

MEMORANDUM



To: Interested Parties

From: Nancy Zirkin, Director of Public Policy and Government Relations

Date: May 9, 2000

Subject: Hutchison Single-Sex Education Amendment to S 2

For your information, attached are materials sent the Senate this afternoon opposing the Hutchison Single-Sex Education Amendment to the Educational Opportunities Act (S 2), including the American Association of University Women (AAUW) letter and the National Coalition for Women and Girls in Education (NCWGE) *Myth vs. Reality* factsheet. We expect the amendment to be offered soon after consideration of the Kennedy Teacher Quality Amendment.

AAUW opposes the Hutchison Single-Sex Education Amendment because single-sex education programs must be "equal," not "comparable."

If you have any questions, please contact me at 202/785-7720.

File Single Sex

**OPPOSE THE HUTCHISON SINGLE-SEX EDUCATION
AMENDMENT: COMPARABLE IS NOT EQUAL**

May 9, 2000



Dear Senator:

On behalf of the 150,000 members of the American Association of University Women (AAUW), I urge you to oppose Sen. Kay Bailey Hutchison's (R-TX) single-sex education amendment to the Educational Opportunities Act (S 2). The language on single-sex education already in S 2 would ensure that single-sex education is consistent with equal protection principles as articulated by the Supreme Court. In contrast, the amendment would allow local education agencies to spend federal dollars to offer single gender schools and classes so long as they are "separate" and "comparable." AAUW opposes the Hutchison Amendment because it violates the constitutional guarantee of equal protection by permitting a return to the separate and unequal programs to which women and girls have too often been relegated.

The Hutchison Amendment would not ensure that authorized single-sex programs provide equal opportunities for students of both sexes. Policy changes regarding single-sex programming could have far reaching implications and should be carefully considered. Unless single-sex programs are carefully designed to remedy particular sex-based disadvantages, such programs can deny equal educational opportunities and reinforce harmful stereotypes. For example, in the mid-1980s, Philadelphia's two sex-segregated magnet schools were found to shortchange girls in everything from course offerings and faculty credentials to recreation facilities and library resources. "Separate but equal" has often meant separate and unequal for girls and women, just as it has for African-Americans.

With the adoption of the Hutchison Amendment, which fails to guarantee equal educational opportunity, S 2 would open the door to sex-segregated programming that is based on harmful sex stereotypes including less challenging math classes for girls due to the belief that girls are not as good at math and science. While the Supreme Court has repeatedly recognized that single-sex education programs may be consistent with antidiscrimination principles if they are compensatory and operate to overcome barriers, the language in the Hutchison Amendment, which contains no legal protections and provides "comparable" as the standard, would permit schools to offer single-sex programs that fall far outside of these protections.

Once again, I urge you to oppose the Hutchison Amendment and support language in S 2 that would encourage a return to equality in education. Our nation must guarantee equal educational opportunity for both boys and girls. If you have any questions, please contact Nancy Zirkin, Director of Public Policy and Government Relations, at 202/785-7720, or Lisa Levine, Government Relations Manager, at 202/785-7730.

Sincerely,

Sandy Bernard
Sandy Bernard
President

NCWGE

NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUCATION

"Separate but Comparable" Single-Sex Programs: A Return to Inequality

Myth: *Single-sex opportunities will not exist if the standard is "equal."*

Reality: Single-sex opportunities will not exist if the standard is "comparable" because "comparable" clearly is not the standard under the U.S. Constitution. The "comparable" standard is an open invitation to lawsuits.

- "Comparability," which is a lesser standard than "equal", is contrary to well-established law and therefore vulnerable to attack, potentially subjecting school districts to significant liability.
- In *United States v. Virginia*, the U.S. Supreme Court makes clear that schools must provide equal opportunities to female and male students. Under the decision, factors that may be relevant to determining whether schools, courses, and programs are equal include the quality and availability of curricular and extracurricular activities, facilities, services, resources, faculty and staff; and the quality and availability of "intangibles" such as institutional history, prestige, and influence of alumni network.
- The Court also stated that "sex classifications may be used to compensate women 'for particular economic disabilities they have suffered ... to promote equal employment opportunity ... to advance full development of the talent and capacities of our Nation's people.'"

Myth: *Single-sex educational programs don't have to be equal to be constitutional.*

Reality: The Supreme Court made very clear in *United States v. Virginia*, that Virginia violated the Constitution by creating a separate school for women that was in every respect unequal to Virginia Military Institute (VMI).

- In the VMI case, the Supreme Court rejected the "substantive comparability" standard that the 4th Circuit had used, calling it "a standard of its own invention." The Court held that sex-based classifications must be based on an "exceedingly persuasive justification" and that such classifications can meet this justification when they are aimed at overcoming barriers to opportunity for women.

- The Supreme Court also held that the creation of a separate all-women's program, which was unequal to VMI in both tangible and intangible benefits, was not an adequate remedy for the constitutional violation of excluding women from VMI's opportunities and advantages.

Myth: *Numerous lower courts have upheld single-sex elementary and secondary education based on the term "comparable."*

Reality: In the few reported court decisions regarding single-sex elementary and secondary schools, none has been upheld based on a "comparable" standard. In fact, the cases demonstrate that such schools must provide equal opportunities for students.

- For example, a court found that the academic school for boys and the academic school for girls in Philadelphia were unequal. As in VMI, the boys school was superior to the girls school: the campus was significantly larger, the library had more books, the boys had a computer room, and the graduates from the boys school received more money for college scholarships. The court found that the exclusion of girls from the superior boys' school, based solely on their sex, denied them their equal opportunities and was therefore a violation of the Constitution.

Myth: *Single-sex education is the answer to the problems plaguing public education.*

Reality: Little research exists on single-sex education, and no research has been done on public single-sex schools in the United States.

- The AAUW report, *Separated by Sex: A Critical Look at Single-Sex Education for Girls*, found that in general, there is "no evidence that single-sex education is better than coeducation." The report's authors stress that the long-term impact of single-sex education on girls or boys is unknown and that more research is needed.

Myth: *In order to address the different learning styles and needs of girls and boys, single-sex programs cannot be equal.*

Reality: The different learning styles and needs of students must be addressed by programs that provide equal opportunities, otherwise they can reinforce harmful stereotypes that may lead to less challenging academic opportunities for one sex.

- If equality is not required, girls could be tracked into less challenging math, science, or technology classes. Further, girls could find themselves in schools that don't offer such programming, based on the belief that girls' needs, learning styles, and abilities preclude them from handling such courses.
- The VMI case is an example of such tracking. In that case, VMI tried to justify its exclusion of women on the ground that women cannot withstand stress as well as men. The Supreme Court rejected this sex-stereotyped view as a rationale for the exclusion of women.

Myth: *The Hutchison amendment would not modify Title IX of the Education Amendments of 1972.*

Reality: Title IX prohibits sex discrimination in federally funded education. It allows same-sex programming under certain limited circumstances.

- Title IX permits single-sex programs to be used when they are designed to compensate women for barriers to opportunity. Further, the law permits single-sex classes in certain common sense circumstances (e.g. competitive athletics, human sexuality classes, choirs).
- The Title IX statute does not use the word "comparable." The statute does contain an exception for admissions in elementary and secondary schools and single-sex schools that were in existence before Title IX was enacted. However, the 1975 regulation uses "comparable" for the implementation of this exception only. This exception does not apply to vocational schools.

Myth: *The word "comparable" is already used by the Department of Education in determining whether a single-sex school is permissible under Title IX.*

Reality: The Department of Education is in the process of reviewing the Title IX regulations that apply to single-sex schools and classes.

- Congress should wait until the Department of Education has completed its review of the Title IX regulations to ensure that education policymaking is consistent with the law.

Contact: Leslie Annexstein, National Women's Law Center, 202/588-5180
Nancy Zirkin, American Association of University Women, 202/785-7720

May 4, 2000

Nancy Duff Campbell
Marcia D. Greenberger
Co-Presidents
National Women's Law Center

BOARD OF DIRECTORS*

Elizabeth J. Coleman, Chair
Director, Civil Rights Division
Anti-Defamation League

Richard J. Beattie
Chairman, Executive Committee
Simpson Thacher & Bartlett

Sheila Birnbaum
Partner
Skadden, Arps, Slate,
Meagher & Flom

Brooksley Born
Partner
Arnold & Porter

Nancy Duff Campbell

Natalia Delgado
Partner
Goldberg, Kohn, Bell, Black
Rosenbloom & Moritz

Donna de Varona
Chair, Women's Sports Foundation

Marcia D. Greenberger

Anita F. Hill
Professor of Law, Social Policy,
and Women's Studies
Brandeis University

Elaine R. Jones
Director/Counsel
NAACP Legal Defense &
Educational Fund, Inc.

Deborah Slaner Larkin
The President's Council on
Physical Fitness and Sports

Rochelle B. Lazarus
Chairman and CEO
Ogilvy & Mather Worldwide

John W. Martin, Jr.

Judith A. Maynes
Vice President-Law
AT&T

Gerald W. McEntee
President
American Federation of State,
County and Municipal Employees

Marilyn Monahan
Vice President
MBNA Education Foundation

Marna S. Tucker
Partner
Feldesman, Tucker, Leifer,
Fidell & Bank

*Affiliations listed for identification
purposes only

March 15, 2000

Ms. Shirley Sagawa
Deputy Assistant to the President
& Deputy Chief of Staff to the First Lady
The White House
Office of the First Lady
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear Shirley:

Enclosed is a one-page quick review of the legal points involving single-sex education. Let me know what else would be useful.

Best,



Marcia D. Greenberger
Co-President

Enclosure

MDG/slh

With the law on your side, great things are possible.

11 Dupont Circle ■ Suite 800 ■ Washington, DC 20036 ■ 202.588.5180 ■ 202.588.5185 Fax

SINGLE-SEX EDUCATION: THE LAW SAYS PROCEED WITH CAUTION

Both the Constitution and Title IX of the Education Amendments of 1972 recognize that there are certain circumstances in which single-sex educational opportunities may be justified, but provide strong protections so that schools cannot use harmful stereotypes to limit girls' opportunities and aspirations through sex-segregated schools or classes. For example, the Constitution and Title IX's prohibition against sex discrimination in education opened up shop classes, vocational education schools for high-paid trades and prestigious academic high schools that had been for boys only. Most recently, the male-only policies of the Virginia Military Institute and the Citadel were declared unconstitutional, even though alternative women's schools were touted by Virginia and South Carolina as "comparable," and best-suited to women. These legal protections are as important now as ever.

The Constitution allows single-sex education programs for girls that are compensatory and operate to overcome barriers.

- In the Supreme Court's Virginia Military Institute case, the Court held that sex-based classifications must be based on an "exceedingly persuasive justification" and that such classifications can meet this justification when they are aimed at overcoming barriers to opportunity for women. The Supreme Court said "Sex classifications may be used to compensate women 'for particular economic disabilities they have suffered ... to promote equal employment opportunity ... to advance full development of the talent and capacities of our Nation's people.'"

Title IX allows single-sex programs only under appropriate circumstances.

- Like the Constitution, Title IX generally frowns on excluding students just because of their sex, but permits single-sex programs to be used when they are designed to compensate women for barriers to opportunity.
- Title IX also has certain common sense circumstances where single-sex classes are specifically allowed (e.g. competitive athletics, human sexuality classes, choirs).
- Unlike the Constitution, Title IX contains a statutory exception addressing admissions in elementary and secondary schools and single-sex schools in place before Title IX was passed, such as VMI, but this exception does not apply to vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

Without the safeguards of the Constitution and Title IX, a school would not need any persuasive rationale or purpose for separating the sexes, and could use harmful stereotypes in a way that would hurt girls and young women.

NATIONAL WOMEN'S LAW CENTER, FEBRUARY 2000

With the law on your side, great things are possible.

11 Dupont Circle ■ Suite 800 ■ Washington, DC 20036 ■ 202.588.5180 ■ 202.588.5185 Fax

> To: Cantu, Norma V; Winnick, Steve; Palmer, Scott; Anthony, Lisa; Liu,
> Goodwin; Lahring, Karl; Craig, Susan
> Subject: FW: Single Sex ed reg
> Importance: High

> I am forwarding the e-mail and attachment below without having reviewed
> either, knowing we have all been waiting with baited breathe

> -----Original Message-----

> From: Pillard, Nina [mailto:Nina.Pillard@usdoj.gov]
> <mailto:[mailto:Nina.Pillard@usdoj.gov]>
> Sent: Friday, April 07, 2000 5:50 PM
> To: 'Judith_winston@Ed.gov'
> Subject: Single Sex ed reg

> <<ss reg edited (EDU).wpd>> Dear Judy,

> Here is our proposed revision of the draft single-sex education regulation
> you sent over. Although any approach to this subject will inevitably
> raise significant litigation risk, we believe this approach is reasonable
> and defensible. We anticipate further discussion regarding this draft,
> but wanted you to have a chance to look it over in advance of meeting
> again. The Civil Rights Division and the Acting Associate Attorney
> General have reviewed this revision and would be happy to join in further
> discussions.

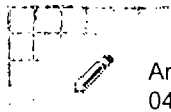
> In making our revisions, we were guided by our understanding that the
> Secretary has the discretion to - and wants to - construe the
> discrimination prohibition in Title IX as generally tracking the equal
> protection standard. We have also been guided by our view that the
> admissions exemption applicable to single-sex schools can be interpreted
> to relieve LEAs of the statutory obligation to justify decisions to
> provide sex-segregated schools, and to permit them to offer a single-sex
> school to one sex and not the other (so long as, in all other respects,
> the educational benefits available to each sex are substantially equal).
> As we have discussed, however, for purposes of the Equal Protection Clause
> (if not for title IX), a public school district still would have to
> provide an exceedingly persuasive justification both for its decision to
> offer sex-segregated schools and for its decision to provide such a school
> to one sex only. While we think that a school district could satisfy the
> constitutional requirements for justifying its decision to provide
> sex-segregated schools, we believe that any choice to offer such schools
> only to one sex inevitably would raise grave constitutional concerns and
> implicate the Department of Justice's enforcement responsibilities. The
> enclosed draft would not preclude conduct that the Constitution would
> prohibit, and the Constitution is very restrictive in this area. Let's
> talk further about this and, in particular, discuss what the preamble
> should say on the constitutional issue.

> The amended draft raises other issues that we believe should, at a
> minimum, be explained in the preamble in order to avoid misapplication of
> the regulation. For example, the Justice Department believes that the
> regulation should explain that the prohibition in draft §106.34(A)(2)(a)
> against relying on "overbroad" sex-based generalizations prohibits
> sociological, psychological or educational generalizations about girls and
> boys, even if those generalizations are not based on archaic stereotypes

> and are supported by reputable empirical research reflecting actual
> statistical tendencies. A sex-based generalization that is untrue for
> even a very few individuals is, in the Court's parlance, "overbroad."
> Outside the remedial context, the Court has permitted classifications
> grounded on sex-based generalizations in only two types of situations:
> First, the Court permitted a generalization based on biological
> differences that distinguish all members of one sex in *Michael M. v.*
> *Superior Court of Sonoma County*, 450 U.S. 464, 480 (1981), where the Court
> upheld a law defining statutory rape as sexual intercourse with a minor
> woman (and not a minor man) on the ground that "males and females are not
> similarly situated with respect to the risks of [pregnancy from] sexual
> intercourse"; second, the Court has permitted generalizations based on
> existing, sex-based legal disabilities affecting one sex, as in *Rostker v.*
> *Goldberg*, 453 U.S. 57, 78 (1981), where the Court upheld a male-only draft
> based on the existence of the unchallenged rule excluding women from
> combat. We would be happy to meet again with you to discuss this, and
> other issues in connection with the draft preamble, once you have had a
> chance to review the enclosed draft of the regulatory text.
> We very much appreciate your cooperation on this complex project, and we
> look forward to meeting with you again soon to discuss it.
> Best regards,
>
> Randy
>
>



- ss reg edited (EDU).wpd



Ann O'Leary
04/12/2000 01:51:26 PM

Record Type: Record

To: Eric P. Liu/OPD/EOP@EOP
cc: Anna Richter/OPD/EOP@EOP
Subject: FW: Single Sex ed reg

Eric -

Below please find the draft revision of the reg sent from DOJ to ED on Friday. I spoke with Peter Rundlet yesterday to get a sense of WH Counsel's involvement in the passback -- they had no involvement whatsoever. The quick reading by ED is that they are trying to get some clarification on changes made -- they believe that DOJ has made it a bit more confusing, but not necessarily worse. I have not had a chance to review it thoroughly.

At this point, I suggest we call an internal meeting with Beth, Peter, Karen, etc. to discuss both the substance as well as the next steps. Beth recently had a conference call with some of the women's groups and felt a bit more worried about moving ahead with our flexibility position. After this meeting, I think we should write a joint memo to POTUS and FLOUTS outlining the substantive changes, constitutional concerns, and a read on the lack of support from the women's groups.

Lets have a chat after we both get a chance to review it -- tomorrow?

Thanks.

-Ann

----- Forwarded by Ann O'Leary/OPD/EOP on 04/12/2000 01:43 PM -----



"Liu, Goodwin" <Goodwin_Liu@ed.gov>
04/12/2000 01:33:34 PM

Record Type: Record

To: Ann O'Leary/OPD/EOP
cc:
Subject: FW: Single Sex ed reg

> -----Original Message-----
> From: Winston, Judith
> Sent: Friday, April 07, 2000 5:08 PM

PROPOSED REGULATORY LANGUAGE

Replace existing sections 106.34 and 106.35 with the following:

106.34.1 Access to course offerings

(A) Permissible sex-segregated courses, programs or activities. A recipient may provide courses or otherwise offer its programs or activities separately on the basis of sex in a non-vocational elementary or secondary school only –

(1) as part of a remedial or affirmative action program under §106.3; or

(2) as part of an even-handed effort to enhance students' educational achievement by offering voluntary choice among equivalent sex-segregated and coeducational programs. A recipient meets this standard if the recipient demonstrates that –

(a) a sex-segregated option is provided based on the recipient's educational judgment, supported by research or other reliable evidence and not using overbroad sex-based generalizations; that exclusion of members of the other sex will substantially enhance educational achievement or other benefit for some students; that such enhanced benefit is not reasonably attainable for those students in a coeducational setting; and

(b) participation in any sex-segregated course is voluntary, an equivalent sex-segregated option is provided to both sexes, and an equivalent coeducational course is also available; *provided, however*, that a sex-segregated course may be provided to only one sex if participation in the sex-segregated course is voluntary, an equivalent coeducational course is also provided, and the recipient has demonstrated that, for the current school year or semester, equivalent sex-segregated courses were offered to both sexes and an inadequate number of students of one sex decided to participate to make a sex-segregated course feasible for that sex. The number of students is inadequate only if it is fewer than the number of students in the smallest course (excluding special education and remedial courses) that the recipient's established policies and practices permit; or

(3) within chorus activities to the extent that requirements based on vocal range or quality may result in a chorus or choruses of one or predominantly one sex; or

(4) within physical education classes or activities to the extent that they involve wrestling, boxing, rugby, ice hockey, football, basketball and other sports a major activity of which involves bodily contact; or

1st must
order?

— must provide?

- (5) during portions of classes that deal exclusively with human sexuality; or
- (6) as part of a mother-daughter or father-son activity at an educational institution, authorized by 20 U.S.C. §1681(a)(8), where opportunities for equivalent activities are provided for students of the other sex.

(B) Prohibitions on sex-segregation of certain courses, programs or activities. Recipients may not offer sex-segregated courses, programs or activities except in the circumstances described in subpart 106.34(A). For example –

- (1) a recipient may not, except as provided in §106.34(a)(4), offer sex-segregated physical education classes or programs. Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards that do not have such an effect;
- (2) a recipient may not offer sex-segregated vocational, technical, home economics, industrial, or business classes or programs.

106.34.2 Admission to schools operated by local educational agencies. Title IX does not prohibit a recipient that is a local educational agency (“LEA”) from operating one or more sex-segregated, non-vocational, elementary or secondary schools if –

- (A) the school is part of a remedial or affirmative action program under §106.3; or
- (B) enrollment in any sex-segregated school is voluntary, and an equivalent coeducational school is also provided.

This section addresses the requirements of Title IX, but does not address the constitutionality of any such sex-segregated school.¹

106.35 Equivalence. In order to be equivalent for purposes of subpart 106.34 or 106.34.1, schools, courses, programs or activities must be geographically accessible and substantially equal in all material respects. Factors relevant to equivalence include, where applicable, policies and criteria of admissions (excluding policies that restrict admission to schools based on sex); the character, quality, range, and availability of curricular and extracurricular activities; the character, quality, range and availability of facilities, services, resources, funding, financial aid, student body, institutional history, prestige, position and influence of alumni network, and other

¹ For discussion of the relevant constitutional constraints, see [cite the preamble].

4/4/00 DRAFT

benefits; and the quality and experience of administration, and qualifications and distribution of faculty and staff.

For last column of chart: We interpret DOJ's regulation to mean:

EPJ for single-sex classes/programs:

1. It is based on the *school's* assessment (based on factors other than sex) regarding the serious and important educational needs of its students. **EXAMPLE:** Drop out prevention.
2. Members of one sex have this need as measured by objective non-sex based criteria. **EXAMPLE:** students with high absenteeism, GPA's of D-F, and discipline problems.
3. **AND** there is reliable research that a single-sex program targeted to students of one sex who met this criteria is substantially more effective in meeting the needs of those students than a coed program. (**EXAMPLE:** research from a drop out prevention mentoring program in a similarly situated school showed that the program reduced male drop out rates, but that boys dropped out of the program if it was coed)
4. Members of the excluded sex with the same need, as measured by the same criteria, are offered an equivalent single-sex program,¹ and enough members of the excluded sex sign up to make it feasible to offer the course.
5. The school's evidence does not – and cannot -- demonstrate that all targeted boys do better in a single-sex program. But that does *not* preclude the program because no student who meets the criteria of the program is denied equal educational opportunity: *i.e.*, to the extent feasible both boys and girls at risk of dropping out have a choice among equivalent (thus, non-stereotyped) single-sex and coeducational prevention programs.
6. The school does *not* need a separate EPJ for the single-sex program for the excluded sex. **EXAMPLE:** The school must offer an equivalent single-sex program for girls even if the evidence does not show that a single-sex program is more effective than a coed program in preventing at-risk girls from dropping out, and even if evidence shows that a different type of program is more effective for at-risk girls. This is because while EPJ permits a school to use single-sex education to target resources based on substantial evidence of effectiveness in meeting specific educational needs – it also requires strict equivalence in program format and content.
7. Members of the excluded who are at risk of dropping out, and who would do better in a single-sex program, may not have this option. (**EXAMPLE:** Only 9 girls sign-up for the single-sex program and the school does not offer courses or programs if less than 12 students sign-up). This is because EPJ does not require the impossible, *i.e.*, does not require the school to offer a program for which there is insufficient interest.
8. Members of the excluded sex who do not meet the criteria for being likely to drop out (**EXAMPLE:** students with GPAs of A-C) cannot demand a mentoring program or a single-sex program to address another need. This is because the regulation is not intended to usurp school's existing authority to make educational judgments regarding school priorities and resources that are based on factors other than sex.

¹ Since schools must plan curriculum ahead of time offered can mean that parents are survey regarding their interest in a potential program.

12/13/99 DRAFT --- Single Sex Regulation --- For Discussion Purposes Only

PREAMBLE

I. Purpose of the Proposed Regulatory Amendments

The Department proposes to amend its existing Title IX regulation regarding single-sex programs and activities, consistent with the purposes of the Title IX statute and subject to appropriate safeguards against discrimination, to assist school districts in responding to important and legitimate educational needs of students. The proposed amendments are intended to support efforts of schools and 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.

II. Background

Title IX of the Education Amendments of 1972 prohibits sex-based discrimination in education programs or activities receiving federal financial assistance. 20 U.S.C. § 1681. The Title IX statute specifically exempts from its coverage admissions policies of non-vocational elementary and secondary schools, private undergraduate postsecondary institutions, and public undergraduate postsecondary institutions that traditionally and continually from their establishment have had a policy of admitting only students of one sex. The statute does not specifically prohibit single-sex classes or programs in coeducational schools.

Title IX is implemented by rules promulgated by agencies providing federal assistance to education programs and activities. 20 U.S.C. § 1682. The Department's current regulation issued by its predecessor agency, the Department of Health, Education, and Welfare (HEW), became effective July 21, 1975. See 34 CFR Part 106.

The regulation does not apply to the single-sex admission policies of non-vocational elementary and secondary schools, among other institutions exempted by the statute. 34 CFR 106.15. Accordingly, recipients can operate single-sex elementary and secondary schools consistent with Title IX. However, the regulation requires that where a local educational agency (LEA) operates a school for one sex, it must provide the other sex, pursuant to the same policies and criteria of admission, with comparable courses, services, and facilities. 34 CFR 106.35.

With limited exceptions, the existing regulation prohibits recipients that operate coeducational schools from conducting single-sex classes, programs, or activities.¹ The regulation reflects

¹ The exceptions are if separation based on sex (1) results from the application of objective standards of physical ability, or vocal range or ability, 34 CFR 106.34(b), (d), and (f); (2) is in a physical education class involving contact sports or is in a class involving human sexuality, 106 CFR 106.34(c) and (e); (3) involves a program offered to pregnant students on a voluntary basis that is comparable to that offered non-pregnant students, 34 CFR

congressional concerns that coeducational institutions were using sex-based policies and practices that reflected out-dated and stereotyped notions of the differences between the sexes and of the limited abilities of girls and women.

III. Summary of Proposed Changes to the Department's Title IX Regulation

The proposed regulation is intended to increase the ability of school districts to respond to educational needs and problems in their schools consistent with the intent and purpose of Title IX. Recent attempts by some school districts to experiment with single-sex programs, as well as recent congressional proposals regarding single-sex programs, reflect important and legitimate efforts to improve educational outcomes for all students. These programs generally are not based on outdated notions regarding the limitations or limited goals of members of one sex. Rather, they aim to provide new and better ways to help all students learn and succeed to high standards.

The three major proposed changes to the regulation can be summarized as follows –

The first and most significant change relates to single-sex classes, programs, or activities in coeducational schools. The proposed regulation permits non-vocational elementary and secondary schools to operate single-sex classes, programs, or activities, in addition to those situations permitted by the existing regulation, if a school can meet the constitutional standard used by the federal courts to review gender classifications. Under this standard, a school must demonstrate an "exceedingly persuasive justification" for the single-sex class, program, or activity. The proposed regulation identifies "even-handed diversity" as a justification that can meet this standard. It also describes two ways that a school can demonstrate "evenhandedness."

Second, the proposed regulation clarifies how LEAs that operate single-sex schools under the existing regulation can provide equal educational opportunity to both sexes.

Third, as discussed in more detail below, there are situations where either evenhandedly providing classes or programs, or ensuring equal educational opportunity in schools, will require "equivalent" programs or schools. The proposed regulation defines "equivalence" and deletes the word "comparable" found in the existing regulation. This change does not alter the intent of the existing regulation, but clarifies that "equivalent" programs and schools under this regulation need not be identical, and that differences between programs and schools cannot be based on stereotypes about the sexes, and such programs and schools must be equal in all fundamental respects. These include admissions criteria, the quality, range, and availability of curriculum, facilities, services, and other benefits, and the qualifications and distribution of staff and faculty. Equivalence will be determined on a case-by-case basis.

106.40(b); or (4) constitutes remedial or affirmative action. 34 CFR 106.3. In addition, pursuant to an OCR policy determination, recipients may offer sex-segregated classes for students who object to coeducational classes on religious grounds. 43 Fed. Reg. No 84 (May 1, 1978).

The proposed changes only apply to elementary and secondary schools, classes and programs. This is where the need for flexibility to respond to students' diverse educational needs is most prevalent, and where the current Title IX regulation limits the discretion of educators to provide single-sex program choices.

IV. Constitutional Standards

The Supreme Court has determined that the Constitution requires equal educational opportunity for men and women. However, sex is not a prohibited classification. For instance, sex classifications may be used "to compensate women 'for particular economic disabilities [they have] suffered,' 'to promot[e] equal employment opportunity,' [and] 'to advance full development of the talent and capacities of our Nation's people.'" United States v. Virginia (VMI), 116 S. Ct. 2264, 2276 (1996) (citations omitted). See also Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331, 3338 (1982) (holding that in limited circumstance, gender-based classifications can be justified).

Nevertheless, gender classifications require an "exceedingly persuasive justification." VMI, 116 S. Ct. at 2275. Gender classifications are permissible if they serve important governmental goals and if the means employed are substantially related to those goals. Id. This is a "demanding" legal hurdle for a school. Id. The governmental 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." Id. See also Hogan, 102 S. Ct. at 3337 (holding that sex-based classifications must be based on "reasoned analysis" rather than through the application of "traditional and often inaccurate assumptions" about the roles of men and women). Because courts will take a "hard look" at the rationales for single-sex programs, schools that establish such programs must make sure they are not relying on generalizations and "tendencies" of girls and boys that are likely to perpetuate patterns of discrimination. VMI, 116 S. Ct. at 2280.

Importantly, the court in VMI suggested a rationale for single-sex schools and programs that may meet the "exceedingly persuasive justification" test: "We do not question the State's prerogative evenhandedly to support diverse educational opportunities." Id. at 2276. Consistent with its mission "to ensure equal access to education and to promote educational excellence throughout the nation," the Department encourages educators to investigate disparities in educational attainment between boys and girls, and to develop and allow parents to choose among a broad array of educational strategies capable of meeting the potentially different learning needs of many boys and girls.

Yet whatever educational opportunities schools or school districts offer to boys and girls, they must offer such opportunities "evenhandedly." Id. In VMI, not only did the State offer "no persuasive evidence that VMI's male-only admissions policy [furthers] a state policy of 'diversity,'" id. at 2279 (internal quotation marks omitted), but the State also failed to show "evenhandedness" in the educational opportunities it did offer to men and women. Indeed, the

core of the equal protection violation was the State's failure to provide VMI-type adversative military training "to women ready, willing, and able to benefit" from such training. *Id.* at 2283. Thus, under VMI, where a school or school district operates a single-sex program or school, it must ensure "substantial equality in the ... educational opportunities" it offers not simply to members of the excluded sex who have the same educational need addressed by the school or program, but specifically to members of the excluded sex who are "ready, willing, and able to benefit from educational opportunities of the kind [the State] offers" to the included sex. *Id.* at 2286, 2283; *see id.* at 2284 ("[G]eneralizations about 'the way women are,' estimates of what is appropriate for most women, no longer justify denying opportunity to those women whose talent and capacity place them outside the average description."). "Evenhandedness," so construed, reflects the basic principle that equal protection is a constitutional right held by individuals, not by groups.

V. Application of constitutional standards to the proposed regulation

The proposed regulatory language continues to treat schools and classes differently because of the Title IX statutory exemption for elementary and secondary school admissions.

A. Single-sex classes and programs

Single-sex classes and programs are not exempt from the Title IX statute. Thus, Title IX requires schools and school districts to justify single-sex classes and programs in coeducational elementary and secondary schools. The Department's proposed regulation would permit single-sex classes, programs, or activities under Title IX to the full extent permissible under the Equal Protection Clause.

Accordingly, the Department will examine on a case-by-case basis whether the school provides single-sex classes or programs in coeducational schools "evenhandedly to support diverse educational opportunities." *Id.* at 2276 n. 7. The following discussion describes situations in which a school demonstrates an evenhanded use of single-sex classes or programs:

(1) Voluntary choice among equivalent educational options

The Department encourages educators to investigate disparities in educational attainment between girls and boys and to attempt innovative educational methods to improve student achievement. The Department recognizes that to promote educational excellence it is important that educators have an array of educational options to meet the diverse needs of this nation's students. An array of educational opportunities including single-sex educational options can promote greater choice for parents and students within the public school system. Such opportunities may encourage the consideration and adoption of innovative teaching practices to improve the academic achievement of all students.

The Department believes that the requirements of VMI leave public schools and school districts with sufficient flexibility to offer the option of single-sex education programs. These options would be based on judgments, supported by research or other reliable evidence, that providing such options would improve educational outcomes for their students. These judgments, for example, could be based on evidence that some students in some circumstances will do better in a single-sex environment, and evidence that students within the attendance area are leaving the public schools to attend private single-sex schools within the district. The Department believes that the school clearly indicates its interest in "evenhandedly ... support[ing] diverse educational opportunities," VMI, 116 S. Ct. at 2276 n.7, when it offers choice among educational options that include equivalent single-sex classes or programs for each sex as well as an equivalent coeducational class or program. Equivalence is a rigorous standard that requires the school or district to offer substantially equivalent curriculum, teaching methods, teacher quality, facilities, and services through each educational option. This standard ensures that the exclusion of one sex from a particular class or program does not deny equal protection to members of that sex, given the other educational opportunities that the school has made available. Moreover, voluntary admissions to each class or program ensures that students are not placed in single-sex programs based on overbroad generalizations about the needs, abilities, or interests of either sex.

(2) Addressing specific educational needs of boys and girls

Educational research suggests that boys and girls may have different learning needs that single-sex educational strategies may effectively address. The Department believes that under VMI, a school may offer single-sex classes or programs to address the legitimate, demonstrated educational needs of one sex, as long as it ensures "evenhanded[ness]," 116 S. Ct. 2276 n.7, or "substantial equality in the separate educational opportunities," id. at 2286, it offers to the other sex. Three points are relevant to meeting this standard.

First, the school must demonstrate that members of one sex (the included sex) have an identified educational need, that the class or program must be targeted to members of the included sex with that need, and that exclusion of members of the other sex (the excluded sex) substantially enhances the effectiveness of the class or program in meeting the need of the included sex.

Second, Title IX and the Constitution require "evenhandedness." This means that where a school has identified and documented specific learning needs of members of one sex that may effectively be addressed through single-sex education, the school must demonstrate that it is effectively serving members of the excluded sex who have the same or similar learning needs. The program offered to the similarly situated members of the excluded sex does not have to be the same as that offered the included sex, nor does it have to be offered in a single-sex environment. Rather, the educational strategies used to address the learning needs of the excluded sex should turn on educational research, good practice, and expert judgment. Strategies that effectively address a particular learning need for most students of one sex may or may not resemble strategies that effectively address the same need for most students of the other sex.

Finally, evenhandedness requires that if a school properly justifies a single-sex program offered to members of one sex, but some members of the excluded sex can benefit from and are willing and able to participate in the program offered the included sex, the school must provide the excluded sex with a class or program that is equivalent to that program. Equal opportunity does not necessarily mean that the single-sex program must be opened up to the excluded sex. Nor does it mean that the program offered the excluded sex must be offered in a single-sex environment, if a coeducational environment is effective for members of the excluded sex. The school would also have flexibility to offer the program to members of the excluded sex in a somewhat different format based on the difference in numbers of students that would benefit from the program, as long as the program is equivalent in fundamental respects.

Schools should monitor and evaluate their classes and programs under this regulation, including those offered to the included sex and the excluded sex, to ensure that the class or program continues to effectively meet the need identified by the school.

Example of evenhanded response to the needs of both sexes:

Example 1 -- A school demonstrates that its female students are not participating or achieving in advance level mathematics classes to the same degree as boys. It also provides evidence of studies from similarly situated schools or school districts showing that girls do better in these classes if they are single-sex. Based on this evidence, it offers a single-sex mathematics class that is open to girls who have the prerequisites to take upper level classes but who are not taking such classes, or who are taking such classes but getting low grades. Enrollment is voluntary. The class uses a traditional teaching method and covers the same core material taught in other upper level mathematics courses. For boys, as well as girls who chose not to enroll in the single-sex class, the school offers advance level math in coeducational classes with substantially equal class size, curriculum, and teacher quality. The school also demonstrates that the best way to increase boys' participation and achievement in upper level mathematics courses is to provide tutoring sessions. It provides these services to any student, boy or girl, who has the prerequisites to take upper level classes but who is not taking such classes, or who is taking such classes but getting low grades. In addition, the school monitors the effectiveness of both the all-girls class and the tutoring sessions in raising the mathematics achievement of the students served. It does not offer a single-sex upper level mathematics class for boys. The excluded sex is being provided equal educational opportunities.

Example 2 -- An urban high school serving primarily African-American students demonstrates a serious dropout problem among its male students. The school does an assessment and learns that boys are dropping out because of peer pressure on them to follow "codes of masculinity" which emphasize hiding one's feelings, experimenting with violence and drugs, and doing poorly in school rather than being labeled a "nerd." The

school also has evidence from a program offered at a school district with similar demographics that boys respond effectively to an intensive counseling and mentoring program to address these issues. The evidence also shows that boys are much more likely to sign-up for and remain in the program if it is single-sex. In response, the school establishes an intensive after-school mentoring and counseling program for boys. The school also has done an assessment that shows that most girls who drop out do so due to heavy family obligations, and that providing a more flexible schedule as well as a one-on-one program advisor for girls at risk of dropping out to work with the family in coordinating school and family obligations is effective in keeping such girls in school. Accordingly, it has established a flexible schedule option and a program advisor program for at-risk high school girls. A small number of girls with serious drug and discipline problems that put them at risk for dropping out are also interested in the intensive mentoring and counseling program offered the boys. There is no evidence that these girls do not effectively respond in a coeducational environment, so the school district offers a smaller, but in other ways identical, coeducational mentoring program. The school monitors the effectiveness of its dropout prevention strategies for both boys and girls. The school offers the excluded sex equal educational opportunity.

B. Single-sex schools

Because of the exemption in 20 U.S.C. 1681(a)(1), Title IX does not apply to the single-sex admissions policies of nonvocational elementary and secondary schools. This precludes the Department from regulating a school's justification for offering a single-sex school. On the other hand, the Department has consistently interpreted Title IX to require that an LEA ensure that when it chooses to offer single-sex schools to one sex – absent a remedial basis – it is providing equal educational opportunities to the other sex.² The proposed regulation does not change this fundamental principle.

The Department believes that in practice similar legal standards apply both to single-sex schools and to single-sex classes or programs. Because of the exemption for admissions to nonvocational elementary and secondary schools, the district does not have to justify establishment of this single-sex school under Title IX. (It will have to do so under the Constitution if it is challenged in court.) However, the justification for and nature of the single sex school shapes the extent of the obligation of the LEA to provide equal educational opportunity for the excluded sex. The Department cannot determine whether similarly situated members of the excluded sex are being provided equal educational opportunity without understanding what need or problem the LEA seeks to address in establishing the single-sex school. In this sense, the focus and goal of the Constitution and Title IX are the same: evenhandedness. Where a school or LEA pursues a single-sex educational strategy, the equality analysis focuses on what educational opportunities the school or LEA is providing to members of the excluded sex. And the goal is to ensure substantial equality in the educational opportunities offered to those members of the excluded

² Moreover, Congress deferred to federal agencies further to determine through regulations the meaning of an equal educational opportunity when an LEA chooses to establish one or more single-sex schools. 20 U.S.C. § 1682

sex who have the same or similar needs to those addressed for the students served by the single-sex school.

Thus, the proposed regulatory language clarifies that a LEA that operates a single-sex school provides equal educational opportunity for the excluded sex where it evenhandedly supports diverse educational opportunities. As with single-sex classes and programs, evenhandedness can be satisfied by providing equivalent single-sex schools as well as an equivalent coeducational school. As discussed above and demonstrated below, equivalence is rigorously defined in order to ensure equal educational opportunity:

Example of nonequivalent schools

A school district establishes single-sex academies for grades 10-12 in addition to offering coeducational schools for students at these grade levels. Admission is voluntary. The schools are given identical resources and facilities, equivalent quality teachers and administrators, and offer an identical curriculum based on core courses in mathematics, science, English, and history. At this point, the school district has evenhandedly supported diverse educational opportunities. However, after several years, the girls' academy develops a close relationship with local business and community leaders. Over time, these outside groups increasingly offer significant mentoring services to the students at the girls academy, such as putting on educational programs for the students, and using their contacts to help the students obtain summer jobs, internships, and interviews with alumni of highly competitive colleges. The groups also joined together to raise and donate money to build a new sports complex at the girls academy. The school district no longer offers equivalent educational opportunities for boys and girls.

As with single sex classes or programs, evenhandedness alternatively may be satisfied where an LEA uses a single-sex school to address a specific educational need affecting members of one sex, as long as the school district provides a school or program that effectively serves members of the excluded sex with the same educational need, and provides an equivalent program to that offered the included sex to those members of the excluded sex who would benefit from and seek this opportunity. LEAs should monitor and evaluate schools and programs offered to both the included and excluded sex to ensure that these LEAs continue to effectively meet the needs identified.

Example of evenhanded response to the needs of both sexes:

An LEA establishes a single-sex leadership high school for girls. The school employs a curriculum and pedagogical and counseling approaches designed to develop leaders. Because of the Title IX statutory exemption for admissions to nonvocational elementary and secondary schools, the LEA does not have to justify establishment of this single sex school under Title IX. (It will have to do so under the Constitution if it is challenged in court.) Nevertheless, the LEA would have to show that it is providing for boys with the

same need or problem addressed in the girls school a program that is effective in addressing that need. Thus, the LEA demonstrates that it offers the leadership school because most girls in its school district are not assuming or even trying for leadership positions in the schools that would prepare them to be leaders in their adult lives. For several years they have been significantly under-represented in school government positions and other extracurricular programs such as the editorial boards of school newspapers. In assessing the needs of boys, the LEA shows evidence that boys avoid leadership positions, not because of anything girls do, but because they lack public speaking skills and role models. Thus, the school district offers a mentoring program at the coeducational high school. Its assessment also showed that a small number of non-leader boys would be interested in the intensive curriculum and counseling program found at the girls school. Thus, the school district offers a smaller, but otherwise equivalent, coeducational program with curriculum and pedagogical and counseling approaches designed to develop leaders in one of its coeducational high schools. The school monitors the effectiveness of its leadership programs for both boys and girls.

VI. The Department seeks comments on other examples of exceedingly persuasive justifications

The Department welcomes educators and others to share their expertise and insight regarding other possible examples of the evenhanded use of single-sex programs and schools, or examples of other "exceedingly persuasive justifications" for single-sex programs or schools. It is important that suggested justifications are consistent with the rigorous legal standards set out above. Depending on comments received during the public comment process, the Department may conclude that there are other examples of justifications that are sufficient to include in the final regulation as categorical types of permissible single-sex programs.

VII. Additional aspects of the proposed regulation

The proposed regulation also retains two longstanding regulatory exceptions that permit single-sex programs and schools consistent with constitutional standards:

Section 106.3 permits single-sex schools, programs and activities that are undertaken to overcome the effects of sex-based-discrimination and to overcome the effects of conditions that have resulted in limited participation by members of one sex. 34 CFR Part 106.3. See e.g. VMI, 116 S. Ct 2276 ("sex classifications may be used to compensate women 'for particular economic disabilities [they have] suffered,'" citing Califano v. Webster, 430 U.S. 313,320 (1977); Hogan, 102 S. Ct. 3338 ("a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened"). Because programs under § 106.3 are intended to remedy existing inequities in a program for one sex, it is not necessary to evaluate whether equivalent opportunities are provided to members of the other sex.

Section 106.34 permits physical education classes involving contact sports, and sex-segregated classes involving human sexuality, as long as equivalent opportunities are provided to members of both sexes. Sex-segregation in these circumstances is based on real differences between the sexes and on compelling issues of privacy. See e.g., VMI, 116 S. Ct. at 2276 (noting that there are enduring physical differences between men and women). Moreover, neither sex is denied equal educational opportunity.

The proposed regulation also retains the existing regulatory provisions that explicitly permit grouping students based on: ability in physical education classes, 34 CFR § 106.34(b), vocal range or quality, 34 CFR § 106.34(f), or pregnancy. 34 CFR § 106.4(b). These provisions and/or classifications are not based on sex and, thus, are not affected by the "exceedingly persuasive justification" standard.

As discussed above, the proposed regulation retains the permissibility of separating students by sex within physical education classes during participation in contact sports. The proposed regulation would not, however, otherwise permit sex-segregated physical education activities. The provision requiring coeducational physical education classes was the subject of thorough debate at the time when the Title IX regulations were promulgated, see 108 Fed. Reg. 24133 (June 4, 1975) and stereotyping in physical education classes was a particular concern of Congress when it enacted Title IX. Nor does the proposed regulation permit sex-segregated vocational education classes. Congress was also specifically concerned with gender-based stereotyping in this area. See 118 Cong. Rec. 5806. To permit single-sex vocational education classes, programs, or activities would be inconsistent with congressional intent since Congress did not permit single-sex vocational education schools at the elementary and secondary level.

PROPOSED REGULATORY LANGUAGE

Replace existing sections 106.34 and 106.35 with the following:

106.34 Access to course offerings

- (a) Except as provided in paragraphs (b) and (c) of this section, a recipient that operates a non-vocational elementary or secondary school may provide or carry out courses, programs, or activities (referred to in this section as "classes or programs") separately on the basis of sex:
- (1) Remedial basis. As part of a program to redress sex-based discrimination or to overcome the effects of conditions that resulted in limited participation by members of one sex under §106.3;
 - (2) Even-handed diversity to enhance educational achievement. If the school is even-handedly supporting a diverse array of educational opportunities to enhance educational achievement for students of both sexes at the same ages or grade levels. A school meets this standard if the recipient demonstrates that –

(i) Voluntary choice among equivalent programs. (A) The school is providing for voluntary choice among equivalent single sex classes or programs to students of both sexes, as well as an equivalent coeducational class or program at the same ages or grade levels;

(B) These options are provided based on the recipient's educational judgment, supported by research or other reliable evidence, that voluntary choice will enhance the educational achievement of students served by these classes or programs; or

(ii) Addressing specific educational needs. (A) The single sex class or program is demonstrably responsive to a significant educational need affecting members of the sex included in the class or program (the "included sex"); the class or program is targeted to students with this need; exclusion of members of the other sex (the "excluded sex") substantially enhances the effectiveness of the class or program in meeting that need for the included sex; and the school is providing for members of the excluded sex with the same educational need, a class or program that is effective in addressing that need.

(B) Subject to sub-clauses (C) and (D), the class or program provided for members of the excluded sex, under this clause—

(I) May be different in subject matter, approach, or emphasis from the class or program for the included sex, depending upon the recipient's educational judgment of how best to serve most members of the excluded sex experiencing the same educational need as the included sex; and

(II) May be a coeducational class or program if that is effective in meeting that need.

(C) The recipient's justification of a single sex class or program under clause (A), and its judgment under clause (B) of how best to meet the same educational need for members of the excluded sex must be based on educational research or other reliable evidence of both the needs of students served by the school and the effectiveness of the education approach used to meet these needs, and may not be based on gender-based stereotypes.

(D) (I) If one or more members of the excluded sex with the need identified under this clause would benefit from, and seeks the opportunity to participate in, the type of program offered the included sex, they must be given an equivalent class or program--subject to appropriate adjustments in format if only a few students would benefit from and are interested in the program.

(II) The equivalent class or program may be coeducational if such a class or program effectively meets the need of the members of the excluded class described in subclause (I).

(3) Body-contact physical education and human sexuality. Within physical education classes or activities while participating in wrestling, boxing, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact, or during portions of classes that deal exclusively with human sexuality.

(b) Physical education. Except as provided in paragraph (a)(3), a recipient may not offer sex-segregated physical education classes or programs.

(1) This paragraph does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance and applied without regard to sex.

(2) Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards that do not have such an effect.

(c) Vocational, home economics, and business education. A recipient may not offer sex-segregated vocational, technical, home economics, industrial, or business classes or programs.

(d) Chorus. Recipients may impose requirements based on vocal range or quality that may result in a chorus or choruses of one or predominantly one sex.

(e) Equivalence. Factors to consider in determining whether a class or program is equivalent under this section include whether there is equivalence in the policies and criteria of admissions (excluding a policy to restrict admissions based on sex); the quality, range, and availability of curriculum; the quality, range and availability of facilities, services, resources, financial aid, and other benefits; and the qualifications and distribution of faculty and staff.

106.35 Access to schools operated by local educational agencies

A local educational agency that operates a non-vocational, single sex elementary or secondary school for members of one sex does not discriminate against students of the excluded sex if --

(a) Remedial basis. The school is part of a program to redress sex-based discrimination or to overcome the effects of conditions that resulted in limited participation by members of one sex under §106.3; or

(b) Even-handed diversity. The local educational agency evenhandedly supports diverse educational opportunities for students of both sexes at the same age or grade level in the same geographic area. A recipient meets this standard if it demonstrates that--

(1) Voluntary choice among equivalent programs. (i) It is providing for voluntary choice among equivalent single sex schools to students of both sexes, as well as an equivalent coeducational school; or

(2) Equal opportunity for the excluded sex in addressing specific educational needs.

In a situation where the single sex school is designed to address an educational need affecting members of the sex included in the school (the "included sex"), the recipient is providing for members of the excluded sex with the same educational need, a program that is effective in addressing that need.

(A) Subject to clauses (B) and (C), the educational program for the excluded sex may be a separate school, a school within a school, or one or more programs or classes; it may be different in subject matter, approach, or emphasis from the school for the included sex, depending on the recipient's educational judgment of how best to meet the same educational need for most members of the excluded sex; and it may be a coeducational program if that is effective in meeting that need.

(B) The recipient's judgment of how best to meet the same educational need for members of the excluded sex must be based on educational research or other reliable evidence of both the needs of students served by the LEA and the effectiveness of the education approach used to meet those needs, and may not be based on gender-based stereotypes.

(C) If one or more members of the excluded sex with the need identified under this subparagraph would benefit from and seeks this opportunity, they must be given a school or, if their numbers do not justify a whole school, a school within a school or one or more programs or classes equivalent to the single sex school for the included sex. The equivalent school, class, or program may be coeducational if such school, class, or program effectively meets the needs of the members of the excluded sex described in this clause.

(c) Equivalence. Factors to consider in determining whether a school is equivalent under this section include whether the schools being compared are offered to students in the same geographic area, and whether there is equivalence in the policies and criteria of admissions (excluding a policy to restrict admissions based on sex); the quality, range, and availability of curricular and extracurricular activities; the quality, range and availability of facilities, services, resources, financial aid, and other benefits; and the qualifications and distribution of faculty and staff.

Summary of Proposed Regulations on Single Sex Education

Purpose -- To amend the Title IX regulations to provide more flexibility to LEA's to establish single sex elementary and secondary schools and programs that respond to the needs of their students, based on educational judgments of how best to meet those needs and subject to safeguards against discrimination and stereotyping.

Current Title IX Regulations

- Generally forbid single sex classes and programs in coed schools. Based on Title IX statutory exemption for non-vocational school admissions, the regulations do not forbid single sex schools but provide that if an LEA establishes one, it must provide comparable opportunities for the excluded sex.
- Absent this provision, an LEA could, for example, establish its only advanced math/science program as a boys school and thereby deny access to advanced math/science instruction for girls. The regulations are ambiguous as to whether comparable opportunities mean the excluded sex may receive comparable programs in a coed school, although OCR's view has been that they require a comparable single sex school.

Legal Landscape

- The cases in this area generally interpret the Constitution's Equal Protection Clause rather than Title IX. To the extent possible, we believe that Title IX regulations should adhere to the constitutional standards to avoid the anomaly that the government may be applying standards that fall short of constitutional requirements.
- The Supreme Court's VMI decision and other cases create a presumption against government classifications or decisions based on gender. While not as tough as the strict scrutiny standard that applies to racial classifications, gender classifications also require heightened scrutiny. They must be based on an "**exceedingly persuasive justification.**" The Department of Justice has advised us that to have a single sex school or program under the Constitution, there must be both an exceedingly persuasive justification for excluding one sex and there must be equal opportunities for the excluded sex.
- VMI clearly holds that equal educational opportunity is an individual right, and a student who is otherwise qualified for and interested in a type of program cannot be denied that opportunity because the program is targeted to address the needs of the other sex. In VMI itself, the Court found that VMI was unique, so the only solution was to admit young women to VMI. However, where a single-sex program is not unique, we do not read VMI to compel admission of qualified members of the other sex, thereby undermining its single sexness, but rather to compel the school to

provide them an equivalent program. We also do not read VMI to compel that the equivalent program be single sex. If a coeducational program is effective in meeting the need of members of the excluded sex, they can be provided an equivalent program in a coeducational setting.

The Proposed Regulations -- Even-Handed Diversity. In addition to citing existing Title IX regulations that already permit single sex schools and programs to remedy discrimination, the proposed regulations would provide that **single sex classes and programs** are permissible if the justification is even-handedly providing a diverse array of educational opportunities to improve educational achievement of students of both sexes. This standard--which appears to be supported in a footnote in the VMI case--would be met in one of two ways--

(a) **Voluntary Choice of Equivalent Programs.** A school provides for voluntary choice of equivalent single sex classes for students of both sexes, as well as an equivalent coeducational class; and an educational judgment has been made by the school, supported by research or other reliable evidence, that voluntary choice will enhance educational achievement of students served by these classes (the proposed regulations would define "equivalent" as essentially the same in quality and range of curriculum, and quality of teaching staff and other inputs); or

(b) **Addressing Specific Educational Needs -- Classes and Programs in Coed Schools**

- A school provides a single sex class that is responsive to a significant educational need affecting members of the sex included in the class; the class is targeted to students with this need; exclusion of members of the other sex substantially enhances the effectiveness of the class in meeting that need for the included sex; and the school provides for members of the excluded sex who have the same educational need a class that is effective in addressing that need. The class for the excluded sex may be different in subject matter, approach, or emphasis from the class or program for the included sex, depending on the educational judgment of how best to serve most members of the excluded sex with that same educational need, and it could be a coeducational class if that is effective in meeting that need.
- However, if one or more members of the excluded sex who have the same need as the included sex and would benefit from and seek the opportunity to participate in the type of program given to the included sex, they would have to be given an equivalent program. It could be coeducational if a coeducational program is effective in meeting their need, and there may be adjustments in the format of the program if only a few students would benefit from and are interested in the program.

Schools -- Because admissions to schools are exempt from coverage under the Title IX statute, an LEA would not need to justify how the single sex school addresses specific educational needs and the basis for excluding the other sex. However, the same proposed

principles described above for applying the concept of even-handed diversity to classes would also apply to schools.

Examples of Permissible Single Sex Programs (These examples are in addition to the case where a school district or school provides for voluntary choices among equivalent single sex classes or schools for boys and girls, as well as an equivalent coeducational class or school, in order to enhance academic achievement.)

(a) **Drop-outs of Boys** -- A school is experiencing a serious drop-out problem among its students. The school does an assessment and makes an educational judgment that boys are dropping out because of peer pressure on them to follow "codes of masculinity" which emphasize hiding one's feelings, experimenting with violence and drugs, and doing poorly in school rather than being labeled a nerd. The school also makes an educational judgment that it needs an intensive counseling and mentoring program to address these issues and that the presence of girls in the program would undercut its effectiveness for many boys at risk of dropping out. Girls may be excluded from the program. But the school also has an obligation to provide equal opportunity for girls. Its assessment shows that most girls who drop-out do so not because of the same problems that boys have, but rather due to heavy family obligations. So the school establishes a separate program addressed to this need. That program could be coeducational if that would be effective in meeting this need. In addition, under VMI, if there are some girls who are at risk of dropping out for the same reasons as boys, and they wish the same type of counseling and mentoring program as the boys, the school would have to provide it. However, the scale and format of the program could be reasonably designed to reflect the smaller numbers of such girls as compared to boys who would benefit from this program. Also, if a coeducational program would be effective for these girls, the program would not need to be single sex.

(b) **Math/Science for Girls** -- A school demonstrates that girls are not participating or achieving in advance level math to the same degree as boys, and it provides evidence that girls' success in advanced math is negatively affected by the presence of boys. It may offer a single sex, advanced math class for girls. If there were boys with similar needs, the school would need to devise a program or instructional strategy that is effective in addressing their needs. It might be a different program from that for the girls, such as an intensive tutoring program. The program for the boys could be coeducational if that were effective in meeting their needs.

(c) **Leadership School for Girls** -- By comparison to boys, most girls in a school district are not assuming or even trying for leadership positions in the schools that would prepare them to be leaders in their adult lives. They are underrepresented in school government positions and other extracurricular programs. The district concludes that a single sex school for girls is needed to address this issue, with a curriculum and pedagogical and counseling approaches designed to develop leaders. Because of the Title IX statutory exemption for admissions to nonvocational elementary and secondary schools, the district does not have to justify establishment of this single sex school under Title IX. (It will have to do so under the Constitution if it is challenged in court.)

However, the justification for and nature of the single sex school shapes the extent of the obligation of the LEA to provide equal educational opportunity for the excluded sex. In this hypothetical, the LEA would have to show that it is providing for boys with the same non-leadership problem as the girls a program that is effective in addressing that need. That program could be a whole school, a school within a school, or a set of programs or classes; it could be different in emphasis or approach from the school for the included sex, depending on the LEA's judgment, based on research or other reliable evidence, of how best to meet the same educational need for most boys; and it may be a co-educational program if that is effective in meeting that need. If one or more boys would benefit from and were interested in the very same type of leadership program that is provided for the girls, they would have to be given an equivalent school, or if their numbers do not justify a school, an equivalent program, which could be coeducational if that were effective in meeting their need.

Special Rules -- The proposed regulations would retain special rules in the existing Title IX regulations barring single sex classes in vocational schools; barring single sex physical education classes, apart from activities involving body contact; and permitting classes involving discussion of human sexuality.

Continuing Problem -- Because of the school admissions exemption in Title IX, OCR could find a school in compliance with Title IX or potentially even enter a compliance agreement, where the school (or agreement) is in conflict with the Constitution. The single-sexness of the school may not be adequately justified under the Constitution, but that is an issue we are foreclosed from addressing under Title IX.