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

Re: Single-Sex Proposed Regulations Comments

Dear Mr. Marcus:

On behalf of the American Civil Liberties Union (ACLU), we respectfully submit the following comments in opposition to the Department of Education's proposal to amend the regulations implementing Title IX of the Education Amendments of 1972, published at 69 Federal Register 11275 (March 9, 2002). Title IX has played a vital role in opening doors for girls and women over the past thirty years. Despite the Department's own conclusion that research regarding the benefits and pitfalls of single-sex education is both inconclusive and incomplete, it is proceeding to weaken Title IX regulations in an effort to promote single-sex classes and schools. The proposed regulations threaten to reverse years of progress, undermine existing protections against sex discrimination, violate legal guarantees of equality, and encourage school districts to provide educational programs that are inherently unequal.

The ACLU is a non-partisan organization with over 400,000 members dedicated to protecting the individual liberties and freedoms guaranteed by the Constitution and laws of the United States. We believe that every person has the right to an equal education, free from invidious discrimination. Educational opportunity must be made available to all students on equal terms and should not be denied or restricted for any reason, including a child's race, religion, sex, national origin, language, or family circumstances. Public schools and recipients of public funding have an obligation to ensure that both females and males can obtain an education in a coeducational setting free from sex discrimination.

One of the highest priorities for federal and state governments must be to provide students with a high-quality education, which is the necessary basis for future success. In too many schools, students must fight daily battles against low achievement, violence, drugs, insufficient resources, sexism, and racial and ethnic tension. Instead of addressing the multi-layered challenges confronting the nation's schools, including continuing gender disparities in opportunities and achievement, the Department of Education has focused its attention on single-sex education programs as a supposed "quick fix." But, as many studies have shown, sex segregation is not a dispositive factor in improved educational outcomes and introduces its own set of thorny problems. The proposed sweeping changes are disturbing in their potential to further exacerbate existing inequalities between the sexes. Compromise on key civil rights protections in education sets a dangerous precedent, particularly when we know that gender inequalities persist in schools; failing to learn from history will lead us to replicate past discriminatory practices.

As detailed below, the proposed changes are an ineffective and unlawful means of improving education for all students. The regulations are not justified by sound social science data and will provide no demonstrated educational benefit to counter the harms created by sex classifications. Moreover, the proposed regulations are inconsistent with constitutional requirements and invite schools to violate the Equal Protection Clause. Not only do the proposed regulations violate Title IX, but they are not authorized under the No Child Left Behind Act. The ACLU strongly urges the Department of Education to abandon this effort and leave current Title IX regulations intact. If the Department is insistent on amending Title IX regulations, they should do so in accordance the constitutional framework outlined in the following comments.

I. The Proposed Regulations Undermine the Progress Made by Title IX.

In response to widespread sex discrimination in education, Congress passed Title IX of the Education Amendments of 1972, mandating that no one shall “be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”¹ Title IX was designed to be a strong, comprehensive measure that addresses the many forms of sex discrimination in education. Its coverage ranges from school admission policies to discriminatory scholarships to sexual harassment of students to the glass ceiling that has prevented women from reaching the highest positions in academia. Its purpose is to liberate women and girls from broad generalizations, stereotypes, and misconceptions about their abilities and aspirations. Title IX plays a crucial role in making sure that girls receive the educational opportunities that have traditionally only been enjoyed by boys.

Title IX has been instrumental in leveling the playing field for girls and women in education. Weakening Title IX regulations to encourage gender discrimination in the form of single-sex education would stymie years of progress toward ensuring gender equality in education. Modifying Title IX regulations to provide more leeway to school districts to establish single-sex education programs would violate both the spirit and the letter of the thirty-year-old statute that broadly prohibits gender discrimination in education. The proposed changes threaten to turn the clock back thirty years, encouraging schools to implement exactly what Title IX seeks to eliminate: separate educational worlds for girls and boys.

A. Progress resulting from Title IX.

Title IX dramatically changed the educational landscape for women and girls in the United States. For example, before Title IX, schools used discriminatory admission practices to prevent women and girls from receiving equal education. Vocational schools teaching skills for traditionally male careers often refused to admit females, thus limiting women’s occupational prospects. Nominally coeducational colleges and universities often required female applicants to meet higher standards than male applicants, or placed caps on their enrollment. Other schools refused to admit women at all. Title IX ended these discriminatory practices in vocational schools, professional schools, and coeducational colleges and universities. Prior to Title IX, the most prestigious scholarships were restricted to men, and men were given preference in the award of loans and fellowships. Title IX prohibits practices that deny women financial aid, and over the past thirty years financial aid programs have evolved to assist women’s access to higher education.² When Title IX was passed, women were less likely than men to enroll in college, making up about 41 percent of students admitted across the country and less than 30 percent of students

¹ 20 U.S.C. § 1681(a) (2002).

² See NAT’L COALITION FOR WOMEN AND GIRLS IN EDUCATION (NCWGE), TITLE IX AT 30: REPORT CARD ON GENDER EQUITY 9 (2002).

admitted to the most selective schools.³ Women earned only 37 percent of master's degrees.⁴ Today women make up the majority of students in American colleges and universities, and earn 56 percent of bachelor's degrees and 57 percent of master's degrees.⁵ In 1972, women received 16% of doctorate degrees. As a result of Title IX, this number has steadily increased and in 1998, 42% of all doctorate degrees were awarded to women.⁶

Another example of progress made under Title IX can be seen in fairer treatment of pregnant and parenting students. Before Title IX's passage, schools often expelled girls who became pregnant or refused to allow mothers to enroll. At best they required pregnant and parenting students to enroll in special educational programs that were often of lower quality than the classes and schools available to other students. Such discriminatory behavior is now illegal.⁷

Title IX has also made a profound impact in the area of athletics. For example, as a result of Title IX's requirements that schools give equal treatment to male and female athletes and conduct coeducational physical education classes, the resources and benefits allotted to female athletes have significantly improved, thereby expanding opportunities for females to participate in sports. In 1971, fewer than 300,000 high school girls participated in interscholastic sports, and by 1997, that number had grown to over 2.4 million. This development is important not merely because female students have more opportunities, but also because athletic involvement during school leads to benefits in health and education. High school female athletes are less likely to use drugs, less likely to have unwanted pregnancies, and have a reduced risk of breast cancer and osteoporosis.⁸ They also receive higher grades and better achievement test scores, are more likely to graduate high school, and are more likely to go to college than girls who are not athletes.⁹

As these examples begin to demonstrate, by opening the doors to educational opportunities, and rejecting sex segregation and disparate treatment in favor of inclusion and equality, Title IX has allowed enormous advances for women and girls.

B. Ongoing challenges.

Despite the progress made in recent years, barriers for women persist in education. Sex segregation remains prevalent in career education, where girls remain clustered in programs that train them for the traditionally female (and low-wage) fields of child care, cosmetology, and health assistance, while boys are the overwhelming majority of those enrolled in courses preparing for high-wage plumbing, welding, and electrician jobs.¹⁰ In many instances, this is the result of discriminatory steering by counselors and teachers, harassment by peers, and other forms of discrimination, which result from a failure to enforce Title IX.¹¹ Women still fall behind men in earning doctorates and professional degrees.¹² While girls in high school now are as likely to take high-level math and science courses as

³ See 118 Cong. Rec. 5805 (Feb. 28, 1972) (statement of Sen. Bayh).

⁴ *Id.* at 5809.

⁵ NCWGE, *supra* note 2, at 10.

⁶ *Id.*

⁷ 34 C.F.R. § 106.40.

⁸ TITLE IX INFORMATIONAL PAMPHLET (produced for the Texas Civil Rights Project) (2000).

⁹ *Id.*

¹⁰ NAT'L WOMEN'S LAW CENTER (NWLC), TITLE IX AND EQUAL OPPORTUNITY IN VOCATIONAL AND TECHNICAL EDUCATION: A PROMISE STILL OWED TO THE NATION'S YOUNG WOMEN 3 (2002).

¹¹ *Id.* at 4-5. The proposed regulations appropriately continue to prohibit single-sex vocational classes and schools, perhaps in recognition of the rampant sex segregation that continues in vocational education and that depresses girls' career and earning opportunities. Discrimination and sex stereotyping, however, are not limited to vocational education, and the proposed regulations should be revised to reflect this reality.

¹² NCWGE, *supra* note 2, at 4.

boys, they are less likely to earn postsecondary degrees in these topics, and are particularly grossly underrepresented in the fields of engineering and computer science.¹³ A recent study by the National Women's Law Center reveals that female students are steered away from advanced computer courses and are often not informed of opportunities to take technology-related courses.¹⁴ Even in the area of athletics, where the most noticeable advancements for girls have occurred, male sports continue to receive more money than female sports at many colleges and universities.¹⁵

These examples begin to show the ongoing gender inequities that persist in education. Discrimination in education cannot be combated by relaxing Title IX regulations; instead, continued, vigorous enforcement of Title IX is necessary. The sharp limits imposed on single-sex education by the current regulations, and required by Title IX and the Constitution, appropriately recognize single-sex education's tendency to exacerbate, rather than diminish, discrimination in education. The proposed relaxation of these limits should be rejected.

II. Social Science Does Not Show Any Clear Educational Benefit from Single-Sex Education.

Social scientific evidence fails to demonstrate that single-sex education produces significant benefits. In the absence of such benefits, there is a grave danger that promoting single-sex schools and classes could produce more harm than good. Upon signing the No Child Left Behind Act, President Bush promised, "[W]e're going to spend more money, more resources, but they'll be directed at methods that work, not feel-good methods, not sound-good methods, but methods that actually work."¹⁶ Single-sex education, however, is at best a "sound-good method," based on misconceptions and overgeneralizations about the abilities and preferences of girls and boys rather than empirical evidence.

Although supporters of single-sex classes and schools often cite social science in support of their position, the available data on single-sex education's efficacy are relatively scant.¹⁷ No evidence exists showing that single-sex education is "better" than coeducation for students.¹⁸ While some single-sex programs have produced good outcomes for some students, research by the American Association of University Women and other organizations reveals that factors such as smaller class size, better teachers, more funding, parental involvement, attention to core academic subjects, and a clear code of behavior and discipline are what lead to educational success.¹⁹ These factors – not single-sex dynamics – result in educational benefits to students. Studies also suggest that once these other variables are controlled for, measurable differences between students' performance in single-sex and coeducational programs disappear, except for differences favoring the coeducational programs.²⁰ For instance, "[b]ecause single-sex schools are more likely to be private selective schools, their students are typically brighter, come from higher socioeconomic backgrounds, may be more highly motivated, and differ from coed students on a variety of other preexisting variables that probably invalidate . . . single-sex/coed comparisons."²¹ Thus,

¹³ *Id.* at 38.

¹⁴ NWLC, *supra* note 10, at 4.

¹⁵ NCWGE, *supra* note 2, at 4.

¹⁶ President George Bush, Remarks on Signing to No Child Left Behind Act 2001 in Hamilton, Ohio (January 8, 2002) in WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 38, Issue 2, January 14, 2002.

¹⁷ AMERICAN ASSOCIATION OF UNIVERSITY WOMEN EDUCATIONAL FOUNDATION (AAUW), SEPARATED BY SEX: A CRITICAL LOOK AT SINGLE-SEX EDUCATION FOR GIRLS 3 (1998).

¹⁸ *Id.* at 2.

¹⁹ AAUW, *supra* note 17, at 4-5.

²⁰ *Id.* at 486-90; Patricia B. Campbell & Ellen Wahl, *Of Two Minds: Single-Sex Education, Coeducation, and the Search for Gender Equity in K-12 Public Schooling*, 14 N.Y.L. Sch. J. Hum. Rts. 289, 300-302 (1997).

²¹ Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 Geo. Wash. L. Rev. 451, 488 (1999) (quoting Herbert W. Marsh, *Public, Catholic Single-Sex, and Catholic Coeducational High Schools: Their Effects on Achievement, Affect, and Behaviors*, 99 Am. J. Educ. 320, 328 (1991)).

the single-sex factor is not dispositive in obtaining positive educational outcomes, and the actual causative characteristics are equally available in coeducational settings.

The most comprehensive study of single-sex education in the United States examined California's experiment with twelve public single-sex academies in the late 1990s. Although the California program had been started in pursuit of the hoped-for potential of advancing gender equity, the study found that "the organizational arrangement alone does not ensure it."²² In fact, the authors found that rather than promoting gender equity, the single-sex schools often reinforced traditional gender stereotypes about girls' and boys' needs and abilities. Teaching styles varied for the boys' and girls' programs: boys experienced more disciplined, traditional, and individualistic teaching styles, while girls' academies emphasized cooperation and nurturing.²³ The single-sex environment also contributed to stereotypical, dichotomous ideas of gender: girls received messages about the importance of their clothing and appearance, boys about their role as a primary wage-earner and strong provider for an emotionally weaker wife.²⁴ Equally troubling was the study's assessment that single-sex public schools can have serious consequences for those not enrolled. In at least two California school districts with single-sex academies, remaining coeducational classes were left with gender imbalances, less motivated students, and less experienced teachers.²⁵

The results of the California study are consistent with other studies finding that when students are shielded from interaction with the opposite sex at school, they learn to view the other sex through sex-based stereotypes. Educational and other social science research studies support the conclusion that government-sponsored separation on the basis of identity characteristics, such as race or sex, encourages false beliefs about group hierarchy and ostensibly innate group differences. Indeed, many parents choose single-sex education for their children because of their commitment to traditional gender roles and their belief that single-sex education will foster these roles.²⁶ Single-sex classes and schools appear to reinforce just such stereotypes and negative attitudes in students about themselves and one another.²⁷ Such stereotypes are especially detrimental in the educational context because they suggest that skills, abilities, and characteristics are associated with only one sex.

Most researchers find that coeducation may better prepare students for adult interpersonal relationships and interactions in the work world, including how to avoid falling into gender-stereotyped roles.²⁸ Women and men live and work together in a coed world, and schools are reflections of and preparation for the larger society. The two sexes have to deal with each other on a daily basis; single-sex education distorts reality by not preparing students to interact and compete with the opposite sex and by depriving students of the richness that comes from a diverse student body.

Despite the lack of evidence that single-sex education improves educational outcomes and despite the troubling evidence that it reinforces gender stereotypes, the No Child Left Behind Act allows public schools to apply for up to \$385 million per year in federal funding to use for the creation of single-sex schools and classes.²⁹ By encouraging schools to institute such single-sex programs, the Department of

²² AMANDA DATNOW ET AL., IS SINGLE GENDER SCHOOLING VIABLE IN THE PUBLIC SECTOR?: LESSONS FROM CALIFORNIA'S PILOT PROGRAM 74 (2001).

²³ *Id.* at 50.

²⁴ *Id.*; Elizabeth Zwerling, *California Study: Single-Sex Schools No Cure All*, Women's Enews (June 3, 2001), at <http://www.womensenews.org/article.cfm/dyn/aid/571/context/cover>.

²⁵ DATNOW, *supra* note 23.

²⁶ AAUW, *supra* note 17, at 2.

²⁷ Levit, *supra* note 19, at 521; AAUW, *supra* note 17, at 20.

²⁸ Levit, *supra* note 19, at 495.

²⁹ Leonard Sax, *How Much Money is in the Federal "Pot" for Single-Sex Public Education?* (2002), at <http://www.singlesexschools.org/money.html>.

Education is proposing a multi-million-dollar gamble that would have dire consequences for educational equity and equality between the sexes.

III. The Proposed Regulations Are Inconsistent with Constitutional Requirements and Invite Schools to Violate the Equal Protection Clause.

The proposed regulations do not comply with the requirements of the Equal Protection Clause. They invite public school districts to expose themselves to liability by creating unconstitutional single-sex arrangements.

The proposed regulations' preamble explains that when the current Title IX regulations were adopted, "it was not unreasonable to base the regulations on a presumption that, if recipients were permitted to provide single-sex classes beyond the most limited of circumstances, discriminatory practices would likely continue," but that "[o]ver the past 30 years, the situation has changed dramatically."³⁰ With this statement, the preamble implies that sex discrimination in schools is largely a thing of the past and that single-sex environments thus should be presumed not to be discriminatory. As recently as 1996, however, the Supreme Court did not share this sanguinity when confronted with single-sex public education.³¹

In *United States v. Virginia*, a case challenging the all-male admission policy at the Virginia Military Institute (VMI), the Court did not assume that society had advanced to the point that single-sex education was no longer likely to discriminate on the basis of sex. Instead, the Court observed, "The all-male college would be relatively easy to defend if it emerged from a world in which women were established as fully equal to men. But it does not. It is therefore likely to be a witting or unwitting device for preserving tacit assumptions of male superiority—assumptions for which women must eventually pay."³² In *Virginia*, the Court made clear that to comply with the Constitution, a governmental actor must shoulder the heavy burden of demonstrating an "exceedingly persuasive justification" for instituting single-sex education. In demonstrating this exceedingly persuasive justification, the school must show "at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are closely related to the achievement of those objectives."³³ In other words, the school must prove that the discrimination is "substantially and directly related" to an important objective.³⁴ Rather than dismissing concerns about single-sex education as outmoded, just eight years ago the Supreme Court reasoned that past practices of sex discrimination *demand* vigilance in examining single-sex education today, stating, "Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history."³⁵ The proposed regulations fail to hold recipients to this demanding constitutional standard.

³⁰ 69 Fed. Reg. 11276 (2004).

³¹ The preamble to the proposed regulations observes that in 1977, the Supreme Court affirmed, by an equally divided vote and without opinion, a 2-1 Third Circuit decision that the Constitution permitted an all-male single-sex public high school when the district also provided a comparable school for girls, and students had the option of attending coeducational schools. 69 Fed. Reg. at 11277 n.4; see *Vorcheimer v. School Dist. of Philadelphia*, 532 F.2d 880 (3d Cir. 1976), affirmed by an equally divided Court, 430 U.S. 703 (1977). While such an equal split between the Justices has the effect of letting the lower court decision stand, it is without precedential value as a decision of the Supreme Court. *Neil v. Biggers*, 409 U.S. 188, 379 (1972). Six years later, a state court struck down the single-sex policy in the all-male high school at issue in *Vorcheimer* as a violation of the state's Equal Rights Amendment and the Equal Protection Clause of the federal Constitution. *Newberg v. Board of Public Educ.*, 26 Pa. D. & C. 3d 682 (Pa. Ct. of Com. Pleas 1983), aff'd 478 A.2d 1352 (Pa. Super. Ct. 1984).

³² 518 U.S. 515, 536 n.8 (1996) (quoting C. Jencks & D. Riesman, *The Academic Revolution* 297-98 (1968)).

³³ *Id.* at 524, 531, 533.

³⁴ *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1982).

³⁵ *Virginia*, 518 U.S. at 531.

- A. *The proposed single-sex class regulations (proposed 34 C.F.R. 106.34(b)) improperly identify providing a diversity of educational options as an interest sufficient to justify single-sex classes.*

The proposed regulations state that recipient schools may create single-sex classes as long as the classes are substantially related to providing a diversity of educational options to students and parents. This proposal fails to require schools to show a substantial relationship between a gender classification and achievement of an important educational objective. Instead, it suggests that a school's interest in offering single-sex classes itself justifies providing single-sex classes. The Constitution requires far more than this of public actors.

While the Supreme Court in *Virginia* “[did] not question the Commonwealth’s prerogative evenhandedly to support diverse educational opportunities,”³⁶ the Court has *never* held that a school’s assertion that single-sex education furthers educational diversity is sufficient to justify excluding students from an educational opportunity because of their sex. On the contrary, *Virginia* disapproves such analysis as “notably circular.”³⁷ In that case, the United States challenged VMI’s all-male admissions policy as a violation of the Equal Protection Clause. Virginia and VMI argued that providing the option of single-sex education as one among many to students was itself an important governmental objective, and that exclusion of women from VMI was not only substantially related to, but essential to, the important objective of providing single-sex education.³⁸ The Court rejected this analysis as a “bent and bowed” version of the applicable constitutional standard.³⁹

The proposed regulations invite schools to create single-sex classes pursuant to a similarly circular analysis. As the preamble makes clear, under the proposed regulations schools could determine that because some students or parents might like the option of a single-sex class, single-sex education is a valuable part of educational diversity.⁴⁰ Under the proposed regulations, as long as an educator, some parents, or some students like the idea of single-sex classes, those classes will be permissible because they further an interest in offering a diversity of educational options. Obviously, this test of the permissibility of single-sex classes, to the extent it can be called a test at all, is utterly toothless. Such short-circuited analysis is in no way consistent with the Supreme Court’s emphasis on the “demanding” nature of a public actor’s burden in demonstrating an exceedingly persuasive justification for single-sex education.⁴¹ As *Virginia* makes clear, single-sex education must be based on more than this circular defense to pass muster under the Constitution.

The proposed regulations substitute the phrase “diversity of educational options” for the hard analytical work that the Equal Protection Clause requires. They misdirect recipients by suggesting recipients have an important governmental interest in a certain educational method, without consideration of whether this method achieves a desirable educational result. The proposed regulations thus focus on “‘means’ rather than ‘end’ and . . . misperceive [Supreme Court] precedent.”⁴² In fact, state actors have no important governmental interest in providing single-sex education as an option for students, absent demonstration of the utility of single-sex education in achieving educational goals. An example illustrates the distinction: while a state has an important interest in teaching its students math, this does not mean that the state has an important interest in purchasing a particular publisher’s mathematics

³⁶ *Id.* at 533 n.7.

³⁷ *Id.* at 545.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See 64 Fed. Reg. at 11278 (“For example, a recipient may determine that students and parents would prefer the option of single-sex classes because they believe they would provide a benefit not available in coeducational classes.”).

⁴¹ *Id.* at 533.

⁴² *Id.* at 545.

textbook. In the case of textbook selection, the Constitution merely requires the state to have a rational basis for believing that the particular publisher's textbook furthers its interest in teaching math. When seeking to justify an educational method that discriminates on the basis of sex, however, the constitutional standard is far more demanding, and thus a much more exact fit between educational methods and educational goal must be shown. "The purpose of requiring that close relationship [between objective and means] is to assure that the validity of the classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women."⁴³ Given the constitutional requirement that any justification for single-sex programs be "exceedingly persuasive," such a single-sex program must be based on exceedingly persuasive evidence that the program directly and substantially forwards educational goals and that admitting students of both sexes to the program would prevent achievement of these goals.⁴⁴

Because of the strong constitutional presumption against sex classifications, the second part of this inquiry—whether inclusion of the opposite sex would frustrate the educational ends allegedly advanced by single-sex education—is crucial, as demonstrated by *Garrett v. Board of Education*.⁴⁵ *Garrett* involved a challenge to 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 plaintiffs were likely to succeed in their claim that the single-sex academies violated the Equal Protection Clause, because while African-American boys in inner-city Detroit clearly had many compelling educational needs that the school board had an interest in addressing, and while the coeducational programs existing prior to establishment of the academies had failed to improve male achievement adequately, the school board had completely failed to demonstrate that coeducation was the *cause* of the prior failure to improve male achievement or that the exclusion of girls from the academies was *directly and substantially related* to addressing boys' compelling educational needs.⁴⁶ *Virginia* and *Garrett* make clear that the Constitution requires an extremely tight fit between discriminatory means and educational end to justify sex classifications.

But, as the preamble to the proposed regulations acknowledges, and as set out above, research has failed to establish exceedingly persuasive evidence that single-sex education directly and substantially forwards educational goals:⁴⁷ on the contrary, "there is presently a debate among researchers and educators regarding the effectiveness of single-sex education."⁴⁸ In the absence of a far stronger demonstration that sex discrimination directly advances educational goals, the Constitution does not permit public actors to justify sex discrimination by the mere assertion that such discrimination forwards an interest in providing a "diversity of educational options." Providing a "diversity of educational options," independent of any showing that these diverse options forward educational goals, is simply not an important state interest: it is a means, rather than an end in itself.

⁴³ *Mississippi Univ. for Women*, 458 U.S. at 725-36.

⁴⁴ The preamble to the proposed regulations states that one reason a recipient might offer single-sex classes in furtherance of the goal of diversity of educational options is if "it has reliable information that single-sex classes would meet its educational objective." 69 Fed. Reg. at 11278. While this hypothetical at least suggests that educational objectives may be important to the relevant inquiry, nowhere does the preamble or the proposed regulations define what is meant by "reliable information." Given the demanding constitutional test for sex classifications, it is clear that information must be more than "reliable" to justify discrimination. It is also clear that providing exceedingly persuasive information that single-sex classes directly and substantially further an important educational objective is the *only* way of defending single-sex classes under the Constitution, rather than one option for doing so.

⁴⁵ 775 F. Supp. 1004 (E.D. Mich. 1991).

⁴⁶ *Id.* at 1008.

⁴⁷ See Levit, *supra* note 19, at 522 ("A cumulative review of available evidence, including the history and social meaning of segregation in education, suggests that the demonstrated benefits of single-sex education are nowhere near sufficiently compelling to satisfy the constitutional requirement of an 'exceedingly persuasive justification.'").

⁴⁸ 64 Fed. Reg. at 11276 n.3.

There is, of course, a different educational diversity interest that the Supreme Court *has* recognized as compelling—namely, the state’s interest in providing educational options that expose students to a diverse student body and promote the educational benefits that such a diverse student body creates.⁴⁹ Interacting within a diverse student body breaks down stereotypes and enables students to better understand persons of different backgrounds.⁵⁰ In addition, “student body diversity promotes learning outcomes and better prepares students for an increasingly diverse workforce and society”⁵¹

The proposed regulations, far from furthering this compelling interest in educational diversity, invite recipients to diminish classroom diversity by excluding students of the other sex. As the social science research discussed in Section II demonstrates, these non-diverse single-sex educational environments increase gender stereotyping among students and thus fail to prepare students to participate with members of the opposite sex in an increasingly gender-integrated workforce and society. In short, the proposed regulations use the language of diversity to promote its opposite, and do so in violation of the Constitution.⁵²

B. The proposed single-sex class amendments (proposed 34 C.F.R. 106.34(b)) improperly invite recipients to provide single-sex classes based on overbroad generalizations about the educational needs of males and females.

The proposed regulations state that recipient schools may create single-sex classes that are substantially related to meeting students’ particular, identified educational needs. Here, in contrast to the “diversity of educational options” rationale, discussed above, the proposed regulations appropriately identify an important state objective that public actors might seek to meet. However, because the proposed regulations (1) do not require schools to compile exceedingly persuasive evidence that single sex classes are directly and substantially related to the sought after educational benefits and (2) do not recognize the strong likelihood that any educational judgment justifying single-sex classes will be based on overbroad generalizations or stereotypes about the sexes, here too, the proposed regulations do not comply with the requirements of the Equal Protection Clause.

The preamble to the proposed regulations indicates that recipients may determine that a single-sex class is appropriate for students’ needs based on “reliable information and sound educational judgment.”⁵³ The preamble later indicates that recipients may conclude single-sex classes are substantially related to educational needs based on “[r]esearch or other reliable evidence . . . such as

⁴⁹ *Grutter v. Bollinger*, 123 S.Ct. 2325, 2337-41 (2003).

⁵⁰ *Id.* at 2340.

⁵¹ *Id.* (internal quotation marks omitted).

⁵² Even where the provision of a diversity of educational options a sufficient justification for single-sex education, single-sex classes would often fail to provide such “diversity.” The proposed regulations make clear, as they must, that a school cannot choose to provide *only* single-sex classes in a particular subject and must ensure that no students are assigned to a single-sex class involuntarily. However, if a school provides single-sex classes in a particular subject, it will in many instances be difficult to guarantee that a truly coeducational option continues to exist for those students that desire it, as the California study demonstrates. For instance, if, in pursuit of diversity, a school offered one single-sex math class for girls and one coeducational math class (which it is permitted to do under the proposed regulations) and all or almost all of the girls chose to enroll in the single-sex class (as might well be the case if, for instance, a more popular teacher taught the class, or the class met at a more convenient time than the coeducational alternative), then no meaningful coeducational option would remain. Thus, boys would be in effect relegated to a single-sex class, even though none of them had chosen single-sex education. In addition, if one or two girls opted for the nominally coeducational and actually almost all-male class, the experience would in no way be that of a truly gender-integrated classroom. Because of the potential for single-sex classes to siphon off students of one gender, the ability of schools to offer coeducational classes that are not overwhelmingly dominated by the other gender will be diminished, to the detriment of coeducation, voluntariness, and true educational diversity.

⁵³ 69 Fed. Reg. at 11279.

teacher, parental, or student feedback.”⁵⁴ As in the context of the “diversity of educational options” rationale, discussed above, the proposed regulations ignore the Supreme Court’s requirement that a justification for gender discrimination be not only “reliable,” but “exceedingly persuasive” and that any sex classification directly and substantially address the relevant educational need. At the very least, the proposed regulations should be revised to reflect the appropriate constitutional standard. This likely would entail requiring recipients to collect scientific or empirical evidence strongly supporting the conclusion that single-sex classes will directly and substantially address the relevant educational need, prior to instituting any single-sex class. As set out below, however, the appropriate constitutional standard will be almost impossible to meet. Therefore, the wiser course would be to withdraw the proposed regulations.

The Supreme Court has made clear that sex classifications based on conclusions about the average preferences and capacities of male and female students are viewed with great skepticism under the Equal Protection Clause.⁵⁵ Yet the proposed regulations appear to encourage recipients to base their sex classifications on precisely these conclusions about males’ and females’ average preferences and capacities. Proponents of single-sex education commonly ground their arguments in support of excluding members of one sex on the notion that, on average, girls and boys have different learning styles; presumably these notions are the sort of “educational judgment” a recipient is likely to rely on in determining that a single-sex class would provide some students educational benefits.⁵⁶ Yet, *Virginia* emphasizes, “State actors controlling gates to opportunity . . . may not exclude qualified individuals based on ‘fixed notions concerning the roles and abilities of males and females.’”⁵⁷ Conclusions regarding “gender-based developmental differences” and typically female and male “tendencies” in learning are just the sort of fixed notions and generalizations that the Constitution rejects as a basis for sex classifications, because they inappropriately obscure and ignore the *individual’s* capacities and tendencies.⁵⁸ In addition, “if the . . . objective is to exclude or ‘protect’ members of one gender because they are presumed to suffer from an inherent handicap or be innately inferior, the objective itself is illegitimate.”⁵⁹

Schools should, of course, take into account the different learning styles and needs of students in crafting curricula, teaching plans, and course offerings, including any persuasive evidence of differences in the average capacities, preferences, and learning styles of males and females. In order to provide equal educational opportunities to all students, schools should ensure that options exist for students of different learning styles and that classroom experiences are structured to give both boys and girls ample opportunities to succeed. Indeed, the principles of gender equality enshrined in the Constitution and Title IX demand no less. What the Constitution forbids, however, is excluding all students of one sex from an educational opportunity based on conclusions about what is appropriate for the average male or female student.⁶⁰

The Supreme Court made this more than clear when it rejected VMI’s argument that its all-male admission policy was justified by the unsuitability of its teaching methods for the average woman. The

⁵⁴ *Id.* at 11280.

⁵⁵ *Virginia*, 518 U.S. at 340-42.

⁵⁶ See, e.g., Kay Bailey Hutchison, *The Lesson of Single-Sex Public Education: Both Successful and Constitutional*, 50 Am. U. L. Rev. 1075, 1080 (2001) (“There can be little doubt that . . . boys and girls, particularly in younger grades, are indeed different in how they learn, develop, and interact with their peers.”); Stephen H. Webb, *Defending All Male Education: A New Cultural Moment for a Renewed Debate*, 29 Fordham Urb. L. J. 601, 604-05 (2001) (“When the testosterone-driven behavior of boys is suppressed—rather than channeled into appropriate activities—biology will fight its way to the surface with unpleasant results.”); V. Dion Haynes, *Boys and Girls in a Class Apart: Amid Evidence that Males and Females Learn Differently, More Educators Are Embracing the Idea of Separate but Equal*, Chi. Trib., Sept. 30, 1999, at N1.

⁵⁷ 518 U.S. at 541 (quoting *Mississippi Univ. for Women*, 458 U.S. at 725).

⁵⁸ *Id.*

⁵⁹ *Mississippi Univ. for Women*, 458 U.S. at 725.

⁶⁰ *Virginia*, 518 U.S. at 541-45.

“adversative” method it used was incompatible with coeducation, VMI argued, because, as expert witnesses attested in unchallenged testimony, “males tend to need an atmosphere of adversativeness, while females tend to thrive in a cooperative atmosphere.”⁶¹ Thus, VMI asserted, the educational benefits offered by a VMI education were in a real sense simply unavailable to the average women.⁶² The Supreme Court concluded that even were these statements of the average capacities and preferences of men and women accurate, they were an impermissible basis for VMI’s discriminatory policy. “[G]eneralizations about the ‘way women are,’ estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description.”⁶³ The promise of the Equal Protection Clause is that individual men and women, and individual boys and girls, will not be forced by their government to conform to generalized understandings of what is essentially “male” or essentially “female,” regardless of whether those generalizations are accurate on average.⁶⁴

Nor does the proposed regulations’ prohibition on schools *assigning* students to a single-sex class avoid the constitutional problem that closing doors to individuals based on generalizations about their sex presents. A single-sex program by definition works an involuntary exclusion on the opposite sex.⁶⁵ In the VMI case as well, the question was not whether men would be assigned to VMI, or women assigned to the lesser Virginia Women’s Institute for Leadership (VWIL); a wide variety of public coeducational options were available to men and women in Virginia and no one would be forced to attend either single-sex institution against their will. The Supreme Court nevertheless identified the problem in VMI’s all-male admission policy as one of excluding women who wished to participate in this confrontational educational process, based solely on assumptions about what educational methods were appropriate to women.⁶⁶ Even if these assumptions contain a kernel of accuracy, and most women would not respond well to such educational methods, such a rationale, the Court stated, “cannot rank as ‘exceedingly persuasive’ as we have explained and applied that standard.”⁶⁷

⁶¹ *Id.* at 541 (internal quotation marks omitted).

⁶² *Id.* at 540.

⁶³ *Id.* at 550; *see also Adams v. Baker*, 919 F. Supp. 1496, 1504 (D. Kan. 1996) (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).

⁶⁴ *See, e.g., Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151-52 (1980); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975); *Frontiero v. Richardson*, 411 U.S. 677, 688-89 (1973). The proposed regulations make a gesture toward complying with constitutional requirements, by stating that recipients providing single-sex classes must conduct periodic evaluations to ensure that single-sex classes are “based upon genuine justifications and do not rely on overly broad generalizations about the different talents or capacities of male and female students.” Proposed 34 C.F.R. § 106.34(b)(4). The language set out in the proposed regulations reflects the language in relevant court decisions, though notably and problematically this review is not required at the time the class is created, when the question is perhaps most relevant. Even more problematically, however, the proposed regulations at no point define the difference between the “reliable information and sound educational judgment” that they suggest are an appropriate basis for instituting single-sex classes and the broad generalizations about the differences between male and female students that are a constitutionally inappropriate basis. This is likely because, as set out in the above discussion, in the great majority of cases there will be no meaningful distinction.

⁶⁵ In addition, as set out in footnote 52, a voluntary single-sex class that siphons students of one sex away from the remaining coeducational option may in effect work to assign students of the opposite sex to a single-sex class against their will.

⁶⁶ *Virginia*, 518 U.S. at 542. The proposed regulations require that when a single-sex class is offered, a substantially equal class be available to the opposite sex, but teaching methods are not listed as factors bearing on whether a class is substantially equal. *See* proposed 34 C.F.R. 106.34(b)(3) (“Factors that the Department will consider in determining whether classes are substantially equal include the following: the policies and criteria of admission; the educational benefits provided, including the quality, range, and content of curriculum and other services and the quality and availability of books, instructional materials, and technology; the qualifications of faculty and staff; and the quality, accessibility, and availability of facilities and resources provided to the class.”). Thus nothing in the proposed regulations prevents recipients from providing an “adversative” math class for boys while providing no “adversative” math class in which girls are permitted to enroll.

⁶⁷ *Virginia*, 518 U.S. at 542.

Given this constitutional backdrop, it becomes difficult to imagine the circumstances under which a single-sex class would be permissible to “provide some students educational benefits.” The reason for this is the imprecise fit between the sex classification and the sought-after educational benefit in almost every circumstance. As set out above, the Constitution demands an exceptionally tight nexus between means and ends to justify sex discrimination. But “[r]esearchers have known for many years that the differences among individual boys and among individual girls are far greater than any average differences between girls and boys.”⁶⁸ Many boys respond positively to the educational styles and methods some researchers have associated with girls’ success, and vice versa.⁶⁹ This is the basic truth that the Supreme Court has recognized in the context of single-sex education: given the imprecision of generalizations about differences between the sexes, such generalizations cannot be the exceedingly persuasive justification necessary for a state actor to impose a sex classification.

Again, this is not to say that a public school must close its eyes to differences in learning styles and educational needs among its students. However, it may not “improperly use gender as a ‘proxy for other, more germane bases of classification.’”⁷⁰ The regulations currently in effect, which appropriately prohibit recipients from instituting single-sex classes in most instances, permit attendance to the wide range of students’ needs, including needs that might be experienced more commonly by one gender than the other. Thus, the Office of Civil Rights of the Department of Education has, under the existing regulations, approved a school district’s provision of math classes for those who are math phobic or doubtful about their ability to succeed in math, a group that is disproportionately but by no means exclusively female.⁷¹ Technology classes targeted at what administrators understood to be the particular needs of female students, but open to boys with the same needs, have also won OCR’s approval.⁷² Such efforts represent a more narrow tailoring of means to end, and do not rely on the less precise and constitutionally disfavored gender classification for their success.

Federal court precedent makes clear that gender classifications will very rarely be an appropriate method of obtaining educational benefits for some students. The proposed regulations fail to reflect this legal landscape and thus do not meet constitutional standards. They should be withdrawn in favor of the restrictive standard set out in current regulations, which protects against single-sex classes based on generalizations about the capacities and needs of males and females. In the alternative, a constitutionally acceptable revision of the proposed regulations could encourage schools to adopt classes and programs adapted to the needs of female and male students, as established using reliable information and sound educational judgment, while forbidding schools from excluding students of the other sex from these classes and programs.

C. Any important interest sufficient to justify single-sex classes in public schools must be based on more than student or parent preference.

The preamble to the proposed regulations suggests that in various instances, student or parental preference for single-sex classes may be an appropriate basis for determining that the recipient has an important interest in providing these classes.⁷³ But the guarantees of equal treatment under law enshrined

⁶⁸ Patricia B. Campbell & Ellen Wahl, *Of Two Minds: Single-Sex Education, Coeducation, and the Search for Gender Equity in K-12 Public Schooling*, 14 N.Y.L. Sch. J. Hum. Rts. 289, 307 (1997).

⁶⁹ *Id.*

⁷⁰ *Garrett*, 775 F. Supp. at 1007 (quoting *Craig v. Boren*, 429 U.S. 190, 198 (1976)).

⁷¹ United States General Accounting Office, *Public Education: Issues Involving Single-Gender Schools and Programs*, GAO/HEHS-96-122, at 9 (May 1996).

⁷² *Id.*; *cf. Adams*, 919 F. Supp. at 1504 (“The evidence shows that some females are stronger than some males. The school can take into account differences of size, strength, and experience without assuming those qualities based on gender.”).

⁷³ 69 Fed. Reg. at 11278 (“For example, a recipient may determine that students and parents would prefer the option of single-sex classes because they believe that they would provide a benefit not available in coeducational classes.”); *id.* at 11280 (“In addition,

in the Constitution and in civil rights statutes have never been and cannot be dependent on the preferences of others.⁷⁴ The beliefs and preferences of students, parents, or even educators, cannot without more justify excluding students from opportunities on the basis of their gender, since often these preferences and beliefs will be based on the very generalizations and stereotypes that the Constitution forbids as a basis for gender classifications. Any single-sex class that is permissible under the Constitution must be based on an exceedingly persuasive justification, which means at the very least that the gender classification directly and substantially furthers an important state interest. Untested beliefs and preferences cannot meet this high bar, and the proposed regulations should be revised accordingly.

D. When a recipient provides a single-sex class that is directly and substantially related to an important interest and supported by an exceedingly persuasive justification, the recipient must also provide equal opportunities to the excluded sex.

To meet the requirements of the Equal Protection Clause, a public actor providing single-sex education must not only demonstrate that the sex classification is directly and substantially related to an important government interest and supported by an exceedingly persuasive justification; the public actor must also provide an equal educational opportunity to the excluded gender. When a unique educational opportunity is afforded to only one sex, “[t]hat is not *equal* protection.”⁷⁵ The proposed regulations begin to acknowledge this obligation to provide opportunities to both sexes by using the language of equality. They fail, however, to provide sufficient safeguards to ensure true equality of educational opportunity for both sexes.

In the context of single-sex classes, proposed 34 C.F.R. § 106.34(b)(3) sets out the factors that the Department will consider in determining whether a class is substantially equal to a single-sex class, including “the policies and criteria of admission; the educational benefits provided, including the quality, range, and content of curriculum and other services and the quality and availability of books, instructional materials, and technology; the qualifications of faculty and staff; and the quality, accessibility, and availability of facilities and resources provided to the class.” The preamble explains, “Under the proposed standard, each factor evaluated does not need to be identical, but each must be substantially equal.”⁷⁶ This factor-by-factor comparison is the correct approach to ensure true equality, and the language requiring this approach should be set out in the proposed regulation itself, rather than in the preamble alone.

The proposed regulations fail to specify teaching methods and approaches as factors to be considered in determining whether equality of educational opportunity exists. *Virginia* makes clear that such factors can be crucial in determining whether the educational opportunities offered to the sexes are truly equal. There the Supreme Court rejected arguments that VWIL, which emphasized a cooperative method of education that reinforced self-esteem, was substantially equal to VMI with its adversative, militaristic style of education. While VWIL’s resources were unequal to VMI’s in myriad ways, this disparity in educational methods based on pedagogical theories of appropriate methods of instruction for men and women and the psychological and sociological differences between the genders was central to

a recipient may have other reliable evidence [for determining that a single-sex class is substantially related to meeting particular, identified needs] such as teacher, parental, or student feedback.”)

⁷⁴ See, e.g., *Mississippi Univ. for Women*, 458 U.S. at 733, 741 (finding that nursing school’s all-female policy violated the Equal Protection Clause, though dissent objected that decision “prohibits the States from providing women with an opportunity to choose the type of university they prefer”); *Adams*, 919 F. Supp. at 1504 (holding parents’ preferences that a girl not wrestle on a boys’ team insufficient under the Equal Protection Clause to justify sex discrimination); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1277 (9th Cir. 1981) (holding that in employment context, customer preferences based on sexual stereotypes could not justify employer’s sex discrimination); *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 388-89 (5th Cir. 1971) (same); 29 C.F.R. § 1604.2(a)(1)(iii) (same).

⁷⁵ *Virginia*, 518 U.S. at 540.

⁷⁶ 68 Fed. Reg. at 11280.

the Court's conclusion that VWIL was not equal to VMI.⁷⁷ To ensure that recipients comply with constitutional requirements, the proposed regulations must list educational methods as a factor to be considered in determining whether an equal opportunity is being offered to the sex excluded from any single-sex class.

In many instances, however, it may be impossible to provide truly equal experiences to students excluded from a single-sex class. “The two sexes are not fungible; a community made up entirely of one [sex] is different from a community composed of both.”⁷⁸ As the Court has recently reaffirmed, educational benefits flow from student body diversity, and interaction with diverse people, cultures, and viewpoints prepares students for participation in diverse workforces and society.⁷⁹ Because of the substantial differences in educational experience that arise when one sex is excluded, which tend to compromise the goal of educational equality for all sexes, the strong medicine of single-sex classes should be applied very sparingly indeed, consistent with the constitutional restraints set out above.

E. The Constitution places the same restrictions on public single-sex schools as public single-sex classes, and the proposed regulations should thus require the same safeguards in both contexts.

The proposed regulations address single-sex schools separately from single-sex classes.⁸⁰ The preamble explains, “Thus, unlike our proposed amendments for single-sex classes, [the proposed amendments for single-sex schools] do not . . . require a recipient to justify establishing a single-sex school.”⁸¹ The proposal does, however, require recipients to provide substantially equal opportunities for students of the excluded sex.

By failing to require justification for establishment of a single-sex school, the proposed regulations ignore constitutional requirements and invite public recipients to expose themselves to liability. As in the context of single-sex classes, to comply with the requirements of the Equal Protection Clause a state actor must give an exceedingly persuasive justification for the gender classification and demonstrate that the discrimination directly and substantially furthers an important state interest. Title IX's exemption of some public schools' admissions policies from its coverage does not alter this

⁷⁷ See *Virginia*, 518 U.S. at 547-51, 551 (“It is on behalf of these women [who wish to participate in the adversative culture of VMI and are capable of doing so] that the United States instituted this suit, and it is for them that a remedy must be crafted”)

⁷⁸ *Id.* at 533 (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)).

⁷⁹ *Grutter*, 123 S.Ct. at 2340. In 1946, the Supreme Court in *Ballard v. United States* held on statutory grounds that women could not be systematically excluded from grand and petit jury panels in federal court. In its discussion of the issue of whether a jury that excluded women was truly representative of the community, the *Ballard* Court addressed issues that are of relevance today in education, given the Supreme Court's recognition of states' compelling interest in a diverse classroom representative of the community in which students must someday work and function and the educational benefits such diversity brings:

It is said . . . that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and not sex. Yet it is not enough to say that women when sitting as jurors do not act as a class. Men likewise do not act as a class. But if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.

329 U.S. at 193-94 (footnotes omitted). *Ballard* and *Grutter* together illustrate the lack of equality between a single-sex environment and one in which both males and females are able and invited to participate.

⁸⁰ See 20 U.S.C. § 1681(a)(1).

⁸¹ 69 Fed. Reg. at 11281.

requirement, and in recognition of these obligations, the proposed regulations should thus hold single-sex schools to the same demanding standards argued for above in the context of single-sex classes.

The proposed regulations provide a weak recognition of public recipients' constitutional obligations in their requirement that recipients provide equal educational opportunities to males and females when providing single-sex schools. The proposal appropriately acknowledges that the current regulation, which requires mere "comparability" between a single-sex school and a school available to students of the excluded sex, fails to meet constitutional standards, and revises this standard to require substantial equality in the opportunities offered to the two sexes.⁸² Equality in educational opportunities available to males and females is certainly an essential element of any constitutionally permissible operation of public single-sex schools. In defining "substantial equality," however, the proposed regulations fail to meet the Constitution's rigorous standard. Proposed 34 C.F.R. § 106.34(c)(3) sets out the factors that will be considered in determining whether two schools are substantially equal, repeating the factors relevant to determining equality in the context of single-sex classes, and adding the factors "quality and range of extra-curricular offerings" and "geographic accessibility." As in the context of single-sex classes, this list too does not include educational methods, which *Virginia* demonstrates are central to equality, and any final regulation must be revised to include this factor. The regulation then goes on to state that the determination of substantial equality "involves an assessment in the aggregate of the educational benefits provided by each school as a whole." The preamble notes, "Each factor does not have to be identical in order for two schools to be substantially equal."⁸³ The preamble and the proposed regulations thus depart from the approach taken in assessing substantial equality in the context of single-sex classes. There, the preamble states that *each* identified factor must be substantially equal. This factor-by-factor approach, rather than the far murkier standard of "aggregate" equality, is proper, and indeed constitutionally required, in the single-sex school context as well.

The Supreme Court has made clear that if single-sex public schools are ever constitutional, the excluded sex must have access to equal educational methods, student body, faculty, course offerings, facilities, prestige, alumni opportunities, and financial support, and that this comparison will be made factor by factor.⁸⁴ Lower courts that have faced this question have also undertaken close, factor-by-factor scrutiny of the relevant schools in determining equality.⁸⁵ Girls are not receiving a substantially equal education to boys if the school they attend does not offer the higher science classes offered in the boys' school, even if the girls' school offers a greater wealth of extracurricular activities. Boys are not receiving an education substantially equal to girls' if the girls' school offers advanced placement courses in English and foreign languages to which they have no access, even if the school the boys attend has a swimming pool and a computer lab that the girls' school lacks. Equality is a demanding standard under the Constitution and any final regulations must treat it as such.

⁸² The proposed regulations, however, exempt certain charter schools from the requirement that recipients ensure equal educational opportunity for any students excluded from a single-sex school. See proposed 34 C.F.R. 106.34(c)(2). While administrative difficulties may arise in ensuring that equal opportunities are provided to the excluded sex when a chartering authority authorizes a single-sex charter school that is its own school district, administrative convenience does not justify public chartering authorities' and charter schools' violation of the requirements of Title IX and the Constitution. See, e.g., *Frontiero v. Richardson*, 416 U.S. 351, 690 (1973). Proposed 34 C.F.R. § 106.34(c)(2), purporting to exempt these institutions from the obligation to provide equal educational opportunities, must therefore be withdrawn, as it is on its face inconsistent with the nondiscrimination provisions of Title IX and the Equal Protection Clause.

⁸³ 69 Fed. Reg. at 11282.

⁸⁴ See *Virginia*, 518 U.S. at 547-554.

⁸⁵ See *Newberg*, 26 Pa. D. & C. 3d at 685-699 (undertaking detailed point by point comparison of the schools in question).

IV. The Proposed Regulations Are Inconsistent with Title IX, and thus the Department of Education Has No Authority to Promulgate Them Pursuant to Title IX.

A. The proposed regulations' relaxation of limitations on sex discrimination in the provision of classes and extracurricular activities violates the plain language of the authorizing statute and are thus beyond the Department's authority to promulgate.

Title IX provides that, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”⁸⁶ The statute goes on to list some exemptions from this sweeping policy, including some institutions' admissions policies, social fraternities and sororities, youth service organizations such as Girl Scouts and Boy Scouts, specified American Legion-sponsored events, some mother-daughter and father-son activities, and certain beauty pageants.⁸⁷ The broadness of Title IX's ban on sex discrimination, and the specificity and narrowness of the exemptions from the nondiscrimination mandate, create a statutory scheme completely inconsistent with the proposed regulations' invitation to recipients to discriminate based on gender when providing classes to students. The proposed regulations are therefore not a reasonable interpretation of Title IX, as they are manifestly contrary to the language of the statute.⁸⁸ The Department, which is empowered to issue regulations of general applicability to “effectuate the provisions of” Title IX's nondiscrimination mandate, is without authority to promulgate regulations contrary to clearly expressed Congressional intent.⁸⁹

In those instances where Congress wished to permit the continuation of traditions of sex-segregation in educational settings, it spoke clearly and specifically to except particular activities, such as beauty pageants and Girl Scouts meetings, from the sweeping language of the statute.⁹⁰ As sponsor Senator Birch Bayh stated in introducing Title IX, federal agencies enforcing the nondiscrimination law can permit “differential treatment by sex” only in “very unusual cases” and only where such treatment is “absolutely necessary to the success of the program.”⁹¹ While the current regulations, which permit sex segregation for contact sports and portions of classes in elementary and secondary schools that deal exclusively with human sexuality, are narrowly drawn for such unusual cases, motivated by concerns for safety and privacy,⁹² the proposed regulations would permit recipients to institute a vast array of sex classifications limiting participation by one gender in a wide variety of classes and activities, based on no more than recipients' perception that students or parents would like such options, or that such options might be useful in some instances for some students. This invitation to discriminate sharply conflicts not only with the plain language of the statute, but also with Congressional intent to overturn sex segregation in programs and classes, as reflected in Senator Bayh's comments condemning single-sex vocational

⁸⁶ 20 U.S.C. § 1681(a).

⁸⁷ *Id.*

⁸⁸ See *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984).

⁸⁹ 20 U.S.C. § 1682.

⁹⁰ *Expressio unius est exclusio alterius*. E.g., *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002); see also *Christensen v. Harris Co.*, 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.”).

⁹¹ 118 Cong. Rec. 5807 (Feb 28, 1972 (statement of Sen. Bayh)). “Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction.” *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 527 (1983).

⁹² 34 C.F.R. 106.34. The current regulations also expressly permit choruses to select members based on vocal range, even if this has the effect of limiting membership to one gender, and permit physical education classes to group based on physical ability without regard to gender; neither of these provisions authorizes sex classifications *per se*. It is worth noting that Senator Bayh, the primary sponsor of Title IX, expressed reservations about even these narrow regulatory exceptions to the nondiscrimination mandate of the statute. *Sex Discrimination Regulations: Hearings before the Subcommittee on Postsecondary Education of the House Committee on Education and Labor*, 94th Congress, 1st Sess. 179 (1975) (testifying that he would prefer that the exception for contact sports not appear in the regulations).

education.⁹³ The encouragement of such a broad expansion of sex discrimination in federally-funded educational activities cannot be reconciled with the statute's clear mandate that, subject to certain specified, narrow exceptions, recipients may not on the basis of sex exclude an individual from participation in, deny an individual the benefits of, or subject an individual to discrimination under any education program or activity.⁹⁴

B. Congress has affirmed the interpretation of Title IX set out in the current regulations.

That the current regulations accurately reflect Congress's intent is demonstrated by the unique circumstance of Congress's approval of these very regulations. Under the General Education Provisions Act, Congress required all agency regulations under Title IX to be "laid before" Congress before they became effective and claimed authority to disapprove any regulations "inconsistent with the Act."⁹⁵ In 1975, the Department of Health, Education and Welfare submitted its Title IX regulations to Congress for review, including the restrictions on single-sex classes that the Department of Education seeks to amend so drastically today.⁹⁶ As the Chair of the House Subcommittee that reviewed the regulations made clear, "The regulations will be reviewed solely to see if they are consistent with the law and with the intent of the Congress in enacting the law. We are . . . meeting . . . solely to see if the regulation writers have read and understood [Title IX] the way the lawmakers intended it to be read and understood."⁹⁷ At these hearings, some witnesses testified that the proposed regulations improperly restricted schools' abilities to offer single-sex classes and activities.⁹⁸ However, as other witnesses pointed out, "[a] number of those people who oppose the regulation actually oppose the law itself."⁹⁹ Following this review, none of the regulations was disapproved, and thus all became effective, including the current regulation's sharp restriction on single-sex classes and educational activities. "Congress' failure to disapprove the [Title IX] regulations is not dispositive, but, . . . it strongly implies that the regulations accurately reflect congressional intent."¹⁰⁰ This is because "[w]here an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned."¹⁰¹

As long as it acts consistently with the demanding requirements of the Equal Protection Clause, Congress has been and remains free to amend Title IX to permit greater experimentation with sex segregation in education. Indeed, it has repeatedly amended the statute to carve out certain narrow, specified sex-segregated activities as exempt from the requirements of Title IX.¹⁰² But Congress has

⁹³ 118 Cong. Rec. 5806 (Feb. 28, 1972) ("Unfortunately, the Office of Education does not keep complete statistics on the number of programs or classes which are restricted in terms of sex; however, a survey of city boards of education indicated that sex separation is the rule rather than the exception."); 118 Cong. Rec. 5807 ("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."). *See also Sex Discrimination Regulations: Hearings* at 172 (statement of Sen. Bayh that Title IX was passed to rectify "discriminatory course offerings," among other purposes).

⁹⁴ *See* 20 U.S.C. § 1681(a).

⁹⁵ Pub. L. No. 93-380, 88 Stat. 567, 20 U.S.C. § 1232 (d)(1) (1970 & Supp. IV 1974).

⁹⁶ *See* 40 Fed. Reg. 24137 (1975).

⁹⁷ *Sex Discrimination Regulations: Hearings* at 1 (statement of Rep. O'Hara).

⁹⁸ *See, e.g., id.* at 146-148 (statement of Rep. Casey); *id.* at 150 (statement of Rep. O'Hara).

⁹⁹ *Id.* at 165 (statement of Rep. Mink) ("For example, those who oppose the regulation's requirement for coeducational physical education classes . . . are in fact opposing the law, not the regulation. Similarly, those who maintain that single-sex honorary societies should be allowed to receive 'significant assistance' from recipient institutions are asking for a legislative change."); *see also, e.g., id.* at 173 (statement of Sen. Bayh) ("The title IX guidelines, as the Congress mandated, call for equality in . . . course offerings . . .")

¹⁰⁰ *Grove City v. Bell*, 465 U.S. 555, 568 (1984).

¹⁰¹ *North Haven Bd. of Educ.*, 456 U.S. at 535 (internal quotation marks omitted).

¹⁰² *See Grove City*, 456 U.S. at 534 n. 25 (setting out amendment history of Title IX, including Congress's exemption of sororities and fraternities and certain voluntary youth service organizations from nondiscrimination requirements in 1974 and its

made no move to amend Title IX to permit broad adoption of single-sex classes and programs by recipient educational institutions. The statute does not empower the Department to disregard Title IX's nondiscrimination requirements in the absence of such a Congressional amendment.

Nor does the No Child Left Behind Act (NCLB) mandate or authorize the proposed regulations. In January of 2002, NCLB was signed into law. Among its provisions is authorization of grants for certain "Innovative Programs," including "[p]rovid[ing] same-gender schools and classrooms (consistent with applicable law)." ¹⁰³ Of course, "applicable law" includes the Constitution, Title IX, and Title IX's current implementing regulations, all of which sharply restrict single-sex education. ¹⁰⁴ NCLB tasked the Department of Education with issuing guidelines for local educational agencies that sought funding to implement same-gender schools and classrooms. ¹⁰⁵ The Department not only issued guidelines explaining the restrictions Title IX imposes on same-gender education, as required by NCLB, ¹⁰⁶ but went above and beyond this directive, proposing amendments to the Title IX regulations that would invite educators to establish single-sex classes and schools, thus encouraging local agencies to violate applicable law. In so doing, it went beyond any NCLB mandate.

The proposed single-sex class amendments thus are in clear conflict with the nondiscrimination requirements of Title IX, and should be withdrawn. In the alternative, Title IX would permit a revision of the proposed regulations that encouraged recipients to assess and meet the needs of both sexes within coeducational classes and activities.

V. If the Proposed Regulations Are Not Withdrawn, They Should Be Revised to Require Approval by the Office of Civil Rights Prior to a Recipient Offering Any Single-Sex Program

For the reasons set out above, to comply with the Constitution, public schools and school districts must have exceedingly persuasive reasons for instituting any single-sex programs, whether schools, classes, or other activities, and must be able to demonstrate a close link between the sex discrimination and the important objective sought to be achieved. Title IX restricts sex discrimination in classes and activities even more sharply than does the Constitution, by its terms flatly prohibiting *any* denial of educational opportunities on the basis of sex, subject only to certain enumerated, narrow exceptions. In contrast to the proposed regulations, which do not require review or approval of a proposed single-sex program, ¹⁰⁷ the best way to ensure that single-sex programs comply with the civil rights protections enshrined in the Constitution and Title IX is to require recipients to put forward their justifications for adoption of sex classifications prior to creating a single-sex class or school. The Department's Office of Civil Rights is the natural and appropriate body to review and approve or disapprove such proposed programs.

Requiring OCR's approval of single-sex programs prior to their institution serves multiple objectives. First, it safeguards the rights of students to be free from unlawful discrimination on the basis of their sex *before* discrimination occurs, thus advancing civil rights. Second, requiring recipients to articulate their reasons for creating a single-sex program prior to its adoption helps to ensure that any sex

exemption of certain American Legion sponsored events, mother-daughter and father-son activities, and certain beauty pageants in 1976).

¹⁰³ 20 U.S.C. § 7215(a)(23) (parenthetical used in the original text).

¹⁰⁴ It also includes state constitutions and statutes, which in many instances may further constrain recipients' abilities to create single-sex educational programs.

¹⁰⁵ 20 U.S.C. § 7215(c)

¹⁰⁶ See Guidelines on Current Title IX Requirements Related to Single-Sex Classes and Schools, 67 Fed. Reg. 31102 (May 8, 2002).

¹⁰⁷ 69 Fed. Reg. at 11277.

classification adopted by recipients is based on exceedingly persuasive evidence that discrimination on the basis of sex directly and substantially furthers educational goals, rather than on generalizations or stereotypes about the needs or abilities of males and females. Third, such review prior to imposing a sex classification helps protect recipients from loss of federal funding if they do not meet the legal requirements for such sex discrimination and from liability to students whom such a classification might discriminate against.

As the body primarily responsible for ensuring that recipients of federal funding operate educational programs without discrimination on the basis of sex, it is OCR's role and obligation to ensure that any denial of opportunities based on sex complies with the requirements of the law prior to such denial going into effect. The proposed regulations should be revised to make this clear.

VII. Conclusion

Amending Title IX regulations to encourage single-sex education is the wrong way to address the problems in our nation's schools. Title IX should be vigorously enforced to continue progress toward the goal of educational equality between girls and boys, not diluted to encourage unlawful sex discrimination. We urge the Administration to use its funds and resources to invite schools to adopt nondiscriminatory methods of improving education for *all* students and advancing gender equity in education.

Sincerely,



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