

## SINGLING THEM OUT: THE INFLUENCE OF THE “BOY CRISIS” ON THE NEW TITLE IX REGULATIONS

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### I. INTRODUCTION

Title IX, which prohibits discrimination on the basis of sex in education programs and activities, is federal legislation intended to resolve gender inequities in education that have historically affected women.<sup>1</sup> The preamble to Title IX states that “[n]o person in the United States 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 ...”<sup>2</sup> On October 25, 2006, the Department of Education released new Title IX regulations that potentially expand single-sex public education by offering greater opportunities for school districts to create single-sex classes and extracurricular activities for both sexes.<sup>3</sup> The regulations increase flexibility for districts to provide single-sex education and promulgate the standards by which a district can provide single-sex education consistent with the original nondiscrimination intent of Title IX.<sup>4</sup>

The newly released regulations will most likely increase what has already been a surge in single-sex education. According to the National Association for Single Sex Public Education, only three public schools in the nation offered a single-sex option for their students in 1995.<sup>5</sup> Today there are at least 366 public

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1. See Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 GEO. WASH. L. REV. 451, 515 (1999) (discussing women’s historical exclusion from education).

2. 20 U.S.C. § 1681(a) (2000).

3. 34 C.F.R. § 106.34(b) (2007); see also No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1781 (codified as 20 U.S.C. § 7215(a)(23) (stating that “[f]unds made available to local educational agencies ... shall be used for innovative assistance programs, which may include ... [p]rograms to provide same-gender schools and classrooms ... ”)).

4. 34 C.F.R. § 106.34(b)(1)(A), (B) (2007).

5. Carla Rivera, *Single-sex Classes on a Forward Course*, L.A. TIMES, Nov. 20, 2006, at A1.

schools in the United States offering single-sex educational opportunities.<sup>6</sup> Given the judicial precedent related to single-sex education, the single-sex surge may surprise observers. In *United States v. Virginia*, the United States Supreme Court held that the state must show an “exceedingly persuasive justification” for segregating military students on the basis of sex.<sup>7</sup> Although the opinion leaves open the option for a state to implement single-sex educational opportunities to provide “diverse educational opportunities,”<sup>8</sup> the standard applied by the majority is exacting. In fact, Justice Scalia criticized the majority by declaring single-sex education “functionally dead” as a result of the opinion.<sup>9</sup>

Single-sex classrooms and schools, however, remain an option throughout the country; an option that has received increased support from the Department of Education. What accounts for the “resurrection” of single-sex education?

One possible answer is that the “boy crisis” in the popular media has influenced society and the Department of Education. In 2006, popular media outlets boldly proclaimed a crisis in public education that hinders the academic success of boys. *Newsweek*,<sup>10</sup> *Esquire*,<sup>11</sup> *The New Republic*,<sup>12</sup> and *The New York Times Magazine*<sup>13</sup> all reported on the “boy crisis.” Educators were accused of creating a “biologically disrespectful model of education.”<sup>14</sup> Some commentators cited changes in educational objectives that are “leaving boys in the dust.”<sup>15</sup> Although researchers have historically paid somewhat less attention to the academic experiences of boys and men,<sup>16</sup> many turned their focus to boys last year. Margaret Spellings, U.S. Secretary of Education, said that the widening achievement gap between girls and boys “has profound implications

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6. National Association for Single Sex Public Education, <http://www.singlesexschools.org/schools-classrooms.htm> (last visited Oct. 1, 2007).

7. 518 U.S. 515, 531 (1996).

8. *Id.* at 534 n.7.

9. Kimberly J. Jenkins, *Constitutional Lessons for the Next Generation of Public Single-Sex Elementary and Secondary Schools*, 47 WM. & MARY L. REV. 1953, 1958 (2006) (citing *U.S. v. Virginia*, 518 U.S. at 596 (Scalia, J., dissenting)). Many commentators agreed that it would be difficult for school districts to meet the “exceedingly persuasive justification.” See Tomiko Brown-Nagin, *Toward a Pragmatic Understanding of Status-Consciousness: The Case of Deregulated Education*, 50 DUKE L.J. 753 (2000); William Henry Hurd, *Gone with the Wind? VMI's Loss and the Future of Single-Sex Public Education*, 4 DUKE J. GENDER L. & POL'Y 27 (1997); Valorie K. Vojdik, *Girls' Schools After VMI: Do They Make the Grade?*, 4 DUKE J. GENDER L. & POL'Y 69 (1997).

10. Peg Tyre, *The Trouble with Boys*, NEWSWEEK, Jan. 30, 2006, at 44.

11. Tom Chiarella, *The Problem with Boys*, ESQUIRE, July 2006, at 94.

12. Richard Whitmire, *Boy Trouble*, THE NEW REPUBLIC, Jan. 23, 2006, at 15.

13. Ann Hulbert, *Boy Problems: The Real Gender Crisis in Education Starts with the Y Chromosome*, N.Y. TIMES, Apr. 3, 2005, (Magazine), at 13.

14. Tyre, *supra* note 10, at 47.

15. Whitmire, *supra* note 12, at 17.

16. Levit, *supra* note 1, at 469.

for the economy, society, families and democracy.”<sup>17</sup> Calls were made for changes in programs, policies and governmental regulations.<sup>18</sup>

Even in the face of urgent cries for reform, educators and school districts should remain cautious. Educational research has produced mixed results regarding both the existence of the “boy crisis” and the remedial benefits of single-sex settings.<sup>19</sup> To the extent the research has produced conflicting results, it remains questionable whether the current educational and psychological evidence should be used to justify segregation by sex. Debate continues among those who accept the “boy crisis” and the skeptics who debate the validity of the research and whether the potential benefits of single-sex education outweigh the costs of implementing single-sex educational opportunities. Critics of single-sex education fear that there are significant disadvantages to implementing single-sex educational programs, such as the perpetuation of gender stereotypes and the diversion of funds from other educational areas that need improvement. Moreover, to the extent that research regarding the existence of the “boy crisis” is conflicting, it may not pass judicial muster under the “exceedingly persuasive justification” standard set forth in *United States v. Virginia*.<sup>20</sup>

This Comment introduces the new Title IX regulations, which allow increased opportunities for single-sex education despite the lack of conclusive evidence of their effectiveness. The discussion of the regulations in Part II includes the objectives that a school district must meet to take advantage of the opportunity to create single-sex educational opportunities. Part III provides a brief history of the judicial opinions regarding single-sex education and the

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17. Tyre, *supra* note 10, at 46.

18. Op-Ed., *Single Sex Education*, WASH. TIMES, Sept. 14, 2003, at B02.

19. See Lesli A. Maxwell, *Conference Focuses on ‘Silent Epidemic’ of Dropouts: Students Offer Candid Stories of Leaving School*, EDUCATION WEEK (Bethesda, MD), May 16, 2007, at 5 (claiming that “graduation rates ... are, at best, 70 percent nationally, and for black and Latino students, especially boys, closer to 50 percent.”). Statistics from the Department of Education also report that only 30% of men who enroll at a four-year college or university will earn a degree within four years, compared with 39.7% of women. National Center for Education Statistics, *Enrollment in Postsecondary Institutions, Fall 2005; Graduation Rates, 1999 and 2002 Cohorts; and Financial Statistics, Fiscal Year 2005*, <http://nces.ed.gov/pubs2007/2007154.pdf> (last visited Oct. 3, 2007). See also, AM. ASS’N OF UNIV. WOMEN EDUC. FOUND., SEPARATED BY SEX: A CRITICAL LOOK AT SINGLE-SEX EDUCATION FOR GIRLS 2 (1998) [hereinafter SEPARATED BY SEX] (stating that “[t]here is no evidence that single-sex education in general ‘works’ or is ‘better’ than coeducation.”). See also, e.g., Paul C. LePore & John Robert Warren, *A Comparison of Single-Sex and Coeducational Catholic Secondary Schooling: Evidence from the National Educational Longitudinal Study of 1988*, 34 AM. EDUC. RES. J. 485 (1997) (noting no difference in academic success, self-esteem, and aspirations between girls in coeducational and single-sex Catholic school settings).

20. See Kristen J. Cerven, *Single-Sex Education: Promoting Equality or an Unconstitutional Divide?* 2002 U. ILL. L. REV. 699, 727 (evaluating the constitutionality of single-sex schools in New York and Chicago and concluding that, although the schools have not been challenged on equal protection grounds, they “will almost certainly be considered a violation of the Fourteenth Amendment if and when such challenge ensues.”).

theme of caution that emerges when courts assess the constitutionality of single-sex education. Part IV discusses the “boy crisis” presented in the popular media and the new evidence from the sciences regarding brain and learning differences between the sexes. Part V explores potential problems with justifying single-sex education by using the “boy crisis.” Part VI discusses additional consequences of segregating on the basis of sex. The Comment concludes with a brief discussion of the courts’ role in ruling on the constitutionality of school districts’ justifications for single-sex education.

## II. TITLE IX REGULATIONS

The new Title IX regulations, effective November 24, 2006, provide increased leeway for schools to create single-sex classes.<sup>21</sup> The requirements for school districts differ with respect to creating single-sex schools and creating single-sex classes. Most notably, Congress amended the regulations to change the general prohibition against single-sex classes in elementary and secondary schools.<sup>22</sup> Although Title IX has always allowed the option of creating single-sex schools,<sup>23</sup> the new regulations expand what was previously a limited option with respect to single-sex classes. The summary section of the regulations states that the amendments “expand flexibility for recipients to provide single-sex education,” especially given that the “former regulations had restricted single-sex classes to very limited circumstances.”<sup>24</sup>

The overarching purpose of Title IX is to ensure nondiscrimination on the basis of sex in educational programs and settings.<sup>25</sup> The Department of

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21. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed. Reg. 62,530 (Oct. 25, 2006) (codified at 34 C.F.R. pt. 106) (citing comments to C.F.R. 2006 as an indication of legislative intent prior to enacting C.F.R. 2007).

22. *Id.*

23. *Id.* at 62,532.

24. *Id.* at 62,530.

25. *Id.* See also the Equal Education Opportunity Act (EEOA), 20 U.S.C. § 1701 (2000) (intending to end discrimination in elementary and secondary schools by prohibiting student assignment to segregated schools); Galen Sherwin, *Single-Sex Schools and the Antisegregation Principle*, 30 N.Y.U. REV. L. & SOC. CHANGE 35, 51 (2005) (stating that “[a]lthough better known as an antidiscrimination act that deals with race rather than sex, the EEOA actually contains a statement that comes the closest of any federal law to applying *Brown*’s prohibition on educational segregation to sex, proclaiming 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[.]’” (quoting 20 U.S.C. § 1702(a)(1) (2000))); 20 U.S.C. § 1703 (2000) (“No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by ... the deliberate segregation by an educational agency of students on the basis of race, color or national origin among or within schools[.]”). It is important to note that the EEOA is inapplicable in two specific situations. First, as the EEOA only applies to situations in which students are assigned to segregated schools, it does not apply to systems of voluntary assignment. Consistent with this, the new Title IX regulations require that enrollment in the single-sex class be entirely voluntary. 34 C.F.R. § 106.34(b)(1)(B)(iii) (2007). Second, the EEOA governs the

Education must justify any proposed regulation with respect to Congress's intent in passing Title IX; thus, any opportunities under Title IX must be offered under conditions that ensure nondiscrimination.<sup>26</sup> According to the Department's position, the regulations are consistent with congressional intent because they require that the school districts that elect to offer single-sex classes do so under conditions that ensure nondiscrimination.<sup>27</sup> To ensure nondiscriminatory conditions, a school district may continue to operate solely coeducational classes or, if it chooses to do so, offer single-sex classes.<sup>28</sup>

In terms of single-sex schools, the new regulations, like the old, require that if a school district decides to establish a single-sex school, it must also offer a "substantially equal" opportunity for the other sex.<sup>29</sup> The new regulations specify that a school district may either offer a single-sex school or a coeducational school to meet the substantially equal opportunity.<sup>30</sup> The determination of whether two schools are substantially equal involves the Department's assessment, "either individually or in the aggregate as appropriate"<sup>31</sup> of a variety of factors. Factors used in this assessment include, but are not limited to, the admission policies and criteria; the educational benefits provided including the quality, range, and content of curriculum and other services; the quality and availability of books and technology; the qualifications of faculty and staff; the reputation of faculty; geographic accessibility; and the availability of facilities and resources.<sup>32</sup>

The most radical change in the regulations regards the implementation of single-sex classes. Consistent with relevant Supreme Court jurisprudence, the regulations require that a school district that receives federal funding present a justification for a sex-based classification.<sup>33</sup> The test is two-fold: first, the school district must identify an important objective; second, it must demonstrate a substantial relationship between the objective and the sex-based means to further that objective.<sup>34</sup> The Department of Education explicitly

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assignment to schools, and therefore does not apply to situations in which students within a school are segregated by sex for the purpose of specific classes. *See* 20 U.S.C. § 1703(c) (2000).

26. 71 Fed. Reg. at 62,532.

27. *Id.*

28. *Id.*

29. 34 C.F.R. § 106.34(c)(1); *see also* 20 U.S.C. § 1681(a)(1) (2000) (regarding admissions to educational institutions, the prohibition against sex discrimination applies only to institutions of vocational education, professional education and graduate higher education, and to public institutions of undergraduate higher education; the prohibition against sex discrimination in admissions does not apply to public elementary and secondary schools).

30. 34 C.F.R. § 106.34(c)(1).

31. 34 C.F.R. § 106.34(c)(3).

32. *Id.*

33. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, *supra* note 21, at 62,533.

34. 34 C.F.R. § 106.34 (b)(i)(A), (B). *See* Sherwin, *supra* note 25, at 56 (stating that many justifications rest on affirmative action principles and that single-sex schools present the best means to address gender inequalities in education). Increasingly, however,

acknowledges the legal standard by stating, “the Supreme Court has indicated that to justify a sex-based classification the public entity must demonstrate that it is based on an important governmental objective and that exclusion of students of the other sex is substantially related to achievement of that objective.”<sup>35</sup> Additionally, the justification for the objective must “be genuine, not hypothesized or invented *post hoc* in response to litigation” and it cannot “rely on overbroad generalization about the different talents, capacities, or preferences of males and females.”<sup>36</sup>

The regulations therefore demand that recipient districts have a justification, an important objective, and a substantial relationship between the important objective and the means to further that objective.<sup>37</sup> The regulations clearly state that each single-sex class or extracurricular activity must be based on the important objective as identified by the school district.<sup>38</sup> The Department has suggested two objectives that recipient school districts may pursue: meeting the particular, identified needs of students; and providing a diversity of educational options.<sup>39</sup>

The “needs objective” and the justification for single-sex education under it requires a school district to identify the students’ educational needs and must be based on *evidence* of the students’ need.<sup>40</sup> Those submitting comments to the proposed regulations worried about the lack of evidence required to show that the proposed single-sex class would be related to an identified educational need

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proponents are turning to the notion that single-sex education might offer a more focused learning environment. Sherwin, *supra* note 25, at 56-57.

35. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, *supra* note 21, at 62,533.

36. *Id.*

37. 34 C.F.R. § 106.34 (b)(i)(A), (B); *See also* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, *supra* note 21, at 62,533. (stating that the “justification must be genuine, not hypothesized or invented or *post hoc*[.]”).

38. 34 C.F.R. § 106.34(b)(1)(i)-(iv). Note that the four criteria (that the single-sex class is based on the recipient’s important objective, that the objective is implemented in a even-handed manner, that student enrollment in the single-sex class is completely voluntary, and that all other students are provided a substantially equal coeducational class in the same subject) apply to classes and extracurricular activities and do not explicitly apply to single-sex schools. A school district may offer one single-sex school, as long as “substantially equal” courses, services, and facilities are present at other schools within the same district.

39. For a discussion of the need for an objective, see 34 C.F.R. § 106 (2007) and Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed Reg. at 62,534. The regulatory section for the diversity objective is found at 34 C.F.R. § 106.34(b)(1)(i)(A) (2007), and the needs objective is found at 34 C.F.R. § 106.34(b)(1)(i)(B) (2007).

40. 34 C.F.R. § 106. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed. Reg. 62,534 (Oct. 25, 2006) (codified at 34 C.F.R. pt. 106) (citing comments to C.F.R. 2006 as an indication of legislative intent prior to enacting C.F.R. 2007).

or educational benefit.<sup>41</sup> The Department of Education defends the "needs" objective by citing *United States v. Virginia*.<sup>42</sup> The Court held that "an array of 'important objectives' can support sex-based classification, including 'to advance the full development of the talent and capacities of our Nation's people.'"<sup>43</sup> The Department concludes that advancing the talent of the Nation's people qualifies as a particular "educational need" of students.<sup>44</sup>

The establishment of the needs objective triggers the nondiscrimination requirements of Title IX. According to the Department of Education, identifying students' needs and meeting those needs evenhandedly ensures compliance with Title IX.<sup>45</sup> This means that a school district could conceivably suggest that single-sex classes would meet the particular, identified needs of students of one sex, but not of the other. The standard of evenhandedness does not necessarily require a district to offer a single-sex class for the other sex.<sup>46</sup> That is, the evenhandedness could come from a similar (supposedly "equal") coeducational classroom. Indeed, a school district must provide a substantially similar coeducational class to any single-sex class offered, because, as required by the regulations, enrollment in single-sex classes must be voluntary.<sup>47</sup>

To the extent that school districts rely on the existence of the "boy crisis," research supporting its existence could be used to create single-sex classrooms for boys only.<sup>48</sup> This possibility reinforces the need to view media coverage of the "boy crisis" with caution, as school districts exercise authority under Title IX and as parents consider single-sex educational opportunities for their children.<sup>49</sup>

The second suggested objective is one based on "diversity." Under this objective, a district may use "[diversity of] educational opportunities" as a rationale for single-sex classes.<sup>50</sup> Despite objections from commenters,<sup>51</sup> the

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41. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, *supra* note 21, at 62,535.

42. *Id.* (quoting *U.S. v. Virginia* at 533).

43. *Id.*

44. *Id.*

45. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, *supra* note 21, at 62,534.

46. 34 C.F.R. § 106.34(b)(2) (2007).

47. 34 C.F.R. § 106.34(b)(1)(iii) (2007).

48. Note, however, that the regulations state that a district "may be required to provide a substantially equal single-sex class ... for students of the excluded sex." 34 C.F.R. § 106.34(b)(2) (emphasis added). Additionally, a district "[m]ust conduct periodic evaluations to ensure that the single-sex classes are based on genuine justifications and that they are substantially related to the achievement of the important objective[.]" 34 C.F.R. § 106.34(b)(4)(i) (2007). The evaluations must be conducted at least every two years. 34 C.F.R. § 106.34(b)(4)(ii) (2007).

49. See Isabelle Katz Pinzler, *Separate But Equal Education in the Context of Gender*, 49 N.Y.L. SCH. L. REV. 785, 803 (2004) (arguing that "providing a single-sex opportunity only to boys or only to girls, with only a co-ed opportunity to the other sex, can never be 'substantially equal.'").

50. 34 C.F.R. § 106.34(b)(1)(i)(A) (2007).

regulations allow establishing single-sex education as a means of achieving “diversity of educational options.”<sup>52</sup> These diverse options are intended to provide an opportunity for parents to choose from different educational options in an effort to improve student outcomes.<sup>53</sup> There are, of course, restrictions. A school cannot merely establish a single-sex class and declare that the class promotes diverse educational opportunities.<sup>54</sup> Rather, it first must show that it has adopted an overall policy of promoting diverse forms of public school opportunities.<sup>55</sup> Additionally, the diverse opportunities must be educationally beneficial.<sup>56</sup>

Although similar to the needs objective, the diversity objective is easier to establish as current research can be used to show that single-sex education benefits at least some students.<sup>57</sup> It, therefore, becomes apparent that school districts will have a greater opportunity to create single-sex schools not based on the educational value of the structure, but merely for the purpose of promoting choice in educational opportunities. Using this “diversity” objective seems to lessen the burden on school districts to demonstrate educational benefit across the board. While the needs objective will “require greater consensus among researchers[,]”<sup>58</sup> the diversity objective can be met by offering different learning environments.<sup>59</sup>

### III. THE STANDARDS FOR SINGLE-SEX EDUCATION

While the new regulations provide greater leeway for single-sex education, the Supreme Court’s approach to the issue has been historically cautious. Although the Court has not specifically addressed the legality of

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51. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed Reg. at 62,534.

52. 34 C.F.R. § 106.34 (2007). Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed Reg. at 62,534.

53. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed Reg. at 62,534. *See also* U.S. v. Virginia, 518 U.S. 515, 535 (1995) (stating that “diversity among public educational institutions can serve the public good[.]”).

54. 34 C.F.R. § 106.34 (2007). Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed Reg. at 62,535.

55. *Id.*

56. *Id.*

57. Jenkins, *supra* note 9, at 1975 (citing Jenny L. Matthews, Comment, *Admission Denied: An Examination of a Single-sex Public School Initiative in North Carolina*, 82 N.C.L. REV. 2032, 2056 (2004) (arguing that diversity is not an end, but a means to achieving education of students)).

58. Lisa A. Gerson, *Single Sex Education*, 6 GEO. J. GENDER & L. 547, 559 (2005).

59. To the extent that the diversity objective is met by offering different education options, the justification does not require research pointing to the educational benefit provided by diverse options. *See* THE BROWN CTR. ON EDUC. POLICY, THE BROOKINGS INSTITUTION, SCHOOL CHOICE: DOING IT THE RIGHT WAY MAKES A DIFFERENCE 23-24 (2003), <http://www.brookings.edu/comm/events/20031117.pdf> (last visited November 13, 2007) (noting that factors other than school choice may influence student learning).

single-sex public elementary or secondary education,<sup>60</sup> judicial standards do exist for single-sex educational schemes.

In *Vorchheimer v. School District of Philadelphia* the Third Circuit Court of Appeals upheld Philadelphia's Central High School's all-male admission policy in 1976.<sup>61</sup> *Vorchheimer* found that the educational opportunities available to boys and girls were "essentially equal" when the school district offered both sexes the opportunity to apply to a single-sex high school.<sup>62</sup> In addition to similar courses offered, the court was persuaded by the fact that attendance at either of the single-sex schools was voluntary.<sup>63</sup> The court acknowledged the opinion of experts, both national and international, on the value of single-sex education.<sup>64</sup> The court also cited the district judge who stated that, even if the parties had not stipulated to the value of single-sex education, the court would have "felt compelled to validate the sex-segregated school"<sup>65</sup> on the basis of expert opinion on the "competition for adolescent energies in a coed school and its detrimental effect on student learning and academic achievement."<sup>66</sup>

The standard, however, does not turn on whether single-sex education is valuable. Soon after *Vorchheimer* was decided, the Supreme Court set the standard of scrutiny for gender-based classifications in *Craig v. Boren*, a case that challenged an Oklahoma law that allowed 18-year-old females to purchase beer with a 3.2% alcohol content but prohibited males from doing so until they were 21.<sup>67</sup> The Supreme Court stated that gender-based classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives."<sup>68</sup> The Court applied an "intermediate" level scrutiny that, although not calling sex a suspect class, elevated the scrutiny applied to gender-based classifications beyond rational basis review.<sup>69</sup> When revisiting Philadelphia's Central High School's admissions policy after *Craig v. Boren*, the court found that the exclusion of women violated the plaintiffs' rights under the Equal Rights Amendment to the Pennsylvania Constitution.<sup>70</sup>

In *Mississippi University for Women v. Hogan* (MUW), the United States Supreme Court was asked to review the constitutionality of the Mississippi University for Women's School of Nursing female-only admissions policy.<sup>71</sup> The stated objective of the policy was to compensate for past discrimination

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60. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, *supra* note 21, at 62,533 n.13.

61. 532 F.2d 880, 888 (3d Cir. 1976).

62. *Id.* at 881.

63. *Id.* at 882.

64. *Id.*

65. *Id.*

66. *Id.*

67. 429 U.S. 190, 192 (1976).

68. *Id.* at 197.

69. *Id.* at 218 (Rehnquist, J., dissenting).

70. *Newberg v. Bd. of Pub. Educ.*, 478 A.2d 1352, 1354 (Pa. Super. Ct. 1984).

71. 458 U.S. 718, 720 (1982).

against women.<sup>72</sup> Applying the *Craig v. Boren* test, the Court first found that women had not been discriminated against in the field of nursing and, therefore, allowing only women to enter the nursing school was not “an important governmental” objective designed to overcome past discrimination.<sup>73</sup> In addition, the Court was not persuaded that the female-only admissions policy was “substantially and directly related” to the suggested compensatory objective.<sup>74</sup> Since men were able to audit classes, MUW could not support its claim that women would be adversely affected by the presence of male students.<sup>75</sup> Since MUW failed both parts of the required test, the Court found that it was unconstitutional for the State of Mississippi to offer educational programs to one sex without offering comparable education alternatives to the other sex.<sup>76</sup>

In 1996 the Supreme Court in *United States v. Virginia* again decided a case regarding the constitutionality of single-sex education, this time in response to Virginia Military Institute's all-male admissions policy.<sup>77</sup> The State of Virginia operated a male-only military institute.<sup>78</sup> A challenge to the school's admission policy resulted in a Fourth Circuit opinion holding the policy unconstitutional.<sup>79</sup> In response, Virginia created the Virginia Women's Institute for Leadership to remedy the equal protection violation.<sup>80</sup> The Supreme Court, found that the parallel program was inadequate.<sup>81</sup> Virginia had to establish an “exceedingly persuasive justification” for segregating men and women on the basis of sex and, in this case, the State failed to do so.<sup>82</sup> The Court found the decision to exclude women relied “on overbroad generalizations about the different talents, capacities, or preferences of males and females” and, therefore, was not justified.<sup>83</sup> In short, the Court did not entirely close the door on single-sex educational options as opposed to coeducational ones, but demonstrated the scrutiny with which they would be constitutionally evaluated.<sup>84</sup>

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72. *Id.* at 727.

73. *Id.* at 729.

74. *Id.* at 730.

75. *Id.*

76. *Id.* at 731.

77. 518 U.S. 515, 519 (1996).

78. *Id.* at 520. “Historically, most of Virginia's public colleges and universities were single[-]sex; by the mid-1970's, however, all except VMI had become coeducational.” *Id.* at 521 n.2.

79. *Id.* at 524.

80. *Id.* at 526.

81. *Id.* at 534.

82. *Id.*

83. *Id.* at 550.

84. The Court addressed the diversity rationale in footnote 7, stating that “[s]everal *amici* have urged that diversity in educational opportunities is an altogether appropriate governmental pursuit and that single-sex schools can contribute importantly to such diversity. Indeed, it is the mission of some single-sex schools ‘to dissipate, rather than perpetuate, traditional gender classifications.’ ... We do not question the Commonwealth's

Since *United States v. Virginia*, state sponsored segregation of the sexes requires an “exceedingly persuasive justification.” This requirement is referenced in the Department of Education’s Title IX regulations. The comments to the regulations also note, however, that the main purpose of the regulations is to implement Title IX.<sup>85</sup> The Department of Education explicitly states that the regulations “do not regulate or implement constitutional requirements or constitute advice about the United States Constitution.”<sup>86</sup> The regulations explain how a district may create single-sex opportunities in a nondiscriminatory manner but recognize that there may be constitutional issues beyond the scope of the regulations.<sup>87</sup>

#### IV. THE “BOY CRISIS”

Although the initial intent of Title IX was to address discrimination against girls, recent discussion concerns boys’ academic performance. The discourse has shifted from how schools “shortchange girls”<sup>88</sup> to the trouble with boys.<sup>89</sup> Throughout 2006, the popular media warned society about boys’ failure in school.

In January 2006, *Newsweek* published a cover story called, “The Trouble with Boys.”<sup>90</sup> The article began with statistics from a University of Michigan study which stated that from 1980 to 2001, the number of boys who said they didn’t like school rose by 71%.<sup>91</sup> The article reported that men are now a minority on college campuses, making up only 44% of undergraduate students when, thirty years ago, they represented 58%.<sup>92</sup> The article suggested that new

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prerogative evenhandedly to support diverse educational opportunities. We address specifically and only an education opportunity recognized by the District Court and the Court of Appeals as ‘unique,’ ... an opportunity available only at Virginia’s premier military institute, the Commonwealth’s sole single-sex public university or college. *Id.* at 534 n.7 (citations omitted).

<sup>85</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, *supra* note 21, at 62,530.

<sup>86</sup> *Id.* at 62,533.

<sup>87</sup> *Id.* at 62,532. See Susan G. Clark, *Public Single-Sex Schools: Are They Lawful?*, 213 ED. LAW REP. 319 (2006) and Frances Elizabeth Burgin, “*Fire Where There is No Flame: The Constitutionality of Single-Sex Classrooms in the Commonwealth*,” 13 WM. & MARY J. WOMEN & L. 821 (2007) for a discussion of how school districts might analyze their authority to create single-sex schools consistent with the Constitution.

<sup>88</sup> See AM. ASS’N OF UNIV. WOMEN EDUC. FOUND. AND NAT’L EDUC. ASS’N, *HOW SCHOOLS SHORTCHANGE GIRLS* (1992); MYRA SADKER & DAVIS SADKER, *FAILING AT FAIRNESS: HOW AMERICA’S SCHOOLS CHEAT GIRLS* (1994).

<sup>89</sup> SARA MEAD, *THE TRUTH ABOUT BOYS AND GIRLS* (2006), [http://www.educationsector.org/usr\\_doc/ESO\\_BoysAndGirls.pdf](http://www.educationsector.org/usr_doc/ESO_BoysAndGirls.pdf) (last visited November 13, 2007).

<sup>90</sup> Tyre, *supra* note 10, at 44.

<sup>91</sup> *Id.* at 46.

<sup>92</sup> Tyre, *supra* note 10, at 44; see also Rosemary C. Salomone, *Single-Sex Programs: Resolving the Research Conundrum*, 108(4) TEACHERS COLLEGE RECORD 778, 788 (2006)

and different standards for academic success are harmful to boys' performance and that boys are more likely to fail when success is based on test scores and placement in accelerated classes.<sup>93</sup> The article also cited other changes negatively affecting boys, such as rigid curricula and cuts in physical education and sports programs.<sup>94</sup>

Christina Hoff Sommers, author of *The War Against Boys: How Misguided Feminism is Harming Our Young Men*, contends that a review of the research<sup>95</sup> shows that boys, not girls, are on the weak side of the educational gap.<sup>96</sup> Sommers suggests that years of women's groups complaining about boys benefiting from a system that favors them has led to a culture where girls are exalted and pitied.<sup>97</sup> She suggests that the tide has turned and now claims "it is boys, not girls, who are languishing academically."<sup>98</sup> Sommers also contends that, in some cases, research is intentionally biased against boys, contains "factual errors," and is motivated by a strategy to secure benefits for females.<sup>99</sup> Sommers lauds other countries' responses to gender education gaps, such as England, where schools began proposing single-sex classes in public schools in 1994.<sup>100</sup> She criticizes the United States' "head in the sand" approach.<sup>101</sup> She suggests that efforts similar to those in European countries are stymied in this country by groups such as the National Organization for Women and the American Civil Liberties Union.<sup>102</sup>

Sommers is not alone in her conviction, Judith Kleinfeld also contends that boys are experiencing harmful treatment in the classroom, resulting in adverse educational outcomes.<sup>103</sup> Other research indicating that girls enter school with advanced verbal and fine motor skills, that they have longer attention spans, and that they also benefit from greater impulse control supports

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(stating that "females comprise a disproportionate number of college students, which has become a matter of national concern.").

93. Tyre, *supra* note 10, at 47-48.

94. *Id.* at 48.

95. CHRISTINA HOFF SOMMERS, *THE WAR AGAINST BOYS: HOW MISGUIDED FEMINISM IS HARMING OUR YOUNG MEN*, 14 (2000).

96. *See, e.g.*, Sara O. Meadows et al., *Assessing Gilligan v. Sommers: Gender Specific Trends in Child and Youth Well-Being in the United States, 1985-2001*, 70 SOC. INDICATORS RES. 1, 44 (2005) (reporting on a study by a group of Duke University researchers that concluded that "it is boys who are falling behind, particularly at the higher levels of education.").

97. SOMMERS, *supra* note 95, at 14, 24.

98. *Id.* at 24.

99. *Id.* at 22-23.

100. *Id.* at 170.

101. *Id.*

102. *Id.* at 171.

103. Jenkins, *supra* note 9, at 1966 (citing JUDITH KLEINFELD, *THE MYTH THAT SCHOOLS SHORTCHANGE GIRLS: SOCIAL SCIENCE IN THE SERVICE OF DECEPTION* 1-3 (1998)).

her conclusion.<sup>104</sup> Other studies indicate that, while the gap favoring boys in math and science has narrowed,<sup>105</sup> the “overall differences favoring boys in math and science pale in comparison with the ones favoring girls in reading and writing.”<sup>106</sup> Recent brain science research also suggests that male and female brains develop differently<sup>107</sup> and some researchers suggest that there is a corresponding difference in learning styles.<sup>108</sup>

A *New Republic* article from January 23, 2006, warns of the lack of response to the boy crisis.<sup>109</sup> Author Richard Whitmire says that, despite the coverage in the popular media, the issue has been met with “near total silence.”<sup>110</sup> He offers more statistics about boys’ failure in schools: that boys are fifty times more likely to repeat grades in elementary school, one-third more likely to drop out of high school, and twice as likely to be identified as having a learning disability.<sup>111</sup> He warns that the problem is boys’ lack of literacy skills and that teaching methods have not changed to help boys adjust to a society that increasingly favors verbal skills.<sup>112</sup> His article does not, however, advocate for single-sex classrooms, but for a change in teaching methods and instruction to help boys adjust.<sup>113</sup>

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104. Salomone, *supra* note 92, at 787 (citing NICHOLAS ZILL, ET AL., OFFICE OF EDUC. RESEARCH & IMPROVEMENT, U.S. DEP’T OF EDUC., SER. NO. NCES 95-280, APPROACHING KINDERGARTEN: A LOOK AT PRESCHOOLERS IN THE UNITED STATES 21, 29 (1995)).

105. Salomone, *supra* note 92, at 787 (suggesting that the success of girls in school is largely due to increased attention towards them).

106. *Id.* at 788.

107. *See, e.g.*, DEBORAH BLUM, SEX ON THE BRAIN: THE BIOLOGICAL DIFFERENCES BETWEEN MEN AND WOMEN (1997). Some commentators suggest that the evidence on gender differences is so great that there should be no judicial presumption against governmental programs that treat male and females differently because of their different learning strategies. *See* Michael J. Kaufman, *Beyond Presumption and Peafowl: Reconciling the Legal Principle of Equality with the Pedagogical Benefits of Gender Differentiation*, 53 BUFF. L. REV. 1059 (2005); *see also* Michael J. Kaufman, *Rhetorical Questions Concerning Justice and Equality in Educational Opportunities*, 36 LOY. U. CHI. L. J. 495 (2005).

108. *See* MICHAEL GURIAN, ET AL., GIRLS AND BOYS LEARN DIFFERENTLY! (2001). *But see*, Isabelle Katz Pinzler, *Separate But Equal Education in the Context of Gender*, 49 N.Y. L. SCH. L. REV. 785, 797 (2004-2005) (concluding that “[t]hose arguments [related to inherent sex-based differences in learning styles] have been thoroughly refuted by the social scientists themselves” (citing Joan E. Bertin, *Legal and Policy Issues Raised by All-Female Public Education*, 14 N.Y.L. SCH. J. HUM. RTS. 175 (1997))).

109. Whitmire, *supra* note 12, at 15.

110. *Id.*

111. *Id.* *See also* National Association of Educational Progress (NAEP) statistics that girls repeat a grade at lower rates than boys, are less likely to drop out of school and are less likely than boys to be identified as having a learning disability, emotional disturbance, or a speech impediment. Statistics available at <http://nces.ed.gov/pubs2005/equity/Section3.asp> (last visited November 13, 2007).

112. Whitmire, *supra* note 12, at 17; *see also* Salomone, *supra* note 92, at 788 (explaining that the gap between girls and boys in reading and writing widens from the fourth to the eighth to the twelfth grade levels).

113. Whitmire, *supra* note 12, at 18.

Similarly, an *Esquire* article written in 2006 by Tom Chiarella suggests the problem is that boys learn differently and, therefore, need a curriculum that is tailored to their learning style.<sup>114</sup> Although Chiarella presents evidence that there needs to be some changes in the classroom, because boys need different levels of activity and competition, he says what is most important is the message that boys receive in schools.<sup>115</sup> He attributes the gains made by girls to women's advocacy and says that girls have received the message that things are possible.<sup>116</sup> Not suggesting that single-sex education will provide the solution for boys, Chiarella says it is also important for boys to get strong messages from male role models.<sup>117</sup>

Although not all commentators agree on the "solution" to the "boy crisis," educating boys in single-sex settings is one frequently presented option. Advocates rely on evidence that suggests that boys in coeducational schools do not participate in the full range of extracurricular activities<sup>118</sup> and that "girls now dominate student government positions and receive the lion's share of academic awards in many secondary schools."<sup>119</sup> The answer, they suggest, is educating boys in a separate environment.<sup>120</sup>

#### V. THE "NEED" TO ADDRESS THE "BOY CRISIS"

Given the new regulations, more attempts to create single-sex educational opportunities will likely be based on evidence of boys suffering academically. Under the new regulations, a school district can create these opportunities by identifying one of the objectives approved by the Department of Education and linking its objective to the action.<sup>121</sup> The needs objective allows a school district to provide single-sex options for boys or girls when they can link the educational scheme to particular, identifiable needs.<sup>122</sup>

As previously noted, even in the spirit of creating new educational opportunities, decision makers in school districts should remain cautious when relying on certain rationales for creating such opportunities. Commenters to the regulations worried that insufficient research supports the contention that single-sex education is necessary for the educational needs of students.<sup>123</sup> They urged the Department of Education to put off releasing new regulations until the "completion of additional scientific research that concludes that single-sex

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114. Chiarella, *supra* note 11, at 98.

115. *Id.* at 99.

116. *Id.* at 137.

117. *Id.* at 137-38.

118. Salomone, *supra* note 92, at 793.

119. *Id.*

120. See, e.g., LEONARD SAX, WHY GENDER MATTERS: WHAT PARENTS AND TEACHERS NEED TO KNOW ABOUT THE EMERGING SCIENCE OF SEX DIFFERENCES (2005).

121. 34 C.F.R. § 106.34(b)(1)(i) (2007).

122. 34 C.F.R. § 106.34(b)(1)(i)(B) (2007).

123. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, *supra* note 21, at 62,532.

education is beneficial to students.”<sup>124</sup> The body of scholarly research on student learning is characterized as both “loosely connected,”<sup>125</sup> yet “mildly and qualifiedly supportive.”<sup>126</sup> Others question the research methodology.<sup>127</sup> It is questionable, given this loose connection, how the research reported in the media can be used to justify single-sex opportunities, therefore creating a “need” for separating boys to enhance their academic performance.<sup>128</sup> Others, temporarily satisfied with existing research, suggest that the research is instructive and urge policy makers to “accept what these studies offer in suggesting specific reasons why single-sex education programs are worthy of consideration.”<sup>129</sup>

It is doubtful that the “boy crisis” can be used as evidence of the “particular identified education needs” of boys based on the lack of evidence as to its extent or even existence. However debated, strong opinions about single-sex education and the justification for it can be created, influenced and supported by social science data.<sup>130</sup> The “boy crisis” was used as a justification for sex separation in Pennsylvania where the first boys’ charter school was recently approved.<sup>131</sup> In advocating for this innovation, Paul Callas, the District of Philadelphia’s chief executive, called the achievement gap between boys and girls “a crisis.”<sup>132</sup> Administrators concur and believe that the school will help “address persistent low achievement among male students.”<sup>133</sup>

In spite of it being used to justify single-sex options for boys, the evidence of a “boy crisis” has been met with strong skepticism. Those proposing the

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124. *Id.* See Sherwin, *supra* note 25, at 77 (stating that supporters of single-sex education resist calling the causal link between single-sex schools and improved achievement into question. The causal link, however, merits further examination, especially in light of significant empirical research calling such a link into doubt).

125. Salomone, *supra* note 92, at 786.

126. ROSEMARY C. SALOMONE, *SAME, DIFFERENT, EQUAL: RETHINKING SINGLE-SEX SCHOOLING* 189 (2003) (calling the findings on single-sex education “mildly and qualifiedly supportive,” but “by no means conclusive.”).

127. See Levit, *supra* note 1, at 503 (stating that advocates often draw on uncontrolled studies with small samples and anecdotal evidence).

128. See Brief for American Association of University Professors as Amici Curiae Supporting Petitioner at 24, *U.S. v. Virginia*, 518 U.S. 515 (1996) (No. 94-1941) (stating that the fact that researchers observe certain differences that are associated with gender does not support the conclusion that men should be separated from women for educational purposes); see also Valerie E. Lee, *Is Single-Sex Secondary School a Solution to the Problem of Gender Inequity?*, in *SEPARATED BY SEX: A CRITICAL LOOK AT SINGLE-SEX EDUCATION FOR GIRLS*, 41, 50 (Susan Morse ed., 1998) (calling the single-sex solution “misguided,” and stating, “I do not think the research on single-sex schooling (my own and others’) should be interpreted as favoring the separation of girls and boys for their education.”).

129. Salomone, *supra* note 92, at 792.

130. Levit, *supra* note 1, at 454.

131. Martha Woodall, *Reworked Charter for Boys Approved Despite Legal Objections by the ACLU and Others, the School Reform Commission Set a 2007 Opening*, *THE PHILA. INQUIRER*, June 29, 2006, at B1.

132. *Id.*

133. *Id.*

existence of the “boy crisis” have been accused of exaggerating the research and drawing conclusions from statistics that are not conclusive.<sup>134</sup> In fact, the research regarding the benefits of single-sex education is weak and has been called “undeniably inadequate.”<sup>135</sup> Many of the studies are not “sufficiently rigorous” and lack the standards necessary for scientific validity.<sup>136</sup> The criticisms prompted the Department of Education Office of Planning, Evaluation and Policy Development to conduct a review in 2005 in an attempt to settle different interpretations of previous results.<sup>137</sup> The report found that only forty out of 2,221 studies on the benefits of single-sex education were sufficiently sound.<sup>138</sup> The report also concluded that when testing various outcomes for students in single-sex environments “there is no evidence of either benefit or harm.”<sup>139</sup>

Education Sector, a Washington-based think tank, refuted the boy crisis based on its own study.<sup>140</sup> Reporting on the study, Jay Mathews highlighted the Sector’s findings and the experts’ response to it.<sup>141</sup> Craig Jerald, an educational consultant, stated, “Ed Sector is right to call foul on all the crisis rhetoric, and we should stop using that word.”<sup>142</sup> The Sector report called the emphasis on boys “misplaced.”<sup>143</sup> The Sector’s conclusions are echoed by directors of the ACLU of Louisiana, who concluded that gender segregation is used as a “fix-all solution to the woes of many struggling districts” and that using this rationale is bad for kids.<sup>144</sup> The report expressed a concern that a “focus on sex differences could sidetrack federal, state and private efforts to put more resources into inner-city and rural schools, where both boys and girls need

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134. Gerald W. Bracey, *Nobels ‘R’ Us*, PHI DELTA KAPPAN, 332, 332-33 (2006).

135. Salomone, *supra* note 92, at 791; *see also* Patricia B. Campbell & Joe Sanders, *Challenging the System: Assumptions and Data Behind the Push for Single-Sex Schooling*, in GENDER IN POLICY AND PRACTICE: PERSPECTIVES ON SINGLE-SEX AND COEDUCATIONAL SCHOOLING 31, 32 (Amanda Datnow & Lea Hubbard eds., 2002) (stating that “[t]here has been no national comprehensive controlled study of academic performance for U.S. students in public and private K-12 single-sex and coed schooling.”).

136. Salomone, *supra* note 92, at 791; *see also* Gary Simson, *Separate But Equal and Single-Sex Schools*, 90 CORNELL L. REV. 443, 452 (2004-05) (explaining that recent studies have cast serious doubt on the methodology of older studies and the benefits of single-sex education)(citing CAROLE B. SHMURAK, VOICES OF HOPE: ADOLESCENT GIRLS AT SINGLE SEX AND COEDUCATIONAL SCHOOLS, 8-12, 17-18 (1998)).

137. U.S. DEPARTMENT OF EDUCATION OFFICE OF PLANNING, EVALUATION AND POLICY DEVELOPMENT, POLICY AND PROGRAM STUDIES SERVICE, SINGLE SEX VERSUS SECONDARY SCHOOLING: A SYSTEMATIC REVIEW (2005).

138. *Id.* at 26.

139. *Id.* at 12.

140. MEAD, *supra* note 89; *see also* David Von Drehle, *The Boys Are All Right*, TIME, Aug. 6, 2007 (refuting the “boy crisis”).

141. Jay Mathews, *Study Casts Doubt on the ‘Boy Crisis’; Improving Test Scores Cut Into Girls’ Lead*, WASH. POST, June 26, 2006, at A1.

142. *Id.*

143. *Id.*

144. Emily Martin & Katie Schwartzmann, *Bad for Both Boys and Girls*, USA TODAY, Aug. 16, 2006, at 10A.

better instruction.”<sup>145</sup> The report states that boys are in fact scoring better and achieving higher than they ever have before.<sup>146</sup> Girls have closed some gaps which leads to the belief that boys are falling behind. Ed Sector believes that some boys “are in real trouble” and states that predominant issues of race and class leave black and Hispanic boys particularly in trouble.<sup>147</sup> The National Association of Educational Progress (NAEP) shows that the difference between white boys and black and Hispanic boys at all levels outweigh the changes in overall performance of boys.<sup>148</sup> To this end, Ed Sector argues that focusing on gender gaps could distract attention from the bigger problems facing minority boys, a distraction it believes to be based on insufficient research. The report went on to state:

There is no sufficient evidence - or the right kind of evidence - available to draw firm conclusions. As a result, there is a sort of free market on theories about why boys are underperforming girls in school, with parents, educators, media, and the public choosing to give credence to the explanations that are the best marketed and that most appeal to their pre-existing preferences.<sup>149</sup>

In fact the report proposed a series of more traditional solutions, suggesting that, “the most reliable evidence available shows that proven approaches to educational reform — such as smaller classes, teachers with decent salaries and parental involvement — make much more sense than separating boys and girls based on outdated stereotypes.”<sup>150</sup>

Other evidence also suggests that males do not blossom in single-sex environments. Research indicates that they have “less favorable social experiences, develop a hyper-masculine ethos and attain no compensatory

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145. Mathews, *supra* note 141.

146. MEAD, *supra* note 89, at 3.

147. *Id.* See Verna L. Williams, *Reform or Retrenchment? Single-Sex Education and the Construction of Race and Gender*, 2004 WIS. L. REV. 15, 37, for a criticism of the theory that single-sex schools benefit African American males (“[S]ex segregation in education has the very real potential to retrench raced and gendered stereotypes, to the detriment of the very students these policies propose to serve.”).

148. MEAD, *supra* note 89, at 9.

149. *Id.* at 14.

150. Martin & Schwartzmann, *supra* note 144; *see also*, Simson *supra* note 136, at 453 (“[T]o the extent that single-sex schools do seem to yield advantageous results, there typically appears to be good reason to believe that the advantages derive not from the single-sex nature of the school but rather from other distinctive features of the school such as small class size, favorable faculty-student ratio, or special mentoring programs – features that could be replicated in coed schools”) (citing Levit, *supra* note 1, at 504-05, 522-23); *see also* Martha Minow, *Fostering Capacity, Equality, and Responsibility (And Single-Sex Education): In Honor of Linda McClain*, 33 HOFSTRA L. REV. 815, 823 (2005) (suggesting that resource allocation may be a more important focus than gender. “We should not let attention to potential disparities in the particular classes or programs offered to girls and boys within one school, or even within one school system, distract us from the enormous disparities between school systems.”).

academic advantages.”<sup>151</sup> In response to the new all-boys charter school in Philadelphia, Michael Churchill, chief counsel of the Public Interest Law Center of Philadelphia, asserted that evidence does not exist to support the contention that separate-sex education improves achievement for either boys or girls.<sup>152</sup> Additionally, only anecdotal evidence supports the claim that boys and girls prefer education without the distracting presence of the opposite sex.<sup>153</sup> Nancy Levit, a law professor and author of *The Gender Line: Men, Women and the Law*, contends, “the majority of research suggests that boys are served best, academically and socially, in coeducational environments. The effects of single-sex education for boys thus are at best, neutral, and at worst, negative.”<sup>154</sup>

The American Association of University Women (AAUW) also argues that the new regulations allow for “experimenting on our nation’s children with unproven, controversial options.”<sup>155</sup> The AAUW advocates that other areas of improvement are more important for student success.<sup>156</sup> It argues that the development of fair public schools is the way to really improve student achievement.<sup>157</sup> The AAUW bases its cautious approach to the Title IX regulations, in part, on its assessment that the research supporting the effect of single-sex education improving educational outcomes is inconclusive.<sup>158</sup> The AAUW cites a 2006 study conducted by the College of Education at Arizona State University that showed the research on single-sex education is either of unacceptable quality or inconclusive.<sup>159</sup> According to the study, the research is flawed by failure to control for certain variables such as class, financial status, selective admissions, religious values, poor learning or ethnicity.<sup>160</sup>

Many argue the studies simply do not establish that coeducational versus single-sex schools have a significant impact on student performance and achievement when compared to coeducational learning environments and, therefore, do not show that single-sex education provides a benefit.<sup>161</sup> However,

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151. Levit, *supra* note 1, at 521.

152. Woodall, *supra* note 131.

153. Levit, *supra* note 1, at 472-73.

154. Levit, *supra* note 1, at 500 (citing Lucinda M. Finley, *Sex-Blind, Separate but Equal, or Anti-subordination? The Uneasy Legacy of Plessy v. Ferguson for Sex and Gender Discrimination*, 12 GA. ST. U. L. REV. 1089, 1103-04 (1996)).

155. SEPARATED BY SEX, *supra* note 19.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* (citing GERALD W. BRACEY, EDUC. POL’Y RESEARCH UNIT, DEP’T OF EDUC., ARIZ. STATE UNIV. *Separate but Superior? A Review of Issues and Data Bearing on Single-Sex Education*, ii (2006)).

160. BRACEY, *supra* note 159.

161. Levit, *supra* note 1, at 498 (stating that “evidence claiming advantages to all male schools is principally anecdotal.”). On the issue of student “distractions” see also Amanda Datnow, Lea Hubbard & Elizabeth Woody, IS SINGLE GENDER SCHOOL VIABLE IN THE PUBLIC SECTOR? LESSONS FROM CALIFORNIA’S PILOT PROGRAM 56 (2001). Girls participating in the pilot program complained about noisy female peers and peers fought in the single-sex

media reporting can misconstrue the results and leave people believing otherwise.<sup>162</sup> It can lead to a “general consensus” about positive education and socialization effects of single-sex education which simply does not exist.<sup>163</sup>

Publicly popular and widely published sentiment regarding a sensitive topic such as education can be dangerous. Martin Mills presents an interesting case study in which he concludes that the media influenced people’s impressions of single-sex schooling in rural Australia.<sup>164</sup> Even discussion of the benefits of single-sex education in a small newspaper called *The Argus* with a circulation of just over 3,000 has the “potential to shape local school-based policies and to add to the wider body of media stories on single-sex classes in the large Australian newspapers.”<sup>165</sup> The publicity does two things. It reinforces the notion that boys are inadequately supported and it allows an opening for pressure to be exerted at the local level.<sup>166</sup> However contentious, the claim that girls outperform boys has acquired a certain amount of acceptance as a result of constant media commentary detailing boys’ disadvantage.<sup>167</sup> The discourse can also lead to the creation of de facto policies.<sup>168</sup> The media focus, where the debate acts as a marketing device,<sup>169</sup> does not lead to the nuanced understanding that is required when dealing with gender issues.<sup>170</sup>

Media coverage presents other problems in the context of the debate over single-sex education. Some academics claim the media attention to research has been misused for political ends to promote single-sex education.<sup>171</sup> Apart from anecdotal reports, these studies do not address whether single-sex education would provide a cure for pervasive and basic inequalities in daily interactions, grading, testing, esteem and discipline.<sup>172</sup> These studies can move the dialogue

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setting, although about different issues. The boys also described an increase in disruptive behavior without the girls to act as a buffer.

162. Levit, *supra* note 1, at 511; *see also* Lee, *supra* note 128, at 42-43 (noting that research on the benefits of single-sex education may be overstated due to the “file drawer problem,” meaning that studies which find a statistically significant difference in performance at single-sex versus coeducational settings are more likely to be published, while those finding no difference are not as likely to be published).

163. Levit, *supra* note 1, at 503.

164. Martin Mills, *The Media, Marketing, and Single-Sex Schooling*, 19 J. EDUC. POL’Y 343 (2004).

165. *Id.* at 345.

166. *Id.*

167. *Id.* at 357.

168. *Id.* at 345.

169. *Id.*

170. *Id.* at 352.

171. JUDITH S. KLEINFELD, *THE MYTH THAT SCHOOLS SHORTCHANGE GIRLS: SOCIAL SCIENCE IN THE SERVICE OF DECEPTION* 3 (1998) (exposing errors in research on girls and calling studies “politics dressed up as science”).

172. Levit, *supra* note 1, at 472.

away from the benefits of co-education.<sup>173</sup> This prevents exploration of more “equitable and effective educational environments.”<sup>174</sup>

Just as educators must be careful when relying on the needs objective to separate girls and boys for educational purposes, caution should also be exercised when taking advantage of the diversity objective. The diversity objective was not directly addressed by the Supreme Court in *United States v. Virginia* because it was not argued. The Court hinted that it would not have been successful, but did leave the issue open.<sup>175</sup> Therefore, diversity as an educational goal remains questionable. It has been suggested that diversity is “not a benefit claimed by educators, but rather is one promoted by political supporters.”<sup>176</sup>

Diversity is also a difficult concept to define. In fact, there is no real framework for determining what diversity means in the context of justifying single-sex education.<sup>177</sup> In his dissenting opinion in *Hogan*, Justice Powell stated that the diversity element of single-sex schools leaves students with an important choice among options different from coeducation.<sup>178</sup> Some, disagreeing with Powell’s interpretation, contend that providing single-sex options to promote diverse choices without regard to whether or not single-sex options reflect performance advantages is troublesome.<sup>179</sup> An alternative definition sees diversity as “providing an educational environment that mirrors the diversity of modern society.”<sup>180</sup> The “diversity of modern society” argument is obviously inconsistent with single-sex education where boy and girl students attend separate schools and separate classrooms. To the extent that separating students by sex creates homogeneity, it is hard to see how single-sex education creates diversity.<sup>181</sup> To this end, commenters argue that providing

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173. Levit, *supra* note 1, at 523; *see also* Sherwin, *supra* note 25, at 83 (arguing for an anti-segregation approach which would “emphasize that it is not necessary or even advisable, to segregate students by sex or to provide educational opportunities to one sex but not the other” and would stress that it is “possible to address differences in boys’ and girls’ educational needs within coeducational schools without reinforcing the conditions that create those differences.”); *see also* Pamela Haag, *Single-Sex Education in Grades K-12: What does the Research Tell Us?*, in *SEPARATED BY SEX*, *supra* note 19, at 15 (referencing the opinion of certain researchers that existing single-sex schools can serve as laboratories that actually “inform and improve the coeducational environment.”).

174. Levit, *supra* note 1, at 522.

175. 518 U.S. 515 at 534 n.7 (1996).

176. Levit, *supra* note 1, at 519.

177. *Id.* at 455.

178. *Mississippi v. Hogan*, 458 U.S. 718, 739 (1982).

179. Levit, *supra* note 1, at 522.

180. *Jones ex rel. Jones v. Bd. of Educ. of N.Y.*, 632 F. Supp. 1319, 1324 (E.D.N.Y. 1986).

181. Levit, *supra* note 1, at 520. *See also* Simson, *supra* note 136, at 453-54 (claiming that the diversity interest discussed in the context of single-sex schools has nothing to do with the interest the Supreme Court found compelling in *Grutter v. Bollinger*. There the interest was one in “attaining a diverse student body.” 539 U.S. 306, 328 (2003). Simson states that, “[I]f anything, creating a single-sex school option is counterproductive in terms of that interest. By excluding one sex from the school, it makes for a less diverse student

diverse educational options is not an important governmental interest for the purposes of the constitutional test for sex-based classifications.<sup>182</sup>

The Department of Education, adopting Justice Powell's interpretation, asserts that the diversity that is sought is that of educational choices available to parents.<sup>183</sup> Even though the Supreme Court has not decided the specific issue of whether this is an important governmental objective for the purposes of justification, the Court has suggested it would uphold the creation of different educational opportunities.<sup>184</sup> A school district could be successful in convincing a court that its single-sex admission policy does further an identifiable goal of increasing diverse educational options in the school system. Diverse educational opportunities might include "charter schools, magnet schools, coeducational schools, single-sex schools, ... coeducational and single-sex classes."<sup>185</sup>

#### VI. ADDITIONAL DANGERS

The Department of Education has admitted that the evidence on the value of single-sex education is not conclusive.<sup>186</sup> While recognizing the debate, the Department of Education nonetheless grants discretion to recipients of federal funds.<sup>187</sup> The regulations read in part:

although there is a debate among educators on the effectiveness of single-sex education, the final regulations permit each recipient to make an individualized decision about whether single-sex educational opportunities will achieve the recipient's important objective and whether the single-sex nature of those opportunities is substantially related to achievement of that important objective.<sup>188</sup>

Proponents of this discretion see it as positive. In a plea to Congress, Senator Kay Bailey Hutchison (R-TX), asked Congress to "drop the barriers.

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body and narrows the ranges of available student perspectives."). *See also* Sherwin, *supra* note 25, at 63 (distinguishing the diversity interest in VMI, to increase the types of educational institutions available to the public, with that set forth by the University of Michigan in *Grutter*, in which the goal was to increase the diversity of the student body within a single institution).

182. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, *supra* note 21, 62,534.

183. *Id.* at 62,536 n.34 (stating that the Supreme Court noted in *Virginia* that "diversity in educational opportunities is an altogether appropriate governmental pursuit and that single-sex schools can contribute importantly to such diversity."). *See also*, 34 C.F.R. § 106.34(b)(1)(iii)(2007) (parental choice remains a requirement as the regulations clearly require that student participation in a single-sex class must be completely voluntary.).

184. *U.S. v. Virginia*, 518 at 534 n.7.

185. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, *supra* note 21, at 62,534.

186. *Id.* at 62,532.

187. *Id.*

188. *Id.*

Open the options for public schools. Give parents a chance to have their child in public school have all the options that would fit the needs of that particular child.”<sup>189</sup> This sentiment supports the Department of Education going forward with the regulations, even while recognizing that the educational research suggesting that single-sex education provides benefits is questionable.<sup>190</sup> The regulations do not appear to sufficiently take into account that conflicting evidence may be misused.

In addition to the danger of society being influenced on the issue of single-sex schooling by media attention, the separation of students based on sex is what some consider a form of segregation.<sup>191</sup> Some argue that before segregating schools it is important to recognize the impact that segregation has had: its history, social meaning and impact.<sup>192</sup> Segregation is divisive and reinforces hierarchies within societies.<sup>193</sup> Historically, societies that support the segregation of women are also those that typically include more rigid and traditional gender roles.<sup>194</sup> These societies also tend to be those in which women are economic, social and political second-class citizens.<sup>195</sup> Sex exclusivity sponsored by the state sends social and psychological messages of inferiority and superiority.<sup>196</sup> A pilot program in California included the

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189. 147 Cong. Rec. 10181 (2001).

190. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, *supra* note 21, at 62,532.

191. Levit, *supra* note 1, at 514.

192. *Id.* See also, Sherwin, *supra* note 25, (describing a NOW-NYC action alert warning that “separation of the sexes in public schools would bring America back to the disgraceful and discredited model of ‘separate but equal’ which became a euphemism for legalized discrimination against African Americans.” (citing NOW-NYC, *RECREATING “SEPARATE BUT EQUAL” IN AMERICA: SEX-SEGREGATED SCHOOLS* (2002))).

193. Levit, *supra* note 1, at 516. See also Simson, *supra* note 136, at 450 (asking if boys are apt to perceive arguably sexist messages from single-sex schools and act upon them in ways that disadvantage girls and women). See also Sherwin, *supra* note 25, at 82 (“[S]ex segregation has historically been used as a tool to confine women to particular roles that correspond to the dominant society’s image of what was appropriate for ... women and their station in life, and to perpetuate race- and sex-based systems of inequality.”); accord Jill Elaine Hasday, *The Principle and Practice of Women’s “Full Citizenship:” A Case Study of Sex-Segregated Public Education*, 101 MICH. L. REV. 755, 807 (2002).

194. Levit, *supra* note 1, at 517.

195. See, e.g., DAPHNE SPAIN, *GENDERED SPACES* 248-51 (1992).

196. Levit, *supra* note 1, at 518. See also Cynthia Fuchs Epstein, *The Myths and Justifications of Sex Segregation in Higher Education: VMI and the Citadel*, 4 DUKE J. GENDER L. & POL’Y 101, 118 (1997) (“Without regular contact in early schooling, men and women may easily categorize and stereotype each other and be ill-prepared for the public life in which they will need to interact.”). See also KIM GANDY ET AL., COMMENTS OF THE NATIONAL ORGANIZATION FOR WOMEN ON THE DEPARTMENT OF EDUCATION’S NOTICE OF INTENT TO REGULATE ON SINGLE-SEX EDUCATION, <http://www.now.org/issues/education/single-sex-education-comments.html> (last visited November 13, 2007) (arguing that the principles adopted in *Brown v. Board of Education*, overruling separate but equal, apply to any plan for single-sex education in the public schools: “publicly sponsored segregation threatens to impose a badge of inferiority on historically disadvantaged groups.”).

opening of single-sex academies in six districts.<sup>197</sup> A 2001 study of the California program found that traditional gender stereotypes were often reinforced in the single-sex academies.<sup>198</sup> An additional concern is that single-sex education results in a reversion to sex-based stereotypes and roles.<sup>199</sup> Emily Martin and Katie Schwartzmann of ACLU Louisiana assert “new discoveries” about brain differences between boys and girls are simply new versions of old stereotypes “that boys must be bullied and girls must be coddled.”<sup>200</sup> They warn parents and students to examine the justifications for single-sex education and be sure that they are not based on the same stereotypes that have always limited the choices of girls and boys.<sup>201</sup>

## VII. JUDICIAL INTERPRETATION

The new Title IX regulations set forth the standards that the Department of Education will enforce. The regulations provide a framework by which the Department can assure schools’ compliance with Congress’s original nondiscrimination intent. The regulations note, however, that other laws such as the Equal Protection Clause and state and local laws, are applicable when creating single-sex educational schemes.<sup>202</sup> This is not to say that Title IX cannot be used to exert pressure on school districts. In fact, the American Civil Liberties Union sued under Title IX when it was concerned with a proposed single-sex educational scheme in Livingston Parish school district in

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197. AMANDA DATNOW ET AL., IS SINGLE GENDER SCHOOLING VIABLE IN THE PUBLIC SECTOR?: LESSONS FROM CALIFORNIA’S PILOT PROGRAM 5 (2001), available at <http://www.oise.utoronto.ca/depts/tps/adatnow/final.pdf>. (last visited November 13, 2007).

198. *Id.* at 6-7.

199. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, *supra* note 21, at 62,533. See also Hasday, *supra* note 193, at 795-801 (discussing the history of public single-sex education as one dominated by gender role stereotyping, with schools for boys emphasizing professional training and girls’ schools emphasizing training to be wives and mothers or to fill low-paying, low-status jobs).

200. Martin & Schwartzmann, *supra* note 144.

201. *Id.*

202. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, *supra* note 21, at 62,533. See also Inessa Baram-Blackwell, *Separating Dick and Jane: Single-Sex Public Education Under the Washington State Equal Rights Amendment*, 81 WASH. L. REV. 337, 362 (2006) (“Single-sex public education, including separate-but-equal educational settings, results in impermissible sex-based classifications by limiting, on the basis of sex alone, the educational opportunities available to a given male or female student.”).

Louisiana.<sup>203</sup> The district agreed to withdraw the plan to force children into single-sex classrooms the day after the suit was filed.<sup>204</sup>

Implementing single-sex education requires ensuring adequate safeguards are in place not only to protect students from adverse consequences, but also to prevent the hindering of innovative programs.<sup>205</sup> When determining whether districts have an adequate justification for creating single-sex educational environments, the courts have had, and will continue to have, an important role.

*Garrett v. Board of Education* demonstrates a court's refusal to accept certain justifications when school districts misuse the research.<sup>206</sup> In *Garrett*, the school district improperly used gender as a proxy for urban dangers that affected both sexes.<sup>207</sup> *Garrett* found that the Board of Education proffered no evidence that the presence of girls in the classroom bore a substantial relationship to the difficulties facing urban males.<sup>208</sup> This is an example of the standard the courts will apply when determining whether the research presented by a school district amounts to a sufficient justification. It is likely that the courts will continue to carefully scrutinize a district's justification for creating single-sex learning environments.

#### VIII. CONCLUSION

The Title IX regulations offer guidance as school districts carry out their educational mission, one that is fundamental to ensuring the successful futures of our children. The importance of education was emphasized by the Supreme Court in *Brown v. Board of Education*, when the Court stated that education is "required in the performance of our most basic public responsibilities" and is the "very foundation of good citizenship."<sup>209</sup> According to the new Title IX regulations, recipient districts must have specific objectives when creating new educational schemes and separation on the basis of sex cannot be based on overgeneralizations. These limitations, stemming from judicial precedent, act as safeguards against potential negative consequences of single-sex education. To protect against these dangers, decisions cannot be based on highly publicized warnings like those that have come from the media's portrayal of the "boy crisis."

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203. Rivera, *supra* note 5 (stating that the ACLU was able to exert this pressure under the old regulations, making it more difficult for public schools to implement single-sex educational schemes).

204. American Civil Liberties Union, *ACLU Wins Major Lawsuit Against Sex-Segregated School in Louisiana*, August 3, 2006, <http://www.aclu.org/womensrights/edu/26367prs20060803.html> (last visited Nov. 5, 2007).

205. Jenkins, *supra* note 9, at 1961.

206. 775 F.Supp. 1004, 1008 (E.D. Mich. 1991).

207. *Id.* at 1007.

208. *Id.*

209. 347 U.S. 483, 493 (1954). *See also* *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (acknowledging "education as pivotal to 'sustaining our political and cultural heritage'" (citing *Plyler v. Doe*, 457 U.S. 202, 221 (1982))).

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It is likely the constitutionality of single-sex classes and schools will ultimately depend on the social science evidence that is used to justify them.<sup>210</sup> As this Comment has argued, the social science and educational research is conflicting as to whether a “boy crisis” exists. Given the great influence that the popular media can have in reporting on the crisis, it is important to be aware of how the research is being used. This attentiveness is required as recipient districts begin to take advantage of the expanded opportunity to create single-sex educational options under the new Title IX regulations.

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210. Levit, *supra* note 1, at 454.