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Verdict

DECEMBER 9, 2014

JOANNA L. GROSSMAN

Tightening the Reins on Single-Sex Classes in Public Schools

The Department of Education's Office for Civil Rights (OCR) **just issued**



(<http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf>)

a much-needed clarification of its prior guidance on the legality of single-sex classes within public schools. A clarification of a guidance of a law may seem like the epitome of bureaucratic mumbo jumbo, but, in this case, the clarification was needed to halt a runaway train—single-sex classes being implemented in public schools around the country in clear violation of existing law and designed in ways more likely to create gender inequality than eradicate it.

Title IX and Single-Sex Education: Complicated and Changing Terrain

Title IX of the Education Amendments of 1972 prohibits schools that receive any federal funding from discriminating on the basis of sex. As a practical matter, this law applies to all public schools, as well as to most private colleges and universities. This core provision is supplemented by administrative regulations that explain the law's application to athletics, pregnancy, harassment, etc. The regulations also explain its application to single-sex education.

Under these regulations, private elementary and secondary schools can operate single-sex programs, without regard to the opportunities available to students of the other sex. Under the original regulations, however, public schools faced greater restrictions in single-sex education (both classes and entire schools) under Title IX, because they need to independently comply with the sex equality mandates of the Equal Protection Clause.

Public school districts could operate single-sex elementary and secondary schools only if they made a “comparable” school available to students of the excluded sex. OCR interpreted this regulation to require that the comparable school also be a single-sex school. So a school district could operate identical all-male and all-female schools, but could not offer particular programs in one, but not the other, nor operate a single-sex school for only one sex. A district could offer a single-sex school for only one sex if doing so was designed to compensate for past discrimination against students of that sex—a so-called affirmative action rationale.

The restrictions on single-sex classes within coeducational public schools, were even more stringent. Coeducational public schools could not offer single-sex classes, except for those involving participation in contact sports, and those primarily relating to human sexuality. Only if a single-sex class was designed to make up for prior discrimination against students of one sex could it be offered in any other subject.

Loosening of the Reins: The 2006 Education Regulations

In 2006, the Department of Education adopted new federal regulations designed to carry out George W. Bush’s desire to increase single-sex educational opportunities in public schools. Hundreds of single-sex classes and schools sprung up quickly after these regulations were adopted.

The 2006 regulations departed from the original ones most significantly by opening up the door generally to single-sex classes and extracurricular activities. Under the 2006 standard, a public elementary or secondary school can restrict classes or activities to one sex in order to meet one of two important objectives: (A) “To improve educational achievement of its students, through [an] overall established policy to provide diverse educational opportunities; or (B) To meet the particular, identified educational needs of its students.” (The former is generally called the “diversity objective,” while the latter is called the “needs objective.”) With respect to either objective, the “single-sex nature” of the program must be “substantially related to achieving that objective.”

If serving a valid objective, single-sex classes or activities are limited in only three ways: School districts must administer them in an evenhanded manner, student enrollment must be completely voluntary, and all students must be provided a “substantially equal

coeducational class or extracurricular activity.”

Schools were supposed to police their own compliance with these requirements. The regulations called for periodic self-evaluations to “ensure [single-sex programs] are based upon genuine justifications and do not rely on overly broad generalizations about the different talents, capacities, or preferences of either sex.”

Single-Sex Classes in Public Schools = Stereotypes Run Amok

When the 2006 regulations were adopted, many voiced concerns that the more lenient standards would throw open the door not just to single-sex classes, but also to free traffic in the gender stereotypes that Title IX was designed to eradicate. There was also a fear that single-sex education had few, if any, proven positive benefits to offset the harm from proliferating stereotypes. Those fears, it turns out, were certainly well taken.

An ACLU investigation revealed widespread violations of the law—and even more widespread reliance on the faux science and stereotypes that schools were cautioned to avoid. (Its preliminary findings are [here](https://www.aclu.org/files/assets/doe_ocr_report2_o.pdf) (https://www.aclu.org/files/assets/doe_ocr_report2_o.pdf.) Several schools were sued and ordered to eliminate the single-sex classes they had implemented, given that they openly violated even the lenient 2006 regulations. A public middle school in West Virginia, for example, was ordered to cease its single-sex classes because they were mandatory, rather than voluntary as the regulations require.

The ACLU found, after initial research in 21 school districts, that “many public school districts misapprehend the [new regulations] relating to single-sex classes and have instituted programs based on sex-stereotyped instruction.” Certainly one surprising aspect of these findings, which are discussed in more detail [here](https://verdict.justia.com/2012/09/18/single-sex-public-schools-and-classes) (<https://verdict.justia.com/2012/09/18/single-sex-public-schools-and-classes>), is that many schools failed to comply even with the clear, objective requirements like voluntariness and the requirement of self-evaluation. And most failed to articulate the required predicate—that they had a valid objective for segregating students by sex. School districts seemed to adopt single-sex classes simply because they were suddenly permitted to—not because they identified any problem such classes would solve.

And along the way to remedying a problem that might not have existed in the first place, many of the schools were at least potentially causing harm. The ACLU also found that “[v]irtually all” of the programs studied “were premised on the theory that ‘hardwired’ physiological and developmental differences between boys and girls necessitated the use of different teaching methods in sex-separated classrooms.” This methodology is based in many cases on the work of Leonard Sax and Michael Gurian, both of whom have argued

that biological differences between boys and girls dictate different educational responses. To take just one example, Gurian “has claimed that boys are better than girls in math because their bodies receive daily surges of testosterone, while girls have similar skills only ‘a few days a month’ when they experience ‘increased estrogen during the menstrual cycle.’”

A Much-Needed Course Correction: The December 2014 Clarification

In light of the concerns raised by the ACLU and others, and the successful lawsuits against public schools, OCR issued a clarification of the existing regulations. This document, **available here (<http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf>)**, does not change the regulations themselves; it merely answers questions about the rules in the hopes that schools will be better equipped to assess their own compliance. By publicizing and explaining the rules, the clarification will also make it more likely that parents and students will more easily be able to challenge violations in their home districts—and when and if OCR conducts an audit or investigates a complaint, the agency will be better able to spot and remedy violations. The paragraphs below highlight some of the most important issues tackled in the clarification.

Justification for Single-Sex Classes or Activities: Each individual class or activity from which members of one sex are excluded must be justified either under the “diversity objective” or the “needs objective”. Thus, while a school may have a valid objective served by single-sex classes in one subject, it must articulate an independent objective for single-sex classes in any other subject. Also, a school must establish its valid objective before offering the single-sex class. During an audit or investigation, OCR will ask for proof of the documented, real reason for the offering, rather than a post hoc rationalization.

Diversity Objective: The clarification states that a single-sex format cannot be the only “diversity” in the educational curriculum. Rather, a school citing this objective must point to other diverse offerings or teaching styles in order to defend a single-sex class under this rubric. It gives (and approves) the example of a school that seeks to improve college preparedness by offering a variety of electives and specialized curricular options—and some single-sex Advanced Placement classes.

Needs Objective: To justify single-sex classes based on need, a school must identify a particular educational need, “evidenced by limited or deficient educational achievement,” and show that the single-sex offering is substantially related to remedying the deficiency. These offerings can be used to remedy learning as well as social deficits—e.g., a single-sex extracurricular program designed to reduce a known problem of dating violence. Administrative convenience can “never justify the offering of single-sex classes,” the clarification states. Moreover, there must be a substantially equal co-educational option

to every single-sex class offered. (Whether a class is substantially equal depends on a variety of enumerated factors.)

Substantial Relationship to the Important Objective: On this score, the clarification presses schools to do legwork that few, if any, have done before adopting single-sex offerings. Schools must provide direct evidence, before changing the curriculum, that single-sex offerings are likely to remedy the cited problem and do not “rely on overbroad generalizations about the different talents, capacities, or preferences of either sex.” It suggests collecting data from comparator schools that have used similar offerings to remedy similar problems—and using all non-gender-related strategies first before resorting to single-sex classes. The clarification recommends reliance on evidence-based research showing that the strategy the school proposes is likely to work. It emphasizes the need for research that is designed to draw causal (as opposed to merely correlative) inferences. Finally, OCR states that the claim that a certain teaching strategy is more effective for one sex than the other does not by itself, even if true, justify single-sex offerings. The evidence must show also that such a strategy works better (or works only) in a single-sex setting. In other words, if it were proven that boys benefit from a certain learning style more than girls, it must also be shown that the benefit can only be captured if girls are excluded from the room while it is being invoked.

Evenhandedness: Even if single-sex classes serve a valid objective, they must also be evenhanded. The clarification states first that this means single-sex offerings for one sex must be offset by single-sex offerings for the other. If curricular diversity is the cited objective, the “diversity” must be equally available to both sexes. The classes do not necessarily have to be offered in the same subjects, but a school must base its choices on pre-enrollment information collected from parents and students. If “need” is the cited objective, schools must target the offerings precisely—if both sexes need a single-sex math class, both must get it. If only one needs it, the other one cannot have it imposed, but must get something in another subject.

Voluntariness: The longstanding rule that single-sex classes must be voluntary seems very clear. And yet, it is routinely violated. The clarification states that enrollment in a single-sex class must be “completely voluntary” and urges schools to collect affirmative consent from parents before enrollment. It provides further that schools cannot require students to “opt out” of a single-sex class—a known technique for coercing inclusion—but must ask them to “opt in” instead. It must also equalize the registration process for single-sex and coeducational classes, so as not to subtly influence a student’s decision. OCR also encourages dissemination of significant pre-enrollment information so parents and students can make informed decisions about whether to enroll in single-sex classes.

Periodic Evaluations: The clarification provides substantial advice on how to conduct the

required biannual self-evaluations. It urges schools to examine not only offerings, but also teaching methods to ensure teachers do not employ sex stereotyped methods. For example, if teachers have learned that boys are born with less sensitive hearing than girls, they might follow Joseph Saks’s suggestion to talk loudly to boys in the classroom to boys, but quietly and gently to girls. However, teachers could not rely on this discovery, even if true, unless there was also scientific evidence that different teaching methods (e.g., loud talking) were more effective for boys than girls. As the clarification explains, the “leap from the biological differences to the use of a particular method or strategy for students of one sex, without the support of evidence regarding the educational effectiveness of the method or strategy for one sex over the other, resulted in an overly broad generalization (that loud talking would improve boys’ ability to learn).” Teachers could still talk more loudly to boys than girls, but to do it in a single-sex setting requires more targeted evidence.

Transgender Students: Buried at the end of the clarification, OCR states that transgender students are to be evaluated, enrolled, and so on, based on their gender identity (as opposed to birth or anatomical sex).

Conclusion

OCR’s clarification rightly responds to the questionable and likely harmful implementation of single-sex classes and activities in public schools. The 2006 regulations were focused on increasing the number of these offerings without focusing on the need for them or the harm they might entail. This clarification is a potent reminder that public schools must heed not only the mandates of Title IX, but also the Equal Protection principles that have all but dispensed with the separate-but-equal notion in the gender context. And single-sex offerings, at least as deployed in most instances, fly directly in the face of our modern notions of equality. Schools that continue to violate the existing regulations with regard to single-sex classes do so at their peril.



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