

August 12, 1998

MEMORANDUM TO: CHARLES RUFF
FROM: EDDIE CORREIA
SUBJECT: Title IX and Single Sex Schools

The Department of Education is nearing the conclusion of its investigation of a possible violation of Title IX by New York City in its operation of a school limited to girls. In addition, Senator Kay Bailey Hutchison has requested OCR's views on her legislation to create an exemption from Title IX for certain types of single sex educational programs. Both these developments suggest that we review the administration's policy in this area.

Background

In 1997 New York established the Young Women's Leadership School, a single sex school for girls in grades 7-12 located in East Harlem. The stated purpose of the school is to create an environment in which some girls will have a better chance to improve their academic performance. Math and science are emphasized; tutors are made available; and there is an emphasis on increasing self-esteem. There is an open admissions policy, and the students represent a wide range of academic abilities. The school is one of a number of specialized alternative public schools in New York, such as those for the performing arts and math and science. The establishment of the school was prompted by a grant from a private individual. While there has been no formal assessment of the program, there are indications that attendance is high and the students perform better than comparable students across the city.¹ The concern is that, unlike all other public schools in New York City, the school admits only girls.

OCR has had extensive discussions with city officials about the fact that the school might violate Title IX. In the course of these discussions, OCR has obtained information about the city's justification for the school and its rationale in establishing the

¹ See Susan Estrich, Time to Give Single Sex Education a Chance, Houston Chronicle, May 21, 1998. She writes that the attendance at the school is 92%, and 90% of the students are at or above grade level, compared to 50% city-wide.

school only for one gender. Secretary Riley intends to talk directly with the New York Superintendent of Schools, and he would like our guidance as to the applicable legal standards and administration policy generally. This memorandum summarizes the key legal and policy issues.

What Law Applies?

There is no doubt that the Equal Protection Clause applies. However, there is some uncertainty whether Title IX applies, since it does not cover the admissions policies of elementary and secondary schools. OCR's position is that this provision excludes institutions only if equivalent or comparable opportunities are made available for each gender, e.g., two equivalent high schools, one for each sex. If, on the other hand, a state operates a well-funded, well-staffed high school open only to boys, and a poorly funded, poorly-staffed high school open only to girls, OCR concludes that Congress did not intend to preclude application of Title IX's basic bar on gender discrimination. I agree with this analysis. Since we face the question of a possible constitutional violation whether or not Title IX applies, the answer to this statutory interpretation question is not dispositive.

Our Approach to Gender Classifications

need an "exceedingly persuasive justification" for gender classifications

The issues raised by this investigation require an examination of our fundamental approach to gender classifications. In VMI the administration advocated that the Court apply the same level of scrutiny to race and gender classifications. However, the Court declined the invitation and used the phrase "exceedingly persuasive justification" to describe justifications for gender classifications. It also cited the traditional formulation of intermediate scrutiny -- a classification must advance an important state interest and be substantially related to the state's goal.

Whatever the precise standard adopted by the Court in VMI, there is no doubt that the city would have a substantial burden to justify the single sex policy in litigation. However, we are not a court. We are not obligated to impose the same burden now that a court would if it had to apply the Equal Protection Clause. Instead, as in any decision involving prosecutorial discretion, our obligation is to advance the public interest, given all the relevant considerations. Consequently, we can decide not to sue the city even if it has not "proven" certain facts, or if they cannot be established one way or the other. If we take the position that the city must definitively establish the answer to certain questions about education policy -- when the experts tell us there are no clear answers -- we could be preventing local governments from conducting valuable educational experiments. Not

only could we be depriving the students in these institutions from excellent educational opportunities, we would be depriving educators all over the country from learning what works.

The leading cases in this area are United States v. Virginia (VMI) and Mississippi University for Women v. Hogan. In Hogan, the state ran two coed nursing schools and a third one limited to women. In VMI, the state prevented women from having access to a unique form of education. In both cases, the state policy was struck down. Together, however, these cases suggest two possible justifications for gender classifications: 1) a comparable opportunities rationale; and 2) a compensatory rationale.

The Comparable Opportunity Rationale

A comparable opportunity rationale means that neither gender is significantly disadvantaged by a gender classification because comparable benefits are offered to both. The state is acting even-handedly. One variation of a comparable benefits rationale emphasizes the value of diversity (institutional and program diversity, not diversity in a student body). For example, the state may offer a variety of programs, one of which is available to only one gender, but argue that members of the other gender are not disadvantaged because comparable coed programs are available. We do not yet have a case upholding a single sex school on that ground. It is clear that a diversity rationale is unacceptable if the benefit offered to one gender is viewed as unique, and the value of the benefit to one gender is not undermined if it is offered to both.

The comparable opportunities rationale must be evaluated in the context of the underlying goals of equal protection. Heightened scrutiny ensures that the state is not making decisions on the basis of animus toward one gender or stereotypes, which could lead to irrational decisions or to a stigma imposed on one gender. These concerns arise differently in race and gender cases. For example, "separate but equal" programs almost always create a stigma in the race context, but they do so less frequently in the gender context. While separate but equal programs for different races has been thought to be impermissible since Brown, the Court has never said that a "separate but equal" program for both genders violates the Equal Protection Clause. In addition, the Court has never said that a comparable alternative to an education program offered to one gender in a single sex setting must also be offered to the other gender in a single sex setting.

The Compensatory Rationale

A compensatory rationale means that the state is attempting to remedy past burdens that have fallen particularly on one gender and the remedy is sufficiently related to these past burdens. We

can assume that a remedy for past discrimination must meet the basic standard for all gender classifications, i.e., there is an exceedingly persuasive justification. However, the requirements for meeting that standard are more flexible ~~on~~ ^{than} those applied to race classifications. In Croson and Adarand, the Court rejected basing remedies for race discrimination on "societal discrimination." The Court's concern was that the "amorphous" nature of societal discrimination means that it is difficult to determine when remedies are sufficiently narrowly tailored. However, this need to narrowly tailor remedies has not been applied to gender classifications. Several cases have upheld gender classifications on the basis that they remedy what amounts to societal discrimination.²

Title IX regulations have specific standards for the remedial justification.³ While there may be some differences with the constitutional standards, they do not appear to be significant in this case.

Applying these Rationale to the Leadership School

In Hogan, the comparable opportunities rationale was rejected because the Court felt males were significantly disadvantaged. The male plaintiff living near the school was forced to travel a long distance for a comparable program. Moreover, the asserted benefits of admitting only women were inconsistent with the state's own policy of allowing men to audit the classes. The Court rejected a compensatory rationale because it was not related to past discrimination. Women already dominated nursing, so a nursing school limited to women could not be said to compensate for past discrimination. Instead, it simply reinforced the stereotype that nursing is a women's profession.

In VMI, the compensatory rationale was obviously not a possibility. (It rarely will be when women are disadvantaged.) The diversity argument was rejected on two grounds. First, most of the Court concluded that diversity was not the actual purpose of the state in establishing VMI. Second, even aside from the actual

² See, e.g., Kahn v. Shevin (property tax exemption for widows) and Califano v. Goldfarb (favorable formula for evaluating Social Security benefits for women).

³ "Remedial action" is permitted if OCR concludes that a recipient has discriminated on the basis of sex and the remedy is "necessary to overcome the effects of such discrimination. "Affirmative action" is permitted to "overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex." 34 CFR § 106.3.

purpose, one way diversity is not enough. If the opportunity is truly unique, then the members of the other gender are disadvantaged unless they can take advantage of something comparable. The state's proffered comparable alternative, Mary Baldwin, was far inferior in staffing, funding and other characteristics.

In contrast to VMI and Hogan, New York has a much better argument for the comparable opportunities rationale. The city offers many educational opportunities that are open to boys with the same basic objectives -- improving academic performance, increasing self esteem, and increasing the likelihood of successfully entering the workforce. While these programs for boys do not take place in a single sex setting, it is clear that the city is not motivated by an animus against boys, that boys are not disadvantaged in any significant sense, and that the school does not impose a stigma on girls. Instead, the city offers a program that appears to benefit girls, that does not burden boys, and that could be undermined if boys were admitted. ^{not}

based on what? There is also an argument for the compensatory rationale in this case, though I think it is a weaker one. The requirements for assessing compensatory gender classifications are more flexible than in race cases. Moreover, there is considerable evidence that many girls do have problems learning math and science in traditional settings. We do not know whether this is because of long-term discrimination, rigid teaching techniques, or some other factors. It is conceivable that the city has traditionally used educational approaches that disadvantaged female students, but we have little or no evidence on this point. Thus, if we endorse a remedial rationale for this school, the remedy is really addressing a host of institutional and social factors for which the city is not responsible.

We should not take the position that the demanding requirements of Adarand should apply to remedies for gender classification. (For example, some of the strongest arguments against I-200 in Washington are that it would end certain education and training programs for women that might not be viewed as narrowly tailored to address specific past discrimination.) However, under the circumstances presented here, I do not believe we would be wise to emphasize the compensatory rationale given the lack of evidence on this point. Trying to justify the school as remedial could require stretching the concept of substantially related remedies too far.

Conclusion

There are several possible outcomes of single sex educational programs. They can benefit mostly girls, and not boys, or vice

versa. They can work well for both genders, or they can work poorly for both. In fact, we know very little about which of these possibilities is correct. It is likely that some programs work for some members of each gender under different circumstances, but this is simply an area where we need to know much more. (One thing we can have confidence about -- current coed programs, particularly in large city districts, are often abysmal.)

Assume there is evidence that a single sex educational program works well for many girls, but not particularly well for many boys. A state decides to use its scarce resources to establish the program only for girls and that the program seems to work well. It cannot (or refuses) to establish a similar program for boys but it attempts to offer the same basic benefits to boys in a coed setting. Assume also that there is no stigma associated with the program, and that there is no stereotype associated with the school because girls attend by choice. Under these circumstances, would we insist that the state close the school for girls? What would we be accomplishing? In an effort to vindicate some abstract (and incredibly rigid) view of equal protection, we would have succeeded in depriving girls of a program that could benefit them without helping boys, or anyone else for that matter.

This may very well be the case here. Arguably, the only "unique" aspect of the Leadership School is that education is offered in a single sex setting. Not only do we have research that shows that single sex education may provide a particular benefit to girls, we have actual experience with this school that shows it is working. Given the state of knowledge, New York could reasonably conclude that it prefers to devote scarce resources to offering a program to girls that appears to work, and to attempt to achieve the same basic goals for boys in some other way. Again, we are not a court. We do not have to subject the city to the same burden of proof requirements that it would face in litigation. Instead, we can consider the benefits of this program to the girls themselves and the benefit to everyone else from the experiment.

I recommend that the Secretary make an effort to resolve this matter with the city by suggesting that it take steps to establish a more directly comparable program for boys in a coed setting. If it agrees, I recommend that we simply close the case and commend the city for its actions. If it disagrees, I recommend that we still close the case. Our explanation should be that, under all the circumstances, boys are not disadvantaged and the program offers promising academic benefits for girls. Therefore, we have decided to evaluate the school and take no further action at this time. The nation has a stake in learning what works, and the Leadership School provides an opportunity for us to do just that.