

SINGLE SEX PROPOSED REGULATION

Background

In August of 1996, the New York chapters of the National Organization for Women and the American Civil Liberties Union filed a complaint with U.S. Department of Education's Office of Civil Rights. The complaint asserted that the Young Women's Leadership Academy, a public single-sex school for girls located in Harlem, violates Title IX. During 1997 and 1998, OCR conducted numerous discussions to try to reach a voluntary agreement between the New York City School Board and the organizations filing the complaint. Within the context of these negotiations, OCR suggested that the school board create new and similar opportunities for boys in the district. The School Board was not willing to create any new opportunities for boys and OCR found that unacceptable under the current regulations.

This case, in combination with the increase in public single sex schools and classrooms, led OCR to propose a regulation change that would provide for greater flexibility in interpreting Title IX. The goal of the proposed regulation is to assist school districts in responding to the diverse educational needs of their students, while safeguarding against discrimination.

The need for clarification is great. In the last three years, 27 independent and public schools for girls have been established, and more than a dozen school districts have begun offering single-sex classes. This year, the Chicago School Board, for example, approved the first all-girls charter school focusing on mathematics, science, and technology to open next fall on the city's South Side. In addition, the issue of the YWLA in Harlem continues to be unresolved as the school district awaits guidance from the proposed regulation change. The YWLA expanded this year from 210 to 400 students and, in doing so, contacted both ED and DOJ to request an explanation for the delay in the new regulations or any guidance.

Legislative Action and Anticipated Leg Action

In addition to action in school districts across the country, several times over the past two years Senator Kay Bailey-Hutchinson has put forth a proposal to amend ESEA in order to provide funding for single sex schools and classrooms. During the FY 1999 and the FY 2000 appropriations debates, the Senator introduced an amendment that would have permitted ESEA Title VI funds (flexible block grants to States for general education reform) to be spent on "educational reform projects that provide same gender schools or classrooms, as long as comparable educational opportunities are offered for students of both sexes."

The Administration did not take a position on this amendment. Instead, we argued on procedural grounds that it should be considered within the context of the reauthorization of ESEA and that the Department of Education would soon be releasing guidance to offer greater flexibility in developing single sex classrooms and schools. ESEA is now being considered in the Senate. It will be marked up by the Senate HELP Committee on Wednesday, March 1st and will be on the floor shortly thereafter. Senate Bailey-Hutchinson is expected to offer her amendment and we will need to be prepared to take a position on it.

The women's groups have opposed the amendment in the past on two grounds: (1) concerned that we do not have the research to support single-sex education in elementary and secondary education (2) concerned that "comparability" will not be monitored or implemented effectively.

Historically, the groups have also been concerned that schools would promote sex-based policies, programs, and classes based on out-dated and stereotyped notions of the differences between the sexes and of the limited abilities of girls and women.

Title IX Regulation on Single Sex Education

Current

Under the current regulation, single sex classes and programs in coeducational schools are generally forbidden. Single sex schools, however, are not forbidden provided that if a school district establishes a single sex school it must provide comparable opportunities for the excluded sex. OCR has generally interpreted “comparable” opportunity to mean a “comparable” single sex school, rather than a comparable opportunity in a coed school.

Proposed

The goal of the proposed regulation is to provide greater flexibility to school districts in developing programs and policies that support the diverse educational needs of their students in aiming to reach high academic standards. The proposed regulation makes three major changes to meet this goal: (1) provides for single sex classes, programs, or activities in a coeducational school (2) clarifies how school districts that operate single-sex schools under the existing regulation can provide equal educational opportunity to both sexes (3) defines “equivalence” and deletes reference to “comparable” educational opportunities.

Single Sex Classes, Programs, or Activities: The proposed regulation would allow school districts to provide single sex classes, programs, or activities in coeducational schools if the school district is “even-handedly” providing a diverse array of educational opportunities to improve educational achievement of students of both sexes. The standard of “even handed diversity” could be met in two ways: (1) voluntary choice of equivalent single sex programs for students of both sexes (2) addressing specific educational needs of one sex through a single sex class or program provided that the excluded sex is provided with an opportunity to meet their needs (class could be different in subject matter, approach, or emphasis), but, if one or more member of the excluded sex had the same need they would have to be provided with an equivalent program.

Single Sex Schools: The proposed regulation does not change the fundamental principle that if a school district offers a single sex school to one sex it must provide equal educational opportunities to the other sex. The proposed regulation clarifies “equal education opportunity” through the lens of “even handed diversity” meaning that a school district that operates a single sex school provides equal educational opportunity for the excluded sex where it evenhandedly supports diverse educational opportunities.

Definition of “Equivalence”: The proposed change from “comparable” to “equivalent” does not alter the intent of the regulation, but rather clarifies that “equivalent” programs need not be identical, that the differences in programs or schools cannot be based on stereotypes about the sexes, and that such programs and schools must be equal in all fundamental respects. It urges school districts to consider the following factors in determining whether a class or program is equivalent: policies and criteria for admission; the quality, range, and availability of facilities,

services, resources, financial aid, and other benefits; and the qualifications and distribution of faculty and staff.

Possible Difference between the Departments of Education and Justice

In developing the proposed regulation the Department of Education worked to ensure that the proposed Title IX regulation adhered to the standards set forth by the Constitution's Equal Protection Clause. The Department of Justice has expressed concern that the proposed regulation could be in violation of the Constitution. The basic difference between the two Departments seems to stem from differing interpretations of the Supreme Court's VMI decision. The two main differences that will need to be resolved are: (1) whether VMI should be interpreted to mean that a school district must provide both the "exceedingly persuasive justification" and an "equal" opportunity for the excluded sex and (2) the definition of "equal" opportunity.

The VMI decision establishes that gender classifications must be based on an "exceedingly persuasive justification." The Department of Justice interprets this to mean that there must be both an exceedingly persuasive justification for excluding one sex and there must be equal opportunities for the excluded sex. While the Department of Justice has not submitted any written response to the proposed regulation, it is unclear how Justice would be satisfied with a definition of equality other than as "identical" educational opportunities. The Department of Education, on the other hand, 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 diversity" or "substantial equality in the separate educational opportunities." This interpretation leads the Department of Education to outline one option for providing a single sex classroom or program that does not require an "equal" educational opportunity for the excluded sex. If a school district can establish that members of one sex have an identified education need and that excluding members of the opposite sex will help to address that educational need, the school district can offer the program or class as long as it is effectively serving members of the excluded sex who have the same or similar learning needs. The Education Department does not determine that the program or class for the excluded sex need to be the same, rather the educational strategies used for both sexes need to be based on educational research, good practice, and expert judgement.

Next Steps

- (1) Resolve differences between DOJ and ED that ensures resolution of constitutional concerns, but also ensures the promotion of flexibility for school districts to develop and implement single sex schools or classes to meet the educational needs of their students
- (2) Begin to meet with stakeholder groups to ensure that they are comfortable with proposed regulation before it is formally submitted to the Federal Register
- (3) Formally submit to Federal Register for comment
- (4) Develop a position on the Senator Bailey-Hutchinson Amendment that is consistent with proposed regulations