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Single-Sex Schools and Classroom: Is "Separate but Comparable" Legally Permissible?

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Gretchen Hall

Abstract

Most public schools in the United States have been coeducational, based at least in part on a general belief that single-sex schools and classrooms were legally impermissible. Now the issue of single-sex education has been raised again by the No Child Left Behind Act of 2001, which provides that federal funds may be made available to local education agencies for an array of innovative assistance programs, including programs to provide same-gender schools and classrooms. An analysis of applicable law, coupled with a review of the merits of single-sex schooling, suggests that "separate but comparable" single-sex public school education might be legally permissible.

Introduction

During the past several decades, most public elementary and secondary schools in the United States have been coeducational, based at least in part on a general belief that single-sex schools and classrooms were legally impermissible. Sadker and Sadker (1994) expressed a common point of view: "Today, single-sex schools are an endangered species; they are illegal in the public sector and vanishing rapidly from the private sector" (p. 232). The American Association of University Women (1998) raised a telling question: Should educators and researchers continue to invest their efforts in a strategy—single-sex education—that is of questionable legality?

Now the issue of single-sex education has been raised again by the No Child Left Behind Act of 2001, which provides that federal funds may be made available to local education agencies for an array of innovative assistance programs, among which are included programs to provide same-gender schools and classrooms.

An analysis of applicable statutory and constitutional law reveals some commonly-held beliefs about single-sex schooling, and explores the circumstances under which "separate but comparable" single-sex education in public elementary and secondary schools might be legally permissible.

Title IX

Title IX of the Education Amendments of 1972 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 assistance" (20 U.S.C. § 1681(a), 2001). The federal regulations implementing Title IX state that no school receiving federal funds shall "provide any course or otherwise carry out any of its education activity separately on the basis of sex" 34 C.F.R. § 106.34 (2002). Reading these two provisions together could lead to a conclusion that no public school receiving federal funding is

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allowed to offer a single-sex education program, whether it be an entire school or a single class within a coeducational (mixed gender) school. But contrary to popular belief, nothing in Title IX explicitly prohibits single-sex schools. In regard to admissions, the prohibition against discrimination based on sex exempts non-vocational elementary and secondary schools (see, 20 U.S.C. § 1681(a)(1), 2001).

The Code of Federal Regulations recites the rules promulgated by the U.S. Department of Education to carry out the provisions of Title IX. A pertinent provision in these regulations states that a local educational agency (LEA) may "exclude any person from admission" to a non-vocational elementary or secondary school "on the basis of sex" only if "such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools" (34 C.F.R. § 106.35(b), 2002). Thus, neither Title IX nor the implementing regulations prohibit school districts receiving federal funding from operating single-sex schools, but only if those districts provide schools with comparable programs for both sexes.

Although single-sex schools may be permissible under Title IX, most single-sex classes within coeducational public schools are not. The general prohibition of sex-based discrimination in the statute (see, 20 U.S.C. § 1681, 2001), is paralleled by language in the federal regulations, (see, 34 C.F.R. § 106.31(a), 2002). The regulations also include a more specific provision pertaining to access to course offerings.

> 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, 2002)

But this section also includes exceptions that may lead to single-sex classes. Among the more important are those that permit grouping students in physical education classes and activities by ability (Id. at § 106.34(b), 2002), separating students by sex in physical education classes or sports where the purpose or major part involves bodily contact (Id. at 106.34(c), 2002), conducting separate sessions for boys and girls in portions of classes that deal exclusively with human sexuality (Id. § 106.34(e), 2002), and having requirements based on vocal range or quality that may result in choruses predominantely of one sex (Id. § 106.34(f), 2002).

The No Child Left Behind Act of 2001

On January 8, 2002, President George W. Bush signed into law the No Child Left Behind Act of 2001, which reauthorized the Elementary and Secondary Education Act of 1965. One section in this massive piece of legislation provides that federal innovative assistance funds made available to local educational agencies may be used to support "[p]rograms to provide same-gender schools and classrooms (consistent with applicable law)" (Id. at § 5131(a)(23), 2001).

The Act also required the Secretary of Education to issue, within 120 days, guidelines for local education agencies seeking funding for programs described in subsection (a)(23) (Id. § 5131(c), 2001). As directed, the Office for Civil Rights, Department of Education,

published guidelines on current Title IX requirements related to single-sex classes and schools (67 Fed. Reg. 31102, May 8, 2002). These guidelines make clear that the Department believes that Title IX and its regulations permit certain kinds of single-sex classes in coeducational schools and, if certain conditions are met, single-sex schools within a school system. If a school district establishes a single-sex school for one sex to offer a particular program, then the other sex must also have access to a comparable school with that curriculum. And, the "comparable school" must also be single-sex.

On that same date, the Department of Education published in the Federal Register a "notice of intent to regulate," (67 Fed. Reg. 31098, 2002), which gave notice that the Secretary of Education intends to propose amendments to the regulations implementing Title IX that would provide more flexibility for educators to establish single-sex classes and schools at the elementary and secondary level.

> The purpose of the amendments would be to support efforts of school districts to improve educational outcomes for children and to provide public school parents with a diverse array of educational options that respond to the educational needs of their children, while at the same time ensuring appropriate safeguards against discrimination. (Id. at 31098, 2002)

The notice invited comments on whether, and under what circumstances, single-sex schools and classrooms should be permitted. As this article was being prepared, the Department was reviewing the many comments received.

The notice of intent to regulate stated that the proposed regulations would have to be consistent with both Title IX and the Constitution. The Department noted that the Supreme Court had decided two constitutional cases that specifically addressed single-sex education, *United States v. Virginia*, 518 U.S. 515 (1996), and *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). These cases are discussed below.

Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States provides that no States shall "deny to any person within its jurisdiction the equal protection of the laws." The Equal Protection Clause comes into play when some form of legislative classification is at issue. To analyze the constitutionality of such classifications, the Supreme Court has devised a three-tiered analysis, which it summarized in *Plyler v. Doe* (1982).

A legislature must have substantial latitude to establish classifications, and in applying the Equal Protection Clause to most forms of state action, the Court seeks only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose (Id. at 216). This is the "rational basis" test, which imposes little difficulty on a government entity.

The Court treats as presumptively invidious those classifications that disadvantage a "suspect class" or that impinge on the exercise of a "fundamental right" for such classifications, the state must demonstrate that its classification has been precisely tailored to serve a compelling governmental interest (Id. at 216-17). This is the "strict scrutiny" test, which is extremely difficult for a government entity to satisfy.

In addition, certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances the Court inquires whether the classification may fairly be viewed as furthering a substantial interest

of the state (Id. at 217-18). This is the intermediate-level "heightened scrutiny" test, which imposes a significant, but not impossible, burden of justification on a government entity.

For many years, classifications based on sex have been subject to scrutiny under the Equal Protection Clause, and state government entities that use such classifications have been required to satisfy the intermediate-level "heightened scrutiny" test (see e.g., *Craig v. Boren,* 1976; *Frontiero v. Richardson*, 1973). Thus, proponents of single-sex schools and classes in public school systems should be prepared to demonstrate an educationally sound justification for such an arrangement.

Single-Sex Education in the Courts

Higher Education

The United States Supreme Court has rendered two decisions dealing with single-sex education at the college level: *Mississippi University for Women v. Hogan* (1982), and *United States v. Virginia* (1996). These two cases offer some insight into the principles that probably would guide an equal protection analysis of gender-based classifications in K-12 schools.

In *Mississippi University for Women v. Hogan* (1982), a male student was excluded, solely on the basis of gender, from enrolling in the School of Nursing at the Mississippi University for Women. He sued the University, alleging a violation of the Equal Protection Clause of the Fourteenth Amendment.

The Supreme Court began its analysis by stating that those seeking to uphold a statute classifying individuals on the basis of gender must carry the burden of showing an "exceedingly persuasive justification" for the classification, a burden that can be met only by showing at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives (Hogan at 724).

The University's arguments for excluding men from the School of Nursing failed to satisfy either part of this Equal Protection test. First, the state made no showing that women lacked either training or leadership opportunities that needed to be remedied by excluding men; rather than compensating for any discriminatory barriers faced by women, the policy of excluding males tended to perpetuate the stereotyped view of nursing as exclusively a woman's job. Second, the argument that women are adversely affected by the presence of men in the College of Nursing was undermined by the policy of permitting men to audit nursing classes. The Court held that excluding males from enrolling in the state-supported School of Nursing violated the Equal Protection Clause.

In *United States v. Virginia* (1996), the Virginia Military Institute (VMI), a prestigious all-male military college, came under fire for its policy of refusing admission to women. While at VMI, male students were engaged in military-type "adversative" training, which was meant to encourage them to be leaders in military and civilian life. Strong emphasis was placed on the cadet-style training, which included rigorous tests of physical and moral aptitude. The school's mission was

> to produce educated and honorable men, prepared for the varied work of civil life, imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high

> sense of public service, advocates of the American democracy and free enterprise system, and ready as citizen-soldiers to defend their country in time of national peril (Id. at 522).

Prompted by a complaint filed with the Attorney General by a female high school student seeking admission to VMI, the United States filed suit against the institution and the Commonwealth of Virginia, alleging that the male-only admissions requirement violated the Equal Protection Clause of the Fourteenth Amendment. The District Court initially ruled in favor of VMI, noting that the government had met its burden of showing the government action based on sex met the "exceedingly persuasive justification" for the classification (Id. at 524). Studying the benefits of single-gender educational environments, the court reasoned that if having a male-only educational environment was central to the mission of the school, then the "only means of achieving the objective is to exclude women from the all-male institution—VMI" (Id.). The Court of Appeals for the Fourth Circuit disagreed, however, and vacated the lower court's judgment. This court emphasized a nondiscrimination commitment undertaken by the Commonwealth of Virginia in a 1990 Report that stated, "It is extremely important that colleges and universities deal with faculty, staff, and students without regard to sex, race, or ethnic origin." (Id. at 525). The Court of Appeals suggested three options for Virginia to consider as remedial actions: (a) admit women to VMI, (b) establish parallel institutions or programs, or (c) abandon state support, leaving VMI to function as a private institution existing on non-public funds.

Virginia chose the second option suggested by the Court of Appeals and established a parallel program at Mary Baldwin College, a private liberal arts school for women. This parallel program, Virginia Women's Institute for Leadership (VWIL), shared much of VMI's mission to produce 'citizen-soldiers'; however, in many respects VWIL was much different from its male counterpart. Compared to VMI, VWIL was much smaller, enrolling around 25-30 students, maintained a less-prestigious faculty holding fewer Ph.D's than that of VMI's faculty, and offered fewer academic majors. Interestingly enough, a task force of Mary Baldwin faculty charged with designing the VWIL program decided that VMI's military model of education would be "wholly inappropriate" for VWIL. The stringent adversative experience that bonded men on the VMI campus would not be part of the VWIL's program; instead, the focus of instruction and training would favor a "cooperative method which reinforces self-esteem" (Id. at 527). Women at VWIL would participate in a less-stringent ROTC program, which the school admitted was "largely ceremonial," and would learn many of the same skills taught through high-stress situations at VMI through guest speakers and service projects (Id.). There were also large differences in funding; VMI enjoyed an endowment of roughly $131 million, compared to Mary Baldwin's endowment of only $19 million. Additionally, the court recognized the wide array of alumni contacts available to VMI graduates that helped with employment prospects and networking opportunities, both of which were unavailable to graduates of VWIL's program (Id. at 748).

Virginia returned to the district court seeking approval of its proposed remedial plan. The district court decided that the plan satisfied the Equal Protection Clause, anticipating that the two schools would achieve substantially similar outcomes; a divided court of appeals affirmed, applying a "substantive comparability" test. The United States petitioned for a writ of certiorari, and the Supreme Court granted the writ, thus choosing to review the court of appeals decision.

In *United States v. Virginia* (1996) the Court confronted two basic issues: First, did Virginia's exclusion of women from the unique opportunities offered by VMI deny them equal protection

of the law? Second, if exclusion from VMI offended the Constitution, what would be the remedial requirement?

The Court followed the analysis it had set out in *Hogan* for cases where there is a state government classification based on gender: focusing on the differential treatment or denial of opportunity, the reviewing court must determine whether the proffered justification is "exceedingly persuasive;" the burden of justification is demanding and it rests entirely on the state. The state must show at least that the classification serves important governmental interests and that the discriminatory means employed are substantially related to the achievement of those objectives. The Court noted that "[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females" (*Virginia* at 532-33).

The Court noted, however, that the heightened review standard

> . . . does not make sex a proscribed classification. Supposed "inherent differences" are no longer accepted as a ground for race or national origin classification. [citation deleted] Physical differences between men and women, however, are enduring: [T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." [citation deleted] (Id. at 533).

Classifications based on sex may be used to remediate past wrongs against women, but may no longer be used "to create or perpetuate the legal, social, and economic inferiority of women" (Id. at 534).

The Supreme Court found that Virginia had shown no "exceedingly persuasive justification" for excluding women from admission to VMI and that the remedy proffered by Virginia—the Mary Baldwin VWIL program—did not cure the constitutional violation.

In addressing the first issue, the Court undertook a study of single-sex education and found that it does benefit some students. However, using the rationale presented in *Hogan*, the Court found no link between the goal of the institution and the actual purpose of the discrimination. That is, there was no connection between preparing students to enter the world as productive citizen-soldiers and the need to exclude women from that educational process. The opinion offered an historical summary of women's education in the United States, noting that tradition at many colleges had been to discriminate against women. Some of the same arguments offered by Virginia had been offered in decades past, including the idea that women would disrupt the campus environment, standards would have to be lowered, and the reputation of the school would be tarnished. As early as 1970, however, a federal district court confirmed the necessity of admitting women to the University of Virginia. Taking the history of Virginia together with the state's policy emphasizing diversity, the Court found no connection between the all-male admission policy of VMI and the desire of the state to promote diversity. The Court also noted that there were women who could meet the current admissions requirements at VMI, and thus in some instances, the only reason some women were denied admission was simply because of their gender, not because they could not meet the school's strenuous demands.

Having found that the exclusion of women from VMI violated the Equal Protection Clause, the Court moved to determine what remedial action, if any, could satisfy the demands of the Constitution. The Court found major differences between the education offered to women at Virginia Women's Institute for Leadership and that offered to male cadets at Virginia Military Institute. Most significant was that the state deliberately did not make VWIL a military-style

institution, which meant that the women at VWIL would not receive the same benefits of the adversative training offered at VMI.

Virginia offered a rationale for the different approaches to education at the two institutions, noting the methodology was "justified pedagogically based on important differences between men and women in learning and developmental needs, and psychological and sociological differences"(Id. at 549). Virginia relied on the educational judgment of the Mary Baldwin faculty that the adversative training offered at VMI was "wholly inappropriate for educating and training *most women*" (Id. at 549). The Court rejected this notion, stating that "generalizations about 'the way women are' . . . no longer justify denying opportunity to women whose talents and capacity place them outside the average description" (Id. at 550).

The Court found VWIL's program to be unequal to VMI's in a number of other respects. First-year students at VWIL scored an average of 100 points less on the SAT than students at VMI; the staff at VWIL held fewer Ph.D.s than their faculty counterparts at VMI; there were fewer curricular choices for students at VWIL than at VMI; there were fewer physical training facilities at VWIL than the expansive practice and training facilities at VMI; there was less financial support for students at VWIL than for those at VMI; and graduates of VWIL do not enjoy the prestige that goes with being a graduate of VMI (Id. at 551-52). The Court concluded by stating that "Virginia, in sum, while maintaining VMI for men only, has failed to provide any "comparable single-gender women's institution . . . Instead, the Commonwealth has created a VWIL program fairly appraised as a "pale shadow" of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence" (Id. at 553).

The Court's analysis in *United States v. Virginia* implies that when girls are educated apart from boys in state educational institutions "separate but comparable" might satisfy the constitutional standard. It must be noted, however, that the notion of constitutional "separate but comparable" in the context of segregation based on sex should not be confused with the unconstitutional "separate but equal" in the context of segregation based on race. The Supreme Court made it clear in *Brown v. Board of Education* (1954) that maintaining separate schools on the basis of race was inherently unconstitutional.

The Court addressed a straightforward issue in *Brown* (1954): "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities?" (Id. at 493). The Court answered with a powerful statement: "To separate them 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).

The evils of segregation based on race may raise concerns about segregation based on sex; however, separation based on sex does not impose the same stigma as does separation based on race. From a constitutional perspective the two forms of classification are fundamentally different. Simply put, there are no meaningful differences between the races, but there are meaningful differences between the sexes. The distinction is reflected in the Equal Protection Clause analysis, where classifications based on race are subjected to the very demanding strict scrutiny test, while classifications based on sex are subject to the less-demanding heightened scrutiny test.

The Court's broad discussion in *United States v. Virginia* (1996) supports the proposition that "separate but comparable" in respect to separating students by sex would be constitutional if in fact the schools and programs provided to both were truly comparable. The Court had the

opportunity, as it did in *Brown*, to simply find that "separate but equal" was constitutionally impermissible, but it did not. Instead, after determining that excluding women from VMI violated the principles of Equal Protection, the Court engaged in a point-by-point comparison of VWIL and VMI and finally determined that because the two institutions were not comparable, excluding women from VMI was not permissible.

Had the Court found that VMIL provided opportunities for women comparable to those VMI provided for men, it may have concluded that the Constitutional requirements for equal protection had been met. If separation by sex is inherently unconstitutional, as is separation by race, the Court arguably would not have engaged in its lengthy point-by-point analysis comparing the two Virginia schools. But the Court did compare the two schools and their programs, thus opening the door to the possibility that "separate but comparable" in the context of single-sex schools and classrooms are constitutionally permissible.

K-12 Education

There have been few cases involving single-sex public elementary and secondary education, but two federal court decisions serve to illustrate the judicial approach to the issues involved. These two courts arrived at different results, but the cases involved different sets of pertinent facts.

The first case was *Vorchheimer v. School District of Philadelphia* (1976) and was decided by the Court of Appeals for the Third Circuit. The court held that a school district board, in a system otherwise coeducational, could maintain a limited number of single-sex high schools in which enrollment was voluntary and the educational opportunities offered to girls and boys were essentially equal.

The plaintiff in *Vorchheimer* (1976) was a female student who alleged unconstitutional discrimination because she was denied admission into an all-male high school. Although she was eligible to attend Girls High, an all-girls college preparatory high school, the student decided she wanted to attend the all-male counterpart, Central High School. Both schools offered an equally stringent education, with comparable academic facilities, similar alumni achievements and historical connections, and similar rates of graduate placements into prestigious universities. The plaintiff presented no factual reasons for her desire to attend Central High School rather than Girls High, and she admitted that after her visit she simply did not like the impression that the all-girls school gave her. After trial, the district court found the gender-based classification at the two schools to lack a fair and substantial relationship to the board's legitimate interest and enjoined the practice. The defendant school district appealed.

The court of appeals summarized the parties' positions:

1. the school district had chosen to make available on a voluntary basis the time-honored alternative of single-sex high schools;
2. the schools for boys and girls were comparable in quality, academic standing, and prestige;
3. the plaintiff preferred to go to the boys' school because of its academic reputation and her personal reaction to Central High School. She submitted no factual evidence that attendance at Girls High would constitute psychological or other injury;

4. the deprivation asserted is that of the opportunity to attend a specific school, not the deprivation of an opportunity to obtain an education at a school with comparable academic facilities, faculty, and prestige.

The court of appeals looked first to federal statutory law to determine if the issues could be resolved on that basis. The court found that Title IX excluded from its coverage the admission policies of secondary schools. The court also considered the implications of the Equal Educational Opportunities Act of 1974, but found that legislation to be equivocal. Concluding that no federal statutes authoritatively addressed the problem, the court turned to the constitutional issue that had prompted the federal court to order that qualified female students be admitted to the all-male high school.

In addressing the Equal Protection Clause issue, the court of appeals noted that in each of the Supreme Court cases reviewed by the district court there was an actual deprivation of a benefit to a female that could not be obtained elsewhere; in none of these cases was there a situation in which equal opportunity was extended to each sex or in which the restriction applied to both. And, none had occurred in an educational setting.

The *Vorchheimer (1977)* court stated its view about the pertinent educational issue involved in the case:

> Equal educational opportunities should be available to both sexes in any intellectual field. However, the special emotional problems of the adolescent years are matters of human experience and have led some educational experts to opt for one-sex high schools. While this policy has limited acceptance on its merits, it does have its basis in a theory of equal benefit and not discriminatory denial. (Id. at 887).

The court noted that the Supreme Court had ruled on one gender-based school admissions policy by affirming a district court decision that a state system including both co-educational and single-sex campuses for both men and women was permissible. Because this case was a summary affirmance of a three-judge district court, the court of appeals did not have the benefit of the Supreme Court's reasoning, but still gave the result precedential weight (*Vorchheimer* at 887).

The court of appeals summarized its reasoning:

> The record does contain sufficient evidence to establish that a legitimate educational policy may be served by utilizing single-sex high schools. The primary aim of any school system must be to furnish an education of as high a quality as is feasible. Measures which would allow innovation in methods and techniques to achieve that goal have a high degree of relevance. Thus, given the objective of a quality education and a controverted, but respected theory that adolescents may study more effectively in single-sex schools, the policy of the school board here does bear a substantial relationship. (Id. at 887-88).

The court of appeals stated that it was not necessary to decide whether *Vorchheimer* required application of the rational basis test or the more demanding substantial relationship test, because under either test the result would have been the same. The court reversed and remanded, concluding that the board regulations establishing single-sex high schools did not offend the Equal Protection Clause.

The second case was *Garrett v. Board of Education of School District of Detroit* (1991), which was decided by a federal district court. The plaintiffs were girls and their parents seeking an injunction prohibiting the opening of all-male "Academies" established by the defendant Detroit Board of Education, alleging that the board's action violated both their statutory and constitutional rights.

After struggling for many years with high rates of unemployment, school dropouts, and homicides among urban males, the board of education planned to open the Academies as a means of addressing some of these issues with different methods than those being used in the existing high schools. Male students in the Academies would study not only the traditional curriculum offered in coeducational high schools, but would also experience programs on career development, test-taking skills, and civic and social responsibilities. Students would also participate in a "Rites of Passage" curriculum intended to focus on male growth and esteem issues. The male students at these schools would benefit from extended school days, tutoring sessions, summer classes, and personal attention from mentors. Parents had to sign a "covenant of participation" promising to stay involved in their children's education, and teachers received additional training beyond that normally offered within the school system.

The plaintiffs in *Garrett* (1991) prevailed on their allegations of violations of both the Equal Protection Clause and Title IX. Relying on *Hogan* (1982), the district court required the Board of Education to show that the sex-based classification serves "important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives" (Garrett at 1006). The Board's reliance on excluding girls because the Academy's were intended for "at-risk" students simply did not make sense. Categorically defining "at-risk" students as males did not acknowledge that similar at-risk situations existed for the female population. There was no evidence that the educational system was failing urban males because females attend schools with males. In fact, the educational system was also failing females. Thus, the district court concluded that the application of the second prong of the *Hogan* (1982) test to the facts at hand made it likely that the plaintiffs would succeed on the constitutional claim.

The Board attempted to defend against the Title IX (2001) complaint by arguing that Title IX excludes from its coverage the admission plans in kindergarten through grade twelve and that its legislative history recognized the need for continued experimentation with unique methods of education, such as the Academies. The court disagreed with the Board's legislative interpretations, stating that the admission plans covered under the exclusion were for historically preexisting single sex schools, not newly created ones, such as the Academies. Also, the U.S. Department of Education's Office of Civil Rights (OCR) had offered an opinion that seemed to suggest that all-male public elementary and secondary schools would violate Title IX (2001). In this instance, the court took the OCR opinion to heart and concluded that Title IX prohibited the Academies.

The Title IX analysis in *Garrett* (1991) seems to be at odds with the language of the statute, (see, 20 U.S.C. 1681(a)(1)), the implementing regulations, (see, 34 C.F.R. 106.35(b), 2000), and the statement in the OCR guidelines (see, 67 Fed. Reg. 31102, May 8, 2002), that single-sex schools are permissible, if there is a comparable opportunity for the excluded sex. The district court noted that the school district had hinted that an academy for girls was in the works, but the court found that any later attempt to equalize opportunities for girls would not compensate for their lost opportunities to learn in the special environment of the academies.

The district court also addressed an allegation that the academies were prohibited by the Equal Educational Opportunities Act of 1974. Because the only applicable case was easily

distinguished, the court found that the plaintiffs had not demonstrated probability of success on that claim.

The *Garrett* (1991) court also found that plaintiffs were likely to succeed on their claim that Michigan state law did not permit the creation of the academies. The impact of state law on the creation of single-sex schools and classrooms could be an important issue where state statutes are more prohibitive of any form of sex discrimination than is federal law.

The Concept of Single-Sex Education

Much of the impetus for single-sex schooling has originated from some general concerns that girls do not fare as well in coeducational settings as do their male peers. There have also been claims, however, that boys may do better in a single-sex setting.

Perceived Problem

Released in 1992, a report commissioned by the American Association of University Women Educational Foundation (AAUW), *How Schools Shortchange Girls,* presented a compilation of research showing that girls were receiving a much different education than boys in coeducational public schools. The authors found that girls received less attention than boys, girls received less constructive teacher feedback than boys, girls had fewer complex personal interactions with instructors, boys received more wait time for responses than girls, and gender bias was prevalent in subjects such as math and science. The AAUW authors suggested that current educational practices be reviewed in order to best meet the needs of both boys and girls and offered a set of recommendations to address what was seen as an inequitable situation.

A 1999 follow-up report, *Gender Gaps: Where Schools Still Fail Our Children*, again commissioned by the AAUW Educational Foundation, concluded that although improvements had been made in attempts to make education more equitable, coeducational public schools were still not best meeting the needs of both boys and girls. The number of girls taking math, science, and technology courses had increased, closing the gap between male and female enrollees. However, girls still outperformed boys on verbal measures in their early years, girls were still more adversely affected by dropping out of school, and sex roles and stereotypes were still promoted within the classroom.

Single-sex schools for girls have been proposed as a possible remedy. Sadker & Sadker (1994) reported that girls in single-sex schools enjoyed greater academic opportunities, including an increased sense of freedom, the encouragement of young women's voices, and a fostering of more confident and independent young women. Girls in single-sex schools also exhibited higher self-esteem, enrolled in more math and science courses, and pursued male-dominated career fields. "They are intellectually curious, serious about their studies, and achieve more" (p. 233).

Anecdotal research may shed insight into the personal nature and responses to single-sex education. Carstensen's (1999) qualitative research examined the experiences of both teachers and students in two private schools for girls in Honolulu. She reported through their own words the lack of fear and the ability to find a stronger, more independent voice, one that is often lost to the more aggressive nature of the boys in the classroom. She found a "female energy" that created an environment of excitement and exuberance and a sense of a cohesive community. Some teachers and students compared it to compassion and a sense of caring, describing the overwhelming feeling of freedom and the ability to express one's true self without having to

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worry about the confines of society. One participant noted, "For me, I think that the female energy we see is the school offering the opportunity for the girls to find who they are and to find their own voice...You can be yourself. You don't have to be that image you put on when you go to school" (Carstensen, 1999, p. 98).

But boys have their own set of problems in school. Sadker & Sadker (1994) found that boys received lower report card grades than girls, were nine times more likely to suffer higher academic stress levels, were more likely to be recommended to special education programs, and were more likely to be punished for misbehavior.

As noted in *Gender Gaps* (AAUW, 1999), boys were less likely than girls to enroll in fine arts, foreign languages, advanced English electives, and other humanities courses and when they did, they tended to underperform girls. Additionally, fewer boys than girls were involved in gifted programs.

Proposed Solution

Given the differences many studies have found between the educational needs of boys and girls, separation of the sexes would seem to be a logical solution. Caplice (1994) summarized some of the education policy arguments by identifying three primary state interests furthered by single-sex education: excellence in education, a self-confident citizenry with well-developed leadership skills, and system-wide diversity in education.

Gurian, Henley, and Trueman (2002), whose studies include research into how the brain functions, explained how boys and girls learn differently and what schools might do to create the ultimate classroom for both boys and girls. They proposed that, especially at the middle school level, separate-sex education offers one of a number of possibilities for educational improvement. This approach would not harm children, as they are already naturally inclined toward separating by sex and could potentially help children who are not learning as well as they might in the naturally gender-competitive environment of coeducation. Also, there are examples from schools where students are separated by sex in the lunchroom or during in-school suspension where educators have noted fewer behavior problems.

Senator Kay Bailey Hutchison (2001) expressed her belief in the merits of single-sex education. She stated that "[s]tudy after study has demonstrated that girls and boys in single-sex schools are academically more successful and ambitious than their co-educational counterparts" (p. 1076).

Hutchison (2001) also cited a newspaper column in which the columnist had noted that while the benefits of single-sex education for boys have been less well-documented, there is at least anecdotal evidence that boys' schools in the inner cities, where discipline is stressed and positive male role models emphasized, may result in lower dropout rates and higher test scores.

Proponents of single-sex education have their own organization and website, the National Organization for Single-Sex Public Education, at <*www.singlesexschools.org*>. The view of this organization is that both boys and girls have special educational needs that may be best met in a single-sex educational environment.

Opposition

The enthusiasm for single-sex public school education has not been shared by all. The challenges to single-sex public education come from many sources: women's groups,

educational organizations, parents, students, and lawyers. Stabiner (2002) noted the struggles of the New York Public School System to open the Young Women's Leadership School, which was committed to offering a demanding single-sex curriculum. But complaints came from the New York Civil Liberties Union, the New York Civil Rights Coalition, and the National Organization of Women, contending that any admission that girls may need to be educated in a different manner than boys would be detrimental to the women's rights movement and would hinder the cause of gender equality. The school did open as planned the fall of 1996.

Some opposition to single-sex education and to the proposed changes in the Title IX regulations come from unlikely sources. The National Coalition for Women and Girls in Education (2002) responded to the Secretary of Education's Notice of Intent to Regulate with a letter of opposition, citing a lack of clarity as to the rationale for the proposed changes. The Coalition argued that the research on single-sex education is "inconclusive, largely anecdotal, and based on private and parochial schools, not public schools." Additionally, it incorporated the findings in the AAUW 1998 report, *Separated by Sex*, which reported that single-sex education works for some students, but not for all, and that the long-term effects of single-sex education are simply unknown. The Coalition also stated that it "does not believe that Title IX should be altered in the name of developing an education program that may or may not be beneficial to students' ability to learn in public education" (National Coalition for Women and Girls in Education, 2002).

A result of roundtable discussion, *Separated by Sex* produced a mixed response about the merits of single-sex education. Researchers who had studied the issues came to a consensus on six points: (a) There is no conclusive evidence that single-sex education is better than coeducation; (b) Policymakers and educators need to continue working to define the parts of a "good education;" (c) Single-sex education does produce positive results for some students in some settings; (d) Long-term impact of single-sex education is unknown; (e) No education environment is a complete escape from sexism; and (f) Investigating single-sex programs requires consideration of outside factors that makes each single-sex situation unique, from the type of program, type of school, to type of students enrolled.

Thus, even the AAUW, an organization that early on promoted single-sex education, seemed to step back from its original stance and acknowledge that all students can benefit from education reform. The issue of improving education was not limited to helping only girls or only boys, but focused on an overall education reform that could benefit all students in all schools, whether coeducational or single-sex.

Caplice (1994) pointed out that the well-informed advocate of single-sex schooling should also consider common criticisms of this form of education such as:

1. While single-sex education may be an admirable and viable educational alternative to coeducation, the state should not pay for the option because it involves state-supported gender separation.
2. Single-sex schooling does not prepare students for a coeducational world.
3. If the market does not provide for this form of education, apparently there is no demand for it.
4. While single-sex education may be beneficial, it is only beneficial for women, not men.

Comparable or Equal

There is an important distinction between "comparable" and "equal." Meg Moulton, Director of the National Coalition of Girls Schools, in a "thoughtful letter" (cited in Hutchison, 2001), explained the distinction. Regarding Hutchison's effort to allow federal funds to be used for "comparable" single-sex programs for both boys and girls, Moulton wrote:

> While the distinction [between "comparable" and "equal"] may be subtle, we feel the implications are profound, to the degree that the intent of this section of the bill would be virtually nullified if [equal] is adopted . . . at the very heart of the impetus to create single-sex schooling opportunities is the well-established fact that boys and girls often exhibit unique learning styles . . . To state that these settings must be equal in all respects is, simply put, illogical. (Hutchison, 2001, p. 1080)

Given the language in the Title IX regulations, (see, 34 C.F.R. 106.35(b), 2002), and the Court's apparent search in *U.S. v. Virginia* (1996) for "comparability" in the programs offered by VWIL and VMI, the distinction between "comparable" and "equal" is indeed important. If all aspects of separate schools or classes for boys and girls are the same, the educational logic for the separation would rest only on the simple fact of keeping the sexes apart. The research suggests that there are meaningful differences between boys and girls that should be addressed by corresponding differences in the education that is provided.

The No Child Left Behind Act, Title IX, and the Equal Protection Clause: Uncharted Waters

The No Child Left Behind Act of 2001 has opened the door for "innovative programs," including single-sex schools and classrooms. Those who see such an arrangement as a promising educational option will now have the additional incentive of federal funding. As noted in the Act, however, such schools must be consistent with applicable law.

Neither Title IX nor current federal regulations and guidelines categorically prohibit single-sex schools and classrooms. Given the support of the Department of Education for the No Child Left Behind Act, If and when new Title IX regulations are promulgated, they are likely to clarify how single-sex schools and classrooms may be organized and operated so as to be consistent with the requirements of federal law.

The Constitution does not prohibit all classifications based on gender. But single-sex schools and classrooms would be subject to challenge under the Equal Protection Clause, and states and school districts may be called upon to justify keeping boys and girls apart. The state would be required to show that such a sex-based classification serves an important governmental purpose and that the discriminatory means employed are substantially related to the achievement of those objectives. Defendants could cite the research showing that single-sex schools and classrooms provide benefits for both boys and girls; plaintiffs could argue, however, that the research is inconclusive.

Those who would establish single-sex schools or classrooms may be confronted with legal challenges and should be prepared to testify about the educational rationale for such an arrangement. As in many areas of education law, courts generally look with favor upon educational policies and practices that are grounded in educational research and professional

judgement. If school officials can demonstrate that both boys and girls have comparable educational opportunities, then such single-sex educational settings should not run afoul of federal law.

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