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Title IX and Single Sex Education: A Legal Analysis

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Summary

Under Title IX of the Education Amendments of 1972, which prohibits sex discrimination in federally funded education programs or activities, school districts have long been permitted to operate single-sex schools. In 2006, the Department of Education (ED) published Title IX regulations that, for the first time, authorized schools to establish single-sex classrooms as well. This report evaluates the regulations in light of statutory requirements under Title IX and the Equal Educational Opportunities Act (EEOA) and in consideration of constitutional equal protection requirements.

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Enacted over three decades ago, Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in federally funded education programs or activities.[1] Although Title IX bars recipients of federal financial assistance from discriminating on the basis of sex in a wide range of educational programs or activities, both the statute and the implementing regulations have long permitted school districts to operate single-sex schools. In 2006, however, the Department of Education (ED) issued Title IX regulations that, for the first time, authorized schools to operate individual classes on a single-sex basis.[2] The issuance of these regulations has raised a number of legal questions regarding whether single-sex classrooms pose constitutional problems under the equal protection clause or conflict with statutory requirements under Title IX or under the Equal Educational Opportunity Act (EEOA).[3]

Background

Under Title IX, "No person ... shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[4] Although the statute prohibits a broad range of discriminatory actions, such as bias in college sports and sexual harassment in schools, Title IX does contain several exceptions. One of these exceptions provides that, with respect to admissions, Title IX applies only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education, unless the latter has traditionally admitted students of only one sex.[5] As a result, Title IX does not apply to admissions to nonvocational elementary or secondary schools, nor does it apply to certain institutions of undergraduate higher education. This means that Title IX permits public or private single-sex elementary and secondary schools, as well as some single-sex colleges.

This exception for single-sex schools has existed since the legislation was enacted, and "the legislative history indicates that Congress excepted elementary and secondary schools from Title IX because of the potential benefits of single-sex education."[6] Less clear is whether Congress intended to permit coeducational schools to establish individual classes on a single-sex basis, as ED's regulations now allow.

The 2006 Regulations

Noting that some studies demonstrate that students learn better in a single-sex educational environment, ED issued new Title IX regulations in 2006 that provide recipients of educational funding with additional flexibility in providing single-sex classes.[7] The regulations apply to both

[1] 20 U.S.C. §§ 1681 et seq.

[2] 71 FR 62530. An explanation of the requirements that were in place before the new regulations were issued is available at 67 FR 31102.

[3] 20 U.S.C. §§ 1701 et seq.

[4] *Id.* at § 1681(a).

[5] *Id.* at §§ 1681(a)(1), (a)(5).

[6] William N. Eskridge, Jr. & Nan D. Hunter, SEXUALITY, GENDER, AND THE LAW 646 (1997).

[7] The regulations also apply to single-sex extracurricular activities, but do not affect athletic requirements under Title IX.

public and private elementary and secondary schools but not to vocational schools. Specifically, the regulations permit recipients to offer single-sex classes and extracurricular activities "if (1) the purpose of the class or extracurricular activity is achievement of an important governmental or educational objective, and (2) the single-sex nature of the class or extracurricular activity is substantially related to achievement of that objective."[8] In its regulations, ED identified two objectives that would meet the first requirement: (1) to provide a diversity of educational options to parents and students, and (2) to meet the particular, identified educational needs of students.

According to the regulations, any schools that choose to provide single-sex classes must meet certain requirements designed to ensure nondiscrimination. For example, participation in single-sex classes must be completely voluntary, recipients must treat male and female students in an "evenhanded" manner, and a recipient's justification must be genuine. These latter requirements mean than a school's use of overly broad sex-based generalizations in connection with offering single-sex education would be sex discrimination. Thus, recipients are prohibited from providing single-sex classes on the basis of generalizations about the different talents, capacities, or preferences of either sex.

In addition, although schools must always provide a "substantially equal" coeducational class in the same subject, they are not always required to provide single-sex classes for the excluded sex, unless such classes would be required to ensure nondiscriminatory implementation. If recipients can show that students of the excluded sex are not interested in enrolling in a single-sex class or do not have educational needs that can be addressed by such a class, then they are not required to offer a corresponding single-sex class to the excluded sex. Although schools must offer classes that are substantially equal, these classes do not have to be identical. In comparing classes under the "substantially equal" requirement, ED will consider a range of factors, including, but not limited to, admissions policies; the educational benefits provided, including the quality, range, and content of curriculum and other services, and the quality and availability of books, instructional materials, and technology; the qualifications of faculty and staff; the quality, accessibility, and availability of facilities and resources; geographic accessibility; and intangible features, such as the reputation of the faculty.

In order to ensure compliance with the regulations, recipients are required to periodically conduct self-evaluations, and students or their parents who believe the regulations have been violated may file a complaint with the school or with ED. ED also has the authority to conduct periodic compliance reviews. According to the National Association for Single Sex Public Education, there are currently at least 514 public schools in the United States that offer single-sex education in the form of single-sex schools or classrooms.[9]

Statutory Implications

As noted above, the enactment of the new regulations raises questions regarding whether ED has the statutory authority under Title IX to authorize single-sex classrooms and whether the regulations comply with the statutory requirements of the EEOA.

[8] 71 FR 62530.

[9] National Association for Single Sex Public Education, *FAQs*, http://www.singlesexschools.org/home-faq.htm.

Title IX

Although Title IX explicitly authorizes single-sex schools, the statute is silent with respect to the question of single-sex classrooms within schools that are otherwise coeducational. As a result, it is possible that the regulations could face a legal challenge on the grounds that ED exceeded its statutory authority. Any court ruling as to the validity of ED's regulations would hinge on the level of deference paid to the agency decision by the reviewing court. The standard for judicial review of such agency action was delineated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*.[10] There, the Supreme Court established that judicial review of an agency's interpretation of a statute consists of two related questions. First, the court must determine whether Congress has spoken directly to the precise issue at hand. If the intent of Congress is clear, the inquiry is concluded, since the unambiguously expressed intent of Congress must be respected.[11] However, if the court determines that the statute is silent or ambiguous with respect to the specific issue at hand, the court must determine "whether the agency's answer is based on a permissible construction of the statute."[12]

It is important to note that the second prong does not require a court to "conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."[13] The practical effect of this maxim is that a reasonable agency interpretation of an ambiguous statute must be accorded deference, even if the court believes the agency is incorrect.[14] Ultimately, given Title IX's silence with respect to single-sex classrooms, it's possible, but not certain, that a court could determine that the statutory language was ambiguous enough to support ED's interpretation of the statute.

Equal Educational Opportunity Act

Although the EEOA contains a congressional finding that "the maintenance of dual school systems in which students are assigned to schools solely on the basis of race, color, sex, or national origin denies to those students the equal protection of the laws guaranteed by the fourteenth amendment,"[15] the statute's prohibition against "the deliberate segregation" of students applies only to segregation on the basis of race, color, or national origin, but not sex.[16] Therefore, ED's regulations regarding single-sex classrooms do not appear to conflict with the EEOA.

Over the years, several courts have considered the question of whether single-sex education violates the EEOA. Although these cases, which are few in number, have contemplated single-sex schools rather than single-sex classes, they are instructive. For example, in *Vorchheimer v. School District of Philadelphia*,[17] the Court of Appeals for the Third Circuit considered a challenge filed

[10] 467 U.S. 837 (1984).

[11] *Id.* at 842-43.

[12] *Id.* at 843.

[13] *Id.* at 843, n. 11.

[14] *Id.* at 845.

[15] 20 U.S.C. § 1702.

[16] *Id.* at § 1703(a).

[17] 532 F.2d 880 (3d Cir. 1976), aff'd by an equally divided Court, 430 U.S. 703 (1977). The Third Circuit also upheld the single-sex schools against a constitutional equal protection challenge.

by a female student who was denied admission to an all-male public high school in Philadelphia. Because the statute did not explicitly prohibit the segregation of schools by sex and because the corresponding all-female high school was found to provide equal educational opportunities for girls, the court rejected the EEOA challenge. In *United States v. Hinds County School Board*,[18] however, the Fifth Circuit held that the EEOA prohibited a Mississippi school district from splitting the four schools in the district into two all-male schools and two-all female schools. The court distinguished the case from the *Vorchheimer* decision, noting that *Vorchheimer* involved two voluntary single-sex schools in an otherwise coeducational school system while the Mississippi school district in question involved the mandatory sex segregation of all of the schools, and therefore all of the students, in the system. Read together, these cases indicate that the EEOA may permit single-sex schools as long as coeducational options are available. Such an interpretation would mean that the new Title IX regulatory requirements are consistent with the EEOA.

Constitutional Implications

As noted above, the 2006 Title IX regulations may raise constitutional issues for public schools that offer single-sex classes. Under the equal protection clause of the Fourteenth Amendment,[19] which prohibits the government from denying to any individual the equal protection of the law, governmental classifications that are based on sex receive heightened scrutiny from the courts. Laws that rely on sex-based classifications will survive such scrutiny only if they are substantially related to achieving an important government objective.[20]

Currently, there are only two Supreme Court cases that address the equal protection implications of sex-segregated schools. Although both of these cases occurred in a higher education setting, they provide some guidance that may be applicable to the elementary and secondary education context. In the earlier case, *Mississippi University for Women v. Hogan*,[21] the Court held that the exclusion of an individual from a publicly funded school because of his or her sex violates the equal protection clause unless the government can show that the sex-based classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. Because the Court found that the state had not met this burden, it struck down Mississippi's policy of excluding men from its state-supported nursing school for women.

The Court's most recent constitutional pronouncement with respect to sex discrimination in education occurred in *United States v. Virginia*.[22] In that case, the Court held that the exclusion of women from the Virginia Military Institute (VMI), a public institution of higher education designed to prepare men for military and civilian leadership, was unconstitutional, despite the fact that the state had created a parallel school for women. Although the Court reiterated that sex-based classifications must be substantially related to an important government interest, the Court also appeared to conduct a more searching form of inquiry by requiring the state to establish an

[18] 560 F.2d 619 (5th Cir.-OLD 1977).

[19] U.S. Const. amend. V; U.S. Const. amend. XIV, § 1. The equal protection clause does not apply to private schools.

[20] Craig v. Boren, 429 U.S. 190, 197 (1976).

[21] 458 U.S. 718 (1982).

[22] 518 U.S. 515 (1996).

"exceedingly persuasive justification" for its actions.[23] According to the Court, this justification must be genuine and must not rely on overbroad generalizations about the talents, capacities, or preferences of men and women. In applying this standard, the Court rejected the two arguments that Virginia advanced in support of VMI's exclusion of women, namely, that the single-sex education offered by VMI contributed to a diversity of educational approaches in Virginia and that VMI employed a unique method of training that would be destroyed if women were admitted.

In rejecting VMI's first argument, the Court concluded that VMI had not been established or maintained to promote educational diversity. In fact, VMI's "historic and constant plan" was to offer a unique educational benefit to only men,[24] rather than to complement other Virginia institutions by providing a single-sex educational option. With respect to Virginia's second argument, the Court expressed concern over the exclusion of women from VMI because of generalizations about their ability. While the Court believed that VMI's method of instruction did promote important goals, it concluded that the exclusion of women was not substantially related to achieving those goals. After determining that VMI's exclusion of women violated constitutional equal protection requirements, the Court reviewed the state's remedy, a separate school for women known as the Virginia Women's Institute for Leadership (VWIL). Unlike VMI, VWIL did not use an adversarial method of instruction because it was believed to be inappropriate for most women,[25] and VWIL lacked the faculty, facilities, and course offerings available at VMI. Because VWIL was not a comparable single-sex institution for women, the Court concluded that it was an inadequate remedy for the state's equal protection violations, and VMI subsequently became coeducational.

In light of the VMI case, it appears that schools that establish single-sex classrooms under ED's Title IX regulations may face some legal hurdles but are not necessarily constitutionally barred from establishing such classes. Consistent with the Court's ruling, the Title IX regulations require schools that wish to establish single-sex classes to demonstrate that such classes serve an important governmental objective and are substantially related to achievement of that objective. What is unclear is whether the objectives approved by the Title IX regulations—to provide a diversity of educational options to parents and students and to meet the particular, identified educational needs of students—would be sufficiently "important" to pass judicial review.

Although the *Virginia* Court rejected VMI's diversity rationale, it did so because it found that VMI's justification was not genuine. As a result, the Court has not ruled on whether diversity is an important governmental objective in cases involving sex-based classifications, although the Court, which stated in the VMI case that it does not question "the State's prerogative evenhandedly to support diverse educational opportunities," may be inclined to uphold the diversity rationale with regard to the new Title IX regulations.[26] Moreover, the *Virginia* Court ruled that the parallel school Virginia established for women—VWIL—was not a sufficient remedy for the exclusion of women from VMI because it lacked the faculty, facilities, and course

[23] *Id* at 533.

[24] *Id.* at 540.

[25] *Id.* at 549.

[26] *Id*. at 534, n. 7. See also, id. at 535 ("Single-sex education affords pedagogical benefits to at least some students ... " and "it is not disputed that diversity among public educational institutions can serve the public good.") Notably, the Court has also upheld racial diversity as an important goal in a recent education case. Grutter v. Bollinger, 539 U.S. 306 (U.S. 2003). However, the Court has never decided whether the "particular identified educational needs" objective is an important governmental goal for purposes of justifying sex-based classifications.

offerings available at VMI. In contrast, the Title IX regulations require schools that offer single-sex classes to provide "substantially equal" classes to the excluded sex. While it's not clear whether the Court would view the "substantially equal" requirement as sufficient to pass constitutional muster, judicial resolution in a given case would most likely depend on the specific facts surrounding a school's single-sex class offerings.

Indeed, organizations such as the American Civil Liberties Union (ACLU) regularly file lawsuits against schools that provide single-sex education.[27] For example, the ACLU has filed a lawsuit alleging that single-sex classrooms in Breckenridge County, KY violate the Constitution, Title IX, the EEOA, and state antidiscrimination law and that ED's Title IX regulations violate the Constitution, Title IX, and the Administrative Procedures Act.[28]

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[27] Stephanie Weiss, *Sex and Scholarship; Across the Country, Educators Are Asking if Boys, Girls, and Learning Don't Mix,* Wash. Post, July 21, 2002, at W18.

[28] American Civil Liberties Union, "ACLU Represents Students in Challenge to Sex Segregation in Kentucky Public School," press release, May 19, 2008, http://www.aclu.org/womensrights/edu/35391prs20080519.html.