

Synopsis by
TDH/Toda

Unlabeled
Title IX

MC public schools

→ An increasing response option to
Paras

File: Single Sex

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ED's Proposed Approach -- Single Sex Proposed Regulations

Based on the concerns of the Secretary and Deputy Secretary that we not go forward with a proposed regulation that will be understood to reduce the existing flexibility of local school districts to create single sex schools under Title IX, the Department is recommending a new option for proposed regulations on single sex programs and schools, as follows--

- 705,
- (1) Adopt the Department of Justice proposal on single sex classes/programs, which would require the school to--
 - (a) justify the need for a single sex class/program;
 - (b) provide evidence the class/program benefits some students;
 - (c) show that it has considered other alternatives and they would not be as effective;
 - (d) provide an equivalent coeducational class/program;
 - (e) provide an equivalent single sex class/program, unless there is insufficient interest on the part of students of the other sex to make the class/program feasible under established policies on minimum size.
 - (2) Retain the existing regulation on single sex schools, except that--
 - (a) the requirement in the regulation that students of the other gender be provided a "comparable" school would be changed to an equivalent school, consistent with the VMI standard;
 - (b) the preamble would explain that an equivalent school would have to be a single sex school, consistent with the Department's longstanding view of its Title IX regulation;
 - (c) the preamble would explain that the difference between the requirements for schools and classes/programs is based on Title IX's failure to address admissions policies of elementary and secondary schools and that schools would still be responsible for complying with the requirements of the Constitution.

Pros:

Would provide additional flexibility for use of single sex classes/programs, which are barred under the existing regulations except under very limited circumstances (classes on human sexuality, contact sports, choir).

Unlike the option to require two equivalent single sex schools and an equivalent coeducational school, would not decrease existing flexibility under Title IX to create single sex schools.

Unlike the option raised by DOJ to require only an equivalent coeducational school, would not reverse the Department's interpretation of existing Title IX regulations on single sex schools and would avoid interpreting Title IX to permit conferring the benefits of single sex schools on only one gender.

Women's groups will be pleased with the tightly written definition of "equivalence."

Cons:

Women's groups generally oppose single sex programs--except as a remedy for discrimination--and will oppose any proposal to provide more flexibility for these programs. They will be upset with the proposal for single sex classes, particularly the exception for "insufficient interest." They also will be unhappy with our interpretation of the single sex school regulation, since they maintain that newly created schools are not subject to the Title IX "exemption."

School administrators will be critical because the regulation does not provide sufficient flexibility, particularly in requiring three classes/programs, whether or not they view those classes/programs as responsive to the needs of students.

The regulation on schools will put OCR in the awkward position of approving Title IX corrective action plans that do not meet DOJ's interpretation of the Constitution. The Department would need to be very clear with school districts that they risk a challenge under the Constitution even if they have met the Title IX requirements. However, that is already our situation under the existing regulations.

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WHERE WE ARE ON SINGLE-SEX REGULATIONS

Consultations with DOJ

- We have had several productive conversations with DOJ (including with representatives from OLC, SG, Associate AG, and Civil Rights).
- We believe that they have been genuinely open to our policy concerns, and have pushed their constitutional analysis as far as they feel they can in order to be responsive to our policy goals. On the other hand, they have admitted that they don't know all the answers in this unsettled area of the law.

Single-sex classes (and programs)

What would be allowed

- It is DOJ's position that under the Constitution (and by derivation, under Title IX), an elementary or secondary school or school district *can offer single-sex classes "as part of an even-handed effort to enhance students' educational achievement."*
- The following requirements would apply:
 - I. Admission to the single-sex class must be *voluntary* -- i.e., students who are offered a single-sex class must always be given a choice of an equivalent coed alternative.
 - II. The school must have an *exceedingly persuasive justification* for the single-sex class. This means:
 - The class or program must address a real, articulated educational need or goal that is not defined on the basis of the sex of students.
 - The school must have research or other reliable evidence that a single-sex class will provide a significant educational benefit to *some* students of that sex.
 - The school must have considered alternatives to the single-sex class to ensure that the educational benefit could not have been achieved in other ways.

III. *The school must provide an equivalent single-sex class for students of the other sex, unless there is insufficient interest in the class to make it feasible, consistent with the school's established policies on minimum class size.*
(This must be assessed annually.)

- ***The school must treat the sexes the same in how it “offers” a single-sex class.*** It cannot affirmatively offer a single-sex class only to members of one sex, and wait for members of the other sex to demand the class.
- ***Access to the single-sex class can and should be the same for both sexes.*** If the single-sex class or program is only offered to students of one sex with particular needs or qualifications, the equivalent single-sex class or program offered to the other sex can and should be restricted in the same manner.
- If there are insufficient numbers of qualified students to offer a single-sex class, those students still must be offered an equivalent class in all respects but the single-sexness.

IV. *“Equivalent” means substantially equal in character, quality, range, and availability.* In other words, nearly identical.

Example -- Single-sex math class

Evidence:

- Responding to state and national education goals, a school seeks to improve the number of its students taking and succeeding in advanced mathematics classes.
- Upon assessing enrollment rates and grades in its existing classes over the past four years, the school learns that significantly less of its female students are participating in advanced mathematics courses compared with male students, and that female students participating in these classes are getting much lower grades than male students. In developing an appropriate educational response, the school finds that studies of schools similarly situated with respect to size, gender composition, and other demographic factors show that many under-achieving girls are more likely to take advanced math classes and do better in them if they are both single sex and utilize a hands-on teaching style.

Programs:

- On the basis of this evidence, the school decides to offer a single-sex advanced math course using a hands-on teaching style targeted to girls who are under-achieving in advanced mathematics. The school can do so, but only after it considers whether it could achieve similar improvement by offering a coed advanced math class that, for

example, targeted particularly timid students, or that utilized a unique teaching style.

- If after such consideration, it concludes that it will offer the single-sex advanced math class using a hands-on teaching style for girls, it must also provide (1) a coeducational advanced math class using a hands-on teaching style and (2) a single-sex advanced math class using a hands-on teaching style for boys. Both the coeducational class and the single-sex class for boys must be equal to the single-sex class for girls in terms of basic curriculum, teaching format, and teacher qualifications.
- If the school decides also to offer a single-sex advanced math class for boys using a teaching style that combines traditional lectures with rapid math drills - based on evidence that these techniques work best to increase boys' participation and achievement in upper level mathematics - it will also have to provide (1) a coeducational advanced math class and (2) a single-sex for girls advanced math class -- both of which must be equal in all respects to the one offered only to boys, including the use in each class of a teaching format that combines traditional lectures with rapid math drills.
- As this example makes clear, whenever a school offers a single-sex class, it must always offer both an equal coeducational one and an equal one for the other sex. However, if so few students actually indicate that they want to enroll in the single sex class, that it will be impractical to implement the class, then the school will not have to provide it. In deciding how few students are necessary to establish a bona fide class, a school will have to look at its prior policies and practices i.e., how small have been other classes that it has provided.

Educational/Flexibility Issues

- DOJ's approach provides more flexibility than the existing regulation, which generally prohibits single-sex classes.
- DOJ's "strict" equality approach protects the proposed regulation from criticism that single-sex programs will be based on impermissible stereotypes and generalizations about the sexes.
- It allows schools that establish a single-sex class to avoid establishing an equivalent class for students of the other sex where there is insufficient interest in that class.
- Assuming appropriate evidence, DOJ's approach permits the school to target needs or qualifications that are not defined by the sex of the students, even if in fact the class primarily affects or benefits one sex -- as long as members of the other sex are offered an equivalent single-sex program. (We will make clear in the preamble, however, that a school that intentionally serves only the needs of one may discriminate in violation of Title IX.)

- On the other hand, this approach requires at least three equivalent classes whenever a school decides to establish a single-sex class - a single-sex class for each sex and a coed class - unless there is insufficient interest in the second single-sex class.
- DOJ requires a “formulaic” equality that may not be responsive to the needs of most members of one sex. While DOJ reads the Constitution to require this outcome, it may not be the best educational outcome. Moreover, this reading of the Constitution allows a school to provide a single-sex class for one sex -- because it best meets their needs, but it does *not* have to provide the other sex with the class that best meets the same needs of most members of that sex. This could raise Title IX concerns.
- To the extent that the school district tries to provide classes that address the different needs of girls and boys, there may be a burdensome proliferation of classes because every class that provides a unique benefit will require an equivalent class for members of the other sex.
- Because DOJ reads the Constitution to require very rigorous scrutiny of gender classifications, schools would need to make a “least restrictive means” showing as part of their predicate for offering a single-sex class. This could be burdensome or impractical in many cases.

Single-Sex Schools

What would be allowed - Option 1

- Because of the statutory exemption for single-sex admissions policies, DOJ would allow us to interpret Title IX to permit a voluntary single-sex school for one sex, as long as an equivalent coeducational school was provided.

Pros and Cons

- This approach puts Title IX at odds with the constitutional standard. Given the explication of the constitutional standards for classes, this approach highlights that these are inconsistent nondiscrimination standards for ED and DOJ.
- This approach places the Department in the awkward position of agreeing to compliance plans that may then be challenged by DOJ.
- We may be able to resolve the NYC case without New York opening a school for boys—although they would need a nearly identical coeducational school, which they do not presently have. However, this outcome would be inconsistent with OCR’s prior interpretation of the Title IX regulation (though not inconsistent with the literal language of the current regulation) to require an equivalent single-sex school.

- This approach – while most flexible – reads Title IX to permit conferring the benefits of single sex schools on only one gender, and thereby tolerates serious inequities.

Option 2

- DOJ would also allow us to interpret Title IX’s equal opportunity requirement as importing the constitutional standard, i.e., to interpret Title IX as requiring all three schools. (This approach would not fully incorporate the constitutional standard, because the Title IX statutory exemption for school admissions would prohibit us from requiring an exceedingly persuasive justification for having a single-sex school.) DOJ has informally expressed strong doubts -- if we took this approach to try to import the constitutional standard -- as to whether we could include the “insufficient interest” exception for school admissions that would avoid the duty to create equivalent single sex schools for both sexes.

Pros and Cons

- On the one hand, we will have a consistent regulation that is generally consistent with the constitutional standard, and that should be fairly easy to apply.
- On the other hand, this would make our new regulation **less flexible** than our existing regulation on schools, which does not require three equivalent schools.
- We will have to find NYC in violation of Title IX, absent a voluntary agreement on its part to meet the revised regulation.

Option 3

Retain the existing regulation on single sex schools, except that—

- (a) the requirement in the regulation that students of the other gender be provided a “comparable” school would be changed to an “equivalent” school, consistent with the VMI standard;
- (b) the preamble would explain that an equivalent school would have to be a single sex school, consistent with the Department’s longstanding view of its Title IX regulation;
- (c) the preamble would explain that the difference between the requirements for schools and classes/programs is based on Title IX’s failure to

address admissions policies of elementary and secondary schools and that schools would still be responsible for complying with the requirements of the Constitution.

Pros and Cons

- Given that Secretary Riley and Deputy Secretary Holleman have expressed strong concerns about Option 2, because it would be perceived to decrease the flexibility of educators, this may be the best way to move forward on an overall package that increases flexibility at the class/program level.
- Women's advocacy groups likely will be much less upset with this option than option 1, which allows as a matter of course the creation of single sex schools for only one sex.
- By contrast to option 1, this option avoids reading Title IX to permit conferring the benefits of single sex schools on only one gender.
- Like option 1, this option will put OCR in the awkward position of approving Title IX corrective action plans that do not meet DOJ's interpretation of the Constitution. The Department would need to be very clear with school districts that they risk a challenge under the Constitution even if they have met the Title IX requirements. However, that is what the current regulation provides.

Recommendation for Schools

The Department of Education proposes to issue a proposed regulation that reflects option 3 on single sex schools (the proposed regulation would also reflect DOJ's proposal regarding single sex classes/programs). We believe this is consistent with our goal to provide flexibility for single sex programs, without permitting unequal schools or programs by gender. DOJ has not cleared option 3, but we believe that they will if we make clear in the preamble that this standard does not address a school district's constitutional obligations.