

National Organization for Women

Kim Gandy
President

Karen Johnson
Executive Vice President



Olga Vives
Action Vice President

Terry O'Neill
Membership Vice President

Single-Sex Proposed Regulations Comments

April 23, 2004

SUBMITTED VIA E-MAIL

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

Re: Comments of the National Organization for Women on the Department of Education's Proposed Single-Sex Regulations

Dear Assistant Secretary Marcus:

The National Organization for Women submits the following comments in response to the draft regulations published at 69 Fed. Reg. 11275 (March 9, 2004), which propose to amend regulations implementing Title IX of the Education Amendments of 1972 governing single-sex education.

I. Introduction

Fifty years ago, in *Brown v. Board of Education*, the United States Supreme Court recognized that separate educational programs for black students violated the Equal Protection Clause of the federal constitution. As in the case of Topeka, Kansas, the school district challenged in *Brown*, these race segregated educational programs often enjoyed strong support in local communities. Despite this support, and despite some communities' efforts to avoid blatant inequality by offering similar amenities at the segregated schools, the Supreme Court held that separate educational facilities are "inherently unequal." This principle has been repeatedly reinforced since 1954. It is, quite simply, the bedrock of United States constitutional law, and indeed, of our society. Notwithstanding this deeply embedded principle, the United States Department of Education's Office of Civil Rights ("OCR") has proposed regulations that will facilitate reintroduction of segregation into the public education system—this time in the form of segregation by sex, instead of race.

On May 8, 2002, OCR issued a Notice of Intent to Regulate ("Notice") stating that it intended "to propose amendments to the regulations implementing Title IX of the Education Amendments of 1972 ["Title IX"] to provide more flexibility for educators to

establish single-sex classes and schools at the elementary and secondary levels." 67 Fed. Reg. 31,098 (May 8, 2002). The Notice cited recent amendments to the Elementary and Secondary Education Act ("ESEA") allowing local educational agencies to use certain funds for innovative assistance programs, which may include, among other things "[p]rograms to provide same-gender schools and classrooms (consistent with applicable law)." 20 U.S.C.A. § 7215(a)(23) (2002).

The National Organization for Women ("NOW"), along with many other individuals and organizations concerned about educational opportunities for women and girls, submitted extensive comments that registered our strong opposition to OCR's proposal. At that time, we set out in great detail the substantial legal and policy reasons that OCR should abandon its proposed course of action. See Comments of the National Organization for Women, <http://www.now.org/issues/education/single-sex-education-comments.html> (last visited on 4/23/04).

On March 9, 2004, OCR promulgated its proposed regulations. 69 Fed. Reg. 11276 (March 9, 2004). While some minor adjustments have been made apparently in response to the comments submitted by NOW and others, these draft regulations continue to pursue the course of expanding sex segregation in public education. Moreover, the draft regulations now provide additional specificity as to how OCR intends implement this misguided proposal.

Because the draft regulations adopt a course for educational policy that is both illegal and unsound, NOW continues to strongly oppose OCR's proposal, and we repeat many of our prior comments here. The legal and policy reasons OCR should withdraw these draft regulations are summarized in the Executive Summary provided in Section II below. Sections III through VII of these comments describe NOW's concerns in more detail.

II. Executive Summary

OCR's proposed regulations implementing Title IX to facilitate the establishment of single-sex programs in primary and secondary schools are flawed on both legal and policy grounds. Reasons for abandoning the proposal include the following:

- **Raises Constitutional Concerns.** In the landmark decision of *Brown v. Board of Education*, the Supreme Court recognized that "separate educational facilities are inherently unequal." 347 U.S. 483, 495 (1954). OCR's proposal to introduce sex segregation into the public schools contradicts the holding in *Brown* and violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Given the admitted lack of evidence supporting a relationship between sex segregation and improved educational outcomes, OCR cannot demonstrate the "exceedingly persuasive justification" that is needed to overcome the heightened scrutiny courts must apply to measures that discriminate on the basis of sex in public education. *United States v. Virginia*, 518 U.S. 515, 531 (1996). As *Brown* demonstrated, the federal government has a unique role to play in ensuring equal educational opportunity. In these proposed regulations, OCR abandons that role and leaves public school students – particularly girls – subject to the exigencies of educational fads and local biases.

· **Lacks Supporting Research.** OCR itself admits that “there is presently a debate among researchers and educators concerning the effectiveness of single-sex education.” 69 Fed. Reg. 11277. In fact, current research fails to support OCR's threshold position that separating boys and girls produces educational benefits. Older research that suggested a correlation between same-sex programs and educational outcomes failed to control for other factors—such as socioeconomic status of the students, selectivity of admissions, resources invested in the program, and class size—that are more likely to affect performance.^[1] As recent studies demonstrate, once those confounding variables are taken into account, differences between same-sex and coeducational schools disappear.

· **Conflicts With Existing Law.** Recent legislation authorized funds to explore same-sex alternatives in public schools, but Congress expressly provided that such alternatives must be “consistent with applicable law.” 20 U.S.C.A. § 7215(a)(23) (2002). OCR's proposal to facilitate the separation of boys and girls in public schools contradicts both the letter and spirit of existing statutes designed to promote sex equality—including the Equal Educational Opportunity Act and Title IX of the Education Amendments of 1972. Further, by resting in large part on community support for sex segregated education, the proposed regulations import into Title IX a concept of “consumer preference” that has long been rejected in other civil rights contexts, specifically because it perpetuates discrimination.

· **Undermines Diversity.** The Supreme Court recently reiterated that the government has a compelling interest in promoting student body diversity in educational settings. *See Grutter v. Bollinger*, 529 U.S. 306 (2003). Among the benefits of such diversity are better learning outcomes, and better preparation for “an increasingly diverse workforce and society.” *Id.* at 333. Although cloaked in rhetoric about enhancing diversity in educational offerings, OCR's proposal to separate students based on identity characteristics is plainly at cross-purposes with this compelling interest in student body diversity. Sex-segregation would serve to deprive students of the benefits associated with a diverse educational environment.

· **Fails to Ensure Equal Opportunity.** OCR's plan is based on the unsubstantiated premise that equal opportunities can be provided to male and female students when they are separated on the basis of sex. Unfortunately, decades of experience in related areas, such as job training, college athletics, and professional sports, indicate that female-dominated programs consistently receive fewer resources than male-dominated programs. Separating girls and boys in primary and secondary educational programs therefore threatens to exacerbate, rather than ameliorate, inequities between boys and girls. This problem is compounded by the proposed regulations' utter failure to require serious review of the on-going implementation of single sex programs. Instead of providing for appropriate oversight, the proposed regulations rely on school districts' periodic “self evaluations” – with no reporting requirements -- thus shifting the full responsibility for monitoring inequities to students and parents.

- **Perpetuates Sex-Stereotyping and Feelings of Superiority/Inferiority.** Studies show that all-boys schools promote sexism and feelings of superiority toward women. Girls, as the traditionally subordinated group, are likely to experience a badge of inferiority as a result of being grouped on the basis of sex—particularly if there are all-boys schools—because the message to the girls is that they are the problem.
- **Undermines Workplace Equality.** Depriving boys and girls of the opportunity to interact daily as peers in the classroom during their formative years will adversely affect gender relations in the adult workplace and in their lives. To promote workplace equality and eliminate the glass ceiling, collaborative interaction between girls and boys in primary and secondary schools should be fostered, not eliminated. Indeed, this connection between student body diversity and productive workplaces was explicitly recognized by the U.S. Supreme Court in *Grutter v. University of Michigan*, 539 U.S. at 334 (describing education as pivotal to “preparing students for work and citizenship”).
- **Fails to Adequately Address Harassment and Discrimination.** While sexual harassment and other forms of discrimination are legitimate concerns in our public schools, separating the sexes is merely a “band-aid” fix that inappropriately treats girls as the problem by removing them from the presence of their male peers. Only a small portion of girls would likely participate in same-sex programs, and those girls who remain in the coeducational environment would be even more likely to suffer from harassment and discrimination as a result of the schools' failure to address those problems head-on. Further, the proposed regulations misapprehend the nature of sexual harassment, which is an exercise of power that may be present in single sex as well as co-ed educational and workplace settings. Investing resources in sexual harassment and sex-equity training for students and teachers would be a much more constructive and effective method of providing a long-term solution to this very real problem.

These and other concerns are examined in greater detail below.

III. National Organization for Women

NOW is uniquely qualified to provide input on the issues raised in the Proposed Single-Sex Regulations. NOW is a non-profit organization dedicated to making legal, political, social, and economic change in our society in order to eliminate sexism and end discrimination. There are more than 500 NOW chapters located throughout the United States, and the organization has more than one-half million contributing members and supporters. Since its founding in 1966, NOW has vigorously advocated equity between women and men in all aspects of society, including public education. As a civil rights organization with a particular focus on women's rights, NOW opposes regulatory programs that threaten to deprive women of equal protection of the laws, such as the program OCR is currently pursuing.

NOW actively supported the enactment of Title IX in 1972 and has remained vigilant since that time in pursuing the protections promised by Title IX. NOW is staunchly opposed to any legislative or regulatory measures that would undermine those protections. By facilitating sex segregation in public schools, OCR's proposed

regulations would contravene Title IX's overriding objective of fostering equality. For the legal and policy reasons set forth below, NOW urges OCR to abandon its efforts to separate girls from boys in public elementary and secondary education.

IV. The Measures OCR Proposes Raise Serious Constitutional Concerns.

In the proposed regulations, OCR erroneously claims that, in light of a purported exemption from Title IX, a school district is not required to “justify establishing a single-sex school.” 69 Fed. Reg. 11281. In addition to misconstruing Title IX, [2]¹ this statement fails to consider whether single-sex programs can survive scrutiny under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. At its core, OCR's plan would reinstitute a practice that runs contrary to U.S. constitutional ideals—the practice of segregation in public schools. Although OCR's proposal concerns segregation on the basis of sex instead of race, it must be evaluated against the backdrop of *Brown v. Board of Education*, 347 U.S. 483 (1954), which signaled the end of our country's shameful history of racial segregation. Indeed, race and sex segregation are not unrelated phenomena. As Professor Verna Williams chronicles in detail, sex-segregation in education has been used repeatedly as a means to further racist goals that could not be pursued directly. See Verna Williams, *Reform or Retrenchment? Single-sex Education and the Construction of Race and Gender*, __ U.Wisc. L.Rev. __ (forthcoming 2004) (draft on file with authors).

While OCR's proposal is directed at sex instead of race, the rationale on which Chief Justice Warren relied in *Brown* applies equally in this context. [3]¹ In *Brown*, the Supreme Court recognized the critical role of public education in a democratic society. The Court described public schools as the primary instruments that introduce children to cultural values, prepare them for future employment, and assist them in adjusting to their environment, and went on to state that children who are denied equal educational opportunities cannot “reasonably be expected to succeed.” *Brown*, 347 U.S. at 493. Emphasizing the pernicious effects of segregation, the Court noted that “[t]o separate [grade school children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” *Id.* at 494. These same principles apply to any plan for single-sex education in the public schools. Whether mandated or made available on a “voluntary” basis, publicly sponsored segregation threatens to impose a badge of inferiority on historically disadvantaged groups. See Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 Geo. Wash. L. Rev. 451, 517 (1999) (“Levit”).

A. The Establishment of Single-Sex Public Education Would Not Likely Survive an Equal Protection Challenge.

A constitutional analysis of OCR's proposal is an essential first step. Any rule providing for the establishment of single-sex public schools or classes would expressly discriminate on the basis of sex and, thus, would trigger analysis under the Equal Protection Clause of the Fourteenth Amendment. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982) (holding that denying otherwise qualified males the right to enroll for credit in a state-sponsored nursing school violated the Equal Protection

Clause). The Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. In evaluating whether gender-based distinctions violate the Equal Protection Clause, courts apply heightened scrutiny. See *United States v. Virginia*, 518 U.S. 515, 531 (1996) ("*VMI*") (finding that the state failed to show an exceedingly persuasive justification for excluding women from a publicly funded military college in violation of equal protection (quoting *Hogan*, 458 U.S. at 724)).^[4]

OCR's proposal very likely would not survive heightened scrutiny. Courts repeatedly have rejected efforts to establish and maintain publicly funded single-sex education programs on equal protection grounds. In *VMI*, the Supreme Court found that Virginia had not shown an exceedingly persuasive justification for prohibiting women from participating in the citizen-soldier training offered at the Virginia Military Institute. See *VMI*, 518 U.S. at 534. Similarly, in *Hogan*, the Court held that the state interest asserted by Mississippi to explain the need to prohibit men from attending a public nursing school did not establish an exceedingly persuasive justification to maintain the single-sex institution. See *Hogan*, 458 U.S. at 731. In *Garrett v. Board of Education*, a federal district court enjoined the implementation of all-male academies in a public school system, finding that the plaintiffs were likely to prevail on the merits of their arguments against sex segregation. 775 F. Supp. 1004, 1009-10 (E.D. Mich. 1991).

This line of precedent makes it extremely difficult, if not impossible, for OCR's proposed regulations to survive equal protection scrutiny. In his dissenting opinion in *VMI*, Justice Scalia professed that, "[u]nder the constitutional principles announced and applied today, single-sex education is unconstitutional." *VMI*, 518 U.S. at 595. He further stated: "In any event, regardless of whether the Court's rationale leaves some small amount of room for lawyers to argue, it ensures that single-sex public education is functionally dead." *Id.* at 596.

Nevertheless, OCR is now proposing to establish single-sex schools and/or classes in public primary and secondary schools. As Justice Scalia acknowledged, such an effort cannot survive equal protection scrutiny. As the academic debate on the merits of such education underscore, there is no exceedingly persuasive justification for establishing same-sex schools and/or classes in the public education system. Likewise, OCR's proposed regulations do not fulfill the second prong of the equal protection test established by the Court, because "the discriminatory means employed [is not] substantially related to the achievement" of the stated objective. *Hogan*, 458 U.S. at 724 (citations and internal quotations omitted).

Before taking the extreme step of separating girls and boys in the public schools, the government must show that this discriminatory act is closely related to achieving the objective of improving the public schools. Given the lack of sound evidence demonstrating a causal relationship between single-sex schools and improved education, OCR's draft regulations are unlikely to survive heightened scrutiny. While various researchers have explored the effects of single-sex education, the existing body of research does not support the measures OCR contemplates for several reasons:

· **Recent Studies Do Not Support OCR's Plan.** While studies from the late 1970s and early 1980s have been touted as demonstrating some benefits from same-sex schools, more sophisticated studies in the 1990s dispute these results. *See* Levit at 500-01. In fact, OCR itself explicitly recognizes “there is presently a debate among researchers and educators regarding the effectiveness of single-sex education.” 69 Fed. Reg. 11277. The more recent studies reveal that, once researchers control for background factors such as intelligence, socioeconomic status, motivation, and prior achievement, there are no statistically significant differences between all-female and coeducational schools. *See id.* at 491, 504-05. Moreover, the older studies should be viewed with skepticism, because conditions in society concerning gender roles and expectations for women have substantially changed since the time those studies were conducted. *See* Patricia B. Campbell and Ellen Wahl, *What's Sex Got To Do With It? Simplistic Questions, Complex Answers* (“Campbell and Wahl”) in American Association of University Women Educational Foundation, *Separated by Sex: A Critical Look at Single-Sex Education for Girls* (1998) (“AAUW Compilation”) 70.

· **Inconclusive Results and Confounding Variables.** There is no consensus in the existing body of research that single-sex schools are beneficial, and older studies that do suggest benefits fail to control for confounding variables. Although single-sex schools arguably benefit *some* students in *some* settings, “researchers do not know for certain whether the benefits derive from factors *unique* to single-sex programs, or whether these factors also exist or can be reproduced in coeducational settings.” AAUW Compilation 2. Studies or anecdotes suggesting a correlation between same-sex programs and positive educational outcomes have no meaning unless an effort was made to control for variables such as socioeconomic status of the students, selectivity of admissions, greater resources invested in the program, and smaller class size. Indeed, without controlling for those variables, one could make the case for separating students based on *any* identity characteristic (such as red hair, blue eyes, etc.). Any group of students provided with better resources than are generally available in the public school system—e.g., strongly motivated teachers, parents, and students, better equipment, smaller class size—undoubtedly would outperform its peers.

· **Overwhelming Similarities Between Sexes.** Although it is undisputed that some differences exist in a comparison of “all boys” and “all girls,” much wider variations exist among members of a group of girls or a group of boys than between the two sexes in aggregate. *See* Campbell & Wahl at 66. An individual's sex alone does not provide any information about that person's academic skills, athletic abilities, or personality traits. *See id.* It might be true that, on average, boys are more aggressive than girls; however, many females are more aggressive than most of their male counterparts. In fact, researchers who have analyzed thousand of studies investigating gender differences have noted that

gender differences in cognitive and affective areas are relatively small and becoming smaller. For example, the degree of overlap in girls' and boys' math skills has been computed to be between 98 and 99 percent, while in verbal skills the degree of overlap has been found to be 96 percent.

Id. (citations and footnotes omitted).

Given the research showing that commonalities between boys and girls far exceed the differences, the drastic step of separating boys and girls in public schools is not warranted. Indeed, the impacts of such an approach on students outside the “normal” range of aptitude or behavior for their gender could be devastating.

- **Perception Versus Reality.** Studies have also demonstrated a paradox between perceived benefits of same-sex schools and the benefits these schools actually produce. See Pamela Haag, *Single Sex Education in Grades K-12: What Does the Research Tell Us?*, in AAUW Compilation 34. Much of the support for same-sex learning stems from the belief that same-sex settings provide a more conducive learning environment for women. However, this conception is not substantiated by research results. In fact, research has consistently shown that "girls' math and science achievement, measured by a variety of means, has not shown statistically significant gains in the single-sex classroom." *Id.*

- **Rarity Skews Benefits.** At least one researcher has pointed out that the purported success of some single-sex programs is limited to school systems in which single-sex education is rare. See Cornelius Riordan, *The Future of Single-Sex Schools*, in AAUW Compilation 55. If single-sex schools are made available on a limited or pilot basis, there is a significant risk that their effect may be distorted (particularly if they employ selective admissions and/or offer greater resources than other schools). If same-sex schools became more common, which could occur if OCR implements its proposal, improved educational outcomes would not likely be realized in the larger population. See *id.*

In short, existing studies do not support the proposition that separating girls from boys in primary and secondary students schools is closely related to performance in the classroom. In the absence of supporting research based on sound methodology, OCR's proposed regulatory changes rest on anecdotes and gender stereotypes. The Supreme Court has made clear, however, that it is unacceptable to use gender as a proxy in matters relating to public education. In *Hogan*, the court explained that

[a]lthough the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.

Id. at 724-25. Because OCR's proposal is based on stereotypes, rather than sound research, it is inconsistent with the Equal Protection Clause.

B. OCR's Proposal Would Undermine Student Body Diversity, Contradicting the Government's Recognized Compelling Interest in Such Diversity

OCR's proposal not only lacks an exceedingly persuasive justification for its implementation as mandated by the Equal Protection Clause, it also undercuts the government's compelling interest in student body diversity. OCR erroneously suggests that there is a compelling interest in providing diverse educational offerings – but that interest, if there is one, surely stops short of offerings that perpetuate discrimination. In any event, such a constitutionally significant interest does not appear to have been recognized by the any court. Rather, consistent with the Equal Protection Clause's focus on individuals, courts have recognized a compelling governmental interest in the diversity of the educational community – student body, teachers – not diversity of educational programs. OCR's proposed regulations, which undermine student body diversity by permitting sex segregation, are plainly at odds with this recognized governmental interest.

The government's asserted interest in student body diversity is longstanding and fundamental. In the context of higher education, the United States Supreme Court has expressly recognized that student body diversity is a compelling interest. *See Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding a law school admissions policy that was narrowly tailored to serve the compelling interest of achieving a diverse student body). The Court has observed that diversity is important in educational contexts because "the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Id.* at 329 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. at 313). While the cases cited above specifically concern racial diversity, there is no question that the state's interest in promoting gender diversity is equally compelling. For example, in addressing the composition of juries, the Supreme Court acknowledged the importance of gender diversity. *See J.E.B. v. T.B.*, 511 U.S. 127, 133-34 (1994).

The presence of both sexes is equally, if not more, important in the educational environment than other types of diversity. Most researchers agree that coeducational schools are a better environment in which to "prepare students for adult occupational and interpersonal roles." *Levit* at 495. For instance, coeducation helps students gain "the understanding of how to maintain long-term relationships with members of the opposite sex and how to avoid falling unthinkingly into traditional or stereotypic roles." *Id.* Although OCR's proposed regulations are cloaked in rhetoric about enhancing diversity by expanding educational choice, the concept of separating students based on identity characteristics is the antithesis of diversity. Indeed, were OCR's formulation accepted, it would threaten to undermine the very meaning of *Grutter* and the promise of diversity; schools would be permitted to pay lip service to the value of diversity while relegating students to programs that perpetuate segregation and stereotypes. The government's compelling interest in student body diversity, particularly when measured against the contradictory evidence on the merits of single-sex education, counsels strongly against OCR's approach.

C. Making Single-Sex Alternatives "Voluntary" Does Not Remedy the Equal Protection Problem.

Given the *Brown* decision and the equal protection concerns articulated above, there can be no question that making single-sex programs *mandatory* would run afoul of the Constitution. Even if OCR were to implement its plan on a "voluntary" basis such that no student would be forced to participate in a single-sex program, this so-called "voluntariness" would not cure the plan of its constitutional flaws. Students who do not voluntarily submit to single-sex programs inevitably would be affected by the existence of those programs. For example, one likely effect of an all-girls school would be to skew the sex ratio in existing coeducational schools or classes, resulting in adverse impacts for the female students remaining in those programs. Researcher Valerie Lee has identified this problem, explaining:

It is not possible to offer separate-by-gender classes only for girls without seriously influencing the gender balance in the remaining classes. We had indications from our research that when supposedly coeducational settings depart much from a 50-50 balance of girls and boys toward larger proportions of boys, there are some negative consequences for girls.

AAUW Compilation 50. Furthermore, if a school district were to provide students with the option to attend an all-female school, the district might not feel as compelled to address the sex discrimination occurring in its coeducational schools, even though it would still be the district's responsibility to combat these problems. Thus, the plan would likely have a discriminatory impact on students who do not voluntarily submit to sex segregation.

OCR's frames its own role as a passive one – it suggests that it is simply responding to public pressure for more flexibility, and that school districts and individual students will not be compelled to participate in single-sex educational programs. In essence, OCR suggests that any potential inequality is of little consequence, since under its proposed regulations, affected students will voluntarily participate in the program. However, in the analogous context of employment, courts have soundly rejected this "customer preference" defense to institutional discrimination. *See, e.g., Lam v. University of Hawaii*, 40 F.3d 1551, 1560 (9th Cir. 1994); *Diaz v. Pan Am World Airways*, 42 F.2d 385, 389 (5th Cir. 1971). In those cases, the courts recognized that legal principles of equal protection, whether statutory or constitutional, override community opinion, and that bowing to such community pressures would perpetuate the discriminatory status quo indefinitely. The same principle applies in the education context. Just because discrimination is popular – or perhaps unrecognized by those who perpetuate it – does not mean that it is legal.

Because students (particularly girls) who do not elect to enter single-sex programs might suffer as a result of the siphoning effect of those programs, and because "customer preference" is not a valid defense to discrimination, making the programs voluntary would not remedy their constitutional deficiencies.

D. A Single-Sex Program Based On a Relaxed Standard of "Substantial Equality" Would Be Unconstitutional.

In its proposed regulations, OCR adopts the standard of “substantial equality” for assessing the legality of single sex educational institutions. That phrase, taken out of context from the *VMI* decision, does not fairly articulate the applicable constitutional standard. Rather, the full text of the *VMI* decision indicates that women must be afforded “genuinely equal protection.” *VMI*, 518 U.S. at 557. As explained in more detail in Section VI.A. below, there is simply no support for the proposition that it is possible to provide *truly equal* opportunities in a sex-segregated primary or secondary school.

The untested standard put forward in the draft regulations is compounded by the total lack of OCR oversight of the proposed regulations’ implementation. OCR offers to provide technical assistance “upon request,” 69 Fed. Reg. 11277, and calls on districts to engage in self study exercises, but otherwise leaves school districts to meet the substantial equality standard without federal oversight. In essence, this means that students and parents will be alone in monitoring this implementation – a burden that should be shouldered by the federal government.

V. Regulations Facilitating the Establishment of Single-Sex Public Schools Would Be Inconsistent With Existing Legislation.

Beyond raising the constitutional concerns described in Section IV above, OCR’s proposed regulations contravene the spirit and letter of existing laws that promote the objective of gender equity.

A. Title IX

Title IX provides that “[n]o 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” 20 U.S.C.A. § 1681(a). OCR currently is interpreting that provision to exclude primary and secondary school admissions from the scope of its prohibitions, relying on a portion of the statute which provides that “in regards to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education.” 20 U.S.C.A. § 1681(a)(1). However, an analysis of past judicial and administrative actions interpreting Title IX, along with the plain language of the regulations implementing Title IX, casts serious doubt on OCR’s current interpretation. [\[5\]](#)

At least one federal court has concluded that Title IX prohibits sex segregation in primary and secondary schools. In *Garrett*, the district court enjoined the establishment of all-male public academies that would serve students in preschool through grade eight, finding that the plaintiffs were likely to succeed in proving that the academies violated

Title IX. *See Garrett*, 775 F. Supp. at 1009-10. In holding that Title IX applied to primary and secondary schools, the *Garrett* court relied on legislative history. The court explained that Title IX only allows the continuation of pre-existing single-sex schools. *See Garrett*, 775 F. Supp. at 1009. It further noted that Title IX

is not viewed as an authorization to establish new single sex schools. No case has ever upheld the existence of a sex-segregated public school that has the effect of favoring one sex over another. The interplay of the Constitution and other statutes, as well as the legislative history, diminishes the persuasiveness of this argument.

Id.

Prior administrative actions also indicate that Title IX prohibits the establishment of same-sex schools. In prior administrations, written opinions by OCR articulated this view. *See id.* at 1009 & n.9 (citing OCR opinions); Note, *Inner-City Single-Sex Schools: Educational Reform or Invidious Discrimination?*, 105 Harv. L. Rev. 1741, 1754 n.95 (1992), *citing* Letter from Jesse L. High, Regional Civil Rights Dir., United States Dep't of Educ. Office of Civil Rights, to Dr. Joseph H. Fernandez, Superintendent of Schs., Dade County Pub. Schs. 2 (Aug. 31, 1988) (informing Miami School District that establishing all-black, all-male classes would violate Title IX) (on file at the Harvard Law School Library); Erin A. McGrath, Note, *The Young Women's Leadership School: A Viable Alternative to Traditional Coeducational Schools*, 4 Cardozo Women's L.J. 455, 478 n.177 (citing Letter from Cathy H. Lewis, Acting Dir., Policy and Enforcement Serv., Office for Civil Rights, to Barbara A. Bitters, Cultural and Equity Section, Wisconsin Dep't of Publ. Instruction (May 18, 1990)).

The regulations implementing Title IX, which were promulgated on the heels of Congressional action in 1974, further evidence the statute's applicability to primary and secondary schools. Those regulations provide that

[a] recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

34 C.F.R. § 106.34 (2001). Following this general statement, the regulations set forth certain exceptions that describe limited circumstances in which same-sex classes are permissible in elementary and secondary schools. The exceptions include sex education courses, contact sports, and choral groups. *See id.* These limited exceptions, which were crafted not long after the statute was enacted, suggest that Title IX was not, nor should it be, interpreted as permitting single-sex schools of the type that OCR is now contemplating.

B. Equal Educational Opportunity Act of 1974

The establishment of single-sex schools also contradicts the Equal Educational Opportunity Act of 1974 ("EEOA"). The stated purpose of the EEOA is to ensure that public schools offer all students equal educational opportunities regardless of their race, color, sex, or national origin. *See* 20 U.S.C.A. § 1701(a)(1). The Act specifically states that "the maintenance of dual school systems in which students are assigned to schools solely on the basis of race, color, sex, or national origin denies to those students the equal protection of the laws guaranteed by the fourteenth amendment." 20 U.S.C.A. § 1702 (a)(1) (emphasis added). While federal courts have disagreed about whether, and to what extent, the EEOA prevents the establishment of single-sex schools, at least one federal appellate court has held that the EEOA prohibits single-sex schools. *See United States v. Hinds County Sch. Bd.*, 560 F.2d 619, 624 (5th Cir. 1977).^[6]

Furthermore, the legislative history of the EEOA suggests that Congress intended the language cited above to prohibit sex segregation in public schools. During the debates concerning the proposed language, Representative Anderson offered an alternate proposal that did not include sex among the prohibited bases for student assignments. *See* 120 Cong. Rec. 8271 (1974). Congress' rejection of this proposal, *see id.* at 8281, demonstrates that the inclusion of sex in the enumerated factors that schools cannot use to make student assignments was not inadvertent. In fact, combating the increased use of sex-segregation in furtherance of racist goals – i.e., separating black males from white females – was one of the principal goals of the EEOA. *See* Verna Williams, *Reform or Retrenchment? Single-sex Education and the Construction of Race and Gender*, __ U.Wisc. L.Rev. __ (forthcoming 2004) (draft on file with authors). OCR's proposal to establish same-sex schools and/or classes is thus flatly inconsistent with the EEOA.

C. The No Child Left Behind Act

In the face of precedent and statutory language militating against the establishment of gender-based distinctions in primary and secondary schools, OCR's proposed regulations hang by the narrow thread of a recent amendment to the Elementary and Secondary Education Act ("ESEA") passed as part of the No Child Left Behind Act in 2002. One subsection of this Act provides that local educational agencies should use certain funds for innovative assistance programs, which may include, among other things "[p]rograms to provide same-gender schools and classrooms (*consistent with applicable law*)." 20 U.S.C.A. § 7215(a)(23) (2002) (emphasis added). The plain language of the parenthetical in this amendment demonstrates that Congress had no intention of undermining the protections afforded by Title IX and the EEOA. Moreover, in passing this statute, Congress did not and, indeed, could not alter the constitutional equal protection analysis under which efforts to separate girls and boys in public schools must be scrutinized. *See Hogan*, 458 U.S. at 732-33. As discussed above, OCR cannot likely overcome this hurdle; there is simply insufficient evidence demonstrating an "exceedingly persuasive justification" for the gender-based distinctions OCR is seeking to impose.

Establishing same-sex public schools and classes would also counteract a statute that Congress passed on the same day as the obscure provision through which OCR seeks

to justify its dubious plan. As part of the No Child Left Behind legislative package, Congress also passed The Women's Educational Equity Act of 2001. *See* 20 U.S.C.A. § 7283, *et seq.* This Act was motivated by congressional findings that "efforts to improve the quality of public education also must include efforts to ensure equal access to quality education programs for all women and girls," and that "excellence in education, high educational achievements and standards, and the full participation of women and girls in American society, cannot be achieved without educational equity for women and girls." 20 U.S.C.A. § 7283(b)(4), (7). For the reasons described above, OCR's proposal to separate boys and girls in primary and secondary schools not only would fail to advance, but would affirmatively undermine those objectives.

VI. Policy Reasons Dictate Against the Establishment of Same-Sex Schools and Classes.

In addition to raising the serious constitutional and statutory concerns articulated above, OCR's proposal is flawed as a matter of public policy.

A. Absence of Truly Equal Opportunities

As the Supreme Court has noted, separate but equal is never really equal in the realm of public education. *See Brown*, 347 U.S. at 495. This principle is as applicable to gender as it is to race. Numerous examples demonstrate that separate programs for men and women have never been equivalent. All-male schools have had greater funding, more skilled staff, and a stronger curriculum than all-female schools. *See* Kristin S. Caplice, *The Case for Public Single-Sex Education*, 18 Harv. J.L. Pub. Pol'y 227, 239 (1994) (citing David Tyack & Elizabeth Hansot, *Learning Together: A History of Coeducation in American Schools* (1990)); *see also* Lucinda M. Finley, *Sex-Blind, Separate But Equal, or Anti-Subordination? The Uneasy Legacy of Plessy v. Ferguson for Sex and Gender Discrimination*, 12 Ga. St. U. L. Rev. 1089, 1103-04 (1996) (noting that all-female schools usually have fewer academic course offerings) ("Finley").

Perhaps the area in which the disparities between separate men's and women's programs are most visible is within the field of athletics. On the intercollegiate level, inequities still exist thirty years after the enactment of Title IX. On the occasion of Title IX's 20th anniversary, the National Women's Law Center cited 30 colleges for "failing to provide a 'fair share' of their athletics scholarships to women." Welch Suggs, *Women's Law Group Warns 30 Colleges About Imbalances in Athletics Scholarships*, Chron. of Higher Educ. (June 19, 2002). Specifically, the Women's Sports Foundation reports "male athletes receive \$133 million, or 36 percent more, than female athletes in college athletic scholarships per year at NCAA member institutions. Women's Sports Foundation, *Title IX at Thirty: Athletics Receive a C+* (2002). In addition, one study has shown that "the average base salary for a coach of a women's team is 59% of the average base salary for a coach of a men's team." Andrea M. Giampetro-Meyer, *Recognizing and Remediating Individual and Institutional Gender-Based Wage Discrimination in Sport*, 37 Am. Bus. L.J. 343, 356 (Jan. 1, 2000). Another study has indicated that "head coaches of women's teams receive only 25% of the average additional benefits head coaches of men's teams receive. Benefits include assistance in the areas of housing, transportation, tickets, and memberships to clubs." *Id.*

Inequities between men's and women's programs are also prevalent in professional sports. For instance, women's sports programs typically offer less prize money and lower salaries. The Wimbledon committee has repeatedly refused to pay women tennis players prize money equal to their male counterparts. *Wimbledon Prize Money Increases*, BBC Sport, (Apr. 23, 2002), at http://news.bbc.co.uk/sport/hi/english/tennis/newsid_1945000/1945863.stm. Similarly, in 1999, the average salary for WNBA players was approximately \$40,000, while the minimum NBA salary was \$287,000. See Pat McKee & Mark Montieth, *Sports Reputation Earns City a Women's League*, Indianapolis Star, June 8, 1999, at IA.

These examples demonstrate concretely that separate is not equal when different programs are created for men and women. Even when programs are developed with the intention of counteracting sex discrimination, glaring inequities still plague them. Inevitably, the same inequities would manifest themselves in the single-sex programs OCR is seeking to implement.

Further, OCR's abdication of any meaningful oversight role would exacerbate the problem. OCR does not require that schools districts go through any vetting process in order to establish single sex school or classes. Implementation of such programs is to be monitored through "self evaluations" that need not be shared with any other governmental body. It is obvious that the school districts involved in actively implementing single sex programs are highly unlikely to identify serious flaws with such programs. OCR's rhetoric concerning equality in implementation is just that – rhetoric, with no actual monitoring in place to oversee these programs.

In an analogous context, the United States Supreme Court recently chronicled the persistent discrimination against women in the area of family care. See *Nevada v. Hibbs*, 538 U.S. 721 (2003). According to the Court, given this unbroken history of placing the primary burdens for such care on women, a law that simply mandated equality would not achieve its objective. *Id.* at 738. Instead, it was necessary to enact a law – the Family and Medical Leave Act -- that created substantive, sex-neutral entitlements.

Here, OCR blithely proposes reinstating sex segregation while ignoring the historical evidence of persistent discrimination that plagues public education as well as other societal institutions. Under those circumstances, as the Court found in *Hibbs*, regulations that simply urge school districts to ensure equality – without any oversight or monitoring -- are patently not enough. In enacting the FMLA, Congress adopted a sex-neutral approach to promoting equality – an approach that has finally begun to make inroads into the sex-based conventions of family care. OCR's decision to promote sex segregation runs directly counter to this legislative trend, and runs the risk of reinforcing inequities and stereotypes rather than combating them.

B. Sex-Stereotyping and the Objectification of Women

The establishment of single-sex schools and programs is also likely to exacerbate the sexualization and objectification of girls and women by depriving both boys and girls of the opportunity to interact daily as peers. Studies have demonstrated that all-boys schools promote sexism and feelings of superiority toward women. *See* Levit at 499-500; Finley at 1119. Considering that school is the "workplace" of children, OCR should seriously consider how a man could ever accept, and thrive under, the leadership of women in the workplace, if he has had no exposure to girls in this setting during his formative years. To eliminate the glass ceiling that hinders women in the workplace, collaborative interaction between girls and boys at the elementary and secondary levels should not only be encouraged, but promoted at every opportunity. OCR's proposed regulations take the exact opposite approach, thus threatening to perpetuate workplace inequality.

Furthermore, there is a significant risk that all-female schools and/or classes will be perceived as remedial and inferior. Strong empirical evidence demonstrates that sex segregation generates "feelings, habits, attitudes, and expectations of superiority and inferiority." Levit at 517. It is widely believed among educators that the establishment or preservation of all-male institutions signals male superiority. *See* Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 14 *Women's Rts. L. Rep.* 361, 365-66 (1992). In fact, as the *Garrett* court recognized, "should the male academies proceed and succeed, success would be equated with the absence of girls rather than the educational factors that more probably caused the outcome." 775 F. Supp. at 1007. OCR's proposal should be rejected because it treats (or at least appears to treat) girls as the problem instead of addressing the root cause of failures in public education.

C. Inappropriate Remedy for Harassment

While sexual harassment of girls and young women undoubtedly is a very real concern in our nation's public schools, separating girls from their male peers is not an appropriate or sufficient means of addressing the sexual harassment problem. Although establishing a limited number of all-female schools might serve the purpose of rescuing some girls from harassment, it is important to keep in mind the broader picture. Removing girls to a separate environment unfairly treats them as the problem and fails to address the motivations and misconceptions that cause male students and teachers to engage in harassing behavior. Moreover, since all-female programs are not likely to be available universally, those female students who remain in a coeducational environment that fails to address the causes of harassment directly are even more likely to be mistreated. Further, sexual harassment is an exercise of power that occurs in same sex environments as well as single-sex institutions. Unless the underlying issues are addressed, sexual harassment will continue regardless of the composition of the classroom. A much better solution than isolating girls from boys would be to invest resources in proactively educating students and teachers about gender sensitivity and sexual harassment.

D. No Justification For All-Male Programs

Even if OCR determines that the establishment of some all-female programs is warranted (which NOW asserts is not the case), there is absolutely no basis for establishing all-male counterparts to those programs. Research shows that same-sex education has an adverse impact on male students. *See* Levit at 500. "[T]he majority of research suggests that boys are served best, academically and socially, in coeducational environments." *Id.* For instance, a study by Valerie Lee and Helen Marks found that graduates of all-male schools demonstrated less concern for social justice and were less satisfied with the nonacademic aspects of their educational experience than their counterparts who attended coeducational schools. *Id.* at 498 (citing Valerie E. Lee & Helen M. Marks, *Sustained Effects of the Single-Sex Secondary School Experience on Attitudes, Behaviors, and Values in College*, 82 J. Educ. Psychol. 578, 585-86 (1990)). Furthermore, establishing same-sex programs that are limited to serving the traditionally dominant group (in this case, males) threatens to perpetuate discrimination and domination.

VII. OCR Should Explore Alternatives to Single-Sex Education.

Instead of promoting a single-sex education plan that has both legal and policy flaws, OCR should focus its resources and efforts on non-discriminatory programs that more directly address the problems facing public school systems. Examples of alternative plans through which OCR and/or local school districts might achieve more favorable results without treading on students' constitutional rights and instigating prolonged litigation include:

- Adequate Funding To Existing Coeducational Schools
- Smaller Class Sizes
- More Diverse Curriculum Offerings To Which All Students Have Access
- Gender Equity Training for Administrators, Teachers, Counselors, and Other Staff
- Sexual Harassment Training and Improving Support Services for Students Who Encounter Sexual Harassment

VIII. Conclusion

We can all agree that there are problems with our public schools that desperately need to be addressed. Unfortunately, OCR's draft regulations propose to counteract those problems with discriminatory measures that will not improve public education. Further, in proposing these new measures, OCR has wholly abdicated its appropriate oversight role, instead relying on school districts to conduct "self-studies" to determine whether equality in education is achieved.

The shameful history of school segregation in this country should not be forgotten. Particularly in light of that history, reinstating this practice in any form, regardless of whether it is voluntary or involuntary and regardless of the identity characteristic at issue, should not even be contemplated absent compelling evidence that it is the only way to ensure that all schoolchildren in the United States receive the education they deserve. OCR falls far short of presenting such evidence. Accordingly, NOW urges that these proposed regulations be withdrawn.

Respectfully submitted,



Kim A. Gandy, President
Terry O'Neill, Vice President - Membership
THE NATIONAL ORGANIZATION FOR WOMEN
733 15th Street, N.W., Second Floor
Washington, D.C. 20005
Phone: (202) 628-8669
Fax: (202) 785-8576

Martha F. Davis
Associate Professor
Northeastern School of Law
400 Huntington Avenue
Boston, MA 02115
Phone: (617) 373-8921
Of Counsel to the National Organization for Women*

* The National Organization for Women gratefully acknowledges the significant contributions of Amy Krieger Wigmore, Wilmer, Cutler & Pickering, to these comments.

[\[1\]](#) The Data Quality Act ("DQA") and its implementing guidelines suggest that OCR should not rely on these flawed studies in implementing a regulatory proposal. In the DQA (which can be found at section 515(a) of the Treasury and General Government Appropriations Act for Fiscal Year 2001), Congress directed the Office of Management and Budget ("OMB") to issue government-wide guidelines that "provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies" Pub. L. No. 106-554 app. C, 114 Stat. 2763A, 154 (2001). OMB has promulgated guidelines implementing the DQA, *see* 67 Fed. Reg. 369 (Jan. 3, 2002), and the Department of Education promulgated guidelines conforming

with those implemented by OMB, www.ed.gov/policy/gen/guid/infoquality.html (Information Quality Guidelines, Sept. 27, 2002). Based on the DQA and its implementing guidelines, OCR should not rely on flawed studies that fail to control for confounding variables to justify its contemplated policy changes.

[2] See discussion in Section V.A below.

[3] The Supreme Court has acknowledged that "[w]hile the prejudicial attitudes toward women in this country have not been identical to those held toward racial minorities, the similarities between the experiences of racial minorities and women, in some contexts, 'overpower those differences.'" *J.E.B. v. Alabama*, 511 U.S. 127, 135 (1994) (citation omitted) (holding that intentional discrimination on the basis of gender by state actors in the use of peremptory strikes in jury selection violates the Equal Protection Clause).

[4] NOW strongly asserts that courts should apply strict scrutiny to gender-based classifications.

[5] Even if Title IX could be read to contain an explicit exemption for primary and secondary schools, such an exemption would not cure OCR's plan of the constitutional problems described in Section IV above. See *Hogan*, 458 U.S. at 733 (rejecting defendant's attempt to rely on Title IX exemption, noting that "[a] statute apparently governing a dispute cannot be applied by judges, consistently with their obligations under the Supremacy Clause, when such an application of the statute would conflict with the Constitution").

[6] But see *Garrett*, 775 F. Supp. at 1010 (holding that voluntary, experimental single-sex schools would not likely violate the EEOA, but distinguishing mandatory programs such as those at issue in *Hinds*).