on a cooperative method of education that reinforced self-esteem was substantially equal to VMI’s confrontational style of education.<sup>40</sup> Moreover, the regulations also state that the listed factors relevant to determining substantial equality will be considered “either

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<sup>38</sup> 34 C.F.R. § 106.34(b)(1)(iv), (b)(2).

<sup>39</sup> *A.N.A. v. Breckinridge County Board of Education*, Civ. Action No. 03:08-CV-4-S (E.D. Ky.). The U.S. Department of Education and Secretary of Education were formerly named as defendants in this lawsuit, but the claims against them were dismissed by the district court earlier this year.

<sup>40</sup> *United States v. Virginia*, 518 U.S. 515, 547-51 (1996).

individually or in the aggregate as appropriate,” again giving school districts little clear guidance as to what will constitute “substantial equality” and inviting the creation of programs that differ from each other in a host of specifics.

- While the 2006 regulations require that enrollment in a single-sex class be “completely voluntary,”<sup>41</sup> they provide no guidance as to how to overcome some of the real barriers to voluntariness. For example, school districts providing students the choice between sex-segregated and coeducational classes confront the potential of significant gender imbalances in the “coeducational” class, if substantially more girls than boys (or vice versa) choose a single-sex option. This imbalance itself can serve to pressure students of the underrepresented sex into “choosing” the sex-segregated option instead, complicating any assumption that students are only in sex-segregated classes because they (or their parents) choose that environment. A similar quandary is posed when a very small number of students selects a particular option (*i.e.*, the all-girls’, all-boys, or coeducational class), which can lead to (for instance) over-crowded coeducational classes and small sex-segregated classes. Wide variations in student-teacher ratios in turn compromise any promise of “substantial equality” between parallel classes.
- While the 2006 regulations require that enrollment in a single-sex class be “completely voluntary,” schools often energetically promote and proselytize a novel single-sex program as the answer to boosting student achievement, thus pushing families to enroll. It is unclear whether such one-sided steering comports with the regulations. In addition, some school districts interpret the voluntariness requirement to be satisfied as long as students have some opportunity to seek affirmatively to transfer out of a sex-segregated program to which they have been assigned, thus further undermining the goal of a completely voluntary selection between options. Because the regulation includes “geographic accessibility” on its list of criteria that will be considered in determining whether sex-segregated and coeducational classes are substantially equal,<sup>42</sup> some school districts have concluded that it is permissible to offer only sex-segregated classes in a particular school, as long as another school in the district offers coeducational classes, thus further undermining voluntariness goals.
- Perhaps most fundamentally, it seems that in at least some instances, school districts have interpreted the regulations *permitting* sex segregation as *encouraging* sex segregation. This has led to the creation of programs that raise serious constitutional questions and that have the potential to reinforce gender stereotypes, to stigmatize students of both sexes by suggesting that one sex can succeed or thrive only absent the other, and to harm students of both sexes who do not conform to traditional gender expectations (including LGBT students).

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<sup>41</sup> 34 C.F.R. § 106.34(b)(1)(iii).

<sup>42</sup> The preamble to the final regulation made clear that this criterion was added to address unusual situations, as when a consortium of three high schools allowed students to take classes at any of the three schools, but this caveat is not reflected in the regulatory text itself. 71 Fed. Reg. 62,530, 62,538 (Oct. 25, 2006).

## II. The Absence of Evidence that the Single-Sex Nature of the Program Improves Student Achievement.

### A. *The available research does not suggest a substantial relationship between the single-sex nature of the program and student achievement.*

In issuing the 2006 regulations, the Department acted on equivocal evidence about the effectiveness of single-sex education in improving student achievement, and as a result school districts now are doing the same, relying on the faulty premise that these programs “work.” In fact, there is no research-based evidence that shows sex-segregated public education works any better than coeducation of equal quality on measures of student achievement. Thus, it may not be the single-sex nature of successful sex-segregated schools that lead to good results on test scores or improved graduation rates, but rather strategies and resources that are available to coeducational classes as well. If that is the case, then the Department’s approach could undermine educational progress for schools by leading schools to employ single-sex education as a solution to academic achievement, with the heightened risks of sex-stereotyping and discrimination introduced by sex segregation, rather than focusing on reforms actually associated with achievement.

In 2005, the Department published an independent review of available data regarding the effectiveness of single-sex schools.<sup>43</sup> (Data regarding single-sex classes in coeducational schools—the context where the 2006 regulations made the most dramatic changes—was not included in this review at all and few studies apparently exist addressing single-sex classes.<sup>44</sup>) First, it is worth noting how little reliable data the Department found to review. The authors collected 2,221 studies for potential inclusion. Virtually all of these studies failed to meet the “What Works Clearinghouse” standards that the Department typically applies in reviewing the effectiveness of educational interventions. These standards were thus relaxed, yielding only 40 quantitative studies for analysis. The general conclusion of this review was that the existing results are equivocal, with some studies suggesting that single-sex education could be helpful, many studies showing no evidence of either benefit or harm, and some studies suggesting that single-sex education can be harmful.<sup>45</sup>

A later analysis from the United Kingdom suggests that even this conclusion may overstate the demonstrated benefits of single-sex education.<sup>46</sup> The UK analysis notes that Valerie Lee, the author of one of the primary studies showing positive effects for single-sex education included in the Department’s analysis, has been unable to replicate these results and has stated, “I do not think the research on single-sex education (my own and others’) should be

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<sup>43</sup> U.S. Dep’t of Ed., *Single-Sex Versus Coeducational Schooling: A Systematic Review* (2005). This report focused solely on data addressing single-sex schools and included no analysis of data regarding single-sex classes in coeducational schools. Thus the Department’s own report failed to address the context where the most changes have occurred following the adoption of the 2006 regulations.

<sup>44</sup> The report also made clear that most available research has focused either on private schools in the U.S. or on schools outside the U.S. Relatively few studies have focused on single-sex education’s impact on boys.

<sup>45</sup> *Id.*

<sup>46</sup> ALAN SMITHERS & PAMELA ROBINSON, *THE PARADOX OF SINGLE-SEX AND CO-EDUCATIONAL SCHOOLING* (2006).

interpreted as favoring the separation of boys and girls for their education.”<sup>47</sup> The UK report also points out that the Department apparently misclassified another of the primary studies it characterized as favoring single-sex education, as the study in question concluded that while boys in single-sex Catholic schools had higher achievement than boys in coeducational schools, this effect can be attributed to pre-enrollment differences in the background and prior achievement of the two groups, rather than to the single-sex environment.<sup>48</sup> “The paradox of single-sex and coeducation is that the beliefs are so strong and the evidence is so weak,” the UK analysis concluded.<sup>49</sup>

Experts have emphasized that research and development is a critical element of education reform, to ensure that the Department knows what is really working to improve educational outcomes. While there are currently a number of theories regarding what works in schools, there is not a lot of information regarding *how* certain approaches may or may not work. This is especially true in the area of single-sex education, where the Department’s own analysis found the available evidence, which was limited to studies of single-sex schools, to be equivocal at best. If some students in single-sex classes are doing better than they did in coeducational classes, but *not* because of the single-sex nature of the program, then replicating and expanding such sex segregation will merely serve as a distraction and a diversion of financial resources from the real educational changes that are needed.

### ***B. Individual success stories.***

Of course, any discussion of available data and its limitations tends to pale in rhetorical power next to stories of particular schools that have instituted sex segregation and are reporting exciting results. This is especially the case given that many (though by no means all) of the schools adopting single-sex programs are urban schools in troubled districts, seeking to respond to compelling community needs. For instance, some reformers believe single-sex education offers special promise for African-American boys—a demographic group that on average faces a crisis in educational achievement. Others point to the excellent results achieved for girls of color in programs like the Young Women’s Leadership Schools in East Harlem, Philadelphia, Chicago, and elsewhere.

It is indisputable that some of these sex-segregated programs are offering an excellent education to the students enrolled—students who may otherwise have had little opportunity to receive an excellent education. What is far less clear is whether the schools in question are excellent *because* of the single-sex nature of these programs or because of other factors more obviously related to educational success, such as engaged, passionate administrators and teachers or a population of students whose parents are committed enough to their children’s success to choose to enroll them in a new, experimental program that promises results and change. Cornelius Riordan is an advocate for providing single-sex educational opportunities specifically

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<sup>47</sup> *Id.* at 8, citing Valerie E. Lee, *Is Single-Sex Secondary Schooling a Solution to the Problem of Gender Inequity*. in SEPARATED BY SEX: A CRITICAL LOOK AT SINGLE-SEX EDUCATION FOR GIRLS 41, 50 (American Ass’n of Univ. Women Educ. Found. ed., 1998).

<sup>48</sup> *Id.*; see Paul C. Lepore & John Robert Warren, *A Comparison of Single-Sex and Coeducational Catholic Secondary Schooling: Evidence from the National Educational Longitudinal Study of 1988*, 34 *Am. Educ. Research J.* 485 (1997).

<sup>49</sup> SMITHERS & ROBINSON, *supra* note. 46, at 31.

to low-income students of color, based on research that leads him to conclude that single-sex schools have a positive impact for low-income African-American and Hispanic students (but little or no effect on white or affluent students). Riordan believes that the most important thing about single-sex education for these students is that participating in such a program requires a “proacademic choice” by students and their parents.<sup>50</sup> Thus, even Riordan’s research suggests that the value of sex-segregated schools for poor students of color may be that they signal a focus on academic achievement to students and parents and thus attract a more academic-minded student body, rather than any effect that a single-sex environment per se has on students. Certainly, in successful single-sex schools, many factors are clearly contributing to student success other than the gender make-up of the schools.<sup>51</sup>

Moreover, while some schools offer inspiring stories of student achievement following quickly on the heels of sex segregation, social science offers potential explanations for that improvement other than single-sex education itself. Psychologists long ago discovered that when workers or students are aware that they are the subject of an experiment, their performance tends to improve, in the short term, no matter what change is made. Thus, in the classic experiment that gave this “Hawthorne effect” its name, workers in the Hawthorne Works plant were (temporarily) more productive when the lights were made brighter, and when the lights were made dimmer, when they were given short breaks, and when they were given longer breaks. Students can be expected to perform better when single-sex education is instituted, because it is a novelty and because they are aware that their response to the program is being monitored, but this doesn’t necessarily mean that any gains are due to the sex-segregated nature of the classes or that these gains can be expected to continue. To the extent that teachers and administrators themselves expect students’ performance to improve in response to single-sex education, these higher expectations can also lead to student improvement and can affect teachers’ and administrators’ subjective evaluations of student performance.

Regardless of these effects, there is little evidence that sex segregation necessarily leads to increased academic achievement for any particular population, including poor students of color. This is clear from the results of California’s single-sex experiment, which funded six single-sex dual academies in the late 90s, most of which recruited “at risk” students of color as pupils.<sup>52</sup> Researchers examining this program found –

- Boys’ schools emphasized discipline and punishment far more than the girls’ schools. This overwhelming focus on the need to control the students in the boys’ schools

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<sup>50</sup> Cornelius Riordan, *What Do We Know About the Effects of Single-Sex Schools in the Private Sector?: Implications for Public Schools*, in GENDER IN POLICY AND PRACTICE: PERSPECTIVES ON SINGLE-SEX AND COEDUCATIONAL SCHOOLING 10, 19 (Amanda Datnow & Lea Hubbard, eds .2002). Note that Riordan specifically rejects the appropriateness of applying these conclusions in the context of single-sex classes (as opposed to schools). *Id.* at 13. Thus, even if one finds Riordan’s conclusions persuasive, they do not provide a basis for the 2006 single-sex classes regulations.

<sup>51</sup> For example, research conducted by the FMF also shows that some inner city single-sex schools are also focusing on enrolling students who already plan to attend college and on obtaining substantial external funding not available to public coeducational schools in the same communities. Susan Klein, Feminist Majority Foundation, *The State of Public School Sex Segregation in the States* (forthcoming).

<sup>52</sup> See Amanda Datnow et al., *Is Single Gender Schooling Viable in the Public Sector: Lessons from California’s Pilot Program* 6 (2001).

- reinforced notions that being masculine meant getting in trouble, while success in school was feminine and thus inappropriate for boys.<sup>53</sup>
- Single-sex programs had the potential to serve as dumping grounds for boys labeled difficult to handle. One male teacher in a boys' academy stated, "for the first three months of school, [his] job was basically just to keep kids [boys] quiet and sitting down and not throwing chairs at each other."<sup>54</sup>
  - Discipline problems in the boys' schools led to high rates of teacher turnover.<sup>55</sup> (A Philadelphia high school that recently became an all-boys' school similarly experienced significant discipline problems, leading to four teachers quitting in the first semester.<sup>56</sup>)
  - Sex segregation did not necessarily protect students from harassment. Students who didn't meet stereotyped gender norms often were labeled gay and experienced homophobic harassment in the single-sex environments.<sup>57</sup> Indeed, one study (outside the California experiment) found that boys in single-sex classes experienced more harassment than any other group.<sup>58</sup>
  - Moreover in some instances the single-sex academies led to severe gender imbalances for those "left behind" in the nominally coeducational programs.<sup>59</sup>

As these examples show, sex-segregated education in some instances rests on and may perpetuate a stereotype of boys as aggressive, dangerous, and sexually threatening to girls. This stereotype is especially damaging for boys of color, given its similarity to negative racial stereotypes of men of color.<sup>60</sup> While many believe that single-sex education is an answer to the needs of students of color trapped in failing school systems, the compelling nature of those needs itself demands close examination of the proffered solution.

### III. A Need for Change

NCWGE is united in its belief that *the 2006 regulations must be rescinded*. Moreover, all members of the coalition agree that a return to the pre-2006 regulations would address our coalition's concerns and protect Title IX's core value of equality of educational opportunity. Finally, to ensure that any further guidance comports with Title IX and the Constitution, members of NCWGE strongly recommend that the core framework of principles set out below inform any such efforts.<sup>61</sup>

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<sup>53</sup> *Id.* at 41-44, 51-52 (2001); see also Elisabeth L. Woody, *Constructions of Masculinity in California's Single-Gender Academies*, in GENDER IN POLICY AND PRACTICE: PERSPECTIVES ON SINGLE-SEX AND COEDUCATIONAL SCHOOLING 280, 286-91 (Amanda Datnow & Lea Hubbard, eds. 2002).

<sup>54</sup> Datnow et al., *supra* note 54 at 67, 42.

<sup>55</sup> *Id.* at 67.

<sup>56</sup> Martha Woodall, *All Boys' High School Off to a Rocky Start*, PHILA. INQUIRER, at B1 (Feb. 26, 2006).

<sup>57</sup> Woody, *supra* note 55 at 296.

<sup>58</sup> Patricia B. Campbell & Jo Sanders, *Challenging the System: Assumptions and Data behind the Push for Single-Sex Schooling*, in GENDER IN POLICY AND PRACTICE, *supra* note 52 at 39-40.

<sup>59</sup> Datnow et al., *supra* note 54 at 66-67.

<sup>60</sup> See Verna L. Williams, *Reform or Retrenchment? Single-Sex Education and the Construction of Race and Gender*, 2004 Wis. L. Rev. 15, 68-73 (2004); David S. Cohen, *No Boy Left Behind? Single-Sex Education and the Essentialist Myth of Masculinity*, 84 Ind. L.J. 134, 158, 173-174 (2009).

<sup>61</sup> As part of this effort, Title IX coordinators should also be identified at the state, district, and school levels and given the training necessary to implement and enforce these principles.



***A. The Department of Education has the obligation to interpret Title IX consistent with the Constitution.***

The Equal Protection Clause’s guarantees must inform the Department’s interpretation of Title IX, both because (where it applies in full) Title IX’s expansive nondiscrimination mandate is at least (although in some ways more) as protective as the Constitution’s. By rescinding the 2006 regulations, the Department can reinvigorate Title IX, bring its own regulatory guidance into constitutional compliance, and affirm, as it should, that Title IX protections are even stronger than the heightened scrutiny of the Constitution. Also, the Department’s interpretation of Title IX must be informed by Equal Protection Clause standards because the Department’s guidance otherwise serves as a trap for unwary school districts, who may comply with Title IX regulations only to face potential liability for violating students’ constitutional rights.

In the context of single-sex classes, this principle means that schools must be required to demonstrate an “exceedingly persuasive justification” for any program that excludes students on the basis of their sex at the time that program is instituted.<sup>62</sup> Mere assertions of benign justifications for sex exclusive programs will not suffice. Thus, proclamations of the value of educational choice or deference to parental preferences are insufficient to justify sex segregation under the Constitution. Such an exclusion is hardly an expansion of educational choice – “[s]ince any gender-based classification provides one class a benefit or choice not available to the other class . . . that argument begs the question.”<sup>63</sup> Indeed, an analogy to racial segregation (or segregation on the basis of ethnicity or religion, for example) reinforces this point. If parents in a community sought the state-sanctioned option of sending their students to schools with only children of that race to increase their educational options, would that be accommodated? The clear answer is no – and at the very least, the constitutional and statutory analysis to justify or deny such a program would not begin and end with the desire to increase educational options.

There is no doubt that improving educational achievement, providing diverse educational opportunities, and meeting the educational needs of students are important to both the Department and school districts around the country. The Department should be wary, however, of a standard that encourages school districts to adopt sex segregation in pursuit of amorphous goals and does not require them to identify the way in which a sex-segregated environment would further those goals. The Constitution requires demonstration of a substantial relationship between a sex classification and an important state interest. As set out above, there is no reliable, research-based evidence that students in single-sex classes do better because of the single-sex nature of the classes. Allowing schools to separate boys and girls for all classes based on nothing more than an unproven assertion that this will improve educational outcomes for all students essentially gives schools a license to separate students by sex for no reason at all – or even to promote sex stereotypes, which are strictly forbidden by Title IX and the Constitution. For the same reason, the Constitution does not allow sex segregation solely for the purpose of providing schools with flexibility to innovate, given the lack of a demonstrated relationship between the sex segregation and a desired educational outcome. The scrutiny given to the

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<sup>62</sup> *Virginia*, 518 U.S. at 531.

<sup>63</sup> *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 731 n.17 (1982).

deprivation of civil rights is heightened for a reason – the government faces a high burden when attempting to take actions that risk violating civil rights protections, as well it should.

Nor are gender-based developmental differences or typically female and male tendencies in learning rationales sufficient to satisfy the exceedingly persuasive standard. Indeed, these are just the sort of generalizations that the Constitution rejects as a basis for sex classifications, because they inappropriately obscure and ignore the individual’s capacities and tendencies.<sup>64</sup> The Supreme Court has made it “abundantly clear in past cases that gender classifications that rest on impermissible gender stereotypes violate the Equal Protection Clause.”<sup>65</sup> Finally, “if the . . . objective is to exclude or ‘protect’ members of one gender because they are presumed to suffer from an inherent handicap or be innately inferior, the objective itself is illegitimate.”<sup>66</sup> Any Department guidance regarding single-sex classes must grapple with these constraints, rather than shifting the burden to school districts to do the hard analytical work of determining whether a single-sex program is substantially related to an important objective, as the current regulations do.

In the context of single-sex schools, it is insufficient for the Department to encourage school districts to seek legal counsel while otherwise ignoring the constraints the Constitution imposes on any plan to establish such schools. Any Department guidance must require school districts proposing single-sex schools to demonstrate an exceedingly persuasive justification for creating such a school, as required by the Constitution. Title IX’s exemption of admission policies at nonvocational elementary and secondary schools does not authorize the Department to encourage school districts to ignore their constitutional obligations, especially given that the only court to consider the question has concluded that this exemption likely does not authorize the creation of new single-sex schools, but was merely intended to permit the continuation of single-sex institutions existing at the time of Title IX’s passage.<sup>67</sup>

***B. Title IX does not broadly authorize single-sex classes.***

Neither the text nor the legislative history of Title IX supports the notion that school districts have broad authority to institute single-sex programs in coeducational schools. Title IX states, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]”<sup>68</sup> The statute then sets out explicit exemptions from this sweeping policy for some institutions’ admissions policies, social fraternities and sororities, youth service organizations such as Girl Scouts and Boy Scouts, specified American Legion-sponsored events, some mother-daughter and father-son activities, and some beauty pageants.<sup>69</sup> It also permits sex-segregated living facilities.<sup>70</sup> In other words, when Congress wished to permit sex segregation, it specifically exempted particular activities from the sweeping language of the statute. The broadness of Title IX’s ban on sex discrimination, and the specificity

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<sup>64</sup> *Virginia*, 518 U.S. at 540-42.

<sup>65</sup> *J.E.B. v. Alabama*, 511 U.S. 127, 139 n.11 (1994).

<sup>66</sup> *Hogan*, 458 U.S. at 725.

<sup>67</sup> *Garrett v. Bd. of Educ.*, 775 F. Supp. 1004 (E.D. Mich. 1991).

<sup>68</sup> 20 U.S.C. § 1681(a).

<sup>69</sup> *Id.*

<sup>70</sup> 20 U.S.C. § 1686.

and narrowness of the exemptions for a few particular single-sex activities and programs, create a statutory scheme completely inconsistent with any regulation generally permitting segregation of students on the basis of sex.<sup>71</sup> Reading the statute to authorize segregation on the basis of sex “ignores the import of [the Supreme Court’s] repeated holdings construing ‘discrimination’ under Title IX broadly.”<sup>72</sup>

Title IX’s legislative history also indicates that Congress intended to prohibit sex segregation. Indeed, Senator Birch Bayh, the sponsor of Title IX, specifically decried sex-segregated classes in the context where sex segregation was then most common—vocational education.<sup>73</sup>

While acknowledging that Title IX exempted for admissions to elementary and secondary schools—and thus permitted single-sex schools to continue their admissions practices—Senator Bayh made quite clear that once a student was admitted to a school, no further sex discrimination or segregation was permissible. In response to queries about which institutions would be permitted to maintain single-sex admissions policies, he described Title IX’s coverage as follows:

At the elementary and secondary levels, admissions policies are not covered. As the Senator knows, we are dealing with three basically different types of discrimination here. We are dealing with discrimination in admission to an institution, discrimination in available services or studies within an institution once students are admitted, and discrimination in employment within an institution, as a member of a faculty or whatever. . . . In the area of services, once a student is accepted within an institution, we permit no exceptions.<sup>74</sup>

The Supreme Court has held that “Senator Bayh’s remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute’s construction.”<sup>75</sup>

Congress further indicated that it intended Title IX to prohibit sex segregation in education by simultaneously making resources available to remedy this sort of segregation. The bundle of provisions that made up Title IX included amendments to Title IV of the Civil Rights Act of 1964, which addressed racial segregation in public schools. Title IV was amended to define “desegregation” as “the assignment of students to public schools and within such schools without regard to their race, color, religion, *sex* or national origin.”<sup>76</sup> The Attorney General was

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<sup>71</sup> See *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (stating that courts “‘must accord’” Title IX “‘a sweep as broad as its language’”).

<sup>72</sup> *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005).

<sup>73</sup> 118 Cong. Rec. 5806 (1972) (statement of Sen. Bayh) (“Unfortunately, the Office of Education does not keep complete statistics on the number of programs or classes which are restricted in terms of sex; however, a survey of city boards of education indicated that sex separation is the rule rather than the exception.”); 118 Cong. Rec. 5807 (1972) (statement of Sen. Bayh) (“This portion of the amendment covers discrimination in all areas where abuse has been mentioned . . . [including] *access to programs within the institution* such as vocational education classes, and so forth.”) (emphasis added).

<sup>74</sup> 118 Cong. Rec. 5812 (1972).

<sup>75</sup> *North Haven Bd. of Educ.*, 456 U.S. at 527.

<sup>76</sup> Pub. L. No. 92-318, Title IX, § 906(a), 86 Stat. 375 (1972) (codified as amended at 42 U.S.C. § 2000c) (emphasis added).

given the authority to sue school boards in order to further sex desegregation,<sup>77</sup> and the Secretary of the Department of Health, Education, and Welfare (later, the Secretary of Education), obtained the authority to (1) provide technical assistance to schools desegregating by sex;<sup>78</sup> (2) fund special training for teachers to address any problems created by sex desegregation;<sup>79</sup> and (3) provide grants to school boards to achieve sex desegregation.<sup>80</sup> Title IV as amended also states, “Nothing in this subchapter shall prohibit classification and assignment *for reasons other than* race, color, religion, *sex*, or national origin.”<sup>81</sup> It is difficult to believe that while giving the Attorney General the authority to initiate lawsuits to further sex desegregation in public education and bestowing broad authority on the Secretary to assist and fund school districts desegregating by sex, Congress simultaneously intended Title IX to authorize sex segregation broadly.

In 1975, the U.S. Department of Health, Education, and Welfare (HEW)—the predecessor to the U.S. Department of Education and the U.S. Department of Health and Human Services—issued its Title IX regulations, interpreting the statute to prohibit separate classes for boys and girls in coeducational schools, with very narrow exceptions.<sup>82</sup> And, as discussed in more detail below, some members of NCWGE point to 34 C.F.R. § 106.3 as an additional authority for single-sex schools under Title IX. Section 106.3(a) permits schools and school districts to undertake remedial steps to address sex discrimination in an education program or activity and authorizes the Assistant Secretary to order remedial steps “necessary to overcome the effects of such discrimination.” Moreover, a school may engage in “affirmative action to overcome the effects of conditions which resulted in limited participation . . . by persons of a particular sex.”<sup>83</sup> Thus, on this basis, some members of NCWGE believe that single sex is authorized narrowly for compensatory or affirmative action purposes.

The 1975 HEW regulations enjoy a unique status as an authoritative construction of Title IX, because Congress formally reviewed these regulations to determine their consistency with congressional intent.<sup>84</sup> Indeed, a House subcommittee held six days of hearings to determine whether the HEW regulations were consistent with the statute.<sup>85</sup> On the Senate floor thereafter,

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<sup>77</sup> 42 U.S.C. § 2000c-6

<sup>78</sup> 42 U.S.C. § 2000c-2

<sup>79</sup> 42 U.S.C. § 2000c-3

<sup>80</sup> 42 U.S.C. § 2000c-4

<sup>81</sup> 42 U.S.C. § 2000c-9 (emphasis added).

<sup>82</sup> 40 Fed. Reg. 24133, 24141 (June 4, 1975) (codified at 45 C.F.R. § 86.34).

<sup>83</sup> 34 C.F.R. § 106.3(b).

<sup>84</sup> Under the General Education Provisions Act in effect at the time, final regulations implementing Title IX were “laid before” Congress before going into effect, so that Congress might disapprove any regulations “inconsistent with the Act.” Pub. L. No. 93-380, 88 Stat. 567, 20 U.S.C. § 1232 (d)(1) (1970 & Supp. IV 1974).

<sup>85</sup> Sex Discrimination Regulations: Hearings before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. (1975) (“*Sex Discrimination Regulations: Hearings*”). The Chair of the House Subcommittee that reviewed the regulations made clear, “The regulations will be reviewed solely to see if they are consistent with the law and with the intent of the Congress in enacting the law. We are . . . meeting . . . solely to see if the regulation writers have read and understood [Title IX] the way the lawmakers intended it to be read and understood.” Sex Discrimination Regulations: Hearings at 1 (statement of Rep. O’Hara). At these hearings, some expressed concern that the regulations improperly restricted schools’ abilities to offer single-sex classes and activities. See, e.g., *id.* at 146-148 (statement of Rep. Casey); *id.* at 150 (statement of Rep. O’Hara). However, as Representative Mink pointed out, “[a] number of those people who oppose the regulation actually oppose the law itself. . . . For example, those who oppose the regulation’s requirement for coeducational

Senator Bayh stated, “As the prime sponsor of title IX, I feel the title IX regulations are consistent with both the spirit and intent of the Congress,” and he urged Congress to accept the regulations and reject any resolutions of disapproval.<sup>86</sup> None of the regulations was disapproved, including HEW’s sharp restriction on sex-segregated classes and educational activities. While the failure to disapprove the Title IX regulations is not dispositive, it strongly implies that the regulations accurately reflect congressional intent.<sup>87</sup> Any broad authorization of single-sex classes and programs, like that found in the 2006 regulations, directly conflicts with this intent.<sup>88</sup>

Perhaps most importantly, it must also be remembered that the core purpose of Title IX is to advance gender equity and end sex discrimination and its effects. If Title IX permits sex-exclusive classes at all, it thus presumably permits them only in pursuit of these goals.

***C. If single-sex programs are permitted, schools districts must justify their programs prior to the adoption.***

Prior to the adoption of any single-sex program, school districts must articulate and make publicly available and accessible the justification for its single-sex nature and ensure that the program comports with Title IX and the Constitution. Requiring school districts to identify their reasons for creating a single-sex program and allowing for public oversight will help to ensure that the program is based on exceedingly persuasive evidence that sex segregation directly and substantially furthers Title IX’s goals of advancing equity and reducing discrimination, rather than on generalizations or stereotypes about the needs or abilities of males and females. In addition, once programs are implemented school districts should regularly evaluate these programs in coordination with school, district, and state officials, including Title IX coordinators, to ensure that they continue to meet the rigorous legal standards.<sup>89</sup> These evaluations should be made publicly available and accessible.<sup>90</sup>

***D. If single-sex programs are permitted, vigorous OCR enforcement is necessary to ensure that they do not violate students’ rights to be free from gender discrimination, but any regulatory scheme cannot assume that such enforcement will always exist.***

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physical education classes . . . are in fact opposing the law, not the regulation.” *Id.* at 165; *see also id.* at 172 (statement of Sen. Bayh) (indicating that Title IX was passed to rectify “discriminatory course offerings,” among other purposes); *id.* at 173 (statement of Sen. Bayh) (“The title IX guidelines, as the Congress mandated, call for equality in . . . course offerings . . .”). Indeed, Senator Bayh expressed reservations about even the narrow regulatory exceptions to the nondiscrimination mandate of the statute. *Id.* at 179 (testifying that he would prefer that the exception for contact sports not appear in the regulations).

<sup>86</sup> 120 Cong. Rec. 20467 (1975).

<sup>87</sup> *North Haven Bd. of Educ.*, 456 U.S. at 533-34.

<sup>88</sup> The 1975 regulations included the language now codified at 34 C.F.R. § 106.3(b), which permits schools and school districts to undertake affirmative action to overcome the effects of conditions that resulted in limited participation by persons of a particular sex. In other words, Section 106.3(b) permits affirmative action programs in pursuit of Title IX’s overarching purpose of ending sex discrimination. This language has been interpreted by some as authorizing single-sex education as a method of affirmative action. The relationship between affirmative action and single-sex education is discussed further a Part IV, *infra*.

<sup>89</sup> In fact, some NCWGE members believe that any approval of single sex may be made only after consultation with Title IX educational administrators, advisory and school board members and public constituents with expertise in gender equity.

<sup>90</sup> A collection of high-quality evaluations may enable researchers to reliably assess the effectiveness of single-sex education on student achievement.

It is critical that OCR be aware of the quantity and quality of single-sex programs around the country. Prior to adopting any single-sex programs, school districts should notify OCR of the program, the rationale for the program, the evidence on which it is based, and the scope of the program. OCR should make this information publically available and accessible and periodically monitor the programs thereafter.

Although OCR can and must play an important role in ensuring that any single-sex programs comply with Title IX's demanding requirements, it would be naïve to assume that future administrations will always prioritize and support OCR's efforts. Thus, any regulations or other guidance addressing single-sex education cannot be based on an expectation that OCR can and will ensure that the guidance will be interpreted and implemented appropriately. Rather, any guidance must provide clear, understandable rules protective of students' rights that are easy for school districts to understand and courts to enforce.

***E. If single-sex programs are permitted, they must be held accountable for showing results.***

There is little evidence that single-sex education will resolve the underlying problems related to student achievement.<sup>91</sup> Rather, the research indicates that good schools with quality teaching, involved parents, small classes, and adequate resources lead to academic success, whether single-sex or coeducational. Single-sex education also has the real potential to foster sex discrimination and sex stereotyping, in direct opposition to the purposes of Title IX. Given this tenuous association between sex segregation and the goals with which it is typically associated following the 2006 Regulations, it is all the more necessary to require school districts to undertake a rigorous review to determine whether, once implemented, any single-sex program does in fact meet its goal. The Department should set out guidelines to ensure that such review yields the most meaningful possible results and is evidence-based.<sup>92</sup> If such a review finds no exceedingly persuasive evidence showing that the single-sex nature of the program has been effective in advancing the program's goals, or finds evidence that the program has increased gender discrimination or gender stereotyping, school districts must be required to open the program to students of both sexes.

***F. Any guidance regarding sex-segregated programs must be clear and readily understandable.***

The 2006 regulations do not meet this test. For instance, they ask individual schools and school districts to bear the burden of determining whether the single-sex nature of a program is "substantially related" to an articulated goal, while providing no guidance as to what this showing requires. They ask individual schools and school districts to determine whether and

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<sup>91</sup> At this point, the field of possible research subjects have broadened considerably, given that it has been three years since the 2006 regulations were issued and hundreds of schools have initiated single-sex programs in that time. The Department should encourage high-quality, rigorous retrospective or prospective studies to gather and analyze this information.

<sup>92</sup> The Department's own What Works Clearinghouse standards for identifying effective educational programs may provide useful yardsticks in this regard.

when a “particular, identified educational need” exists among its students that a single-sex program would appropriately address, while providing no guidance as to the evidence necessary to determine that such a need exists and that a single-sex program would fill it. While they indicate that in some instances, it may be necessary to provide a single-sex program to students of both sexes in order to ensure that any such program is evenhanded, they provide no guidance as to when this will be the case. They set out multiple factors that will be considered in determining whether a coeducational option is substantially equal, but indicate that these factors will be considered “either individually or in the aggregate as appropriate,” without explaining when either analysis is appropriate. Overall, the 2006 regulations formulate an amorphous and complicated test for the legality of sex-segregated education and ask individual school districts to apply that test with the only oversight being that provided as a result of complaints made to OCR or the courts. This is a recipe for violation of students’ rights.

To avoid this, any guidance regarding sex-segregated programs should set out clear, readily understood rules as to whether or when such programs are permissible. To the extent the permissibility of the program depends on particular circumstances in the school district (or any other federally funded educational setting), the guidance must make clear the specific types of evidence and circumstances that will support the creation of a sex-segregated program, rather than shifting the burden of uncharted constitutional and statutory analysis to educators in the first instance.

***G. If single-sex options are permitted, equal educational opportunities must be provided to the excluded sex, not “substantially equal.”***

If public schools are ever permitted to provide “separate but equal” opportunities for males and females under law to meet the goals of enhancing student achievement (and the Supreme Court has never held that they are), the programs offered must be “genuinely” equal.<sup>93</sup> The 2006 regulations’ requirement of “substantially equal” programs flows from a misreading of the Supreme Court’s opinion in *United States v. Virginia*. In its many comparisons between the programs offered by the Virginia Military Institute (VMI) and the Virginia Women’s Institute for Leadership (VWIL), the Court made clear that nothing short of equality is constitutionally acceptable.<sup>94</sup> The Court’s reference to a “substantial equality” standard comes in reference to *Sweatt v. Painter*<sup>95</sup> — a case effectively overruled by *Brown v. Board of Education*, which rejected the proposition that separation of students on the basis of race could ever result in equal educational opportunities. The discussion of the “substantial equality” standard in *Virginia* merely demonstrated that VWIL was a “pale shadow’ of VMI” unable to meet even the discredited *Sweatt* standard.<sup>96</sup> Any rule that approves providing educational opportunities to both sexes on a basis that is less than equal violates the motivating purpose behind Title IX.

***H. Title IX and the Constitution contain no exceptions for charter schools.***

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<sup>93</sup> *Virginia*, 518 U.S. at 557.

<sup>94</sup> *Id.* at 547 (VWIL was “unequal in tangible and intangible facilities”) (emphasis added); 551 (VWIL does not qualify as VMI’s “equal”) (emphasis added); 552 (a VWIL graduate could not assume an employer would be “equally” interested in her credentials).

<sup>95</sup> 339 U.S. 629 (1950).

<sup>96</sup> 518 U.S. at 553-54.

The 2006 regulations completely exempt single-sex charter schools operating as their own LEA from any obligation to offer even substantially equal opportunities to the excluded sex. Thus, for example, if the only school in the area offering advanced math and science instruction happened to be an all-boys charter school operating as its own LEA, the 2006 regulations indicate that Title IX does not require that any even roughly comparable program be made available to girls. This enormous loophole is apparently based on the conclusion that it would be administratively burdensome to hold these charter schools to the same standards as all other schools receiving public funds. In no other context is a school or school district exempted from civil rights laws because of the perceived inconvenience of these laws. Charter schools are public schools and thus are bound by the same nondiscrimination requirements under Title IX and the Constitution as any other federally-funded public schools.<sup>97</sup> Any responsible guidance must acknowledge this.

#### **IV. Two Paths Forward**

While united in its belief in these core principles, NCWGE contains some diversity of opinion about the legality and desirability of single-sex education as an affirmative strategy to overcome past barriers to educational opportunity and advance gender equality. In an attempt to provide our most candid, helpful assistance, we set out in some detail below the two primary positions within our coalition and the rationale for each.

##### ***A. The case for prohibition of single-sex programs except as an appropriate compensatory affirmative action tool.***

Several member organizations of NCWGE believe that while the 2006 regulations must be rescinded, consistent with Title IX, the Constitution, and the Department's pre-2006 regulations, it is appropriate to permit single-sex education as a method of affirmative action to address barriers to equal educational opportunity and historic stereotypes that have resulted in limited participation in educational programs by persons of a particular sex. And although all of these organizations believe that this is not a broad authority for the creation of single-sex programs, a subset of these organizations further believe that these programs necessarily trigger review under Title IX similar to strict scrutiny and may be created only after co-ed alternatives have been considered and evidence indicates that comparable benefits cannot be accomplished through sex-neutral means.

An explicit provision permitting single-sex compensatory programs would be consistent with the principles outlined by the Supreme Court in *Hogan* and *Virginia*, as well as 34 C.F.R. § 106.3(b), which permits schools and school districts to undertake affirmative action in the

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<sup>97</sup> See, e.g., *Racine Charter One, Inc. v. Racine Unified Sch. Dist.*, 424 F.3d 677, 683 (7th Cir. 2005) (“While there may be some arguable uncertainty over what kind of public school a [a charter school sponsored by an entity other than a local school district is] one thing is clear: they most certainly are not private or parochial schools.”); *Riester v. Riverside Cmty. Sch.*, 257 F. Supp. 2d 968, 972 (S.D. Ohio 2002) (“Under the public function test, [charter schools and community schools] are state actors because they provide a traditional state function -- in that they provide free, public education to Ohio students. . . . [F]ree, public education, whether provided by public or private actors, is an historical, exclusive, and traditional state function.”) (internal citations omitted).



absence of a finding of past discrimination.<sup>98</sup> In considering the constitutionality of single-sex public education, the Supreme Court has noted that “[i]n limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened.”<sup>99</sup> Thus, sex-based classifications can be permissible if used “to compensate women for particular economic disabilities they have suffered . . . to promote equal employment opportunity . . . to advance full development of the talent and capacities of our Nation’s people.”<sup>100</sup> The legality of these efforts does not depend on a showing that the school district itself previously discriminated on the basis of sex; rather, such remedies are appropriately undertaken based on a broader societal disadvantage.<sup>101</sup> Moreover, when gender and race have reinforced each other’s effects in creating particular barriers to participation in a school’s programs or activities, this standard would allow schools to create single-sex programs that have been demonstrated to be effective in overcoming these combined barriers.

The Court has further stated, “It is readily apparent that a State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification.”<sup>102</sup> In other words, the mere assertion that a single-sex program constitutes affirmative action does not demonstrate its constitutionality.<sup>103</sup> Rather, there must be a factual showing that the program is designed to compensate for historical or current discriminatory sex-based barriers. For this reason, any guidance or regulation permitting single-sex education as compensatory affirmative action must require a rigorous showing that members of the sex benefitted by the classification have tended to suffer significant relevant harms.

Because of the unique context of single-sex education, an additional subset of NCWGE organizations further believe that, even when implemented for compensatory reasons, if gender-neutral measures would be equally effective in addressing the barrier, the single-sex program is unlawful. These organizations favor a stricter analysis because, where there are equally effective gender-neutral measures, the necessary relationship between the exclusion of members of one sex and remedying discrimination does not exist.<sup>104</sup> This standard would permit compensatory single-sex programs only after less restrictive or segregative alternatives that may have accomplished the school’s goals have been considered and evidence indicates that comparable sex-neutral means cannot be reasonably expected to produce the results sought through the

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<sup>98</sup> See U.S. General Accounting Office, *Public Education: Issues Involving Single-Gender Schools and Programs* 7 (May 1996); 65 Fed. Reg. 52859 (Aug. 30, 2000) (indicating in preamble to Title IX common rules for multiple agencies that single-sex programs targeted at young women and designed to encourage their interest in a profession in which they are underrepresented may be permissible as part of a remedial or affirmative action program).

<sup>99</sup> *Hogan*, 458 U.S. at 728.

<sup>100</sup> *Virginia*, 518 U.S. at 533.

<sup>101</sup> *Califano v. Webster*, 430 U.S. 313, 317 (1977) (describing constitutionally permissible purpose of “redressing our society’s longstanding disparate treatment of women”).

<sup>102</sup> *Hogan*, 458 U.S. at 728.

<sup>103</sup> *Id.* at 729.

<sup>104</sup> *Orr v. Orr*, 440 U.S. 268 (1979) (“Where, as here, the State’s compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex.”).

single-sex classrooms or programs. Such a requirement is necessary because no automatic correlation between single-sex education and increased gender equity has been demonstrated.<sup>105</sup>

While this standard is more demanding than that required by the Court in *Johnson v. Transp. Agency*,<sup>106</sup> or in some ways even than the standard for race-conscious admission programs articulated in *Grutter v. Bollinger*,<sup>107</sup> a single-sex program is a somewhat unique form of affirmative action. Most forms of gender-conscious affirmative action seek to help the underrepresented sex gain access to a particular program to which the other sex has disproportionately high access—for example, efforts to employ more women as police officers in a particular municipality that already employs many men as police officers. A single-sex school or class, on the other hand, while following the pattern of increasing access to a benefit to which the other sex already has disproportionately high access (*e.g.*, ensuring that girls obtain a facility in computer science comparable to that typically achieved by boys), does so by creating an educational program from which the other sex is completely excluded.<sup>108</sup> Because single-sex programs necessarily create an absolute bar to the other sex’s participation,<sup>109</sup> and because they thus hold unique potential for stereotyping and other negative consequences, several NCWGE organizations would advocate for a stricter legal standard on their creation.

### ***B. The case for a ban on sex segregation in almost all instances.***

Several member organizations of NCWGE believe that Title IX prohibits any sex segregation in coeducational schools beyond the narrow exceptions for human sexuality education, contact sports, dormitory living, and voluntary programs for pregnant students that are explicitly authorized in the 1975 regulations and by Congress. In the wake of the increasingly powerful movement toward sex segregation over the past decade, these organizations believe that the appropriate question for the Department to ask is not whether Title IX regulations can be amended so as to permit an ideal single-sex program; it must be whether Title IX regulations are sufficiently protective against the inherent dangers of sex segregation.

The explosion of sex-segregated programs over the past ten years has demonstrated that in the context of gender, just as in the context of race, separate is inherently unequal. This is for reasons both philosophical and practical.

Inequality naturally flows from segregation in part because “[t]he two sexes are not fungible; a community made up entirely of one [sex] is different from a community composed of both.”<sup>110</sup> Educational benefits flow from student body diversity, and interaction with diverse

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<sup>105</sup> See, *e.g.*, AMERICAN ASS’N OF UNIV. WOMEN, SEPARATED BY SEX: A CRITICAL LOOK AT SINGLE-SEX EDUCATION FOR GIRLS 3 (1998) (noting one point of consensus among participants in roundtable including various points of view on single-sex education to be that “[s]ingle sex classes and schools can reinforce stereotypes about men’s and women’s roles in society just as coeducational programs can.”).

<sup>106</sup> 480 U.S. 616 (1987).

<sup>107</sup> 539 U.S. 306 (2003).

<sup>108</sup> Cf. *Johnson v. Transportation Agency*, 480 U.S. 616, 638 (1987) (finding gender-conscious affirmative action program at issue lawful under Title IV in part because “[n]o persons are automatically excluded from consideration; all are able to have their qualifications weighed against those of other applicants”).

<sup>109</sup> See *id.*

<sup>110</sup> *Virginia*, 518 U.S. at 533 (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)).

people, cultures, and viewpoints prepares students for participation in diverse workforces and society.<sup>111</sup> Interacting within a diverse student body breaks down stereotypes and enables students to better understand persons of different backgrounds.<sup>112</sup> In addition, “student body diversity promotes learning outcomes and better prepares students for an increasingly diverse workforce and society . . . .”<sup>113</sup> Excluding one sex from a classroom thus necessarily results in an educational experience that is substantially different and which compromises the goal of educational equality for all sexes.

Single-sex classes also, by their very nature, tend to compromise equality because segregation implicitly sends a message about the centrality and importance of gender to education and identity, whether or not such a message is intended, which in turn tends to encourage overbroad gender stereotyping by both teachers and students. It is true that many individual single-sex programs in the United States also offer qualities such as passionate and dedicated administrators, students whose parents have made the affirmative choice to try something new to improve their children’s academic potential, and staff who bring energy and excitement to their work. Not surprisingly, many of these individual programs have achieved good results for reasons that, available research suggests, have much less to do with the single-sex nature of the environment and much more to do with the characteristics that lead to positive educational outcomes in both coeducational and single-sex schools. These programs pose the “dangerous . . . prospect” identified in *Garrett* that should these programs “proceed and succeed, success would be equated with the absence of [the opposite sex] rather than any of the educational factors that more probably caused the outcome.”<sup>114</sup>

Segregation also poses numerous practical problems. For example, if a school provides sex-segregated classes in a particular subject, it will in many instances be difficult to guarantee that a truly coeducational option continues to exist for those students that desire it. If, in pursuit of diversity, a school offered one single-sex math class for eighth-grade girls and one coeducational eighth-grade math class, and all or almost all of the girls chose to enroll in the single-sex class (as might well be the case if, for instance, a more popular teacher taught the class, or the class met at a more convenient time than the coeducational alternative), then no meaningful coeducational option would remain. Boys would be in effect relegated to a single-sex class, even though none of them had chosen single-sex education (and even no evidence supported the conclusion that providing a single-sex boys’ math class was substantially related to an important state interest). If one or two girls opted for the nominally coeducational class and actually almost all-male class, the experience for those girls would in no way be that of a truly

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<sup>111</sup> *Grutter v. Bollinger*, 539 U.S. 306, 330-31 (2003). The Supreme Court in *Ballard v. United States* held on statutory grounds that women could not be systematically excluded from grand and petit jury panels in federal court. In its discussion of whether a jury that excluded women was representative of the community, *Ballard* states:

The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 330 (internal quotation marks omitted).

<sup>114</sup> 775 F. Supp. at 1007.

gender-integrated classroom. Because single-sex classes will tend to siphon off students of one gender, the ability of schools to offer coeducational classes that are not overwhelmingly dominated by the other gender will be diminished, to the detriment of coeducation, voluntariness, and true educational diversity.<sup>115</sup>

More fundamentally, it is impossible, and indeed would be undesirable, to police sex-segregated programs to ensure continuing meaningful equality in programs. Once separate programs are created, they will inevitably differ in important ways, and these differences will tend to increase over time, as they proceed under different teachers, at different paces, with different teaching strategies, focusing on different material. When these natural differences in educational approach occur within a sex-segregated environment, it means that many students will be unable to benefit from the classes that otherwise might be the best match for their needs simply because of their sex. Single-sex programs thus necessarily close the door to certain academic opportunities to students because of their sex; on the other hand, the close and ongoing scrutiny necessary to ensure equality in segregated programs itself threatens to have perverse and negative effects, as discussed above.

These NCWGE member organizations are sympathetic to the impulse to retain the option of single-sex education as long as the strategy is employed to forward civil rights goals, including both gender and racial equality. Such an approach is appealing in that it seeks to preserve well-intentioned efforts to use sex segregation to advance educational equity and the enthusiasm that single-sex education has generated in some circles as a marker for reform and academic achievement. However, no exceedingly persuasive evidence shows that sex segregation is in fact an effective strategy to advance goals of gender (or racial) equity. Indeed, the best available evidence suggests that strategies equally available in coeducational environments are the most effective methods of forwarding these goals. For these reasons, such efforts are of dubious constitutionality of such efforts. Moreover, affirmative action efforts gain effectiveness and legitimacy when they have an *inclusionary* purpose and effect. For all the reasons set out above, segregating students by sex invites many negative consequences, even when it is undertaken in an attempt to advance compelling objectives.

Another fundamental concern is the fear that adopting a rule that explicitly permits single-sex education as a method of affirmative action would not provide the clarity necessary in this context. It is not as though there is an accepted definition of affirmative action or compensatory purpose. Indeed, in the educational context, even questions of which sex should be the primary object of such affirmative action efforts are hotly disputed. Single-sex education advocates like Sax and Gurian already frame their efforts as attempts to overcome the discrimination that all boys have historically faced within elementary and secondary education systems designed to reflect and reward girls' ways of learning. While a regulatory shift limiting single-sex programs to the affirmative action context would no doubt lead school districts to change the language of their justifications somewhat, to emphasize (for example) the alleged harm that boys, or girls, have faced in the past as these learning differences have been ignored, it

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<sup>115</sup> This is especially so given that single-sex education is typically less far popular among boys than among girls. See AMERICAN ASS'N OF UNIV. WOMEN, *supra* note 104 at 66-67; Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 Geo. Wash. L. Rev. 451, 499 (1999).

is not at all clear that it would lead to dismantling of many of those current programs that appear most troubling in their reliance on gender stereotypes.

Moreover, the lack of clear guidance from the courts addressing whether and when single-sex programs are permissible as a form of affirmative action (and, indeed, a relative lack of guidance on the standard by which any gender-conscious affirmative action program should be reviewed) would make it difficult to write such rules with confidence in their constitutionality. This is especially so given ongoing shifts in Supreme Court jurisprudence on questions related to affirmative action both inside and outside the educational context.<sup>116</sup> Given that, presumably, affirmative action justifications would not support providing an equal single-sex program for the opposite sex, the appearance of favoritism would make it more likely that these programs would face legal challenge. The Department would be placed in the position of determining particular programs' legality without clear guidance as to what the Constitution permits and requires, while school districts would be exposed to potential liability even if they had assiduously complied with Department requirements.

## **V. Conclusion**

For all these reasons, NCWGE urges the Department to take a hard look at the 2006 regulations and substantially alter its approach to single-sex education. Title IX seeks to ensure that gender does not determine what education a student will receive. The 2006 regulations represent a retreat from this promise and must be rescinded. We look forward to continuing to discuss these matters with you going forward. If we can be of further assistance, please do not hesitate to contact us.

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<sup>116</sup> See generally *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).