UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

A.N.A., by and through her parent and next friend, S.F.A., *et al.*, Plaintiffs, v. BRECKINRIDGE COUNTY BOARD OF EDUCATION, *et al.*, Defendants.	Civil Action No. 3:08-cv-00004-CRS **Electronically Filed**

MEMORANDUM OF LAW IN SUPPORT OF
A.N.A. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs A.N.A., by and through her parent and next friend, S.F.A.; S.E.A., by and through her parent and next friend, S.F.A.; Z.H.S., by and through his parent and next friend, S.S.; and S.L., by and through her parent and next friend, C.L., and on behalf of all others similarly situated (collectively, "A.N.A. Plaintiffs"), hereby submit this memorandum in support of their motion for summary judgment.

INTRODUCTION

This case concerns the intentional classification and separation of students on the basis of sex at Breckinridge County Middle School ("BCMS"), a coeducational, public middle school in Harned, Kentucky. Since 2003, Defendants have intentionally classified BCMS students based on sex and have excluded boys from participating in designated girl-only classes and excluded girls from participating in designated boy-only classes. Pl. Ex. A, Breckinridge County Defendants' Responses and Objections

to Plaintiffs' First Set of Interrogatories ("Def. Responses to Pl. Interrog."), Nos. 1-2.[1] This classification and segregation of students by sex for academic classes at a coeducational middle school is proscribed by Title IX of the Education Amendments of 1972 and is subject to heightened judicial scrutiny under the Constitution.

Specifically, Title IX forbids sex-based exclusion of students from academic classes in a coeducational school receiving federal funding. And even if Title IX permitted such segregation, Defendants would still have to satisfy the heavy burden imposed by the Constitution, which requires the government to demonstrate that its classification of students by sex rests on an exceedingly persuasive justification. Because the government must demonstrate that classifying students by sex is substantially related to an important governmental interest, Defendants' actions here are constitutionally impermissible, in that their justifications for implementing sex-segregated classes rely upon invalid stereotypes about the allegedly different learning needs of boys and girls. Defendants have failed to put forth competent evidence that could demonstrate that excluding children from classes based solely on their sex is substantially related to the objective of raising academic performance. Therefore, the Court should grant A.N.A. Plaintiffs judgment as a matter of law.[2]

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

A. BCMS Segregated Students by Sex from 2003 until the Present, Based in Part on Generalizations about the Different Learning Needs of Boys and Girls

[1] All documents cited as exhibits to this memorandum are attached to the accompanying Declaration of Rachel L. Braunstein, dated June 8, 2010 ("Braunstein Decl.").

[2] Plaintiffs are seeking summary judgment as to the First, Second, Third, Sixth, and Seventh Causes of Action in the Amended Complaint. Pl. Ex. B, A.N.A. Plaintiffs' First Amended Complaint, filed May 19, 2008 (Docket Entry No. 41) ("Am. Compl."). In addition, Plaintiffs seek that the Court enter judgment (i) permanently enjoining Defendants from segregating any class or educational program by sex; (ii) declaring that Defendants' actions constitute discrimination on the basis of sex, in violation of Plaintiffs' rights under federal and state law; (iii) declaring 34 C.F.R. § 106.34(b) to be an impermissible interpretation of Title IX; (iv) granting Plaintiffs monetary damages against Defendants to fairly and reasonably compensate Plaintiffs for the deprivation of their rights in the 2007-2008 school year in an amount to be determined; and (v) awarding Plaintiffs their expenses, costs, and reasonable attorneys' fees under 42 U.S.C. § 1988 and any other applicable provision of law, along with any other relief as the Court deems just and proper.

In 2003, BCMS initiated a sex-segregated "pilot program," in which students were placed in single-sex math and science classes. Pl. Ex. A, Def. Responses to Pl. Interrog. No. 1; Pl. Ex. C, Excerpts from the Deposition of BCMS Principal Kathy Gedling, Oct. 12, 2009 ("Gedling Dep. Vol. 1"), at 70:7-8; Pl. Ex. D, Excerpts from the Deposition of BCMS Principal Kathy Gedling, Nov. 23, 2009 ("Gedling Dep. Vol. 3"), at 68:20-69:2; Pl. Ex. E, *LEAD Kentucky* Newsletter, dated Jan. 2005 ("*LEAD* art."), at 10. The following year, BCMS expanded the program to include single-sex math, science, language arts, related arts, social studies, and skills classes. Pl. Ex. F, Single-Sex Class Enrollment Letters to BCMS Parents for 2004-2005, 2005-2006, 2006-2007, 2007-2008, 2008-2009, and 2009-2010 School Years ("2004-2010 Parental Consent Letters"), at BCORR 00611 (stating that BCMS offered gender-based classes "in all areas in all grades"). In every year since, BCMS has continued its sex-segregated classes without material alteration, varying only the procedure it utilized in assigning students to sex-segregated classes and changing the mechanism (if any) that would allow students to choose coeducational classes over sex-segregated classes.[3] Pl. Ex. G, Excerpts from the Deposition of BCMS Curriculum Specialist Jennifer O'Reilly, Oct. 1, 2009 ("O'Reilly Dep."), at 110:3-5 (BCMS' curriculum specialist indicating that she is unaware of any changes to "gender plan"); *see also* Pl. Ex. H, Excerpts from the Deposition of BCMS Principal Kathy Gedling, Oct. 29, 2009 ("Gedling Dep. Vol. 2"), at 172:2-173:10 (indicating that BCMS' 2005-2006 plan is "basically the same" as the 2004-2005 plan). Each single-sex class is limited to students of a particular sex and is closed to students of the other sex; thus, no boy may participate in any of the "all-girls" classes, and no girl may participate in any of the "all-boys" classes. Pl. Ex. F, 2004-2005 Parental Consent Letter, at BCORR 00611.

[3] The procedures and mechanisms Defendants used included: (1) assigning students to single-sex classes unless parents affirmatively chose coeducational classes (2003-2004, 2004-2005, 2005-2006, 2006-2007); (2) assigning students to mandatory single-sex classes with no option for electing coeducational classes (2007-2008); and (3) assigning students to coeducational classes unless parents chose single-sex classes (2008-2009, 2009-2010). Pl. Ex. C, Gedling Dep. Vol. 1 at 100:9-101:5; Pl. Ex. D, Gedling Dep. Vol. 3 at 70:6-22.

Defendants articulated a number of justifications for separating students by sex, many of which rely upon notions of differences in the ways that boys and girls learn. BCMS officials stated that they sought to improve student performance by creating a learning environment in which each gender's "specific needs" could be addressed, free from "distractions" caused by a coeducational classroom. Pl. Ex. I, 2003-04 BCMS School Report Card ("2003-2004 Report Card"), "What We Are Doing to Improve," at 4. Defendants argued that "research" supports theories that boys and girls learn differently and need to be separated to avoid "hormonal" influences. Pl. Ex. F, 2004-2005 Parental Consent Letter, at BCORR 00611. Defendants sent home a letter to parents stating that, "[b]ecause research shows that boys and girls have different learning styles, learning needs and interests, it makes sense that gender-based classes would provide the means for better meeting these needs." *Id.* School officials stated that single-sex classes would allow teachers, through the use of "brain research," to "accommodate the various needs of the gender based classes." Pl. Ex. F, 2005-2006 Parental Consent Letter, at BCORR 00610.

Defendants also communicated this rationale to staff. In 2004, Defendants sent two teachers to the Gurian Institute[4] in Colorado for a four-day training on the "brain differences in males and females and the benefits of instructional differentiation." *Id.* Upon their return, the teachers gave a presentation (mandatory for all BCMS teachers), instructing teachers to, for example, "[e]njoy & navigate 'Huck Finn' type male energy" for boys and "[p]rovide concrete sensual manipulatives when teaching science" to girls. Pl. Ex. L, PowerPoint Presentation given by Ann O'Connell and Missy Critchelow for Gender Professional Development Day, June 26, 2004 ("2004 PowerPoint Training"), at BCORR

[4] The Gurian Institute is an organization founded by single-sex education advocate Michael Gurian, whose teachings are premised on the idea that putative brain differences between boys and girls call for gender-based differentiated instruction. *See Boys and Girls Learn Differently: A Guide for Teachers and Parents*, http://www.michaelgurian.com/boys_and_girl_learn_differently_parents_and_teachers.html (last visited June 7, 2010). Plaintiffs contend these are not valid pedagogic strategies. *See infra* Part III; *see also* Pl. Ex. J, Expert Report of Diane F. Halpern, Ph.D. ("Halpern Rep."), at 27-32. Furthermore, Gurian is not a credible brain science researcher. *See* Pl. Ex. K, Excerpts from the Deposition of Michael S. Kimmel, Ph.D., Feb. 8, 2010 ("Kimmel Dep."), at 154:20–155:22, 157:4-23.

00647. Defendants also articulated other rationales for segregating students by sex, including that single-sex classes would "improve the educational achievement of [participating] students." Pl. Ex. F, 2008-2009 Parental Consent Letter, at BC 16475; *id.* at BC 16478 (2009-2010 Letter, stating the same).

Three years after Defendants first instituted single-sex classes, the United States Department of Education ("DOE") issued new regulations interpreting Title IX. 71 Fed. Reg. 62,542 (Oct. 25, 2006) (codified at 34 C.F.R. § 106.34). Unlike prior, longstanding DOE regulations, and in conflict with the Title IX regulations of other federal agencies, the 2006 DOE regulations purport to allow schools to institute single-sex classes when certain conditions are met. *See infra* Part IV. Thereafter (once litigation commenced), Defendants reformulated their justification for sex-segregated classes to incorporate language from the 2006 DOE regulations, while retaining the original focus on different learning needs for girls and boys. Pl. Ex. F, 2008-2009 Parental Consent Letter, at BCORR 00594 (stating that the classes "provide diverse learning environments and opportunities that address specific learning needs of each gender"). Moreover, after litigation commenced, Defendants stated that they segregate students by sex because students and parents choose single-sex classes. *See, e.g.*, Pl. Ex. G, O'Reilly Dep. at 227:15-17 ("As long as we have students that still choose that they want to be in [single-sex classes], we will provide it."); Pl. Ex. H, Gedling Dep. Vol. 2 at 70:23-72:8 (because some parents and students, by choosing single-sex classes, have determined that to be the best learning environment, the classes are beneficial to student performance).

B. Defendants Never Established a Substantial Relationship Between Sex-Segregated Classes and Improved Academic Performance

BCMS officials have never established a substantial nexus between participation in sex-segregated classes and improved student performance, whether measured by class grades or standardized test scores. Pl. Ex. G, O'Reilly Dep. at 72:9-13 (admitting she is unable to determine the extent to which any change at BCMS has contributed to improving student performance); *id.* at 149:18-

150:10 (testifying she is unable to identify a correlation between students' participation in sex-segregated classes and increased test performance); *see also* Pl. Ex. M, Excerpts from the Deposition of BCMS Teacher Missy Critchelow, Oct. 15, 2009 ("Critchelow Dep."), at 35:11-18 (expressing inability to determine whether sex-segregated classes or block scheduling resulted in improved student performance). After the state labeled BCMS a "school in assistance" in 2002-2003, prompting the assignment of "highly skilled educator" Michelle East to the school,[5] BCMS implemented a host of strategies aimed at pulling the school out of crisis. The school's educational leadership testified that, to the extent the school — or any individual student — has made gains in academic achievement, they do not know which of the many strategies they implemented is related to such gains. *See* Pl. Ex. N, East Dep. at 91:5-7 ("There's no way to know what does and what doesn't [work] from year to year, so you just keep trying."); Pl. Ex. G, O'Reilly Dep. at 37:5-8 ("There's just a whole variety of things that we've done at the middle school that have led to improvement, and it's hard to single out one thing that might be a reason"); *id.* at 150:4-10 ("Q: Is there any correlation between gender classes and increased test performance? A: For some students, yes. Q: Is that because of their participation in the gender classes? A: I can't say that it is. I can't say that it isn't."); Pl. Ex. O, Excerpts from the Deposition of Breckinridge County Schools Superintendent Janet Meeks, Oct. 2, 2009 ("Meeks Dep."), at 94:9-11 ("[F]or the past few years [BCMS has] made steady gains. Do I know it's from [the gender program]? No. I don't have a clue.").

Nor have Defendants undertaken any reasonable attempt to assess, using the information available to them, the success of the single-sex program in achieving educational objectives. Pl. Ex. G, O'Reilly Dep. at 97:6-101:19 (admitting that she makes only an informal assessment of students' state test results based on participation in sex-segregated classes and that she does not track the information);

[5] Pl. Ex. N, Excerpts from the Deposition of Highly Skilled Educator Michelle East, Jan. 15, 2010 ("East Dep."), at 20:9-21:7 (explaining that a "school in assistance" requires the assistance of a highly skilled educator provided by the state of Kentucky because the school is "not progressing toward the goal of proficiency at an adequate rate").

Pl. Ex. C, Gedling Dep. Vol. 1 at 181:11-182:14; Pl. Ex. P, Excerpts from the Deposition of BCMS Teacher Ann O'Connell, Oct. 16, 2009 ("O'Connell Dep. Vol. 1"), at 120:20-121:16. School officials acknowledge that student performance indicators are irrelevant to their decision whether to continue offering sex-segregated classes. Pl. Ex. H, Gedling Dep. Vol. 2 at 77:20-78:13 (stating that continued participation, not student testing data, is determinative of BCMS' decision to continue offering single-sex classes); *see also id.* at 73:2-19 (both existence of, and narrowing of, gender gap in students' performance indicate continuing need for sex-segregated classes). When Defendants retained an expert in empirical analysis to prepare for possible analysis by A.N.A. Plaintiffs' experts in this litigation, he could not determine what effect single-sex classes had on student achievement, because BCMS had not provided him data on which students were in single-sex classes — apparently because the school did not track this data. Pl. Ex. Q, Excerpts from the Deposition of Edward Fergus, Ph.D., Apr. 8-9, 2010 ("Fergus Dep."), at 82:6–84:20, 105:18–106:2.

C. Defendants' Implementation of Single-Sex Classes and Procedural History

The present suit arose when individual plaintiffs objected to BCMS' assigning students, on the basis of sex, to sex-segregated classes in 2007-2008, without giving them the opportunity to choose a coeducational alternative. Pl. Ex. F, 2007-2008 Parental Consent Letter, at BCORR 00608; *see also* Pl. Ex. C, Gedling Dep. Vol. 1 at 100:20-23 (noting BCMS' decision not to provide students an option to choose single-sex or coeducational classes in 2007-2008); *id.* at 236:24-237:9 (explaining that BCMS unilaterally assigned students without providing them a choice because of minimal parental input in previous years, and because they intended to place every student in some single-sex and coeducational classes). After BCMS received repeated objections to its actions, school officials relented and allowed students assigned to sex-segregated academic classes to transfer into coeducational ones. Pl. Ex. F, 2007-2008 Parental Consent Letter, at BCORR 00608. However, this option did not extend to "related

arts classes"[6] and only occurred *after* the beginning of the school year when students had already received a significant amount of academic instruction and had become acclimated to their schedules. *Id.*; Pl. Ex. R, Excerpts from the Deposition of Former BCMS Student A.N.A., Nov. 16, 2009 ("A.N.A. Dep."), at 30:23-32:6. Moreover, BCMS required any affected student choosing to transfer to coeducational classes to do so on an "all or none" basis; thus, affected students opting for coeducational classes were required to accept an entirely new academic class schedule after the beginning of the school year. Pl. Ex. C, Gedling Dep. Vol. 1 at 258:25-259:14 (explaining that students' transfer option was "all or none," *i.e.*, they could only request all coeducational classes, not specific class reassignments). Since the inception of its single-sex program, BCMS has faced logistical difficulties inherent in implementing single-sex classes resulting in class-size imbalances.[7]

A.N.A. Plaintiffs commenced this action in January 2008 against Defendants, along with the United States Department of Education and Margaret Spellings, then-Secretary of Education. In their Amended Complaint, dated May 19, 2008, A.N.A. Plaintiffs challenged the legality of sex-segregated classes, as well as the legality of the 2006 DOE regulations purporting to allow schools to implement such classes under certain circumstances. Pl. Ex. B, Am. Compl. In an order dated August 20, 2008, ruling on Defendants' motion to dismiss, this Court rejected Defendants' arguments that the claims arising from the 2007-2008 and 2008-2009 school years were moot and not yet ripe for review, respectively. Pl. Ex. S, Memorandum Opinion and Order, dated Aug. 20, 2008 (Docket Entry No. 88), at 3. Further, in an order dated March 27, 2009, this Court dismissed the claims against DOE and Spelling, ruling that "plaintiffs have asserted claims [against the Breckinridge County Defendants]

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[6] "Related arts" encompasses art, music, physical education, and library classes at BCMS. *See* Pl. Ex. G, O'Reilly Dep. at 165:6-8.

[7] *See* Pl. Ex. C, Gedling Dep. Vol. 1 at 188:8-190:19; 228:12-229:10. In the 2009-2010 school year, class sizes ranged (in sixth, seventh, and eighth grades) from 10-15 students for the all-boys classes, *id.* at 188:8-15, to 20-23 students in the all-girls classes and 18-30 students in coeducational classes, *id.* at 188:16-189:3. Similar disparate classroom sizes existed the previous year, in 2008-2009: among all three grades, the all-boys classes ranged from 10-18 students; the all-girls classes from 20-30 students; and the coeducational classes from 20-31 students. *Id.* at 228:12-229:10.

which provide an adequate remedy." Pl. Ex. T, Memorandum Opinion and Order, dated Mar. 27, 2009 (Docket Entry No. 123), at 5.

SUMMARY JUDGMENT STANDARD

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." *Havensure, LLC v. Prudential Ins. Co.*, 595 F.3d 312, 315 (6th Cir. 2010) (quoting Fed. R. Civ. P. 56(c)(2)); s*ee also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In deciding a motion for summary judgment, the Court must consider "whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Patton v. Bearden*, 8 F.3d 343, 346 (6th Cir. 1993) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)).

SUMMARY OF ARGUMENT

Defendants' intentional classification of students based on their sex is subject to distinct but overlapping legal roadblocks imposed by (1) Title IX of the Education Amendments of 1972, 20 U.S.C.A. §§ 1681-88 (West 2010) ("Title IX"), and its implementing agency regulations, including those promulgated by the United States Department of Agriculture ("USDA"), the United States Department of Health and Human Services ("HHS"), and the United States Department of Education ("DOE"), and (2) the Equal Protection Clause of the United States Constitution's Fourteenth Amendment. These laws can be grouped into two categories: those establishing a *per se* prohibition on the segregation of students by sex within a coeducational middle school (Title IX and the regulations of USDA and HHS), and those requiring the governmental body undertaking the segregation to demonstrate that its program is substantially related to an important governmental

interest and otherwise satisfies certain exacting legal requirements (the Equal Protection Clause and 2006 DOE regulations).

Based on the undisputed fact that BCMS continues to offer boys-only and girls-only classes, the Court can grant summary judgment on A.N.A. Plaintiffs' claims that the BCMS program violates Title IX, including Title IX's interpretation by USDA and HHS, as a matter of law. Title IX, by its terms, strictly forbids the exclusion of children from classes based on their sex at coeducational schools. This interpretation accords with the statute's plain language, structure, legislative history, and longstanding implementing regulations of numerous federal agencies authorized to interpret and enforce the law.

Defendants have not raised a genuine issue of material fact regarding their failure to satisfy the independent requirements of the Constitution, under which Defendants bear the burden of showing that classification of students by sex is substantially related to an important governmental objective and is not based on generalizations about boys and girls. BCMS has repeatedly justified its sex-segregated classes with references to the different learning "needs" of boys and girls, but the Supreme Court has held that such generalizations do not amount to an "exceedingly persuasive justification" for classifying students based on sex. BCMS has also argued that separating students by sex would lead to improved academic performance, but it has not raised a material issue of fact as to whether there is a substantial relationship between participation in sex-segregated classes and improved student performance. The evidence further demonstrates that the BCMS program fails to meet the requirements of the 2006 DOE regulations, which, in any event, themselves run afoul of Title IX and the Constitution and cannot be relied upon by Defendants to legitimate the BCMS program. The Court should therefore grant A.N.A. Plaintiffs summary judgment on these claims, enjoin the BCMS program, and declare the 2006 DOE regulations invalid as a matter of law.

ARGUMENT

I. BCMS VIOLATES TITLE IX

Title IX forbids the exclusion of students "from any education program or activity" based on their sex, with limited exceptions not relevant here. This prohibition encompasses the single-sex classes instituted by BCMS. There is no factual dispute that BCMS denies boys the opportunity to participate in its all-girls classes, nor that BCMS denies girls the opportunity to participate in its all-boys classes. BCMS has not pointed to any exception in Title IX that would permit its program, nor could it, because none of the statutory exceptions applies. The structure and legislative history of Title IX confirm that Congress did not contemplate the segregation of children by sex — whether voluntary or not — for academic classes in coeducational institutions. For these reasons, the single-sex program at BCMS violates Title IX as a matter of law.

A. The Wording and Structure of Title IX Prohibit Single-Sex Classes in Coeducational Schools

Title IX provides that "[n]o person in the United States shall, on the basis of sex, [i] be excluded from participation in, [ii] be denied the benefits of, or [iii] be subjected to discrimination under any education program or activity receiving Federal" funding. 20 U.S.C.A. § 1681(a). This language is to be construed broadly. *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) ("There is no doubt that if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language." (alteration in original) (internal quotation marks omitted)). While violation of any one of these prohibitions contravenes Title IX, BCMS violates all three. First, the statute bars funding recipients from creating separate classes for boys and girls, because such classes (i) "exclude[]" boys from "participation in" the all-girls classes, and vice versa. 20 U.S.C.A. § 1681(a). This is indisputably the situation at BCMS, where girls are not allowed to participate in the all-boys classes

and boys are not allowed to participate in the all-girls classes.[8] BCMS also violates the second prong of Title IX, in that girls are (ii) "denied the benefit of" the all-boys classes, and boys are "denied the benefits of" the all-girls classes, on the basis of sex and in direct contravention of the statute's command. *Id.*

Finally, segregating students by sex in academic classes also (iii) "subject[s]" students to unlawful "discrimination" under the third prong of Title IX, as the plain language of the statute as well as its structure and legislative history make clear. *Id.*; *see also Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) (relying on the Supreme Court's "repeated holdings construing 'discrimination' under Title IX broadly"). Directly following the statute's broad prohibition on exclusion or discrimination based on sex, it enumerates "a list of narrow exceptions" to that rule. *Jackson*, 544 U.S. at 173. These include exceptions for *admission* to certain educational institutions, exceptions for certain religious and military educational institutions, exceptions for fraternities and sororities, and other highly specific exceptions. 20 U.S.C.A. § 1681(a)(1)-(9) (listing exceptions); *id.* § 1686 (exception for separate-sex living facilities).[9] None of the exceptions can be read to permit exclusion of students, on the basis of sex, from classes in a coeducational school to which they have been admitted.

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[8] Plaintiff K.A.S. testified that she did not know what material the all-boys classes covered, "because I wasn't in those all boy classes, and I wasn't able to be in those all boys' classes because I am a girl." Pl. Ex. U, Excerpts from the Deposition of Former BCMS Student K.A.S., Jan. 4, 2010 ("K.A.S. Dep."), at 63:5-7. Similarly, Plaintiff Z.S. testified that, because he was placed in an all-boys math class in his eighth grade year, he was denied the opportunity to learn from and interact with his female peers in the classroom. Pl. Ex. V, Excerpts from the Deposition of Former BCMS Student Z.S., Dec. 1, 2009 ("Z.S. Dep."), at 93:9-94:6 ("Q: Is there anything specific that you think you would have learned from a female student in your eighth grade classes that you would not have learned from a male student in your eighth grade classes? A: I don't know. I didn't have the opportunity.").

[9] Activities and programs exempted under Title IX are nonetheless subject to Equal Protection scrutiny. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (nursing school that excluded males is unconstitutional, notwithstanding Title IX exemption); *United States v. Virginia*, 518 U.S. 515 (1996) (military school that excluded females is unconstitutional, notwithstanding Title IX exemption). Accordingly, courts have repeatedly ordered schools to allow girls to participate on male football and wrestling teams, even when such participation was considered outside the purview of Title IX. *See, e.g.*, *Adams v. Baker*, 919 F. Supp. 1496, 1503 (D. Kan. 1996); *Saint v. Neb. Sch. Activities Ass'n*, 684 F. Supp. 626 (D. Neb. 1988); *Lantz v. Ambach*, 620 F. Supp. 663 (S.D.N.Y. 1985).

Under the fundamental canon of statutory construction, "*expression unius est exclusion alterius,*" (the expression of one thing is the exclusion of another), the statute must be read to prohibit coeducational funding recipients from limiting participation in academic programs or classes to boys or to girls. *See Christensen v. Harris County*, 529 U.S. 576, 583 (2000) ("We accept the proposition that when a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." (internal citations omitted)); *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("'Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.'" (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980))); *United States v. Johnson*, 529 U.S. 53, 58 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference, and the one we adopt here, is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth."). The Supreme Court has expressly declined to create additional exceptions to Title IX's sweeping prohibition beyond those set forth in the statute itself. *See N. Haven Bd. of Educ.*, 456 U.S. at 521-22 (holding that "the absence of a specific exclusion . . . among the list of exceptions" provided in Title IX supports the "conclusion that Title IX's broad protection" applies to prohibit the discrimination in question). The Court should decline to do so here.

B. Congress did not Intend to Permit Funding Recipients to Segregate Classes by Sex in Coeducational Schools

The legislative history of Title IX makes clear that sex-segregated classes are unlawful discrimination under Title IX. Senator Birch Bayh, the lead sponsor of Title IX in the Senate, specifically decried single-sex classes in the context where that type of segregation was then common — vocational education. 118 Cong. Reg. 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)).[10] While acknowledging Title IX's express statutory exemption for *admission* to single-sex elementary and secondary *schools*, Senator Bayh explained that once a student is admitted to a school, no further sex discrimination or segregation is permissible:

> At the elementary and secondary levels, admissions policies are not covered. . . . We are dealing with . . . *discrimination of available services or studies within an institution once students are admitted*. . . . *In the area of services, once a student is accepted within an institution, we permit no exceptions.*

Id. at 5812 (1972) (emphasis added).[11]

Congress indicated its intent to prohibit sex-segregated classes by modeling Title IX on Title VI of the Civil Rights Act of 1964, which prohibits race discrimination in federally funded programs.[12] At the time of Title IX's enactment, Title VI was universally understood to prohibit federally-funded educational programs from segregating students in any way on the basis of race. *See, e.g.*, 45 C.F.R. § 80.3(b)(1)(iii) (2009) (stating Title VI prohibits, *inter alia*, "subject[ing] an individual to segregation or separate treatment in any manner related to his receipt of any service . . . or other benefit"); *see also Henry v. Clarksdale Mun. Separate Sch. Dist.*, 409 F.2d 682, 689 (5th Cir. 1969) (noting that the U.S. Department of Health, Education, and Welfare's policies regarding Title VI support the court's ruling that school zone lines should be drawn to "promote desegregation rather than perpetuate segregation"); *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 852 (5th Cir. 1966) ("We read Title VI as

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[10] The Supreme Court has made clear that "Senator Bayh's remarks, as those of the sponsor of [Title IX], are an authoritative guide to the statute's construction." *N. Haven Bd. of Educ.*, 456 U.S. at 526-27.

[11] Similarly, in introducing predecessor legislation to Title IX that failed to gain passage the prior year, Senator Bayh had made clear that the statute was intended to prohibit segregation in schools' academic programs when Senator Dominick asked whether prohibition of discrimination in "any program or activity" included prohibition of sex segregation in dormitories. Contrasting segregation in dormitories or contact sports with the statute's core purpose of equal access to education, Senator Bayh responded:

> I do not read this as requiring integration of dormitories between the sexes, nor do I feel it mandates the desegregation of football fields. What we are trying to do is provide equal access for women and men students to the educational process and the extracurricular activities in a school, where there is not a unique facet such as football involved.

117 Cong. Rec. 30407 (1971).

[12] Title VI provides, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C.A. § 2000d (West 2003).

a congressional mandate for change — change in pace and method of enforcing desegregation"). Courts repeatedly ordered the racial desegregation of classes *within* public schools. *See, e.g., Adams v. Rankin County Bd. of Educ.*, 485 F.2d 324, 327 (5th Cir. 1973) ("[A] school board may not direct or permit the segregation of students within the classrooms."); *Johnson v. Jackson Parish Sch. Bd.*, 423 F.2d 1055, 1056 (5th Cir. 1970) (holding that "it was manifestly clear that" Supreme Court precedent "required the elimination of not only segregated schools, but also segregated classes within the schools"). Under the Equal Protection Clause — whose protections were incorporated into Title VI[13] — even segregation *within* a single classroom was prohibited. *McLaurin v. Okla. State Regents*, 339 U.S. 637, 641-42 (1950) (prohibiting state-operated University from segregating students within a classroom, within the cafeteria, and within the library, even though all students had the same access to teachers, food and books).

Because Title IX's prohibition was modeled on Title VI, "[t]he drafters of Title IX explicitly assumed that [the language of Title IX] would be interpreted and applied as Title VI had been during the preceding eight years." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696 (1979); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998); *see also Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788, 797 (2009) ("In the absence of any contrary evidence, it follows that Congress intended Title IX to be interpreted similarly to [Title VI]."). [14] Therefore, segregation that would be prohibited by Title VI, including segregation of classes within integrated schools, is similarly prohibited by Title IX

[13] The Supreme Court has repeatedly "explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI." *Gratz v. Bollinger*, 539 U.S. 244, 276 (2003) (citing *Alexander v. Sandoval*, 532 U.S. 275, 281 (2001); *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992); *Alexander v. Choate*, 469 U.S. 287, 293 (1985)).

[14] During the 1975 Congressional hearings on the validity of the Title IX regulations, Representative Patsy Mink, for whom the statute was recently named, observed that "[t]hroughout the debate on [T]itle IX, reference was made to the parallel nature of [T]itle VI . . . . The nearly identical wording of [the statutes] can only indicate that Congress wished to ban sex discrimination in the same manner." *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., 164 1st Sess. (1975) (statement of Rep. Mink, Original Sponsor of Title IX in the House of Reps.).

when done on the basis of sex, unless it falls within one of Title IX's enumerated exceptions. Because BCMS' sex-segregated classes do not fall within one of those exceptions, they are prohibited.

C. BCMS Violates Title IX as Interpreted by the U.S. Department of Agriculture and the U.S. Department of Health and Human Services

USDA and HHS regulations interpret Title IX in accordance with its plain meaning and legislative history to prohibit coeducational institutions from segregating students in classes on the basis of sex. "Each Federal . . . agency which . . . extend[s] Federal financial assistance to any education program . . . is authorized and directed to effectuate the provisions of [Title IX] . . . by issuing rules, regulations, or orders of general applicability." 20 U.S.C.A. § 1682. Both USDA and HHS promulgated regulations barring funding recipients from "provid[ing] any course or otherwise carry[ing] out any of its education program or activity separately on the basis of sex," and from "requir[ing] or refus[ing] participation therein by any of its students on such basis." 45 C.F.R. § 86.34 (2009) (HHS); 7 C.F.R. § 15a.34 (2010) (USDA).[15] An all-girls or all-boys class is a "course . . . carr[ied] out . . . separately on the basis of sex." 7 C.F.R. § 15a.34.

These regulations are entitled to considerable weight. HHS, like the DOE, inherited the original 1975 U.S. Department of Health, Education, and Welfare ("HEW") regulations interpreting Title IX when HEW was reconstituted as HHS and the DOE. USDA adopted its Title IX regulations in 1979 and noted its intent that its rules be consistent with the HEW regulations. Education Programs or Activities Receiving or Benefitting From Federal Financial Assistance; Nondiscrimination on the Basis of Sex, 44 Fed. Reg. 21,607 (Apr. 11, 1979).[16] The 1975 HEW regulations were presented to Congress

[15] The Breckinridge County School District receives federal funding from the HHS and USDA, Pl. Ex. W, Breckinridge County School District, Schedule of Expenditures of Federal Awards (for the year ended June 30, 2008, and is therefore bound to comply with those agencies' regulations enforcing Title IX.

[16] USDA rejected requests that 4-H programs be exempted from the USDA Title IX regulations and be allowed to remain separate for boys and girls, noting, "Congress in enacting Title IX, provided certain statutory exemptions, none of which apply generally to 4-H. Moreover, even if we had such authority, we would not exempt 4-H because, as a matter of policy, this Department is opposed to sex discrimination." 44 Fed. Reg. 21,607, 21,609 (Apr. 11, 1979). The USDA further stated its opinion that, "[t]o segregate boys and girls for contest purposes is to subject those individuals to discrimination"

for review of their consistency with the statute.[17] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 40 Fed. Reg. 24,133, 24,141 (June 4, 1975) (codified at 45 C.F.R. § 86.34 (2009)). In the wake of this process, the Supreme Court recognized that "Congress' failure to disapprove the [Title IX] regulations is not dispositive, but . . . it strongly implies that the regulations accurately reflect congressional intent," *Grove City College v. Bell*, 465 U.S. 555, 568 (1984) (declaring the statute's unique post-enactment history to be persuasively probative of Congress' intent), and that they are entitled to considerable weight, *see N. Haven Bd. of Educ.*, 456 U.S. at 531-34.[18]

II. BCMS' SINGLE-SEX CLASSES VIOLATE THE KENTUCKY SEX EQUITY IN EDUCATION ACT

Kentucky's Sex Equity in Education Act, Ky. Rev. Stat. Ann. § 344.555, contains the same wording and structure as Title IX and is construed consistently with its federal counterpart. *Savage v. Carter County Bd. of Educ.*, No. CIV. A. 07-118-ART, 2009 WL 1884137, at *11 (E.D. Ky. June 30, 2009). For the reasons stated in Part I, *supra*, A.N.A. Plaintiffs are also entitled to summary judgment on this claim.

III. BCMS' GIRL-ONLY AND BOY-ONLY CLASSES VIOLATE THE CONSTITUTION'S GUARANTEE OF EQUAL PROTECTION

Although the Court can enjoin BCMS' program based on its violation of Title IX alone, the Constitution imposes independent requirements on programs that classify students based on sex, whether or not those programs comply with Title IX, because the requirements of Title IX and Equal

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because, "[w]hen a person is not allowed to compete in a particular group because of his or her sex, that person is 'excluded from participation in' that activity." *Id.* at 21,610.

[17] Under the General Education Provisions Act in effect at the time, the final regulations implementing Title IX were "laid before" Congress before going into effect, and Congress had the option of disapproving any regulations "inconsistent with the Act." Pub. L. No. 93-380, 88 Stat. 484, 567, 20 U.S.C.A. § 1232(d)(b)(1) (West 2010). A House subcommittee held six days of hearings to determine whether the HEW regulations were consistent with the statute. *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. (1975). Following this review, none of the regulations was disapproved, and all became effective, including HEW's prohibition on sex-segregated classes and educational activities.

[18] The regulations promulgated by the Department of Education and other agencies charged with implementing Title IX are discussed in Part V, *infra*.

Protection are independent and overlapping. *Fitzgerald*, 129 S. Ct. at 796.[19] The Fourteenth Amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. It is well established that "[p]arties who seek to defend gender-based government action" against a Fourteenth Amendment challenge "must demonstrate an 'exceedingly persuasive justification' for that action." *United States v. Virginia*, 518 U.S. 515, 531 (1996) (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136-37 & n.6 (1994); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). "The burden of justification [for gender-based government action] is demanding and it rests entirely on the state." *Id*., 518 U.S. at 533 (citing *Hogan*, 458 U.S. at 724). When the government "classifies individuals on the basis of their gender," it "must carry the burden" of "showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Hogan*, 458 U.S. at 724 (quoting *Wengler v. Druggist Mutual Ins. Co.*, 446 U.S. 142, 150 (1980)).

It is beyond dispute that Defendants' actions are both "government action"[20] and "gender-based." *Virginia*, 518 U.S. at 531. Defendants repeatedly refer to their single-sex classes as "gender-

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[19] In both *Hogan* and *Virginia*, the Supreme Court struck down as unconstitutional the sex-based classifications of two educational institutions that fell within one or more exemptions to Title IX's prohibition on exclusion of students from an education program based on sex. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 732 (1982) (rejecting state's argument that program was exempt from constitutional requirements because its admission policies were exempt from Title IX pursuant to 20 U.S.C. § 1681(a)(5)); *United States v. Virginia*, 766 F. Supp. 1407, 1408 (W.D. Va. 1991) (district court opinion in Virginia explaining that, because "single-sex colleges and single-sex military schools are exempted from Title IX of the Civil Rights Act, 20 U.S.C. 1681(a)(4) and (5), the United States alleged only a constitutional violation"), *vacated, remanded by*, 976 F.2d 890 (4th Cir. 1992).

[20] It is undisputed that Defendants are state actors and are subject to suit for violations of the Fourteenth Amendment under 42 U.S.C. § 1983. *See* 20 U.S.C.A. §§ 1687(2)(B), 7801(26)(A) (West 2003) (the phrase "program or activity" under Title IX includes "all the operations of" "a local educational agency," which, in turn, is defined as "a public board of education . . . for either administrative control or direction of . . . public elementary schools or secondary schools in a . . . school district . . . that is recognized in a State as an administrative agency for its public elementary . . . or secondary schools"). The Sixth Circuit has held that school districts and school boards are local governmental entities for purposes of § 1983. *See Soper ex rel. Soper v. Hoben*, 195 F.3d 845, 853-54 (6th Cir. 1999) ("A local governmental entity may be held liable under 42 U.S.C. § 1983 for violations of federal law committed pursuant to a governmental 'policy or custom.' A school district is a local governmental entity. It logically follows that a school board is also a local governmental entity.") (citing *Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658, 694 (1978); *Lopez v. Houston Ind. Sch. Dist.*, 817 F.2d 351, 353 (5th Cir.1987)).

based." Pl. Ex. F, 2004-2010 Parental Consent Letters, at BCORR 00611 to 00612, 00610, 00609, 00608; BC 16475 to 16480 (referring to "gender" or "gender-based" classes at BCMS); *see also* Pl. Ex. X, Memorandum in Support of Defendants' *Daubert* Motion to Exclude the Testimony, Reports, and Opinions of Plaintiffs' Experts (Docket Entry No. 201-1) ("Def. *Daubert* Memorandum") at 4. Similarly, Defendants "classif[y] individuals on the basis of their gender," when they limit enrollment in certain classes to girls or boys based solely on the students' sex.[21] Therefore, the only question is whether Defendants have met their heavy burden of "demonstrat[ing] an exceedingly persuasive justification for that action," *Virginia*, 518 U.S. at 531 (internal quotation marks omitted), by showing that the action "serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives,'" *Hogan*, 458 U.S. at 724 (quoting *Wengler*, 446 U.S. at 150). The undisputed material facts demonstrate that Defendants have failed to satisfy this burden.

A. BCMS' Rationales for Segregating Students by Sex Are Constitutionally Impermissible

In assessing whether a government actor has shown that the challenged "classification serves 'important governmental objectives,'" a court must evaluate the validity of the proffered justification. *Virginia*, 518 U.S. at 533 (quoting *Hogan*, 458 U.S. at 724). The justification "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Id.* (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643, 648 (1975); *Califano v. Goldfarb*, 430 U.S. 199, 223-24 (1977) (Stevens, J., concurring)). "The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation." *Id.*

As discussed in more detail below, Defendants' proffered justifications fail. Most of them rely on "overbroad generalizations" about the ways that boys and girls learn. With regard to the lone

[21] *See supra* note 8.

justification Defendants proffer that may be legally sufficient — improving student achievement — the undisputed facts show that BCMS has failed to carry its burden of demonstrating that single-sex classes are substantially related to achieving that goal.

1. Generalized notions of boys' and girls' "different learning needs" do not justify classifying children based on their sex

Defendants justified their decision to segregate students by sex based on the rationale that boys and girls have different learning needs and that these generalizations about boys and girls are supported by "research." *See* Pl. Ex. F, 2004-2005 Parental Consent Letter, at BCORR 00611 ("Because research shows that boys and girls have different learning styles, learning needs, and interests, it makes sense that gender-based classes would provide the means for better meeting these needs.").[22] Generalizations about differences in the ways that boys and girls learn, however, are a constitutionally impermissible justification for classifying and separating students by sex. In *Virginia*, the District Court "made 'findings' on 'gender-based developmental differences'" based on "opinions about typically male or female 'tendencies.'" 518 U.S. at 541 (quoting 766 F. Supp. at 1434-35). The Supreme Court rejected these "findings," including the idea that male students '"tend to need an atmosphere of adversativeness,' while '[f]emales tend to thrive in a cooperative atmosphere.'" *Id*. (alteration in original). The Court held that state actors "may not exclude qualified individuals [from an educational program] based on 'fixed notions concerning the roles and abilities of males and females,'" *id.* (quoting *Hogan*, 458 U.S. at 725), and "cautioned reviewing courts to take a 'hard look' at generalizations or 'tendencies'" about the differences between male and female learning styles or needs. *Id.* (citing Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. Rev. 1546, 1551 (1991)).

[22] BCMS also cited "research" as a justification for its segregation of students by sex in subsequent letters to parents about the gender program. *See* Pl. Ex. F, 2005-2006 Parental Consent Letter, at BCORR 00610 (adding that two faculty members had "attended the Gurian Institute in Colorado, a leader in gender research, for a four-day training on the brain differences in males and females and the benefits of instructional differentiation," and that those teachers led training for all BCMS staff); *id.* 2006-2007, 2008-2009, 2009-2010 Parental Consent Letters at BCORR 00609, BC 16475, BC 16478 (reiterating that the "interest in gender-based classes results from a growing body of research showing different instructional needs for boys and girls.").

Such generalizations are constitutionally infirm, even if they are supported by research with regard to *average* boys and *average* girls. *Id.* at 549. The Supreme Court, in *Virginia*, held that, even if true as to "*most women*," estimates about each sex's capacities "no longer justify denying opportunity to women whose talent and capacity place them outside the average description." *Id.* at 550.[23] The Equal Protection Clause bars government actors from forcing individuals to conform to generalized understandings of what is essentially "male" or essentially "female," regardless of whether those generalizations are accurate on average. *See, e.g.*, *Wengler*, 446 U.S. at 151-52; *Wiesenfeld*, 420 U.S. at 645; *Frontiero v. Richardson*, 411 U.S. 677, 688-89 (1973) (plurality opinion). Accordingly, the government may not use gender as a "proxy for other, more germane bases of classification." *Craig v. Boren*, 429 U.S. 190, 198 (1976).

Generalizations about the "learning needs" and "tendencies" of boys and girls are at the heart of Defendants' justifications for creating girl-only and boy-only classes. BCMS' curriculum specialist testified that teachers received instruction on research indicating that "generally as a group boys are better [with] spacial [*sic*] . . . mathematical [and] mechanical [concepts] . . . . Girls [are better] with verbal linguistics . . . [and] the social aspect." Pl. Ex. G, O'Reilly Dep. at 182:14-17.[24] In 2004, the entire BCMS staff was required to attend a PowerPoint presentation featuring numerous slides describing purported "Brain Gender Differences," instructing the teaching staff that "Boys and Girls Learn Differently!" and suggesting pedagogic techniques tailored to boys and girls. Pl. Ex. L, 2004 PowerPoint Training, at BCORR 00643-00653. The training instructed staff to "[e]njoy & navigate

[23] Other courts have similarly rejected arguments about average differences between males and females in the educational context. *See Adams*, 919 F. Supp. at 1504 (rejecting school district's argument that preventing girls from wrestling was substantially related to student safety, because it was based on generalization about average differences between male and female physical strength and ignored the fact that some females are stronger than some males); *Lantz v. Ambach*, 620 F. Supp. 663, 665 (S.D.N.Y. 1985) (same, in context of junior varsity football team); *Force v. Pierce City R-VI Sch. Dist.*, 570 F. Supp. 1020, 1028-29 (W.D. Mo. 1983) (same, in context of junior high football team).

[24] Similarly, "highly skilled educator" Michelle East testified that "typically girls learn better with concrete examples; boys through abstract. Boys typically prefer movement and having room to work. Girls typically like to talk." Pl. Ex. N, East Dep. at 59:22-25.

'Huck Finn' type male energy" as to boys. *Id.* at BCORR 00647. One BCMS teacher reported to a local educational publication that he did different activities with the boys "because they have a lot of hormones inside of them and a lot [of] energy," while "softer music" and "softer lights work well with the girls." Pl. Ex. E, *LEAD* art., at 11. Defendants promoted theories on "brain differences" or "different instructional needs for boys and girls" in letters encouraging parents to enroll students in single-sex classes. *See* Pl. Ex. F, 2005-2006, 2006-2007, 2008-2009, 2009-2010 Parental Consent Letters, at BCORR 00610, 00609, BC 16475, 16480.

The stereotypes that "[g]irls typically like to talk," *see supra* note 24, while boys have "Huck Finn type male energy" do not provide a valid basis for state action. *See J.E.B.*, 511 U.S. at 130-31 (barring state action "on the basis of gender" that "serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women"). Grouping and excluding students based on what girls and boys "typically" do is indistinguishable from the practice, rejected by the Supreme Court, of excluding students based on what male and female students "tend to" do. *Virginia*, 518 U.S. at 541. Such action is suspect, because treating children based on gender stereotypes can "make [such] assumption[s]" about boys' and girls' capacities and needs into "a self-fulfilling prophecy." *Hogan*, at 729-30; *see also* Pl. Ex. J, Halpern Rep. at 17-18 (beliefs and expectations of educators created self-fulfilling prophecies by influencing educational outcomes). Therefore, BCMS' segregation of students into single-sex classes on the basis of purported differences in how boys and girls learn is invalid.

2. The potential for "hormonal" "distractions" does not justify single-sex classes

Defendants also justified their single-sex educational program by reasoning that students are less distracted by students of the opposite sex,[25] and are better behaved[26] in sex-segregated classes.

[25] *See, e.g.*, Pl. Ex. F, 2004-2005, 2006-2007 Parental Consent Letters, at BCORR 00611 (2004-2005 letter from BCMS to parents, arguing that single-sex classes would allow for "[l]imited distractions" and "[n]o fear of asking questions" in the

These rationales have informed the implementation of single-sex classes at BCMS throughout the program's history. The mandatory teacher training in 2004 instructed that "Girls and boys in middle school are experiencing the greatest hormonal upheaval of their lives. For instance boys are hit with testosterone 7-10 times a day!!" Pl. Ex. L, 2004 PowerPoint Training, at BCORR 00648. Based on the information, the staff was told that, "in a mixed class both genders neglect actual academic learning." *Id.* BCMS administrators continued to reiterate such rationales in recent letters to parents, *see* Pl. Ex. F, 2008-2010 Parental Consent Letters, at BC 16475-16480, and in their deposition testimony.[27]

Arguments about "hormonal" "distractions" and "flirting" experienced by students in integrated settings rely upon impermissible stereotypes. Regardless of whether true for some students, it is impermissible to assume *all* students are affected by such distractions. *Virginia*, 518 U.S. at 533 (state actors "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females"). The Equal Protection Clause does not permit the government to justify the exclusion of individuals based on their sex by hypothesizing that the mixing of the sexes would result in "impropriety." *Eslinger v. Thomas*, 476 F.2d 225, 231 (4th Cir. 1973) (applying intermediate scrutiny to strike down the exclusion of female student senate pages in South Carolina).

The idea that students in coeducational classes neglect academic learning because of the mixed-sex setting is not supported by competent evidence; on the contrary, it has been discredited. Pl. Ex.

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middle school setting, "where social and hormonal influences seem to take over student interest in academics"); BCORR 00609 (2006-2007 letter stating, "Gender classes provide an atmosphere that enables students to focus on academics instead of the social and hormonal problems that occur in the middle school setting."); Pl. Ex. C, Gedling Dep. Vol. 1 at 211:24–212:1 ("With the removal of the opposite sex possibly as a distraction . . . that parent has determined to make that selection for their child"); Pl. Ex. Y, Excerpts from the Deposition of BCMS Teacher Kimberly Minton, Jan. 14, 2010 ("Minton Dep."), at 158:2-5 ("I do not think that [distractions of the opposite sex] is solely justification, but I think that that is part of making a very good learning environment for your child."); Pl. Ex. Z, Excerpts from the Deposition of Former BCMS Principal Dan Snodgrass, Sept. 28, 2009 ("Snodgrass Dep."), at 174:18-21 ("if there are less distractions, then teachers can . . . get students to focus in that maybe they wouldn't in another type of class").

[26] *See, e.g.*, Pl. Ex. A, Def. Reponses to Pl. Interrog. No. 1 (noting "fewer distractions [and] less behavior problems").

[27] *See supra* notes 25 & 26; *see also* Pl. Ex. N, East. Dep. at 79:12-19 ("Obviously it cuts down on flirting during class. There are just some indications that students improve their self-esteem and their willingness to speak out in class and to engage themselves in learning if there are not members of the opposite sex in the room, especially in the middle school years."); *id.* at 79:21-23 ("[Middle school students] seem to be going through a lot of hormone issues when they are in that age.").

AA, Expert Report of Michael S. Kimmel, Ph.D. ("Kimmel Rep."), at 33 ("The notion of the distraction because of the presence of the opposite sex has been substantially disconfirmed empirically."); *see also* Pl. Ex. J, Halpern Rep. at 14, 16, 33-34. Undisputed evidence demonstrates that coeducation has been a success. Pl. Ex. AA, Kimmel Rep. at 27; Pl. Ex. K, Kimmel Dep. at 247:7-17 ("[T]he very educational innovations implemented over the past 20 years to better facilitate girls' education have actually benefitted boys as well, because they are more attentive to individual differences and learning styles rather than gender stereotypic ones."); *see also* Pl. Ex. J, Halpern Rep. at 33.

Nor does research on the effects of single-sex education support contentions about improved discipline in all-boys classrooms conveyed to BCMS staff[28] and parents.[29] Instead, evidence shows that disciplinary problems *increase* in all-boys settings. Pl. Ex. J, Halpern Rep. at 15-16, 35.[30] Thus, BCMS' overbroad generalization about males and females is not an "exceedingly persuasive justification" under clear Supreme Court precedent.

3. Defendants' *post hoc* rationale that BCMS offers single-sex classes because of student choice or comfort is impermissible as a matter of law

Perhaps because of its obvious illegality, Defendants backed away — once litigation had commenced — from their claims that brain research shows boys and girls learn differently.[31] They now deny that BCMS alters teaching strategies on the basis of the gender make-up of classes or

[28] Teachers were told in a mandatory training that "[t]he boys work better together," and experience "[f]ewer disciplinary problems." Pl. Ex. L, 2004 PowerPoint Training, at BCORR 00649.

[29] Improved behavior has been presented as an incentive for choosing single-sex classes. *See* Pl. Ex. F, 2008-2010 Parental Consent Letters, at BC 16475-80 (citing "fewer discipline issues").

[30] This scientific research confirms the experiences of at least some BCMS teachers. Pl. Ex. BB, Excerpts from the Deposition of BCMS Teacher Brittany Whitmore, Jan. 12, 2010 ("Whitmore Dep."), at 75:16-77:21 (one all-boys class was a "rough group of kids" who were "talkative at times, disruptive," and "rowdy"); *see also* Pl. Ex. E, *LEAD* art., at 11 (BCMS teacher stating, "When . . . you bring all the boys together, it is chaos," and, "You can expect a lot of trouble with the guys.").

[31] However, Defendants still proclaim "a growing body of research showing different instructional needs for boys and girls" in more recent letters to parents just as they had for earlier iterations of the program. *Compare* Pl. Ex. F, 2008-2010 Parental Consent Letters, at BC 16475-80, *with id.* 2004-2005 and 2006-2007 Parental Consent Letters, at BCORR 00609, 00611.

students' sex, *see, e.g.*, Pl. Ex. Y, Minton Dep. at 23:2-14, 66:13-67:24; Pl. Ex. BB, Whitmore Dep. at 64:15-24; Pl. Ex. N, East Dep. at 70:12-13; Pl. Ex. G, O'Reilly Dep. at 156:11-20, 160:15-18, and deny espousing the belief that boys and girls learn differently. Pl. Ex. C, Gedling Dep. Vol. 1 at 125:23-25 ("There's not any particular learning styles that necessarily are just unique to girls or just unique to boys.").[32]

Instead, Defendants offer the circular rationale that sex-segregated classes are justified by the fact that parents and students continue to choose them. *See, e.g.*, Pl. Ex. CC, Carr Dep. at 239:5-7 ("I think it's good for the students to have the option to choose their learning environment"); Pl. Ex. G, O'Reilly Dep. at 76:17-18 ("obviously, for students [the gender classes have] worked because they continue to choose to be in them"); *id.* at 147:21-148:1 ("[W]ith the gender plan we are giving students and parents a choice if that is what they want for their student, if that is the environment that the student feels more comfortable in, or the parent feels they will succeed more in that environment."). Defendants also argue that the classes are justified because some students feel more comfortable in single-sex classes.[33]

The preferences of students, parents, or even educators do not constitute an "exceedingly persuasive justification" for segregating students on the basis of a constitutionally protected

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[32] Defendants now also deny that BCMS uses the strategies learned at the Gurian Institute to provide differentiated instruction to boys and girls. Pl. Ex. G, O'Reilly Dep. at 232:11-23. Nor, according to Defendants, do single-sex and coeducational classes differ in atmosphere, Pl. Ex. BB, Whitmore Dep. at 186:8-188:11; "modeling" of the curriculum, Pl. Ex. G, O'Reilly Dep. at 193:7-12; or the materials and curriculum itself, Pl. Ex. Z, Snodgrass Dep. at 54:10-15; Pl. Ex. CC, Excerpts from the Deposition of BCMS Teacher Jennifer Carr, Jan. 11, 2010 ("Carr Dep."), at 25:7-16; Pl. Ex. Y, Minton Dep. at 133:3-134:4.

[33] BCMS personnel repeatedly claimed that single-sex classes allowed students to feel more comfortable. *See, e.g.*, Pl. Ex. CC, Carr Dep. at 26:9; 26:13-14 (single sex classes provide "a comfortable safe environment for them . . . a nice, happy learning climate that the student is comfortable in"); Pl. Ex. G, O'Reilly Dep. at 147:23-25 (offering single sex classes "if that is the environment that the student feels more comfortable in"); *id.* at 158:11-18 (recognizing "the kind of learning needs that maybe they have at that age where they're self-conscious of how they feel when the opposite sex is in the room. It's more so a thing that's more unique to this age because their body is changing, their voice is changing, they're physically changing, emotionally changing. So sometimes [single-sex classes] provide[] more comfort for them."); Pl. Ex. N, East Dep. at 79:11-17 (stating that students' self-esteem and willingness to speak in class increase if members of the opposite sex are not in the room). This rationale was also stated to parents as a purported benefit of single-sex classes. Pl. Ex. F, 2008-2010 Parental Consent Letters, at BC 16475-80.

characteristic, such as sex. *Virginia*, 518 U.S. at 524, 531, 534. In *Hogan*, the Supreme Court invalidated a nursing school's all-female policy as violating the Equal Protection Clause, over the dissent's objection that the decision "prohibits the States from providing women with an opportunity to choose the type of university they *prefer*." *Hogan*, 458 U.S. at 741 (emphasis added); *see also Adams v. Baker*, 919 F. Supp. 1496, 1504 (D. Kan. 1996) (holding parents' preferences that a girl not wrestle on a boys' team insufficient under the Equal Protection Clause to justify girls' exclusion from the boys' team); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1277 (9th Cir. 1981) (holding that customer preferences based on sexual stereotypes could not justify employer's sex discrimination); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388-89 (5th Cir. 1971) (same); 29 C.F.R. § 1604.2(a)(1)(iii) (2009) (same).

These holdings mirror cases establishing that student preferences do not legitimate racial segregation in schools. While the *level* of judicial scrutiny is stricter for racial segregation than for sex segregation, *see Virginia*, 518 U.S. at 532-33, both trigger judicial scrutiny, regardless of whether the segregation is mandatory or is chosen by students on a voluntary basis. In the wake of *Brown v. Board of Education*, some communities offered "voluntary" segregation programs, which courts rejected as unconstitutional, because they nonetheless perpetuated racial discrimination. *See, e.g.*, *Green v. County Sch. Bd. of New Kent*, 391 U.S. 430, 441-42 (1968) (holding that a school board's "freedom of choice" plan allowing students to choose which public school to attend did not constitute a "sufficient step" towards dismantling the segregated public school system); *Kelley v. Bd. of Educ. of Nashville*, 270 F.2d 209, 230 (6th Cir. 1959) (upholding invalidation of a statute "providing for separate schools for white and Negro children whose parents or guardians voluntarily elect that such children attend schools with members of their own race" on the ground that "such schools would not only be separate, but separated because of race"); *United States v. Jefferson County Bd. of Educ.*, 380 F.2d 385, 389 (5th Cir. 1967).

The rationale that students elect sex segregation would therefore be invalid, even if Defendants had offered it contemporaneously, and not *post-hoc* in response to litigation. *Virginia*, 518 U.S. at 533.

B. BCMS' Single-Sex Classes Are Not Substantially Related to Improving Student Achievement

BCMS also articulated the goal of improving student academic achievement as a justification for instituting single-sex classes.[34] A.N.A. Plaintiffs do not dispute that raising student achievement is an important governmental objective.[35] Defendants have failed, however, to demonstrate that excluding boys from all-girls classes and excluding girls from all-boys classes are "substantially related" to the achievement of that goal. The Supreme Court recently emphasized that the government may not classify schoolchildren based on a constitutionally protected characteristic if it cannot "tie[]" the classification to "any pedagogic concept" of what is "needed to obtain the asserted educational benefits." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 726 (2007).

In order to "tie" any rise in student achievement to the segregation of students by sex, Defendants must overcome the law's presumption that there is no legitimate basis for separating students by sex. The Supreme Court has repeatedly advised that "gender . . . generally provides no sensible ground for differential treatment." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S.

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[34] *See* Pl. Ex. A, Def. Responses to Pl. Interrog. No. 1 (BCMS was labeled a school in distress by the Kentucky Department of Education in 2003 and was assigned a highly skilled educator who suggested single-sex classes "to aid in raising test scores and minimizing achievement gaps"); Pl. Ex. O, Meeks Dep. at 84:3-7 (BCMS "had very low test scores" and sex-segregated education was "one of the . . . things that they tried" to "improve those test scores"); Pl. Ex. DD, 2008-2009 BCMS Single-Sex Education Plan ("2008-2009 Gender Plan"), at BCORR 01129 ("Our important objective for offering single-sex classes is to improve the educational achievements of our students.").

[35] Defendants have asserted that one objective was to minimize the gap in achievement between boys and girls. *See* Pl. Ex. E, *LEAD* art., at 1 (quoting Snodgrass as stating: "Boys were performing significantly below girls"); Pl. Ex. M, Critchelow Dep. at 158:19-25; 310:19-21 (rationale of the single-sex program in 2006-2007 school year was to reduce gender gaps); Pl. Ex. EE, Excerpts from Deposition of BCMS Teacher Ann O'Connell, Nov. 23, 2009 ("O'Connell Dep. Vol. 2"), at 49:24-50:7 (closing a gap is always a goal of BCMS teachers); Pl. Ex. C, Gedling Dep. Vol. 1 at 174:10-22 (believes gender pilot program was initiated because of gender gaps in test data). Single-sex classes cannot be considered "substantially related" to both improving overall achievement and closing achievement gaps, because if overall achievement increases, then any preexisting gaps would widen, not close. Pl. Ex. J, Halpern Rep. at 24 ("If single-sex education were really ideally suited for promoting learning for both girls and boys, then it would not reduce the achievement gap; it would increase it."). Moreover, closing a gender gap in achievement does not, in and of itself, enhance student achievement and therefore cannot be considered an important governmental objective. *See id.* ("The easiest way to reduce a performance gap between any two groups is to reduce the performance of the higher achieving group, which is undeniably an undesired outcome.").

432, 440 (1985). "[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform." *Frontiero*, 411 U.S. at 686 (plurality opinion).

Applying these precepts, a court in this Circuit held that the Constitution demands a showing that including members of the other sex in single-sex educational programs would frustrate the asserted educational goal. *Garrett v. Bd. of Educ. of Detroit*, 775 F. Supp. 1004, 1006, 1014 (E.D. Mich. 1991) (enjoining the opening of three all-male elementary school "academies" in inner-city Detroit designed to address the needs of at-risk African-American boys). The court held that, while African-American boys in Detroit had many compelling educational needs and while coeducational programs had failed to improve boys' achievement adequately, the school board had failed to demonstrate that coeducation was the *cause* of the school's failure to improve male achievement and that the exclusion of girls from the academies was substantially related to addressing boys' compelling educational needs. *Id.* at 1008. Defendants likewise fail to meet their heavy burden of demonstrating that "the sex characteristic" bears a direct and substantial relationship to their educational objectives.

1. Defendants cannot demonstrate that excluding students from certain classes based on sex enhances student achievement

BCMS has not put forward any evidence indicating that single-sex classes bore a substantial relationship to any rise in student achievement. Nor can it. Defendants repeatedly testified that BCMS does not systematically assess whether its "gender-based" program is related to boosting student achievement. BCMS personnel testified that they do not compare scores of children in single-sex classes with scores of their peers in coeducational classes and that they do not systematically track particular children's achievement over time to determine whether their scores improved once assigned to single-sex classes. Pl. Ex. M, Critchelow Dep. at 36:24-37:12 (the only assessment of the pilot program was her and another teacher's observations of their classrooms; no written analysis was done);

id. at 151:16-25 (stating she never determined whether gender classes were performing better or worse than other classes for 2005-2006); Pl. Ex. P, O'Connell Dep. Vol. 1 at 121:3-16 (stating that she did not compare grades for 2004-2005 school year by gender, but looked at all students' grades "individually"). Senior administrators testified that they did not "sit down and look at those classes" to determine their effect on student performance, nor are they certain how one would be able to do so. Pl. Ex. O, Meeks Dep. at 86:22-23, 96:14-16 ("[W]ould I know that gender-based classes was the thing that closed the gap? Again, no, I wouldn't.").

In order to show that a challenged classification is "substantially related" to the proffered important governmental objective, "reliance upon anecdotal and weak circumstantial evidence" is "insufficient to carry [the] burden." *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 459 F.3d 676, 693 (6th Cir. 2006) (internal quotation marks omitted). Here, Defendants have offered a combination of anecdotal evidence and unsubstantiated claims of overall academic improvement at the school. *See, e.g.*, Pl. Ex. A, Def. Responses to Pl. Interrog. Nos. 1 & 2; Pl. Ex. C, Gedling Dep. Vol. 1 at 181:11–182:19 (explaining that the only evaluations comparing single-sex and coeducational classes have consisted of "informal tallies" evincing no differences in academic progress); Pl. Ex. G, O'Reilly Dep. at 77:9-12 ("Our gaps are not as significant as they were previously. Is that strictly because of gender, you can't attribute it to that."). But anecdotal evidence does not make "the link showing that" the discriminatory classification is "substantially related" to the goal. *Cmtys. for Equity*, 459 F.3d at 694. Moreover, simply asserting that scores have risen overall is insufficient, because Defendants have not shown that any improvement is substantially related to its single-sex program. Pl. Ex. C, Gedling Dep. Vol. 1 at 181:11–182:8 (BCMS lacks the "time or manpower" to determine whether improvements in test scores can be attributed to sex segregation); Pl. Ex. G, O'Reilly Dep. at 150:4-10 ("Q. Is there any correlation between gender classes and increased test performance? A. For some students, yes. Q. Is

that because of their participation in the gender classes? A. I can't say that it is. I can't say that it isn't."); *id.* at 88:8–89:1; Pl. Ex. O, Meeks Dep. at 94:9-11 ("[F]or the past few years [BCMS has] made steady gains. Do I know it's from [the gender program]? No. I don't have a clue.").

Apparently, Defendants did not even maintain the records necessary to assess whether single-sex classes are substantially related to improved student performance. The expert whom Defendants paid more than $17,000 to input and prepare student achievement data testified that he was unable to determine how students in single-sex classes performed in relation to those in coeducational classes, because BCMS never provided him with information on which students were in single-sex classes and which were in coeducational classes.[36] Pl. Ex. FF, Invoices of Dr. Edward Fergus ("Fergus Invoices"), at BCEF 00619-00623; Pl. Ex. Q, Fergus Dep. at 82:6–84:20, 105:18–106:2, 321:13-25.[37] In these circumstances, Defendants are unable to carry their burden of showing that the single-sex classes were substantially related to achieving their educational goal.

Defendants also are unable to isolate single-sex classes as the cause of improved student achievement. In an effort to improve student performance, Defendants implemented a range of strategies simultaneously, Pl. Ex. N, East Dep. at 91:2 (school was "doing whatever we could"); Pl. Ex. G, O'Reilly Dep. at 57:4-17, including (i) "teaming," Pl. Ex. C, Gedling Dep. Vol. 1 at 57:5-10;[38] (ii) "active engagement strategies," *id.* at 60:8-13; Pl. Ex. G, O'Reilly Dep. at 61:16-25; and (iii) "block

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[36] Defendants dispute their expert's conclusion and, without citation to any evidence, insist that Dr. Fergus' failure to compile a suitable data set "was not simply because of document issues, it was also because there were too many other variables to consider." Pl. Ex. X, Def. *Daubert* Memorandum at 5. This proposition was not corroborated by Dr. Fergus during his deposition; his testimony to the contrary was quite clear.

[37] *See also* Pl. Ex. GG, Fergus Codebook, Breckinridge Middle School Status of Dataset, at BCEF 000494-000497 (describing information on student gender and assignment to single-sex classes as "corrupted"); Pl. Ex. Q, Fergus Dep. at 27:14–31:19, 77:15–79:19, 141:25–146:19, 160:5–161:22. Plaintiffs' expert reached the same conclusion based upon the absence of this data produced by Defendants in discovery: "If, however, you all would like to give me the data, the achievement data, broken out by single-sex and co-ed classes, I would be able to give you a much more definitive answer" as to the classes' effectiveness. Pl. Ex. HH, Excerpts from the Deposition of Patricia B. Campbell, Ph.D., Feb. 11, 2010 at 136:12-15.

[38] "Teaming" allows a teacher of one academic subject to share the same group of students with a team of teachers of other subjects so that faculty can effectively address individual student needs among smaller groups of students. Pl. Ex. G, O'Reilly Dep. at 33:22-35:23.

scheduling," Pl. Ex. M, Critchelow Dep. at 12:12-17, 36:3-19.[39] Defendants, however, did not attempt to determine which, if any, of these diverse strategies was effective. Pl. Ex. N, East Dep. at 91:5-7 ("There's no way to know what does and what doesn't [work] from year to year, so you just keep trying."); Pl. Ex. G, O'Reilly Dep. at 37:5-8 ("There's just a whole variety of things that we've done at the middle school that have led to improvement, and it's hard to single out one thing that might be a reason"). When asked, most staff *denied* that the sex-separated classes were the most significant strategy adopted by the school, and testified that other strategies were more important.[40]

It may be valid, as a matter of educational policy, to persist in utilizing a range of strategies, without knowing which are effective and which are not. The law demands more, however, when a school implements a strategy of separating students on the basis of a protected characteristic, such as sex. To justify using such a strategy, Defendants must show that the sex-based strategy, itself, is "substantially related" to the achievement of the stated important goal. It is undisputed that Defendants have failed to do so.

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[39] Defendants also used the following strategies: (i) computer labs and "Carnegie Math" computer programs, Pl. Ex. Y, Minton Dep. at 40:16–18; Pl. Ex. CC, Carr Dep. at 152:3–158:3; Pl. Ex. G, O'Reilly Dep. at 59:11–61:15; (ii) "ESS," an after-school tutoring program, Pl. Ex. Y, Minton Dep. at 40:18–21; (iii) "CHAMPs," a classroom discipline management program, Pl. Ex. M, Critchelow Dep. at 111:7–113:3; Pl. Ex. Y, Minton Dep. at 162:2–4; Pl. Ex. N, East Dep. at 137:4–8; Pl. Ex. G, O'Reilly Dep. at 58:2–59:10; (iv) "differentiated instruction," Pl. Ex. M, Critchelow Dep. at 31:25-32:7; Pl. Ex. P, O'Connell Dep. Vol. 1 at 119:9–16; Pl. Ex. G, O'Reilly Dep. at 141:6-11; 159:11-160:18; Pl. Ex. Z, Snodgrass Dep. at 90:25–92:15; (v) homogeneous and heterogeneous student grouping, Pl. Ex. Z, Snodgrass Dep. at 104:24–105:8; (vi) cooperative group work, Pl. Ex. CC, Carr Dep. at 146:15–147:10; (vii) "active engagement" and "literacy strategies," Pl. Ex. G, O'Reilly Dep. at 61:16-25, 63:6–67:12; and (viii) innovative uses of technology, *id.* at 69:7–71:11.

[40] *E.g.*, Pl. Ex. G, O'Reilly Dep. at 33:22-34:4 ("Q: What would you say has been the most significant change in terms of methods of instruction or operation since you've been there? A: . . . Teaming . . . began in . . . either 04-05 or 05-06"); Pl. Ex. C, Gedling Dep. Vol. 1 at 57:5-10 (testifying that the most significant change at BCMS during her tenure is the implementation of the team concept, because limiting the number of students for which teachers are responsible is helpful for the staff and students); Pl. Ex. M, Critchelow Dep. at 35:11-18 (testifying that she did not know whether changes in student performance were "a result of the single-gender or because of the block scheduling with more concentrated time"); Pl. Ex. O, Meeks Dep. at 73:25-75:17 (attributing improvement to a greater focus on individual students, review of work samples, accountability within the school).

2. Defendants cannot rely on research to establish that single-sex classes are substantially related to improving student achievement

In the absence of specific evidence establishing that single-sex classes at BCMS are substantially related to improved student achievement, Defendants cannot rely on academic research literature to fill the gap, because it is undisputed that the research on single-sex education is equivocal. An expert in systematic research review and meta-analysis[41] evaluated what is acknowledged to be the "best available" literature review of research on single-sex schools and concluded that it did not form a sound basis for instituting sex-segregated education. Pl. Ex. II, Expert Report of Jeffrey C. Valentine, Ph.D. ("Valentine Rep."), at 6-8. This literature review, which was commissioned by the U.S. Department of Education and relied upon in promulgating the 2006 DOE regulations, conceded that the research is "equivocal." Pl. Ex. JJ, 2005 U.S. Department of Education Report, *Single-Sex Versus Coeducational Schooling: A Systematic Review* ("2005 DOE Report"), at x; s*ee also* Part V.B., *infra*. Such mixed results are a far cry from the required "exceedingly persuasive justification."

In sum, viewing the evidence in the light most favorable to Defendants, they have failed to meet their legal burden to demonstrate that they based their separation of students by sex on an exceedingly persuasive justification. BCMS' proffered objectives for the "gender-based" classes are constitutionally infirm, and Defendants have not demonstrated that BCMS' separation of students by sex is substantially related to improving student achievement.

IV. BCMS VIOLATES THE 2006 DOE REGULATIONS

The BCMS single-sex education program has never satisfied the 2006 DOE regulations purporting to allow sex segregation under limited circumstances.[42] First, the program was implemented three years before the regulations took effect. *See* 71 Fed. Reg. 62,542 (Oct. 25, 2006)

[41] These are two techniques used by social scientists to synthesize and evaluate multiple research studies.

[42] A.N.A. Plaintiffs' position is that any construction of the 2006 DOE regulations that would permit sex-segregated classes in a coeducational school would render the regulations invalid as contrary to Title IX and the Constitution, to which they are necessarily subordinate. *See infra* Part V; U.S. Const. art. VI, cl. 2 (Supremacy Clause). However, even if these regulations were valid, BCMS' sex segregation still fails to comply with their nondiscrimination requirements.

(codified at 34 C.F.R. § 106.34). Once the regulations took effect, BCMS did not satisfy their stringent requirements. Far from making single-sex education "a tool for educators to try," Pl. Ex. X, Def. *Daubert* Memorandum at 9, the regulations presume that sex segregation constitutes discrimination, 34 C.F.R. § 106.34(a) ("[A] recipient *shall not* provide or otherwise carry out any of its education programs or activities separately on the basis of sex, or require or refuse participation therein by any of its students on the basis of sex") (emphasis added), and only tolerate it upon a showing that *each* single-sex class meets the following four requirements:

1. that sex segregation is based on an enumerated "important objective," and is "substantially related" to achieving that objective;

2. that sex segregation is implemented in "an evenhanded manner";

3. that enrollment in the classes is "completely voluntary"; and

4. that a school offer "all other students, including students of the excluded sex, a substantially equal coeducational class."

34 C.F.R. § 106.34(b)(1)(i)-(iv). These requirements are drafted conjunctively; BCMS' failure to meet even one constitutes a violation of the regulations. Defendants have consistently failed to meet the first two requirements in implementing the BCMS program since the 2003-2004 school year. Therefore, even if Defendants complied with the third and fourth requirements in some years, their failure to meet all four for each single-sex class offered at BCMS is fatal to their compliance with the regulations.

1. Defendants must first identify an important objective, and establish a substantial relationship between that objective and each single-sex class offered, a requirement mirroring the Constitutional demand. 34 C.F.R. § 106.34(b)(1)(i); Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed. Reg. 62,530, 62,533 (Oct. 25, 2006) ("[F]ailure to have a [genuine] justification, *i.e.*, an important objective and a substantial relationship between [the sex segregation furthering that] objective . . . would be sex

discrimination.") (preamble to the 2006 DOE regulations). *See* discussion *supra* at Part III. The justification cannot be invented *post hoc* in response to litigation. 71 Fed. Reg. at 62,533.

The DOE regulations recognize only two "important objectives": sex segregation must be *either* (A) part of a recipient's overall established policy to provide diverse educational opportunities, *or* (B) to address the particular, identified education needs of its students. 34 C.F.R. § 106.34(b)(1)(i). As to the first, BCMS had no "established policy" of providing "diverse educational opportunities" before implementing its sex segregation program, nor indeed any policy at all regarding the gender program until the 2008-2009 school year, when a policy was created *post hoc* in response to litigation. *See* Pl. Ex. C, Gedling Dep. Vol. 1 at 219:21-23 (prior to 2008-2009, "we didn't have a formal plan written previously at all, in trying to make sure that we followed the [2006 DOE] regulation"). Even if such a policy were established prior to the 2003-2004 pilot program, "offering an additional education option," consisting of single-sex classes, Pl. Ex. A, Def. Reponses to Pl. Interrog. No. 2, fails to provide the range of "diverse educational opportunities" required by the DOE regulations. 71 Fed. Reg. at 62,535 (requiring that "the range of choices offered to students and parents [not be] limited to single-sex schools and classes and coeducational schools and classes"). BCMS would have to offer single-sex classes in addition to other existing options. *Id.* Defendants cannot satisfy this prong by "simply establish[ing] a single-sex class and declar[ing] that the class by definition promotes diversity," as they attempt to do here. *Id.*; Pl. Ex. A, Def. Reponses to Pl. Interrog. No. 2.

In any event, the Supreme Court has held that providing single-sex options does not serve a constitutionally adequate interest in "diversity."[43] The Court has rejected attempts to use the language of "diversity" to promote single-sex learning environments. *Virginia*, 518 U.S. at 545. Rather, the diversity interest recognized as genuinely compelling is the creation of a diverse student body, which

[43] In *Virginia*, VMI argued that providing single-sex education as one option among many was an important governmental objective, and that the exclusion of women from VMI was essential to that end. 518 U.S. at 545. The Court rejected this analysis as "notably circular," and a "bent and bowed" version of the constitutional standard. *Id.*

breaks down stereotypes and enables students to understand persons who are different than they. *Grutter v. Bollinger*, 539 U.S. 306, 324-34 (2003).

Under the regulations, Defendants also could claim that their program was instituted to address the "particular, identified educational needs" of BCMS students. 34 C.F.R. § 106.34(b)(1)(i)(B). But any effort to improve the overall achievement at BCMS fails to focus on the subset of academically "limited or deficient" *students* as required by the DOE regulations. 71 Fed. Reg. at 62,535. Defendants assert that sex segregation was initially implemented after BCMS was labeled a "school in assistance" for low standardized test scores. Pl. Ex. A, Def. Reponses to Pl. Interrog. No. 1. Defendants do not address the "particular, identified educational needs" of students by offering single-sex classes to every BCMS student.

BCMS' sex segregation also is not "substantially related" to achieving the objectives named in the regulations. Defendants have only proffered a correlation between an overall "improvement in test scores, educational environment, discipline and . . . achievement gaps," evidenced by "Kentucky Performance Reports, grades, discipline records, anecdotal evidence, as well as teacher, student, parent and administrator input." Pl. Ex. A, Def. Reponses to Pl. Interrog. Nos. 1 & 2; *see also* Pl. Ex. X, Def. *Daubert* Memorandum at 9 n.4. As explained *supra*, Part III.B.1, Defendants have never established a nexus between single-sex classes and these improvements, much less how *each* sex-segregated course offered at BCMS is substantially related to achieving an important educational objective. The DOE regulations require more than a "hypothesized" link between sex segregation and educational benefits. 71 Fed. Reg. at 62,533 (quoting *Virginia*, 518 U.S. at 533).[44] As in the constitutional context, assuming that *all* students are "distracted" by the opposite sex is exactly the type of reliance on "overly

[44] Defendants must conduct a fact-specific evaluation at least every two years to ensure that single-sex classes are "substantially related" to achieving an important objective. 34 C.F.R. § 106.34(b)(4)(i); 71 Fed. Reg. at 62,539; *see also* 34 C.F.R. § 106.71 (incorporating record retention requirements for recipients demonstrating compliance with DOE's regulations prohibiting discrimination).

broad generalizations about the different talents, capacities, or preferences of either sex" considered to be discrimination under the regulations. 34 C.F.R. § 106.34(b)(4)(i); 71 Fed. Reg. at 62,533-34 (same).[45]

2. BCMS violated the 2006 DOE regulations by failing to implement its program objectives in an evenhanded, nondiscriminatory manner. Defendants must implement either of the "important objectives," 34 C.F.R. § 106.34(b)(4)(i), in a manner consistent with the specific requirements of each objective and must "provide equal educational opportunity to students regardless of their sex." 71 Fed. Reg. at 62,536.

Evenhanded implementation requires Defendants to take certain steps in determining whether such classes should be offered in the first place. BCMS must determine "which classes in which subjects should be offered as a single-sex opportunity and to whom" before proceeding to offer single-sex classes in furtherance of diverse educational opportunities. *Id.* If meeting particular, individualized needs of students, BCMS would be further obligated to make an "unbiased assessment, based on evidence, of the educational needs of both sexes within a particular setting." Once those needs are ascertained, BCMS would determine "based on an analysis of evidence, that the single-sex nature of the class would be substantially related" to meeting those needs. *Id.* at 62,536, 62,535.

As discussed in Part III.B.1, *supra*, BCMS has never undertaken any evidence-based analysis in deciding to initially implement, or continue offering, single-sex classes. Nor have they attempted to decide which students, if any, should be targeted. While they concede they have an obligation to evaluate the program every two years, Pl. Ex. X, Def. *Daubert* Memorandum at 8-9, the two-year interval is only a procedural obligation; their substantive obligation to ensure that the program is

[45] Defendants also have not shown that single-sex classes are "substantially related" to improving discipline at BCMS. 71 Fed. Reg. at 62,536 (discipline and other social needs may be permissible objectives only if "the single-sex nature of the class [is] substantially related to the objective"). Instead, Defendants attribute any improvement in discipline to the CHAMPs program, a comprehensive discipline plan implemented during the same years as its gender program. *See* Pl. Ex. G, O'Reilly Dep. at 58:2–59:10; Pl. Ex. N, East Dep. at 137:4–8; Pl. Ex. Y, Minton Dep. at 162:2–4.

implemented in a nondiscriminatory manner — including analyzing "evidence" confirming a substantial relationship between single-sex classes and meeting student needs — is ongoing. 71 Fed. Reg. at 62,539; 34 C.F.R. § 106.34(b)(4). Because Defendants have never performed such an analysis, they failed to satisfy the "evenhandedness" requirement at any time.

3. Defendants fail to meet the requirement that enrollment in the sex-segregated program be completely voluntary. A school cannot, for example, "for administrative convenience, assign or attempt to 'steer' students" into single-sex classes. 71 Fed. Reg. at 62,537; *see also* 34 C.F.R. § 106.34(b)(1)(iii). BCMS scheduled single-sex classes as the default scheduling configuration for the 2004-2005, 2005-2006, 2006-2007, and 2007-2008 school years. Pl. Ex. F, 2004-2008 Parental Consent Letters at BCORR 00611, 00610, 00609, 00608. Between 2004 and 2006, if parents failed to return the opt-out forms provided by the school, students would be placed by BCMS staff into single-sex classes. Pl. Ex. C, Gedling Dep. Vol. 1 at 100:15-16 ("So when parents didn't return those [opt-out forms], we would put the students in single-gender classes."). In 2007-2008, students were assigned *mandatorily* to single-sex classes without parental authorization. Pl. Ex. C, Gedling Dep. Vol. 1 at 100:20-23. They were only given the option to switch into some coeducational classes well into the school year and after much protest. Even then, students did not have the option to choose coeducational related arts classes. Pl. Ex. F, 2007-2008 Parental Consent Letter. Furthermore, as described below, the coeducational alternatives available to BCMS students were not substantially equal as required under the 2006 DOE regulations.

BCMS unlawfully "steered" students into single-sex classes. Principal Gedling acknowledged that BCMS counseled parents on whether to opt for their students to remain in single-sex classes, describing to parents, for example, the "benefits of building self-confidence in single-gender classes," and that the school's practice of steering students toward single-sex classes only changed "[w]hen we

had the lawsuit." Pl. Ex. C, Gedling Dep. Vol. 1 at 106:9-16, 107:7-18, 108:19-23. Similarly, in describing the single-sex program in the opt-out letters to parents, BCMS improperly "steered" students toward single-sex classes by emphasizing the purported benefits of those classes to the exclusion of any harms, in violation of the 2006 DOE regulations. The letters state that "[g]ender classes provide an atmosphere that enables students to focus on academics instead of the social and hormonal problems that occur in the middle school setting"; that "[i]nterest in gender-based classes continues to increase in Kentucky schools"; and that single-sex classes were supported by a "growing body of research." Pl. Ex. F, 2004-2005, 2005-2006, 2006-2007 Parental Consent Letters at BCORR 00611, 00610, 00609. The letters included comments from students praising single-sex classes for improving their grades, limiting "distractions," and minimizing their "fear of asking questions." *Id.* Even the 2007-2008 parent letter, which was prompted by what BCMS characterized as "some parents/guardians [being] dissatisfied" with single-sex classes, touted the classes as a strategy to "enable [each student] to be successful and eventually become a productive citizen." *Id.*, 2007-2008 Parental Consent Letter at BCORR 00608.

In the parent letters, BCMS neglected to address the risk of harm to students associated with government-sponsored separation — whether "voluntary" or not — based on sex, including include the risk of depriving students of certain opportunities, reinforcing gender stereotypes, and "flattening the differences among boys and among girls." Pl. Ex. AA, Kimmel Rep. at 21-22. The evidence suggests that at least some of these harms occurred at BCMS. *See, e.g.*, Pl. Ex. R, A.N.A. Dep. at 73:23-74:12 (describing all-girls classes as more "dramatic" and girls in those classes as "catty," exemplifying common gender stereotypes). Grouping children by sex can exacerbate discipline problems and bullying, in particular in all-boys groupings. Pl. Ex. AA, Kimmel Rep. at 15-20; *accord* Pl. Ex. BB, Whitmore Dep. at 75:16-77:21 (describing an all-boys class of hers with particularly severe behavioral

issues). And researchers have found that classroom management and discipline in single-sex classes reinforce gender stereotypes. Pl. Ex. J, Halpern Rep. at 15, (citing Datnow, *et al., Is single-gender learning viable in the public sector? Lessons from California's pilot program,* 2001).[46] Accordingly, the evidence is undisputed that BCMS' single-sex program was not "completely voluntary."

4. BCMS has not consistently offered *substantially equal coeducational alternatives* as required by the 2006 DOE regulations. Defendants do not offer coeducational classes that are the same size as single-sex classes. Pl. Ex. H, Gedling Dep. Vol. 2 at 34:24–35:25 (since she became principal, two of the fewer than six classes that exceeded state capacity for enrollment were all-girls classes). Single-sex classes are smaller when compared to the coeducational classes. It is undisputed that class size has an impact on learning and student achievement. *See* Pl. Ex. LL, Excerpts from the Deposition of Kathleen M. Ronay, Mar. 12, 2010 at 143:20-25, 146:9-13 (noting that some research shows that class size, when below 15 students, markedly improves student performance); Pl. Ex. J, Halpern Rep. at 15 (listing smaller class size as one of the "resources related to the enhancement of student achievement"); *see also* Pl. Ex. C, Gedling Dep. Vol. 1 at 99:2-100:4 (noting preference for smaller class sizes, particularly class sizes below 25 students).

V. EVEN IF BCMS SATISFIED THE 2006 DOE REGULATIONS, THOSE REGULATIONS ARE CONTRARY TO LAW

Defendants' protestations that BCMS' single-sex program is lawful because it complies with the 2006 DOE regulations are unavailing because, as A.N.A. Plaintiffs have argued throughout this case,[47] those regulations are contrary to law. Even if Defendants were found to comply with the regulations, which, as explained above, they do not, their program independently violates Title IX and

[46] The cited study found that, when boys' and girls' classes were on the same campus or taught by same teachers, it "actually served to create and maintain theories of gender," because it "allowed teachers to constantly compare boys and girls." Pl. Ex. KK, Amanda Datnow, *et al., Is Single Gender Schooling Viable in the Public Sector? Lessons from California's Pilot Program*, May 20, 2001, ANA-DH 01590 to ANA-DH 01674, at p. 51.

[47] *See* Pl. Ex. MM, A.N.A. Plaintiffs' Response to Defendants United States Department of Education and Margaret Spellings' Motion to Dismiss (Docket Entry No. 103), at 15-25, 27-38.

the Constitution. Defendants cannot cure these defects by relying on regulations that themselves violate Title IX, are not entitled to judicial deference, violate the standards for reasoned agency decisionmaking, and violate the Constitution.

A. BCMS Cannot Rely on the 2006 DOE Regulations, Because They Violate Title IX and are not Entitled to *Chevron* Deference

Defendants cannot avoid their own Title IX violation by relying on the 2006 DOE regulations, because those regulations do not constitute a reasonable interpretation of Title IX and are not entitled to judicial deference. A court reviewing an agency's interpretation of a statute that it administers must utilize the two-step process outlined by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). First, the court determines "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed" legislative intent. *Id.* at 842-43. Where "Congress has not directly addressed the precise question at issue," and "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

DOE's 2006 regulations fail at "Step One" of the *Chevron* inquiry, because Congress has directly addressed the question and "left no gap . . . for the agency to fill." *Carcieri v. Salazar*, 129 S. Ct. 1058, 1066 (2009). As discussed above, Title IX provides that no student can "be excluded from participation in, be denied the benefits of, or be subjected to discrimination" in any "education program or activity" receiving federal funding. 20 U.S.C.A. 1681(a) (West 2010). While the statute enumerates "a list of narrow exceptions" to this broad rule, *Jackson*, 544 U.S. at 173; 20 U.S.C.A. §§ 1681(a)(1)-(9), 1686 (West 2010), it contains no exception for the sex-based exclusion of students from classes in a coeducational school, and an agency may not create additional exceptions beyond those enumerated in the statute. *See supra*, Part I.

The 2006 DOE regulations allow exclusion of students from classes based on sex when the requirements of 34 C.F.R. § 106.34(b)(1)(i)-(iv) are met, in direct contravention of the statute. Because "the text of the statute is unambiguous" as to whether coeducational recipients may exclude students from classes based on sex, "and, therefore, the intent of Congress is clear, that is the end of the matter" under the *Chevron* inquiry. *Chao v. OSHRC*, 540 F.3d 519, 523 (6th Cir. 2008) (internal quotations omitted). When, as here, "the statute is unambiguous, there has been no delegation to the agency to interpret the statute and therefore the agency's interpretation deserves no consideration at all, much less deference." *Terrell v. United States*, 564 F.3d 442, 450 (6th Cir. 2009) (citing *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001)).[48]

Even if Title IX could be read to have "explicitly left a gap for an agency to fill," *Chevron*, 467 U.S. at 843, the 2006 DOE regulations would not be entitled to deference, because they conflict with the regulations of all other executive agencies charged with interpreting Title IX. 20 U.S.C.A. § 1682 (West 2010). More than twenty-five federal agencies have issued such regulations.[49] Each, apart from

[48] By contrast, courts have recognized that the DOE's regulations implementing Title IX in the realm of athletics are entitled to *Chevron* deference, "'because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX.'" *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 288 (2d Cir. 2004) (quoting *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (2d Cir. 1993) (citing Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974))); *see also Neal v. Bd. of Trustees of the Cal. State Univs.*, 198 F.3d 763, 770 (9th Cir. 1999) ((noting with regard to the explicit delegation of authority to the agency to create standards for athletic programs under Title IX, "Under *Chevron*, where Congress has expressly delegated to an agency the power to 'elucidate a specific provision of the statute by regulation,' that agency's regulations should be accorded 'controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.'") (citations omitted)).

[49] These agencies include the U.S. Department of Homeland Security, 6 C.F.R. § 17.415 (2010); the U.S. Department of Agriculture, 7 C.F.R. § 15a.34 (2010); the U.S. Nuclear Regulatory Commission, 10 C.F.R. § 5.415 (2010); the U.S. Department of Energy, 10 C.F.R. § 1042.415 (2010); the U.S. Small Business Administration, 13 C.F.R. § 113.415 (2010); the National Aeronautics and Space Administration, 14 C.F.R. § 1253.415 (2010); the U.S. Department of Commerce, 15 C.F.R. § 8a.415 (2010); the Tennessee Valley Authority, 18 C.F.R. § 1317.415 (2010); the U.S. Department of State, 22 C.F.R. § 146.415 (2010); the U.S. Agency for International Development, 22 C.F.R. § 229.415 (2010); the U.S. Department of Housing and Urban Development, 24 C.F.R. § 3.415 (2010); the U.S. Department of Justice, 28 C.F.R. § 54.415 (2009); the U.S. Department of Labor, 29 C.F.R. § 36.415 (2009); the U.S. Department of the Treasury, 31 C.F.R. § 28.415 (2009); the U.S. Department of Defense, 32 C.F.R. § 196.415 (2009); the U.S. National Archives and Records Administration, 36 C.F.R. § 1211.415 (2009); the U.S. Department of Veterans Affairs, 38 C.F.R. § 23.415 (2009); the U.S. Environmental Protection Agency, 40 C.F.R. § 5.415 (2009); the U.S. Department of the Interior, 43 C.F.R. § 41.415 (2009); the Federal Emergency Management Agency, 44 C.F.R. § 19.415 (2009); the U.S. Department of Health and Human Services, 45 C.F.R. § 86.34 (2009); the National Science Foundation, 45 C.F.R. § 618.415 (2009); the Corporation

DOE, expressly prohibits coeducational institutions from segregating classes by sex, stating that "[a] recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis."[50]

When a Spending Clause statute like Title IX authorizes any agency, regardless of mission, to promulgate regulations affecting it, there is "not the same basis for deference predicated on expertise as [the Supreme Court] found with respect to the Environmental Protection Agency's interpretation of the 1977 Clean Air Act Amendments in *Chevron*." *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 643 n.30 (1986) (examining regulations promulgated by HHS implementing the Rehabilitation Act). A contrary rule would create the danger that a regulated party would "be faced with multiple and perhaps conflicting interpretations of the same requirement." *Collins v. Nat'l Transp. Safety Bd.*, 351 F.3d 1246, 1253 (D.C. Cir. 2003). The 2006 DOE regulations create such a dilemma for funding recipients such as Defendants, who cannot provide the single-sex classes contemplated by the regulations without violating the regulations of other agencies.

DOE's new interpretation is at odds with its own longstanding, congressionally-approved regulations. "The fact that [an] agency's interpretation 'has been neither consistent nor longstanding . . . substantially diminishes the deference to be given to [the agency's] present interpretation of the statute.'" *Bowen*, 476 U.S. at 646 n.34 (quoting *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 412 n.11 (1979)). As explained *supra*, the prior DOE regulations had been specifically approved by Congress. The 2006 regulations represent a sea change from that longstanding, authoritative interpretation; accordingly, they are "entitled to considerably less deference than a consistently held

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for National and Community Service, 45 C.F.R. § 2555.415 (2009); and the U.S. Department of Transportation, 49 C.F.R. § 25.415 (2009).

[50] *See supra* note 49; *see also* discussion at *supra* Part I.C. (discussing HHS and USDA regulations and explaining that single-sex classes violate this regulatory mandate).

agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447 n.30 (1987) (internal quotation marks omitted).

Finally, *Chevron* deference does not apply where an agency's interpretation of a statute raises serious constitutional issues, even if the interpretation would otherwise be permissible. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574-75 (1988). The 2006 DOE regulations' interpretation of Title IX raises grave constitutional questions under the Equal Protection Clause, as set forth in Part V.C., *infra*. Therefore, the Court should "independently inquire whether there is another interpretation, not raising these serious constitutional questions, that may fairly be ascribed" to the statute. *Id.* at 577. The Court must construe the statute to avoid constitutional difficulties "if such a construction is not plainly contrary to the intent of Congress." *Chamber of Commerce v. FEC*, 69 F.3d 600, 605 (D.C. Cir. 1995). A construction of Title IX that avoids constitutional difficulties accords with the intent of Congress as expressed in Title IX's passage and in its approval of the original HEW Title IX regulations forbidding sex-segregated classes.[51]

B. BCMS Cannot Rely on the 2006 Regulations, Because They Are Arbitrary and Invalid

Defendants cannot rely on the 2006 DOE regulations, because they are not "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 844-45 ("regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute").[52] Where an agency failed to articulate a "rational connection between the facts found and the choice made" in promulgating its regulation, the regulation is not entitled to weight. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). An "agency's action must be upheld, if at all, on the basis

[51] *See supra* Part I.C.

[52] The legal inquiry under step two of the *Chevron* test concerning the permissibility or reasonableness of agency interpretations overlaps with the substantive rationality review under the "arbitrary and capricious" test set forth in *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983). *See Republican Nat'l Comm. v. FEC*, 76 F.3d 400, 407 (D.C. Cir. 1996) ("Our [*State Farm*] inquiry here overlaps somewhat with our *Chevron* step-two analysis."); *Arent v. Shalala*, 70 F.3d 610, 615 (D.C. Cir. 1995) ("[I]n some respects, *Chevron* review and arbitrary and capricious review [under *State Farm*] overlap at the margins.").

articulated by the agency itself" at the time of the decision, *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 50 (1983), including the administrative record before the agency, *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).[53]

This record shows that the DOE's decision to promulgate the 2006 regulations was contrary to the available evidence. Approximately ninety-five percent of public comments voiced opposition to the Notice of Intent to Regulate ("NOIR"), 67 Fed. Reg. 31,098 (May 8, 2002), and Notice of Proposed Rulemaking ("NPRM"), in Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 69 Fed. Reg. 11,276 (Mar. 9, 2004), which the DOE issued prior to issuing the final 2006 regulations.[54] In the NOIR, DOE stated that it intended "*to provide more flexibility for educators* to establish single sex classes and schools at the elementary and secondary levels." Nondiscrimination on the basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 67 Fed. Reg. 31,098 (May 9, 2002) (emphasis added),[55] but giving educators "flexibility" to segregate students by sex is contrary to Title IX's purpose of prohibiting sex discrimination in education and to DOE's mandate to effectuate Title IX. *See* discussion *supra* Part I.B.

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[53] DOE produced more than 14,100 pages of documents in response to a FOIA request for all documents before the agency at the time it promulgated the 2006 Regulations. Counsel for A.N.A. Plaintiffs submitted a FOIA request to the DOE, dated July 6, 2009, seeking, among other things, documents before the agency when it promulgated the 2006 regulations. *See* Pl. Ex. NN, FOIA Request No. 09-01520-F, by the American Civil Liberties Union, dated July 6, 2009, and Response by the U.S. Department of Education, dated July 16, 2009 ("FOIA Request & Response"). In response, the DOE produced ten sets of documents, including research studies and syntheses, internal memoranda and communications, and public comments. *Id.* For the Court's convenience and ease of reference, a table of relevant quotations from key public comments is attached as Exhibit PP to the Braunstein Decl. ("Table of Comments"). The public comments cited therein are also attached as Exhibit QQ to the Braunstein Decl. ("Public Comments").

[54] In 2004, the DOE received a total of 5,860 comments in response to the NPRM, with 5,506 comments opposing the proposed regulations, 295 in support of them, and 62 categorized as "other." *See* Pl. Ex. RR, DOE Regulatory Action Memorandum, dated July 6, 2005, by James F. Manning, Office of Civil Rights, to the Secretary ("Regulatory Action Memo"), at ANA-DOE-1022. The comments were submitted by an array of individuals, including advocates, researchers, concerned citizens, students, and even former federal Department of Education employees.

[55] The DOE's goal of providing educators more "flexibility" to create single-sex schools, classes and activities was also reflected in a DOE Regulatory Action Memorandum, dated July 6, 2005, by James F. Manning, Office of Civil Rights, to the Secretary. *See* Pl. Ex. RR, Regulatory Action Memo at ANA-DOE-1021.

DOE's decision to promulgate the regulations was not supported by the available research. The 2005 DOE Report, which was prepared by a team of scientists working with the RMC Research Corporation,[56] undertook a systematic review of the published research on the effects of single-sex schools, Pl. Ex. JJ, 2005 DOE Report, at 1,[57] with the objective of identifying research findings for or against the efficacy of single-sex education,[58] but even this Report had serious limitations. Only 40 of the 2,221 studies on single-sex schooling identified in a search of the available published literature were included, because the vast majority of studies did not meet applicable standards for study design.[59] The Report cautioned that "the studies in this review may over or understate the true effects of [single-sex] schooling." *Id.* at xi.[60] In addition, the Report acknowledged that the available data was limited to certain types of schools, primarily high schools and a preponderance of Catholic schools, *see id.* at 86,[61] and that it excluded research on the effects of single-sex *classes* within a coeducational school, such as BCMS. *See id.* at x.

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[56] The team of researchers included, among others, Jeffrey Valentine, Ph.D., an expert witness in this litigation for A.N.A. Plaintiffs.

[57] The failure of the 2005 DOE Report to include all available research studies — not just published studies — on single-sex schooling in its systematic review, or to explore the impact of this omission on its conclusions, suggests that the Report's results may be biased. *See* Pl. Ex. II, Valentine Rep. at 4; *see also* Pl. Ex. SS, Jeffrey C. Valentine, *Manuscript: A Comprehensive Research Agenda for Single Sex Schooling*, Duke University (undated), at ANA-DOE-4227, 4237.

[58] According to a study design document titled *Study of Single Sex Schools: OMB Clearance Package, Supporting Statement, and Data Collection Instruments*, which was submitted to the DOE on December 2, 2004, the review was to "be the first step toward obtaining rigorous scientific data on the characteristics and effects of public single sex schools and will provide guidance for future research on single sex schooling." Pl. Ex. TT, Study of Single Sex Schools, at ANA-DOE-4202 (at p. 1).

[59] While the reviewers sought to apply the standards set forth by the What Works Clearinghouse (a 2002 DOE initiative that provides guidelines for reviewing scientific evidence and research quality), they were forced to resort to relaxing those standards in order to include <u>*any*</u> studies in the systematic review. Pl. Ex. JJ, 2005 DOE Report, at 5.

[60] The Report acknowledged that because of the small number of studies included in the review, it could draw only limited conclusions. *See* Pl. Ex. JJ, 2005 DOE Report, at xv (noting findings "came from a pair of studies, indicating the lack of high-quality research on these important criteria") (emphasis added); *id.* at xvi (casting doubt on findings that "generally do not appear in *more than one or two studies* that made it" into the review) (emphasis added).

[61] *See also* Pl. Ex. VV, Excerpts from the Deposition of Diane F. Halpern, Ph.D., Mar. 15, 2010 ("Halpern Dep."), at 199:12–18 (noting that the DOE "had to relax their own standards" in the commissioned report, "often comparing private or parochial single-sex with public coed" and that "was not often done with the appropriate controls"). Significantly, "not a single study in the quantitative review reported findings from a sample of middle school students." Pl. Ex. JJ, 2005 DOE Report, at 86; *see* Pl. Ex. VV, Halpern Dep. at 245:24–246:10 (discussing the 2005 DOE Report's failure to include any studies at the middle school level and noting that a DOE "follow-up" study's "lone finding [on single-sex education] for middle school is that it worsened behavior").

In any event, DOE's Report found that the data on single-sex schooling was "equivocal" at best and that, "for many outcomes, there is no evidence of either benefit or harm." *Id.* The Report further found "limited support for the view that single-sex schooling may be harmful or that coeducational schooling is more beneficial for students." *Id.* Internal DOE documents likewise noted that research findings as to single-sex education were "mixed" and that this "precludes drawing firm conclusions for policy development and program management." Pl. Ex. UU, *Single Sex Schools: Their Characteristics and Effects*, at ANA-DOE-4167. Public comments highlighted the equivocal nature of the research and noted that "there is no consistent research demonstrating that single-sex education produces significant educational benefits or enhances student achievement." *See* Pl. Ex. QQ, Public Comments, at ANA-DOE-13047 to 13048; *see also* Pl. Ex. PP, Table of Comments, at pp. 6-13.

While acknowledging that many comments "recommended that the Department postpone amendment of the regulations … until the completion of additional scientific research that concludes that single-sex education is beneficial to students," 71 Fed. Reg. at 62,532, DOE refused to delay or modify the proposed regulations, pointing to its 2005 Report. Pl. Ex. JJ, 2005 DOE Report, at xvii. Although DOE failed to consider *any* evidence concerning the effects of *single-sex classes* within coeducational schools, the regulations "expand flexibility" to educational institutions in implementing such classes. *See* 71 Fed. Reg. at 62,530. Despite permitting sex-based classifications that Title IX otherwise prohibits, the regulations fail to provide adequate safeguards or require enhanced oversight of schools.[62] Finally, DOE failed to account for the increased likelihood of litigation against schools

[62] Comments received by DOE addressed this issue. An individual who had been employed by DOE and its predecessors for decades commented that, "[w]ithout stringent oversight," society would not "learn from the schools that decide to use single-sex education," because no one will "know when or why schools have decided to use single-sex education, what they hope to achieve and if they indeed did achieve it, and if there have been any unintended negative outcomes." Pl. Ex. QQ, Public Comments, at ANA-DOE-09970. Educational and advocacy organizations noted the "unacceptable risk" associated with lack of oversight and raised concerns about schools monitoring their own compliance. *Id.* at ANA-DOE-11788; *see also* Pl. Ex. PP, Table of Comments, at pp. 14-16. DOE responded, "these regulations and our current enforcement requirements and procedures are sufficient to ensure compliance," 71 Fed. Reg. at 62,533, and required that

implementing single-sex programs arising from readily foreseeable constitutional and Title IX violations.[63] Accordingly, DOE's promulgation of the regulations was arbitrary, *see State Farm*, 463 U.S. at 43; *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 762-64 (6th Cir. 1995) (holding that the FCC "acted arbitrarily" in promulgating rules when it "provided little or no support for its assertions"), and Defendants may not rely on the regulations to justify BCMS' single-sex program.

C. BCMS Cannot Rely on the 2006 DOE Regulations, Because They Violate the Equal Protection Clause

Defendants cannot rely on the 2006 DOE regulations, because those regulations violate the Equal Protection Clause. The regulations approve single-sex classes adopted to "improve educational achievement . . . through a recipient's overall established policy to provide diverse educational opportunities," 34 C.F.R. §106.34(b)(1)(i)(A), suggesting that a school's interest in offering single-sex classes serves the interest of "diversity," and that recipients have an important governmental interest in sex-segregated classrooms, without considering whether this method achieves a desirable educational result. *See supra*, Part IV.1. This focus on "'means' rather than 'end' … misperceive[s] [Supreme Court] precedent." *Virginia*, 518 U.S. at 545. State actors have no important interest in providing single-sex education as an option for students, absent demonstration of the utility of single-sex education in achieving educational goals.[64] The regulations therefore fail to require proof of exceedingly persuasive information that single-sex classes substantially further an important educational objective.

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recipients conduct self-evaluations at least every two years. *See* 34 C.F.R. § 106.34(b)(4). As discussed above, BCMS has not even complied with this minimal requirement.

[63] Many public comments addressed concerns about the legality and constitutionality of the proposed regulations. *See, e.g.*, Pl. Ex. QQ, at ANA-DOE-00090, ANA-DOE-00319, ANA-DOE-13488-13489.

[64] In an apparent attempt to patch over this deficiency, the preamble to the regulations states schools may rely on the "diversity" rationale if they "have evidence that some boys and girls show educational improvement . . . during their adolescent years." 71 Fed. Reg. at 62,534 n.27. But neither the preamble nor the regulations define what is meant by "evidence." This conflicts with the constitutional requirement to "tie[]" the classification to "any pedagogic concept" of what is "needed to obtain the asserted educational benefits." *Parents Involved in Cmty. Schs.* 551 U.S. at 704.

The regulations also allow schools to create single-sex classes to meet students' particular, identified educational needs, 34 C.F.R. §106.34(b)(B), without establishing that meeting such needs can be accomplished by excluding students from certain classes because of their sex. The preamble to the regulations indicates that recipients must conduct "unbiased assessment based on evidence" or an "analysis of evidence" in determining whether single-sex classes are substantially related to meeting those needs. 71 Fed. Reg. 62,535-36. But the regulations do not require persuasive evidence that single sex classes are substantially related to meeting students' needs, and fail to provide guidance to schools on how much evidentiary support is necessary. As the regulation acknowledges, research has failed to offer exceedingly persuasive evidence that single-sex education substantially furthers educational goals. 71 Fed. Reg. at 62,532. Unless the debate is resolved in a manner firmly establishing a substantial relationship between sex-segregated classes and meeting students' educational needs, the regulations fail.

The regulations also permit single-sex classes where equal educational opportunity is not provided to both sexes. Instead of requiring a single-sex counterpart, they only require a coeducational alternative. 34 C.F.R. § 106.34(b)(1)(iv); 71 Fed. Reg. 62,536 ("[A] recipient is not required to provide a single-sex class to students of the [excluded] sex, but would be required to offer a substantially equal coeducational class.") A public actor providing single-sex education must provide an equal educational opportunity to the excluded sex; otherwise, "[t]hat is not *equal* protection." *Virginia*, 518 U.S. at 540 (emphasis in original).

The regulations further permit schools to divide students on the basis of sex stereotypes, as BCMS' actions illustrate. Nothing in the regulations prevents schools from implementing single single-sex classes in a manner incorporating sex stereotypes, for example, by adopting an "adversative" math class for boys, while providing no "adversative" math class in which girls are permitted to enroll.

Many boys respond positively to the educational styles and methods some researchers and advocates have associated with girls' success, and vice versa, such as strategies promoted by Gurian, as BCMS personnel have testified. *See, e.g.*, Pl. Ex. M, Critchelow Dep. at 59:23-60:11 (testifying regarding Michael Gurian's gender-based strategies that, "[i]f a strategy works, it doesn't matter to me the gender of the student"); Pl. Ex. P, O'Connell Dep. Vol. 1 at 64:4-65:6 (stating that she tries to use some of Gurian's strategies designed for boys "for all my students, not just my boys"). The regulations fail to reflect the Supreme Court's teachings that, given the imprecision of generalizations about differences between the sexes, such generalizations cannot justify imposition of a sex-based classification.

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment to A.N.A. Plaintiffs as to the First, Second, Third, Sixth and Seventh Causes of Action in the Amended Complaint and enter judgment (i) permanently enjoining Defendants from segregating any class or educational program by sex; (ii) declaring that Defendants' actions constitute discrimination on the basis of sex, in violation of A.N.A. Plaintiffs' rights under federal and state law; (iii) declaring 34 C.F.R. § 106.34(b) to be an impermissible interpretation of Title IX; (iv) granting A.N.A. Plaintiffs monetary damages against Defendants to fairly and reasonably compensate A.N.A. Plaintiffs for the deprivation of their rights in the 2007-2008 school year in an amount to be determined; and (v) awarding A.N.A. Plaintiffs their expenses, costs, and reasonable attorneys' fees under 42 U.S.C. § 1988 and any other applicable provision of law, along with any other relief as the Court deems just and proper.

DATED: June 8, 2010

/s/ Rachel L. Braunstein
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