

## Citizens Commission on Civil Rights

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### Via U.S. Mail and Email

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

**Re: Proposed Amendments to Title IX Regulations concerning  
single-sex classes and schools, 6 Fed. Reg. 11276 (March 9, 2004)**

Dear Mr. Marcus:

We are writing on behalf of the Citizens' Commission on Civil Rights in opposition to the Department's proposed amendments to the regulations implementing Title IX of the Education Amendments of 1972.

The Citizen's Commission on Civil Rights is a bipartisan organization established in 1982 to monitor the civil rights policies and practices of the federal government and to seek ways to accelerate progress in the area of civil rights. The Commission's members have extensive experience in civil rights, including Title IX and gender equity. For example, Birch Bayh served in the United States Senate and was the principal sponsor of Title IX when it was enacted in 1972. Augustus Hawkins was a member of Congress and served for many years as Chairman of the House Committee on Education and Labor. Aileen Hernandez was Chair of the National Organization of Women, one of the chief proponents of Title IX.

The Commission opposes the proposed rule changes for the legal and policy reasons set forth in greater detail in the comments filed by the National Women's Law Center. In our comments that follow, however, we highlight several significant problems with the proposal:

**The proposed regulations disregard legal standards established under both Title IX and the Constitution.** With respect to the statute itself, the Department’s proposal goes far beyond Title IX’s very limited allowances for segregation based on gender in education programs. For example, on a schoolwide basis, the new rules would allow recipients of federal funds to establish whole schools segregated by gender without *any* justification whatsoever. 69 Fed. Reg. 11281. Within schools, the regulations would vastly expand the circumstances under which sex-segregation is permitted to include single-sex classes under a virtually unlimited set of circumstances. 69 Fed. Reg. 11284. While the Department has suggested that some progress over the years in eradicating discrimination might justify a relaxation of legal standards, it has not set forth (nor could it) either the legal authority nor a convincing evidentiary basis on which to do so.

Moreover, the proposed rules permitting sex-segregated educational programs run afoul the Constitution’s guarantee of equal protection. As we stressed in our comments on the Department’s Notice of Intent to Regulate in this area, submitted on July 8, 2002, the 14<sup>th</sup> amendment demands that gender-based classifications, including segregation of students by gender, serve an “exceedingly persuasive justification.” The proponent of the classification must demonstrate that there is a “substantial relationship” between the practice and the important interest to be served. *United States v. Virginia*, 518 U.S. 515 (1996). As discussed in the NWLC comments, the proposed allowances for sex-segregation based either on *no* justification (in the case of whole schools) or on one based simply on a desire to have more options for parents and students (in the cases of classes within schools), manifestly fail to meet these standards.

**Instead of promoting equality and advancing the interests of all students, the proposed regulations may end up reinforcing harmful gender-based stereotypes.** The proposal, as written, could allow local education agencies to exclude boys or girls from classrooms or schools based on harmful gender stereotypes or in response to parental surveys or pressure. Parents’ and students’ desires for certain options, however, cannot be allowed to dictate the scope of a school or school district’s civil rights responsibilities. This is unlawful and could reverse years of progress made under our civil rights laws to ensure that government action – including pupil assignment and programming – is free from bias and stereotyping. *See United States v. Virginia*, 518 U.S. 515, 533 (1996)(unacceptable to rely on “overbroad generalizations”); *Brown v. Board of Education*, 349 U.S. 294, 300 (1955) (“the vitality of . . . constitutional principles cannot be allowed to yield simply because of disagreement with them.”). Not only does sacrificing anti-discrimination principles to parent preference violate the Constitution, it is also likely to result in precisely the sort of stigmatization and unequal treatment that the Supreme Court has repeatedly rejected.

**There is insufficient research evidence to support the proposed changes with regard to single-sex classes and schools.** Most scholars agree, and the Department concedes in the NPRM, that research on the benefits of public

single-sex education is inconclusive. In support of this view, we incorporate by reference<sup>1</sup> a research paper previously submitted to the Department as an attachment to our comments filed on July 8, 2002. The paper was written for a seminar on Law and Public education taught by William L. Taylor, the Commission's Chair, as an adjunct professor at Georgetown University Law School. The author, Nancy C. Cantalupo, who served as Director of Georgetown University's Women's Center, carefully reviewed the research literature on single-sex classes. Ms. Cantalupo did not find persuasive research demonstrating academic or related benefits stemming from single-sex education. In some cases where educational benefits were found, single-sex classes were accompanied by other initiatives such as reduced class size, which may have accounted for the gains. Other research found negative effects associated with single-sex classes. Additionally, Ms. Cantalupo's paper specified discriminatory practices that commonly occur and remedies for those practices that can be applied in coeducational classes.

**There is insufficient accountability and evaluation.** The proposed rule changes would "expand flexibility... in providing single-sex schools or classes" at the elementary and secondary levels. 69 Fed. Reg. 11276. Yet, as we have learned after a decade of experience with education reforms enacted under two reauthorizations to the Elementary and Secondary Education Act, flexibility without accountability and results is useless at best and is often harmful to the very groups of students who have been the victims of discrimination or neglect.<sup>2</sup> The Citizens' Commission does not oppose educational innovation or flexibility. But initiatives that seek to encourage segregative practices and that have the potential to benefit one group of students at the expense of another need to be carefully designed, monitored, controlled and evaluated. Rather than undertake a wholesale amendment of Title IX's regulations, the interests of our nation's children, particularly those in the lowest-performing schools, would be better served by a more narrowly tailored approach. Under a more limited and sensible approach, the Department might design a series of demonstration projects with a set of safeguards and components including, for example: classes or schools targeted to low or under-achieving students; equal opportunities for both boys and girls to participate in both single-sex and coeducational settings with verifiable and substantially equal opportunities; and highly rigorous third-party evaluation, based on the same standards for scientifically-based research embraced by other offices within the Department.

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<sup>1</sup> CCCR submitted this research paper to the Department in its July 8, 2002 response to the Department's Notice of Intent to Regulate concerning single-sex classes and schools. If the Department had seriously considered the findings of this research, the Department would not have issued its proposed amendments to the regulations.

<sup>2</sup> See, e.g., Citizens' Commission on Civil Rights, *Title I in Midstream: The Fight to Improve Schools For Poor Kids* (1999); **Closing the Deal: A Preliminary Report on State Compliance With Final Assessment and Accountability Requirements Under the Improving America's Schools Act of 1994** (2001).

**Conclusion.** On May 17, 2004, the nation will commemorate the 50<sup>th</sup> anniversary of the Supreme Court’s landmark decision in *Brown v. Board of Education*. 347 U.S. 483 (1954). Since *Brown*, the federal courts, the Congress and most previous administrations have consistently affirmed the principle that in the education of our children, “separate is inherently unequal.” The proposed regulations could lead to many setbacks in the quest for equality of opportunity for all students and to the very same harmful impact of segregation recognized by the Court in *Brown*. See *Brown*, 347 U.S. at 494.

*Therefore, the Citizens’ Commission urges the Department to withdraw the proposed regulations and, instead, to enforce vigorously the existing civil rights laws, along with other federal law and policy (e.g., the No Child Left Behind Act) intended to redress discrimination and to advance educational achievement and opportunity.*

Respectfully Submitted,

William L. Taylor  
Chair

Dianne M. Piche  
Executive Director