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April 23, 2004

Kenneth L. Marcus
Assistant Secretary for Civil Rights
U.S. Department of Education
400 Maryland Ave., S.W.
Room 5000
Mary E. Switzer Building
Washington, D.C. 20202 – 1100

Re: Single-Sex Proposed Regulation Comments

Dear Assistant Secretary Marcus:

As representatives of 2.7 million education employees who are members of the National Education Association (“NEA”), we appreciate the opportunity to share with you our views regarding the Department of Education’s proposed amendments to the regulations implementing Title IX of the Education Amendments of 1972 governing single-sex education. NEA strongly opposes the proposed amendments and urges the Department to withdraw them.

Summary of Concerns

Title IX has worked exceptionally well for 30 years – not simply by opening up opportunities for girls and women in athletics, but also by expanding career and educational options. In light of this strong track record, NEA believes that the Title IX regulations should not be changed absent compelling evidence that the proposed changes will actually improve student achievement. In addition, NEA believes the proposed regulations reflect bad educational policy that will have significant adverse consequences, including: the diversion of resources from educational practices that already have been proven to improve student achievement for both girls and boys (*e.g.*, smaller class size, quality teachers, and parental involvement); the promotion and legitimization of harmful and false sex stereotypes of both boys and girls; and the creation of an artificial single-sex environment that will ill prepare students for life in the real world. Perhaps most troubling, the proposal would elevate the discredited doctrine of “separate but equal” to official government policy – a particularly inappropriate change as we celebrate the 50th anniversary of the Supreme Court’s decision in *Brown v. Board of Education*.

Lack of Consistent Research in Favor of Single-Sex Education and Diversion of Limited Resources from Proven Initiatives

The Bush Administration has consistently taken the position that educational innovation must be supported by "scientifically-based research." In particular, the No Child Left Behind Act includes a broad mandate that schools use instructional approaches that have been proven to work. The proposed changes to Title IX clearly do not meet this standard. In fact, there is no consistent research demonstrating that single-sex education produces significant educational benefits or enhances student achievement. On the contrary, a 1998 report prepared by the American Association of University Women ("AAUW") on the research on single-sex education concluded that there is no evidence that single-sex education in general "works" or is "better" than coeducation.¹

Moreover, in contrast to single-sex education, a number of educational reforms such as reducing class sizes, increasing parental involvement, and ensuring high quality teachers have proven track records of success in maximizing student achievement. Encouraging single-sex education serves merely to drain resources from these proven initiatives while funneling dollars to experimental programs with no such proven record.

Lack of Accountability and Appropriate Evaluation

The proposed "evaluations" mandated by § 106.34(b)(4) are both meaningless and useless. The regulation does not actually require recipients to evaluate whether single-sex classes enhance student achievement, produce desirable educational outcomes, or even attain identifiable goals. The so-called "evaluations" will not provide parents or other stakeholders with any meaningful information about the success or desirability of single-sex classes; indeed, recipients are not even required to make the results of such "evaluations" public.

As currently drafted, the provision on "evaluations" makes little sense. Recipients are told that they should determine whether their single-sex classes are based on "overly broad generalizations about the different talents or capacities of male and female students." It is unclear as to the meaning of this standard or how a school district is supposed to make the determination. It appears that the Department is requiring recipients to ascertain whether the decisionmakers who implemented the single-sex classes had a discriminatory and illegal motive – a determination they are not likely to make. Recipients also are told that they must determine whether their "single-sex classes are substantially related to achievement of the objective for the classes." However, since the proposed regulations specifically allow recipients to create single-sex classes in order to further the "objective" of providing "a diversity of educational options to parents," the single-sex classes must be "substantially related" to achieving that objective.

In sum, the proposed regulation on periodic evaluations is fatally flawed because there is no requirement for accountability. For this reason, we strongly urge that this provision be revised to require recipients to conduct an annual assessment of the effectiveness of both single-sex classes and

¹ "Separated by Sex: A Critical Look at Single-sex Education for Girls," report by AAUW Education Foundation (1998).

single-sex schools² and to determine whether such programs enhance student achievement or otherwise improve educational outcomes. We also recommend that the regulations specifically require that such assessments be made public.

Questionable Legality

The proposed regulations, which allow recipients to establish single-sex classes and single-sex schools, are of questionable legality, and the Department has failed to provide recipients with adequate legal guidance. This will result in costly litigation, which will drain precious resources from schools already underfunded. We agree with other organizations, such as the National Women’s Law Center, that have filed comments forcefully demonstrating how the proposed regulations violate both Title IX and the Equal Protection Clause of the U.S. Constitution, and there is no need to repeat such legal commentary here. We note in passing, however, that, at three different places in the “Overview” accompanying the proposed regulations, the Department warns recipients to “consult[] legal counsel” before implementing same-sex educational programs.³ The inability or unwillingness of the Department to provide sound legal guidance to recipients simply confirms what NEA and other organizations have cautioned, namely that these are unchartered legal waters, and any school district that undertakes such a risky experiment is inviting the victims of sex discrimination to sue. This is one reason why recipients should be required to submit any proposed single-sex education program to the Department for its review and approval prior to implementation. While such a practice would not necessarily immunize recipients from litigation, it hopefully would reduce the chances that patently illegal single-sex programs would be implemented.

Another shortcoming in the proposed regulations concerns their silence on the question as to whether teacher assignment to such classes must be voluntary. In its comments to the Department’s initial notice of intent to amend the Title IX regulations submitted in July 2002, NEA urged the Department to caution recipients not to assign school personnel to any single-sex education program on the basis of gender. We strongly reiterate that recommendation.

Sex-based job assignments in the public schools are illegal under federal law. School employees are protected by Title IX’s prohibition on sex discrimination, and the Title IX regulations explicitly prohibit “[j]ob assignments” on the basis of sex.⁴ The regulations further ban employment actions based upon the “stereotyped characterizations of one or the other sex,” as well as sex-based employment actions that are based on the “preference[s]” of “the recipient, ... students, or other persons.”⁵ School employees also are covered by Title VII, which similarly outlaws sex-based employment decisions, including decisions based on the “preferences of coworkers, the employer,

² As currently drafted, the proposed regulations do not require evaluations of single-sex *schools*.

³ See footnotes 5, 32, and 42 of ED’s “Overview.”

⁴ 34 C.F.R. § 106.51(b)(4); see also 34 C.F.R. § 106.55(a) (providing that a recipient of federal education funds “shall not: [c]lassify a job as being for males or for females.”)

⁵ 34 C.F.R. § 106.61

clients or customers....”⁶ The few reported decisions to address the question in the educational context have held that it is a Title VII violation for an employer to refuse to hire a female coach or a female counselor because the job involved working with only male students.⁷

Although the law is clear that public school employers may not make sex-based job assignments, there is a danger that school officials may not be aware of this restriction and may believe that, since it is now permissible to establish single-sex classes and schools, it also is permissible to assign school personnel of the same sex to such programs. In order to reduce the chances of this type of illegal discrimination, we urge the Department specifically to state in the regulations or the Overview that sex-based employment decisions of this sort are impermissible.

Promotion of Harmful Stereotypes

Fifty years ago this spring, the U.S. Supreme Court announced the fundamental principle that, when it comes to the education of our nation’s young people, separation on the basis of race is inherently unequal. Just last year, the Court reaffirmed the proposition that diversity – exposing students to those different from themselves – is a critically important educational value.

But the Department’s proposed regulations would contravene these basic tenets, not only threatening opportunities for women and girls in education, but undermining the understanding of equal protection and civil rights that has informed our nation’s laws and policies for half a century. According to noted researchers David Sadker and Karen Zittleman, “whenever groups have been segregated, the least-valued group has ended up with fewer resources and fewer opportunities. Historically that has been a costly lesson for girls (and African-Americans and the poor). The proposed changes do not require equal treatment or equal facilities, but only ‘substantially equal’ programs. As the proposal now stands, a school could provide a single-sex option for boys and not for girls, or cutting-edge science equipment for boys and an up-to-date cosmetology center for girls.”⁸

By ignoring the safeguards set by current law to protect against sex discrimination, the proposed regulations would enshrine stereotypes and discriminatory preferences as acceptable bases for government decision-making. Moreover, acceptance of this doctrine in the context of gender could lead us down the “slippery slope” of segregation of students based on race or religion.

⁶ 29 C.F.R. § 1604.2(a)(1)(iii).

⁷ Burkey v. Marshall County Bd. or Educ., 513 F. Supp. 1084 (N.D. W.Va. 1981) (school board’s policy of allowing only males to coach boys’ athletic teams violates Title VII); Jaczak v. Ochburg, 540 F.Supp. 698 (E.D. Mich. 1982) (refusal to hire female counselor to work as child care worker at sheltered workshop for mentally ill male youths based on the employer’s desire for a “male role model,” violates Title VII). See also Diaz v. Pan Am World Airways, Inc., 442 F.2d 385 (5th Cir. 1971) (rejecting airline’s argument that “customer preference” justified its practice of hiring only female flight attendants; “it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid.”) Id. at 389.

⁸ Sadker, David and Zittleman, Karen. “Single-sex schools: A good idea gone wrong?” Christian Science Monitor, April 8, 2004, p.9.

In addition, the proposal would promote and legitimize harmful and false sex stereotypes of both boys and girls, specifically that boys are disruptive and rambunctious and cannot be expected to behave around girls, while girls are delicate and need to be protected from the bad influence of boys. Stereotypes about the learning and developmental needs of men and women continue to this day. In a study of public single-sex schools completed in 2001, for example, researchers discovered that some teachers' teaching styles were premised on gender-based stereotypes -- such as the notion that girls learn better through collaboration and nurturing while boys need structure and discipline.⁹

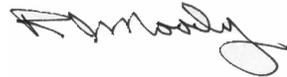
Given the above-outlined reasons, we strongly urge the Department to withdraw its proposed Title IX regulations and to keep current regulatory standards intact.

Thank you for the opportunity to submit these comments.

Sincerely,



Diane Shust
Director of Government Relations



Randall Moody
Manager of Federal Policy and Politics

⁹ Datnow *et. al.*, *Is Single Gender Schooling Viable in the Public Sector? Lessons from California's Pilot Program* (May 2001).