

# SINGLE-SEX EDUCATION

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## I. INTRODUCTION

Does single-sex education provide developmental benefits and encourage women to pursue non-traditional fields? Or does single-sex education allow gender stereotypes to go unchallenged? In an educational system with a history of segregation along gender, racial, and economic lines, the question of whether single-sex education promotes gender equity remains uncertain. The legality of single-sex schooling, particularly for primary and secondary institutions, is similarly unclear.

For a large number of public elementary and secondary school students, the experiment is already in place. As of the 2014-2015 school year, about 283 public schools qualify as single-sex schools in that most or all school activities occur in

single-sex settings.<sup>1</sup> In March 2002, by contrast, only about twelve public schools offered single-sex classrooms to their students.<sup>2</sup>

While many students and parents have welcomed single-sex educational opportunities, scholars and civil rights groups such as the National Organization for Women (“NOW”), the American Civil Liberties Union (“ACLU”), and the National Association for the Advancement of Colored People (“NAACP”) believe that the separation of the sexes in education undermines the fight for gender equality. As a result, these groups have voiced strong opposition to the expansion of single-sex education.<sup>3</sup>

The original limitations on single-sex education derived from the Equal Protection Clause of the Fourteenth Amendment.<sup>4</sup> Congress established further limitations in 1972 through Title IX of the Education Amendments, which prohibits discrimination on the basis of sex in any federally-funded education program or activity.<sup>5</sup> Despite the Equal Protection Clause and Title IX, some single-sex public schools have survived legal challenges. Over the past decade, there has been an increased interest in providing single-sex educational opportunities in co-ed public schools.<sup>6</sup>

This article will examine the current legal status of single-sex schooling in primary and secondary education. Part I will set up the constitutional framework for single-sex schooling. Part II will provide an overview of the legal status of single-sex schools in elementary and secondary education, including consideration of the impact of the No Child Left Behind Act of 2001, its successor, the Every Student Succeeds Act of 2015, and subsequent regulations on single-sex elementary and secondary education, as well as popular arguments for and against increased expansion of single-sex classes and schools. Part III will discuss legal considerations in the context of higher education, including Title IX and major Supreme Court cases. Part IV will consider arguments for and against single-sex

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1. Corey Mitchell, *Single-Gender Public Schools in 5 Charts*, EDUC. WK. (Nov. 2, 2017), <https://www.edweek.org/ew/section/multimedia/single-gender-public-schools-in-5-charts.html>.

2. Kenneth Jost, *Single-Sex Education*, CQ RESEARCHER (July 12, 2002), <https://library.cqpress.com/cqresearcher/document.php?id=cqresrre2002071200>.

3. See Rosemary C. Salomone, *SAME, DIFFERENT, EQUAL: RETHINKING SINGLE-SEX SCHOOLING* 40 (2003); see also Allie Bohm, *Back to School Minus the Sex Stereotypes*, AM. CIVIL LIBERTIES UNION (Sept. 10, 2013, 1:33 PM), <https://www.aclu.org/blog/womens-rights/womens-rights-education/back-school-minus-sex-stereotypes> (stating that “[s]chools separating students by sex and designing curriculum around gender stereotypes convey the message-intentionally or not-that there are particular ways ‘normal’ boys or girls ought to think or behave”).

4. U.S. CONST. amend. XIV, § 1.

5. Educational Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235 (1972) (codified as amended at 20 U.S.C. 1681); see also Verna L. Williams, *Reform or Retrenchment?: Single-Sex Education and the Construction of Race and Gender*, 2004 WIS. L. REV. 15, 29 (2004).

6. See Jenni White, *Growing Trend Toward Single-Sex Schools Expands Education Options*, THE HEARTLAND INST. (Jan. 24, 2018), <https://www.heartland.org/news-opinion/news/growing-single-sex-education-trend-gives-public-school-parents-options> stating that “[n]ew charter schools devoted to single-sex education are springing up across the country, and formerly co-ed public schools are adding single-sex classrooms”).

education and the need for additional research in this area. Finally, Part V will explore the future challenges and changes to single-sex education. By providing an overview of the legal history of single-sex schooling in elementary and secondary education, this article will create a framework for understanding the current debate over single-sex schooling.

## II. CONSTITUTIONAL AND STATUTORY FRAMEWORK—EQUAL PROTECTION CLAUSE

The Fourteenth Amendment of the U.S. Constitution prohibits states from denying citizens equal protection of the laws.<sup>7</sup> The Supreme Court has also held that the Fifth Amendment of the Constitution contains an equal protection component that constrains the federal government in a similar manner.<sup>8</sup> Although the Constitution does not provide a fundamental right to education,<sup>9</sup> current Equal Protection jurisprudence requires heightened scrutiny of any laws that treat citizens differently based on suspect classifications like race, ethnicity, and sex.<sup>10</sup> The Court in *Brown v. Board of Education*, applying strict scrutiny<sup>11</sup> to school assignments based solely on race, construed the Equal Protection Clause to mean that “in the field of public education the doctrine of ‘separate but equal’ has no place.”<sup>12</sup> Although *Brown* struck down racial segregation in public education, the theory that separate is “inherently unequal” has been noticeably absent from cases challenging gender discrimination in public education.<sup>13</sup> Furthermore, at least two courts have ruled that schools which segregate students by sex are constitutional.<sup>14</sup>

7. U.S. CONST. amend. XIV, § 1.

8. See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (“This Court’s approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment”); *Bolling v. Sharpe*, 347 U.S. 497, 498–500 (1954) (holding that discrimination held unconstitutional under the Equal Protection Clause of the Fourteenth Amendment also violates the Due Process Clause of the Fifth Amendment).

9. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

10. See *Brentwood Acad. v. Tenn. Secondary Athletic Ass’n*, 531 U.S. 288, 295 (2001) (“state action may be found if, though only if, there is such a ‘close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself.’” (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1975)); *Reed v. Reed*, 404 U.S. 71, 75 (1971) (applying heightened scrutiny to gender); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (applying heightened scrutiny to race). However, it is important to note that the equal protection clause applies only to state action and thus does not apply to private schools unless state influence can be established. See *The Fourteenth Amendment and the State Action Doctrine*, 24 WASH. & LEE L. REV. 133 (1967).

11. 347 U.S. 483 (1954); see *Korematsu*, 323 U.S. at 216 (noting that legal restrictions that curtail the rights of any single racial group are automatically suspect and subject to rigid scrutiny).

12. *Brown*, 347 U.S. at 495.

13. See *United States v. Virginia*, 518 U.S. 515, 553–56 (1996) (holding that the exclusion of women from the all-male Virginia Military Institute was unconstitutional because its proposed remedy, the alternative Virginia Women’s Institution for Leadership was not equal to the all-male Virginia Military Institute but noting that the constitutionality of an “equal” all-female institution may remain an open question).

14. See *Vorchheimer v. Sch. Dist. (Vorchheimer II)*, 532 F.2d 880, 888 (3d Cir. 1976), *aff’d*, 430 U.S. 703 (1977); *A.N.A. ex rel. S.F.A. v. Breckinridge Cty. Bd. of Educ.*, 833 F. Supp. 2d 673, 678 (W.D.Ky. 2011).

In the last thirty years, the Supreme Court has spoken only three times on the issue of single-sex education.<sup>15</sup> Yet, these few decisions, combined with federal legislation, have changed the legal landscape for treatment of sex in educational contexts.<sup>16</sup> The Supreme Court's two-pronged analysis for determining whether state action violates the Equal Protection Clause asks (1) whether the goal sought to be achieved is constitutional, and (2) whether the means implemented are sufficiently related to achieving that goal.<sup>17</sup> Over time, as the Court has applied this analysis to various cases and situations, a hierarchy of "classifications" has developed. Strict scrutiny, the most stringent analysis applied by courts, is reserved for classifications based on race and requires that a state's conduct be necessary to further a compelling state interest.<sup>18</sup>

Prior to 1976, the Court recognized only one other level of scrutiny—minimal scrutiny or the rational basis test—which requires only that state conduct be rationally related to a legitimate state purpose.<sup>19</sup> Because sex classifications were considered less "invidious" than racial classifications, courts originally applied the rational basis test<sup>20</sup> and thereby increased the likelihood that future courts would uphold sex classifications.<sup>21</sup> Thus, in *Hoyt v. Florida*, a law that exempted females from jury service was held constitutional because, despite women's "entry into many parts of community life formerly considered to be reserved to men, [a] woman is still regarded as the center of home and family life."<sup>22</sup> In *Goesaert v. Cleary*, the Court determined that it was reasonable for a Michigan law to prevent all women from being bartenders unless their husband or father was the tavern owner because "the oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight."<sup>23</sup>

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15. See *Virginia*, 518 U.S. at 515; *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Vorchheimer, aff'd* 430 U.S. 703.

16. Congress enacted Title IX pursuant to its powers under U.S. CONST. amend. XIV, § 5. See *The 14th Amendment and the Evolution of Title IX*, U.S. CTS., <https://www.uscourts.gov/educational-resources/educational-activities/14th-amendment-and-evolution-title-ix>.

17. See Laura Fortney, Comment, *Public Single-Sex Elementary Schools: "Separate But Equal" in Gender Fifty Years Following Brown v. Board of Education*, 35 U. TOL. L. REV. 857, 861 (2004).

18. See *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (holding that a Virginia prohibition on interracial marriages violates the equal protection clause because the racial classification is not "necessary to the accomplishment of some permissible state objective"); Holly Dyer, Comment, *Gender-Based Affirmative Action: Where Does it Fit in the Tiered Scheme of Equal Protection Scrutiny?*, 41 KAN. L. REV. 591, 594 (1993) ("Strict scrutiny requires that there be a compelling government interest or purpose and that the means employed to remedy the discrimination closely fit that purpose.").

19. See Fortney, *supra* note 17, at 861.

20. See Dyer, *supra* note 18, at 596.

21. See *id.* at 592.

22. 368 U.S. 57, 62 (1961).

23. 335 U.S. 464, 466 (1948); see also *Bradwell v. Illinois*, 83 U.S. 130, 142 (1872) (holding law prohibiting women from joining the state bar constitutional because a legislature could rationally believe that the practice of law requires "decision and firmness which are presumed to predominate in the sterner sex").

Over a period of roughly twenty years, the Supreme Court struggled with the question of where to place sex classifications within the scrutiny hierarchy. In a 1973 plurality decision by Justice Brennan, four justices recognized that “sex, like race . . . is an immutable characteristic determined solely by the accident of birth”<sup>24</sup> and as such “[is] inherently suspect, and must therefore be subjected to strict judicial scrutiny.”<sup>25</sup> Only three years later, in *Craig v. Boren*, the Court established “intermediate scrutiny” for sex classifications, a standard requiring that sex classifications “serve important governmental objectives” and “be substantially related to achievement of those objectives.”<sup>26</sup>

In the 1979 plurality decision of *Personnel Administrator v. Feeny*, the Supreme Court further stated that the “important government objective” prong of the “intermediate scrutiny” standard “would require an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment.”<sup>27</sup> The “exceedingly persuasive justification” standard was adopted by a majority of justices in the 1981 decision in *Kirchberg v. Feenstra*.<sup>28</sup> The Supreme Court has continued to use the “exceedingly persuasive justification” standard in subsequent cases in the context of single-sex higher education.<sup>29</sup> However, scholars question the clarity of the “exceedingly persuasive justification standard” in the context of single-sex higher education.<sup>30</sup> As the Supreme Court takes a more conservative turn with the recent appointments of Justices Neil Gorsuch and Brett Kavanaugh, the “exceedingly persuasive justification” standard may disappear altogether.<sup>31</sup>

24. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

25. *Id.* at 688.

26. 429 U.S. 190, 197 (1976) (holding Oklahoma law prohibiting the sale of non-intoxicating beer to males under the age of 21 and to females under the age of 18 unconstitutional).

27. 442 U.S. 256, 273 (1979).

28. 450 U.S. 455, 461 (1981) (stating “the burden remains on the party seeking to uphold a statute that expressly discriminates on the basis of sex to advance an ‘exceedingly persuasive justification’ for the challenged classification”).

29. See *United States v. Virginia*, 518 U.S. 515, 524 (1996); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

30. See Herman D. Hoffman, *Exceedingly [Un]persuasive and Unjustified: The Intermediate Scrutiny Standard and Single-Sex Education and United States v. Virginia*, 2015 MICH. ST. L. REV. 2047, 2072-94 (2015); R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The Base Plus Six Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 238 (2002); Pherabe Kolb, Comment, *Reaching for the Silver Lining: Constructing a Nonremedial Yet “Exceedingly Persuasive” Rationale For Single-Sex Education in Public Schools*, 96 NW. U. L. REV. 367, 374 (2001) (noting that the “exceedingly persuasive” rationale led “some legal scholars to question whether the legal standard for reviewing gender classifications had been drastically altered”); Elizabeth Douglas, Note, *United States v. Virginia: Gender Scrutiny Under an “Exceedingly Persuasive Justification” Standard*, 26 CAP. U. L. REV. 173, 179-80 (1997) (stating that “with no clear standard of what constitutes an exceedingly persuasive justification for gender discrimination, Equal Protection Clause jurisprudence has given rise to much debate regarding the implications of this seemingly heightened level of intermediate scrutiny”).

31. See Wilson R. Huhn, *The Impact of Justice Scalia’s Replacement on Gender Equality Issues*, 8 CONLAWNOW 47, 51 (2001).

### III. ELEMENTARY AND SECONDARY EDUCATION

#### A. EQUAL EDUCATIONAL OPPORTUNITY ACT OF 1974

There has been debate over the Equal Educational Opportunity Act's (EEOA) applicability to sex<sup>32</sup> because the factual context in which it was passed centered almost entirely on the issues that arose after *Brown*.<sup>33</sup> However, the plain language of the EEOA declares that "all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin" and that "the neighborhood is the appropriate basis for determining public school assignments."<sup>34</sup> This Act could be particularly relevant in filling the gap left by Title IX because, unlike Title IX, it was specifically intended to cover elementary and secondary education. Congress begins the EEOA with the specific finding that dual school systems in which school assignments are based solely on race, color, sex, or national origin deny the affected student equal protection of the laws.<sup>35</sup> Although this language directly parallels *Brown*, the explicit inclusion of sex broadens its potential applicability. But despite the EEOA's plain language, courts that have considered the EEOA have dismissed the inclusion of "sex" as incidental and ambiguous because the bulk of the EEOA does not address that issue.<sup>36</sup>

#### B. VORCHHEIMER V. SCHOOL DISTRICT OF PHILADELPHIA

The Supreme Court most recently considered the issue of single-sex education in a secondary school setting in 1977, when a divided Supreme Court affirmed without opinion a Third Circuit Court of Appeals decision upholding an all-boys admission policy in *Vorchheimer v. School District of Philadelphia*.<sup>37</sup> However, subsequent appeals court and state-level decisions have modified and limited *Vorchheimer*, indicating a refusal to permit racial discrimination or discrimination on the basis of sex when alternate educational offerings are not substantially similar.<sup>38</sup>

In *Vorchheimer*, a female student, who graduated with honors from a Philadelphia middle school brought suit on behalf of similarly situated students

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32. See, e.g., *Vorchheimer v. Sch. Dist. (Vorchheimer II)*, 532 F.2d 880, 885 (3d Cir. 1976), *aff'd* 430 U.S. 703 (1977) (holding that because the EEOA does not explicitly prohibit schools from segregating based on sex, but does forbid segregation based on race, color, or national origin, the legislation has little value to the single-sex education debate).

33. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

34. Equal Education Opportunity Act of 1974, 20 U.S.C.A. § 1701(a) (West, Westlaw through P.L. 115-231 (also includes P.L. 115-233 to 115-244, 115-246 to 115-250 and 115-253)).

35. *Id.* § 1702(a)(1) (stating 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").

36. See, e.g., *Vorchheimer II*, 532 F.2d at 884.

37. *Vorchheimer v. Sch. Dist. (Vorchheimer III)*, 430 U.S. 703 (1977).

38. See, e.g., *United States v. Hinds Cty. Sch. Bd.*, 560 F.2d 619, 622-23 (5th Cir. 1977); *Newberg v. Bd. of Pub. Educ.*, 26 Pa. D. & C.3d 682, 711 (1983).



when she was denied entrance to the all-male Central High School because of her sex. The trial court found that the availability of an all-female high school of similar caliber did not provide an equal educational opportunity.<sup>39</sup>

Relying heavily on trial court stipulations about the comparable offerings and opportunities provided by the two schools, the Third Circuit held that the school admissions policy was constitutional.<sup>40</sup> The Third Circuit also found that the plaintiff's statutory claims were without merit, holding that Title IX non-discriminatory admissions requirements did not apply to secondary schools.<sup>41</sup> The Third Circuit further held that the only applicable law was the Equal Protection Clause because the text of the EEOA contradicted previous legislative history, did not adequately address the issue of single-sex education, and was equivocal.<sup>42</sup>

In assessing the facts under the Equal Protection Clause, the Third Circuit first considered *Reed v. Reed*, in which the Supreme Court applied the intermediate scrutiny "fair and substantial relationship" test to strike down an Idaho law preventing a female from acting as executor of an estate if a qualified male was available.<sup>43</sup> The court then discussed *Williams v. McNair*, wherein the Supreme Court affirmed without opinion a district court decision permitting South Carolina to deny men admission to the Winthrop College because the state had a "rational justification" for maintaining an all-women's college.<sup>44</sup> The court indicated a preference for the *Williams* test, but it ultimately declined to decide whether rational basis or intermediate scrutiny applied, finding that under either test, the school board satisfied its equal protection burden by providing all-male and all-female secondary schools of equal quality.<sup>45</sup> Furthermore, it held that the local school boards had a substantial interest in determining the best methods of educating the children in its jurisdiction and that the school boards should determine whether it was in the children's best interest to provide parents with the option of a public, single-sex school. According to the Third Circuit, the school district's interest in providing the best possible education was substantially related to the method of single-sex schooling.<sup>46</sup>

The Supreme Court's consideration of *Vorchheimer* is the only Supreme Court decision to date to specifically address single-sex education on an elementary and secondary level. Its value as precedent is uncertain at best, as the equally

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39. *Vorchheimer v. Sch. Dist. of Phila. (Vorchheimer I)*, 400 F. Supp. 326 (D. Pa. 1975).

40. See *Vorchheimer II*, 532 F.2d at 882 (3d Cir. 1976) (supporting party stipulation that "the schools for boys and girls are comparable in quality, academic standing, and prestige").

41. See *id.* at 883.

42. *Id.* at 886.

43. *Reed v. Reed*, 404 U.S. 71, 76-77 (1971).

44. *Williams v. McNair*, 316 F. Supp. 134, 138 (D.S.C. 1970), *aff'd*, 401 U.S. 951 (1971).

45. *Vorchheimer II*, 532 F.2d at 888. Although the court declined to determine whether the rational relationship test or substantial relationship test applied, it held that single-sex education reflected a "controverted, but respected theory that adolescents may study more effectively in single-sex schools," and thus could meet either burden of proof. *Id.*

46. *Id.*

divided<sup>47</sup> Court affirmed the Third Circuit's holding without opinion.<sup>48</sup> By affirming without opinion, the Court failed to answer what degree of scrutiny should apply to single-sex schools at this level. Accordingly, while the case presented an opportunity to address explicitly the separate-but-equal doctrine in the context of sex and to establish definitively the standard of review for sex classifications, the Court left those questions largely unanswered.

### C. POST-*VORCHHEIMER*, PRE-NO CHILD LEFT BEHIND ACT LITIGATION

Subsequent appeals courts and state decisions have interpreted *Vorchheimer* as a narrow and frequently inapplicable standard.<sup>49</sup> First, courts have asserted that sex-based segregation will not be permitted when the true intent of such segregation is to force continued racial segregation. In *U.S. v. Hinds County School Board*, the Fifth Circuit held that the EEOA prevented the Amite County, Mississippi, school district from offering only single-sex classes when the true motivation of such gender segregation was to perpetuate racially-based segregation.<sup>50</sup> Furthermore, the court held that *Vorchheimer* did not apply because, whereas *Vorchheimer* indicated that local school boards had a substantial interest in offering parents a choice between single-sex and co-educational public schools, Hinds County only offered single-sex schools.<sup>51</sup> Thus, because Hinds County did not offer an alternative to single-sex schools, the Fifth Circuit found its policy unconstitutional.<sup>52</sup>

Likewise, sex segregation will not be permitted when the state fails to provide a substantially similar educational offering for both sexes. In *Newberg v. Board of Public Education*, the Philadelphia County Court of Common Pleas again considered a suit from females who wished to obtain admission to Philadelphia's all-male Central High School.<sup>53</sup> The court refused to extend *res judicata* to *Vorchheimer*, finding that the plaintiff's counsel in *Vorchheimer* failed to make materially adequate representation of plaintiff's cause because counsel failed to note that Central offered a bachelor of the arts degree in addition to a high school diploma, offered twenty-five thousand more library books, had three times more faculty with Ph.D.'s, had a substantially greater endowment, and provided numerous other benefits that Girls' High did not.<sup>54</sup> Accordingly, because the two schools were not "separate but equal" and students at Girls' High received a

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47. Justice Rehnquist took no part in the consideration or decision of this case. *Vorchheimer v. Sch. Dist. (Vorchheimer III)*, 430 U.S. 703, 703 (1977).

48. *Id.*

49. *See* *United States v. Hinds Cty. Sch. Bd.*, 560 F.2d 619, 622-24 (5th Cir. 1977); *Newberg v. Bd. of Pub. Educ.*, 26 Pa. D. & C.3d 682, 705 (1983).

50. 560 F.2d at 622-23 (5th Cir. 1977); *see also* *United States v. Georgia*, 466 F.2d 197 (5th Cir. 1972) (remanding single-sex education case to a lower court to determine whether a Georgia single-sex school was being used to perpetuate racial segregation).

51. *Hinds Cty.*, 560 F.2d at 624 n. 7.

52. *Id.*

53. *Newberg v. Bd. of Pub. Educ.*, 26 Pa. D. & C.3d 682 (1983).

54. *Id.* at 702-04.



disparately lower quality education than those at Central, the policy failed the substantial relationship test.<sup>55</sup> The court did not assess the policy in light of a rational relationship test, and the school district opted not to appeal the court's ruling. It is therefore unclear whether a higher court would have instead applied a rational relationship test that might permit segregated education to continue.

In *Garrett v. Board of Education of the School District of the City of Detroit*, the Eastern District of Michigan granted an injunction preventing Detroit from operating six all-male academies.<sup>56</sup> The Detroit school board had established the schools in an effort to counteract rising dropout, homicide, and unemployment rates among African American males.<sup>57</sup> The court found that even though this goal was laudable, it was not strong enough to permit the existence and operation of such schools when the school district failed to offer a similar program for females.<sup>58</sup> The court held that the proposed schools were not substantially related to a government purpose, noting that “[a]lthough co-educational programs have failed, there is no showing that it is the co-educational factor that results in failure.”<sup>59</sup> The court expressed acute concern over the “prospect that should the male academies proceed and succeed, success would be equated with the absence of girls rather than any of the educational factors that more probably caused the outcome.”<sup>60</sup> The court additionally held to be insufficient the fact that Detroit had considered and was in the process of developing a similar academy for girls, finding that girls would be irreparably harmed if the court permitted the all-male academies to begin operating and females were denied benefits similar to those of males for even one semester.<sup>61</sup>

Despite *Newberg* and *Garrett*, the 1990s did witness the formation of some single-sex public schools, most notably The Young Women's Leadership School (TYWLS) in East Harlem, New York. Founded in 1996 by Ann Rubenstein Tisch in association with the New York Public School System, the school represented the first all-girls school in New York City since before the passage of Title IX and the EEOA.<sup>62</sup> Despite complaints filed against it in 1996 by the New York Civil Rights Coalition and the National Organization for Women, and a 1997 preliminary finding by the United States Department of Education's Office of Civil Rights (OCR), the academy has neither converted to a co-ed institution nor has it converted to a private institution.<sup>63</sup> Following the founding of the Harlem school,

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55. *Id.* at 711.

56. *Garrett v. Bd. of Educ. of Sch. Dist. of City of Detroit*, 775 F. Supp. 1004, 1014 (E.D. Mich. 1991).

57. *Id.* at 1006.

58. *Id.* at 1012–14.

59. *Id.* at 1007.

60. *Id.*

61. *Id.* at 1014 n. 14.

62. See *History*, STUDENT LEADERSHIP NETWORK, <https://www.studentleadershipnetwork.org/history/> (last visited Jan. 16, 2019).

63. See Jacques Steinberg, *All-Girls Schools May Violate Rights of Boys, Officials Say*, N.Y. TIMES (Sept. 18, 1997), <https://www.nytimes.com/1997/09/18/nyregion/all-girls-school-may-violate-rights-of-boys-officials-say.html>. The school and civil rights groups ultimately reached a stalemate; while the

the Young Women's Leadership Foundation has established similar schools in New York City and commissioned affiliates in several states throughout the country.<sup>64</sup> To date, these schools have withstood inquiries by OCR;<sup>65</sup> it is likely that any additional challenges brought to OCR would be rejected.

#### D. NO CHILD LEFT BEHIND ACT

The No Child Left Behind Act of 2001 ("NCLB") and subsequent Department of Education amendments to the NCLB regulations attempted to provide school districts with additional flexibility to experiment with single-sex education.<sup>66</sup> NCLB reauthorized the Elementary and Secondary Education Act of 1965 ("ESEA"),<sup>67</sup> which, in part, aimed "to provide for education reform programs that provide same-gender schools and classrooms."<sup>68</sup> Amendment No. 540 provided that "school districts should have the opportunity to spend federal educational funds on promoting single-sex opportunities so long as they are consistent with applicable law."<sup>69</sup> The amendment's sponsor, Senator Kay Bailey Hutchison (R-TX), concluded her remarks to the Senate with a plea to the Department of Education to "drop the barriers." Open the options for public

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chancellor of the New York City Public School System and the civil rights groups both threatened to take the issue to court, there is scant evidence that this occurred. Following the passage of the No Child Left Behind Act in 2001, discussed *infra* section III.D, and its replacement in 2015 with the Every Student Succeeds Act, discussed *infra* section III.F, any such legal challenge would presumably have been dropped.

64. For a list of TYWLS schools in the New York City area, see *The Young Women's Leadership Schools*, STUDENT LEADERSHIP NETWORK, <https://www.studentleadershipnetwork.org/program/the-young-womens-leadership-schools/> (last visited Jan. 16, 2019). For a list of nationwide affiliates, see *Young Women's Leadership Network Affiliate Schools*, STUDENT LEADERSHIP NETWORK (last visited Jan. 16, 2019).

65. See generally Michael Meyers, *The long, futile fight against same-sex public schools: We lost—because neither local nor federal officials ultimately care about gender segregation in education*, N.Y. DAILY NEWS (Nov. 9, 2015), <https://www.nydailynews.com/opinion/michael-meyers-same-sex-public-schools-won-article-1.2428487>.

66. No Child Left Behind Act of 2001, Pub. L. 107–110, 115 Stat. 1425 § 5131(a)(23) (repealed 2015) ("Funds 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 (consistent with applicable laws).")

67. No Child Left Behind Act of 2001, Pub. L. 107–110, 115 Stat. 1425 (repealed 2015); NCLB functioned as a collection of amendments to the ESEA. The purpose of the NCLB "was to ensure that "all children have a fair, equal and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging state academic achievement standards and state academic assessments." *Id.* at 636–37 (quoting 20 U.S.C. § 6301 (2000)).

68. 147 CONG. REC. S5,943 (daily ed. June 7, 2001) (statement of Sen. Hutchison). Prior to the passage of the amendment, Senator Hutchison authored an article in which she explained that "[her] amendment is not a mandate, but an option." Kay Bailey Hutchison, *The Lesson of Single-Sex Public Education: Both Successful and Constitutional*, 50 AM. U. L. REV. 1075, 1082 (2001). Hutchison's position stemmed from her belief that educational decisions ought to be made at the local level, and that a degree of flexibility is required in order to enable schools to provide public school children with the best possible education. See *id.*

69. See 147 CONG. REC. S5,943 (daily ed. Jan. 7, 2001) (statement of Sen. Clinton).

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>70</sup>

In an effort to provide an incentive for educators to explore single-sex schooling options, the NCLB provided three million dollars in federal grant money for single-sex education.<sup>71</sup> In addition, the NCLB required the Department of Education to issue new guidelines on current single-sex regulations for educational agencies looking to explore single-sex schooling options.<sup>72</sup> In March 2004, the Department of Education proposed new regulations intended to provide additional flexibility in single-sex schooling that comply with the requirements of Title IX and the Equal Protection Clause,<sup>73</sup> issuing final regulations in October 2006.<sup>74</sup> These regulations were intended to proscribe only educational practices that were unconstitutional.<sup>75</sup> As such, they reflected the Department of Education’s interpretation of current jurisprudence on single-sex schooling.<sup>76</sup>

The regulations cover both single-sex classes within co-educational institutions and single-sex schools.<sup>77</sup> The regulations for single-sex classes apply to both public and private schools that receive federal funding.<sup>78</sup> Under the regulations, public entities receiving federal funding must have an “important governmental objective” for implementing single-sex classes, and the implemented program must be “substantially related” to that objective.<sup>79</sup> Private entity recipients of federal funding must have an “important educational objective” for operating on a single-sex basis.<sup>80</sup> The objective may be “[t]o improve educational achievement of its students, through a recipient’s overall established policy to provide diverse educational opportunities,” or “[t]o meet the particular, identified educational needs of its students.”<sup>81</sup> In both cases, the single-sex nature of the class must be “substantially related to achieving that objective,”<sup>82</sup> and the school must offer

70. *Id.*

71. See Joanna Grossman, *The Bush Administration’s Push for Single-Sex Education: An Attempt to Erode Federal Gender Equality Guarantees?*, Findlaw (June 11, 2002), <https://supreme.findlaw.com/legal-commentary/the-bush-administrations-push-for-single-sex-education.html>.

72. Pub. L. 107–10, 115 Stat. 1425 § 5131(c) (repealed 2015).

73. See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 69 Fed. Reg. 11,276, 11,276–77 (proposed Mar. 9, 2004).

74. See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Assistance, 71 Fed. Reg. 62,530-01 (Oct. 25, 2006) (codified at 34 C.F.R. pt. 106).

75. *Id.* at 62,532-33.

76. *Id.*

77. See 34 C.F.R. § 106.34 (2018).

78. See 34 C.F.R. § 106.11 (2018).

79. See 34 C.F.R. § 106.34 (2018).

80. 71 Fed. Reg. 62,530-01, 62,534 (Oct. 25, 2006) (codified at 34 C.F.R. pt. 106) (“The same Title IX nondiscrimination standards apply to classes, whether public or private recipients operate them. We used two terms, ‘important educational objective’ and ‘important governmental objective,’ in recognition of the fact that the regulatory provisions on single-sex classes apply to both private and public recipients.”).

81. See 34 C.F.R. § 106.34(b)(1)(i) (2018).

82. *Id.*

“substantially equal coeducational class[es]” in the same subject.<sup>83</sup>

The regulations further require that diverse educational options (i.e., single-sex options) must be offered in an “evenhanded manner.”<sup>84</sup> The same standard must be met when responding to the particular, identified needs of boys and girls.<sup>85</sup> However, this does not mean that a school must offer all-boys and all-girls classes in all the same subjects.<sup>86</sup>

Further, participation in single-sex classes must be voluntary.<sup>87</sup> To ensure voluntary participation, schools must provide a “substantially equal coeducational class” for every single-sex class, because otherwise, students’ enrollment in a single-sex class would not be voluntary.<sup>88</sup> “Substantially equal” does not require classes to be “identical.” Rather, in determining whether classes are “substantially equal,” OCR will conduct a case-by-case analysis of several factors, including, but not limited to: (1) admission policies and criteria; (2) educational benefits provided, including the quality and content of curriculum, books, instructional materials, and technology; (3) faculty and staff qualifications; (4) quality, accessibility, and availability of facilities and resources; (5) geographical accessibility; and (6) intangible features, including reputation of faculty.<sup>89</sup>

Under the implemented OCR regulations, single-sex non-vocational elementary and secondary schools are lawful as long as there are substantially equal opportunities offered for the excluded sex in a single-sex or co-educational setting.<sup>90</sup> Therefore, the regulations provide greater freedom for local school bodies seeking to establish single-sex schools. That freedom is tempered, however, by the newly inserted “substantially equal” language, which creates a higher

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83. See 34 C.F.R. § 106.34(b)(1)(iv) (2018). However, the Supreme Court has not stated whether the substantially equal opportunity should be single-sex for the excluded gender or co-educational.

84. See 34 C.F.R. § 106.34(b)(1)(ii). “Evenhandedness requires the [school] to provide each sex an equal opportunity to benefit from the important governmental or educational objective it seeks to achieve by providing single-sex classes.” Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 69 Fed. Reg. 11,276, 11,280 (proposed Mar. 9, 2004).

85. See 34 C.F.R. § 106.34(b)(1)(i). For example, if a school determines that its female students’ greatest academic need is an all-girls science class, it need not provide an all-boys science class. However, it would be required to consider all-boys classes, in science or in another subject, if it determines that is the greatest academic need of its male students. See *id.*

86. See 69 Fed. Reg. 11,276, 11,279. OCR gives the example of a school deciding which classes to offer in single-sex settings. It suggests that an “evenhanded manner” may require surveying both male and female students (and their parents) to assess the demand for single-sex classes. If the results of the survey reflect a high demand for an all-girls chemistry class and no demand for any all-boys classes, the school would not violate the regulations by offering only the chemistry class on a single-sex basis. However, the school must provide a “substantially equal” co-educational chemistry class.

87. 34 C.F.R. § 106.34(b)(1)(iii).

88. See *id.* § 106.34(b)(1)(iv). The Supreme Court applied the “substantially equal” standard in *United States v. Virginia*, 518 U.S. 515, 554 (1996).

89. 34 C.F.R. § 106.34(b)(1)(iv)(3).

90. 34 C.F.R. § 106.34(c)(1)-(3). In assessing the “substantial equality” of single-sex schools, OCR will consider the same factors as in the single-sex class analysis, plus an additional factor: quality and range of extracurricular offerings.

burden<sup>91</sup> than the “comparable” language formerly used.<sup>92</sup>

In its notice of proposed rulemaking for the regulations, OCR requested feedback for the proposed rules, producing a flurry of comments from advocacy groups on both sides of the issue. Many of the responses were sharply critical. Several groups, including NOW, the ACLU, and the Feminist Majority Foundation, commented that the new rules, by authorizing single-sex schools and classes, would perpetuate sex stereotypes and sexual discrimination and would fail to meet established equal protection standards.<sup>93</sup> Furthermore, these groups felt that single-sex education lacked basis in scientific evidence.<sup>94</sup> Those organizations in support of the regulations most frequently cited a belief in the overriding benefit of single-sex education during the notice and comment period.<sup>95</sup> While proponents of single-sex education have been pleased with the passage of the regulations, it is likely that public single-sex educational options will continue to face challenges under the Equal Protection Clause.<sup>96</sup>

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91. See *County of Washington v. Gunther*, 452 U.S. 161 (1981). In an action by female prison guards alleging unequal wages as compared to male guards, the Supreme Court used the language “comparable” and “substantially equal” in a way that suggests the latter is a more demanding standard: “A remedy would not be available where a lower paying job held primarily by women [was] ‘comparable,’ but not substantially equal to, a higher paying job performed by men.”

92. See 34 C.F.R. § 106.34(b)(1)(iv).

93. See, e.g., Laura W. Murphy et al., *ACLU Letter to the Department of Education on Single-Sex Proposed Regulations Comments*, AM. CIVIL LIBERTIES UNION (Apr. 23, 2004), <https://www.aclu.org/letter/aclu-letter-department-education-single-sex-proposed-regulations-comments> (“The proposed regulations threaten to reverse years of progress, undermine existing protections against sex discrimination, violate legal guarantees of equality, and encourage school districts to provide educational programs that are inherently unequal.”).

94. See Laura W. Murphy et al., *ACLU Single-Sex Notice of Intent Comments to the Department of Education*, AM. CIVIL LIBERTIES UNION (July 8, 2002), <https://www.aclu.org/other/aclu-single-sex-notice-intent-comments-department-education> (noting that the success observed in single-sex educational settings is often due to other factors, such as “small classrooms, extensive resources, well-trained teachers, and advanced educational methods,” and could be replicated in co-educational educational settings as well); Eleanor Smeal, *Re: Single-Sex Proposed Regulation Comments*, FEMINIST MAJORITY FOUND. (Apr. 23, 2004), <https://www.ncwge.org/documents/comments-FMF.pdf> (taking exception to the Department of Education’s uncharacteristic leniency in requiring social science evidence, stating “[t]he regulations’ proposed justifications and procedures are so flawed that they do not meet the Department of Education’s own standards for evidence-based decision making.”).

95. *Id.*; *Single Sex vs. Coed: The Evidence*, NAT’L ASS’N FOR SINGLE-SEX PUB. EDUC., <http://www.singlesexschools.org/research-singlesexvscoed.htm> (last visited Jan. 19, 2019). See, e.g., *Re: Single Sex Proposed Regulations Comments*, NAT’L ASS’N FOR SINGLE-SEX PUB. EDUC. (Apr. 16, 2004), <http://www.singlesexschools.org/OCR.htm> (“[T]here is substantial evidence that single-sex education has a beneficial effect on grades and test scores, particularly for girls in grades 7 through 12, and for boys in grades K through 5.”). NASSPE also argues that single-sex education results in fewer disciplinary problems for both boys and girls and expands educational opportunities.

96. See Gina Jordan, *Why Florida Wants to Expand Single-Gender Classes*, STATEIMPACT (Jan. 13, 2014, 10:02 AM), <https://stateimpact.npr.org/florida/2014/01/13/why-florida-wants-to-expand-single-gender-classes/> (discussing Florida’s aim to provide more single-sex classrooms to public school students and ACLU’s belief that Florida’s proposed legislation violates federal law).

## E. POST-NO CHILD LEFT BEHIND ACT LITIGATION

Two recent federal court decisions—*A.N.A. ex rel. S.F.A. v. Breckinridge County Board of Education*<sup>97</sup> in 2011 and *Doe v. Wood County Board of Education*<sup>98</sup> in 2012—have helped clarify the meaning of the 2006 regulations on the elementary and secondary education level.<sup>99</sup> In *Breckinridge County*, the Western District of Kentucky upheld the constitutionality of the regulations,<sup>100</sup> while in *Wood County*, the Southern District of West Virginia went one step further to explain when participation in single-sex programs constitutes complete voluntariness.<sup>101</sup>

In *Breckinridge County*, the parents of students attending Breckinridge County Middle School (BCMS), located in Harned, Kentucky, filed a class action challenging the legality of the school's decision to offer single-sex classes to its students.<sup>102</sup> The plaintiffs asserted that the single-sex education program, implemented under the provisions set forth in 34 C.F.R. § 106.34, violated both state and federal law.<sup>103</sup> Their argument centered around the notion that “all BCMS students are injured by being required to attend a public middle school which engages in sex discrimination in education by offering a single-sex program.”<sup>104</sup>

The Western District of Kentucky rejected the plaintiffs' argument that the coexistence of single-sex and co-educational classes constitutes a form of discrimination.<sup>105</sup> It distinguished between separation based on sex and separation based on race, stating that, as a matter of law, “[i]ndividuals are harmed when they attend schools in which students are separated on the basis of race because such separation ‘generates a feeling of inferiority . . . that may affect [students’] hearts and minds in a way unlikely to ever be undone.’”<sup>106</sup> While the court noted that precluding students from educational opportunities based solely on sex without an “exceedingly persuasive justification” is unconstitutional,<sup>107</sup> it held that such a violation did not occur in this case, since BCMS students were given the

97. *A.N.A. ex rel. S.F.A. v. Breckinridge Cty. Bd. of Educ.*, 833 F. Supp. 2d 673 (W.D. Ky. 2011).

98. *Doe v. Wood Cnty. Bd. of Educ.*, 888 F. Supp. 2d 771 (S.D. W. Va. 2012).

99. See *The Legal Status of Single-Sex Public Education*, NAT'L ASS'N FOR SINGLE-SEX PUB. EDUC., <http://singlesexschools.org/policy-legalstatus.htm> (last visited Jan. 19, 2019).

100. *Breckinridge*, 833 F. Supp. 2d at 678.

101. *Wood Cnty.*, 888 F. Supp. 2d at 776.

102. *Breckinridge*, 833 F. Supp. 2d at 674.

103. *Id.* at 675–76. Plaintiffs argued that the program violated Title IX, the Equal Education Opportunities Act, the Equal Protection Clause, and the Kentucky Sex Equity Education Act.

104. *Id.* at 677. According to plaintiffs, “single-sex and coeducational classes can never offer substantially equal educational opportunities,” and thus “the mere exposure to such alleged inequality is injurious to BCMS students.”

105. *Id.* at 677–78.

106. *Id.* at 678 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954)).

107. *Id.*; see also *United States v. Virginia*, 518 U.S. 515 (1996); *Miss. Univ. for Women v. Hogan*, 458 U.S. 732 (1982).



option to participate in either single-sex or co-educational classes.<sup>108</sup> Because the choice to participate in single-sex classes was left to the discretion of the students' parents and because there was no finding of "a concrete and particularized harm to any legally protected interest" as a result of BCMS's program, the court dismissed the plaintiffs' claims.<sup>109</sup>

The court in *Wood County* was presented with a different issue. In this case, a mother and her three daughters who attended Van Devender Middle School (VDMS) in Parkersburg, West Virginia, alleged that the school's single-sex education program violated Title IX and the Equal Protection Clause.<sup>110</sup> Unlike the program at BCMS, in which students were given the option to participate in either single-sex or co-educational classes, students at VDMS were automatically placed in single-sex classes and then given the option to opt out of them.<sup>111</sup> Noting that the 2006 regulations require that student enrollment in a single-sex class or extracurricular activity be completely voluntary,<sup>112</sup> the court determined that VDMS's program was unconstitutional. Although the Department of Education failed to define "completely voluntary" when it adopted the 2006 regulations, the court took "completely voluntary" to mean that participation in single-sex classes "require[s] an affirmative assent by parents or guardians,"<sup>113</sup> preferably in the form of a written, signed agreement "explicitly opting *into* a single-sex program."<sup>114</sup> Because the program did not require affirmative assent from students' parents or guardians, the opt-out provision in VDMS's program did not meet the requirement that single-sex classes be "completely voluntary."<sup>115</sup> Though the Southern District of West Virginia held that the program implemented by VDMS failed to meet the 2006 regulations' requirements, it nonetheless noted that single-sex education programs are constitutional when they comport with Title IX's guidelines.<sup>116</sup>

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108. A.N.A. *ex rel.* S.F.A. v. Breckinridge Cnty. Bd. of Educ., 833 F. Supp. 2d 673, 678–79 (W.D. Ky. 2011).

109. *Id.* at 682.

110. Doe v. Wood Cnty. Bd. of Educ., 888 F. Supp. 2d 771, 773–74 (S.D.W. Va. 2012).

111. *See id.* at 777.

112. 34 C.F.R. §106.34(b)(1)(iii) (2014).

113. *Wood Cnty.*, 888 F. Supp. 2d at 775–76 (relying on discussions leading up to the adoption of the regulation, particularly the following statement: "In order to ensure that participation in any single-sex class is completely voluntary . . . the recipient is strongly encouraged to notify parents, guardians, and students about their option to enroll in either a single-sex or coeducational class *and receive authorization from parents or guardians to enroll their children in a single-sex class.*" (emphasis added) (quoting Nondiscrimination on the Basis of Sex Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed. Reg. 62,530, 62,537 (Oct. 25, 2006))).

114. *Id.* at 776 (emphasis in original).

115. *Id.* at 776. The court noted that "presuming that parents or guardians have enrolled their children in a single-sex class completely voluntarily because they failed to opt out would undermine the purpose of Title IX to prevent discrimination based on gender."

116. *Id.* at 779.

The *Breckinridge County* and *Wood County* decisions are notable in that both uphold the legality of the 2006 regulations. Taken together, these decisions suggest that single-sex classes do not constitute a form of discrimination because the option to participate in such classes is a choice. Accordingly, single-sex classes would be found constitutional under the 2006 regulations so long as participation is completely voluntary.

#### F. EVERY STUDENT SUCCEEDS ACT

Despite NCLB's position as the overarching legislation on education in the United States, NCLB faced significant backlash throughout the years, mainly because the law prescribed tests to measure students' achievement and sanctioned schools that were not yielding improvement.<sup>117</sup> Further, NCLB was criticized as too far-reaching and a "one-size-fits-all approach" to education.<sup>118</sup> Thus, in December 2015, President Barack Obama signed the Every Student Succeeds Act (ESSA), which largely rewrote NCLB.<sup>119</sup> ESSA attempts to balance federal and state powers by retracting some of NCLB's federally imposed regulations in favor of giving the states more decision-making power.<sup>120</sup> The bill was a bipartisan signing—a success in an often gridlocked Congress<sup>121</sup>—passing the House 359–64 and the Senate 85–12.<sup>122</sup>

ESSA retained parts of NCLB—including federally mandated standardized testing—but eliminated penalties to states that had poor testing results.<sup>123</sup> ESSA allows each state to set its own performance goals, as well as repercussions if those individualized goals are not met.<sup>124</sup> ESSA prevents states from imposing certain academic requirements, such as the Common Core State Standards Initiative or the requirement that every student become proficient in math and reading by a set date.<sup>125</sup> Essentially, ESSA provides broadly defined guidelines for states' individual accountability goals and plans.<sup>126</sup> While NCLB imposed sanctions for schools that did not meet federal goals, ESSA provides that only the schools that struggle the most (the bottom 5%) will face federal requirements to

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117. Maggie Severns, *How Congress finally killed No Child Left Behind*, POLITICO (Dec. 11, 2015, 4:17 PM), <https://www.politico.com/story/2015/12/paul-ryan-congress-no-child-left-behind-216696>.

118. Gregory Korte, *The Every Student Succeeds Act vs. No Child Left Behind: What's Changed?*, USA TODAY (Dec. 10 2015, 4:25 PM), <https://www.usatoday.com/story/news/politics/2015/12/10/every-student-succeeds-act-vs-no-child-left-behind-whats-changed/77088780/>.

119. Every Student Succeeds Act, 20 U.S.C.A. § 6301; Julie Hirschfield Davis, *President Obama Signs Into Law a Rewrite of No Child Left Behind*, N.Y. TIMES (Dec. 10, 2015).

120. Tim Walker, *With Passage of Every Student Succeeds Act, Life After NCLB Begins*, NEATODAY (Dec. 9, 2015, 6:09 PM), <http://neatoday.org/2015/12/09/every-student-succeeds-act/>.

121. Davis, *supra* note 119.

122. Severns, *supra* note 117.

123. *Id.*

124. *Id.*

125. *Id.*

126. *See id.*

close gaps in achievement.<sup>127</sup> However, the ESSA does not mandate *how* the states will do so.<sup>128</sup>

Although litigation has commenced under ESSA in the scope of disability, adequate reporting, and abuse and harassment, no litigation thus far has discussed this new Act within the scope of single-sex education. Thus, it remains to be seen how ESSA will affect the issue, if at all.

#### IV. HIGHER EDUCATION

##### A. TITLE IX

Title IX of the Education Amendments was signed into law on June 23, 1972 and places a general prohibition on discrimination on the basis of sex in “any education program or activity receiving Federal financial assistance.”<sup>129</sup> Unlike the Equal Protection Clause, which applies only to government action,<sup>130</sup> Title IX applies to both public and private institutions, due to the federal funding provision.<sup>131</sup>

However, for several reasons, Title IX should not be viewed as a prohibition on single-sex education. First, the law applies only to vocational or professional education, graduate higher education, and public institutions of higher education,<sup>132</sup> thereby presumably leaving the door open to single-sex public education at the elementary and secondary levels.<sup>133</sup> Second, at the undergraduate level, the law exempts any institution “that traditionally and continually from its establishment has had a policy of admitting only students of one sex.”<sup>134</sup> Third, OCR has promulgated regulations that offer three exemptions under which single-sex groupings are explicitly allowed: (1) physical education classes when such grouping is “assessed by objective standards of individual performance” and during participation in sports involving bodily contact,<sup>135</sup> (2) human sexuality classes in elementary and secondary schools,<sup>136</sup> and (3) groupings within choruses “based on vocal range or quality.”<sup>137</sup> Nevertheless, despite these exceptions and the fact

127. *See id.*

128. *Id.*

129. 20 U.S.C.A. § 1681 (West, Westlaw through P.L. 113-163 (excluding 113-128)) (“No 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 . . .”).

130. U.S. CONST. amend. XIV; *see Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that the Equal Protection Clause of the Fourteenth Amendment applies only to state action).

131. 20 U.S.C.A. § 1681.

132. 20 U.S.C.A. § 1681(a)(1).

133. *See Williams*, *supra* note 5, at 29–30.

134. 20 U.S.C.A. § 1681(a)(5); *see Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 732 (1982) (recognizing that although the school’s admission policy fails under the Equal Protection Clause, it appears that the school would have been exempt from Title IX’s prohibitions under sub-section 5).

135. 34 C.F.R. § 106.34(a)(1)–(2) (2014).

136. 34 C.F.R. § 106.34(a)(3).

137. 34 C.F.R. § 106.34(a)(4).

that Title IX does not contain an explicit prohibition on single-sex education, the statute has become a legal roadblock for those educators who have tried to open single-sex schools.

Title IX also has implications for single-sex institutions' considerations of if, and how, to admit transgender students. In April 2014, the Department of Education's Office for Civil Rights issued guidance on Title IX expressly stating that the regulation protects transgender students from discrimination, as well.<sup>138</sup> Subsequently, many women's colleges put in place, or revised, policies on admitting transgender students.<sup>139</sup> In 2016, the Obama administration issued a second Dear Colleague letter, outlining the accommodations that schools were required to make in order to ensure a safe and non-discriminatory environment for transgender students.<sup>140</sup> These letters comprised "significant guidance," but no changes were made to the regulation through the formal notice and comment channels.<sup>141</sup> However, in February 2017, the Department of Justice and the Department of Education under the Trump administration issued a Dear Colleague letter withdrawing the previous letter's guidance.<sup>142</sup> While it is unlikely that colleges will change existing policies stemming from the previous administration's 2016 letter, the 2017 letter highlighted a change in administrative priorities.

#### B. MISSISSIPPI UNIVERSITY FOR WOMEN V. HOGAN

Five years after *Vorchheimer*, the Supreme Court addressed the issue of sex segregation in higher education in *Mississippi University for Women v. Hogan*.<sup>143</sup> Joe Hogan, a male nurse, applied to the Mississippi University for Women, a state-supported all-female college, because the University's School of Nursing offered the closest nursing baccalaureate program to Hogan's home. Although otherwise qualified, he was rejected on the basis of the University's female-only admission policy. Applying a substantial relationship test (the stricter test considered by the *Vorchheimer* Court),<sup>144</sup> the Supreme Court held that the state-

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138. U.S. Dep't of Educ., Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

139. Anna North, *Can transgender students go to women's colleges? Across the country, the answer is evolving.*, VOX (Sep. 22, 2017), <https://www.vox.com/identities/2017/9/21/16315072/spelman-college-transgender-students-womens-colleges>.

140. U.S. Dep't of Justice, Civil Rights Division & U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter on Transgender Students (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>

141. *Id.* "ED and DOJ (the Departments) have determined that this letter is significant guidance. This guidance does not add requirements to applicable law but provides information and examples to inform recipients about how the Departments evaluate whether covered entities are complying with their legal obligations." (footnote omitted).

142. U.S. Dep't of Justice, Civil Rights Division & U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter (February 22, 2017), <https://www.justice.gov/crt/page/file/942021/download>.

143. *Hogan*, 458 U.S. at 718.

144. *Id.* at 721, 724. The district court ordered summary judgment for the Mississippi University for Women on the grounds that the single-sex institution bore a "rational relationship" to the State's

sponsored university violated the Equal Protection Clause by limiting enrollment to women and denying admission to otherwise qualified men.<sup>145</sup> Because it was clear that Hogan was denied admission on the basis of sex, the primary question before the Court was whether the state had a legitimate interest in keeping the school all-female. The University argued that restricting admission to females was a kind of “educational affirmative action” that compensated females for past discrimination.<sup>146</sup> While acknowledging the permissibility of gender-based classifications when it serves to benefit a sex that is disproportionately burdened, the Court held that “Mississippi has made no showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field.”<sup>147</sup> Thus, the admissions policy was unconstitutional because it was not narrowly tailored to remedy a specific discrimination suffered. Therefore, it discriminated against men by making non-compensatory classifications under the Equal Protection Clause of the Fourteenth Amendment.<sup>148</sup> The Court’s analysis in this case clearly articulated the intermediate scrutiny standard: it noted that there must be important governmental objectives that create an “exceedingly persuasive justification” for any sex-based classification.<sup>149</sup> Furthermore, “the discriminatory means employed [must be] ‘substantially related to the achievement of those objectives’” to be constitutional.<sup>150</sup>

### C. UNITED STATES V. VIRGINIA

In 1996, the Supreme Court issued another critical opinion on the constitutionality of single-sex education in *United States v. Virginia (VMI)*.<sup>151</sup> The United States sued Virginia on behalf of all qualified female students who were denied admission to the Virginia Military Institute (VMI) because of their sex. Rejecting Virginia’s contention that admitting women would change the nature of the institution, the Court ruled against VMI’s male-only admission policy. Although Virginia argued that the single-sex admission policy at VMI was substantially related to the goal of providing diverse educational opportunities, the Court held that an “exceedingly persuasive justification” was required for sex-based classifications, and Virginia’s justification did not meet this standard.<sup>152</sup>

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legitimate interest “in providing the greatest practical range of education opportunities for its female student population.” The Fifth Circuit reversed, recognizing that the lower court improperly applied a rational basis test to a gender classification. *Hogan v. Miss. Univ. for Women*, 646 F.2d 1116 (5th Cir. 1981).

145. *Id.* at 725–26 (“The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women.”).

146. *Id.* at 727.

147. *Id.* at 729.

148. *Id.* at 730.

149. *Id.* at 724.

150. *Id.*

151. *United States v. Virginia*, 518 U.S. 515 (1996).

152. *Id.* at 534.

Under this framework, Justice Ginsburg's majority opinion assessed VMI's arguments using a heightened scrutiny standard.<sup>153</sup> It first considered VMI's contention that its founding as a single-sex school was substantially related to a Virginia state objective of providing a diverse array of educational options.<sup>154</sup> The Court noted that when VMI was founded in 1839, few national universities or colleges accepted women and no Virginia institution did so.<sup>155</sup> Even though the state later opened some all-female colleges, by the time *VMI* reached the Court, most of these schools and all of Virginia's all-male schools (with the exception of VMI) had begun to admit members of both sexes.<sup>156</sup> VMI's reluctance to admit females rendered it an anomaly amongst formerly all-male Virginia schools, and as a result, the Court held that VMI's single-sex existence could not have been the product of a state policy of diversity.<sup>157</sup>

The Court likewise declined to adopt VMI's argument that admitting women would force the school to modify its adversative training techniques.<sup>158</sup> VMI alleged that admitting women would force it to eliminate the certain adversative aspects of its training program and thus deny the benefits of such training to both men and women.<sup>159</sup> The Court rejected VMI's logic, however, relying on expert testimony that "some women . . . are capable of all of the individual activities required of VMI cadets."<sup>160</sup> By rejecting both VMI arguments, the Court provided a strong precedent against single-sex education when such segregation is justified solely based on traditional notions regarding the abilities of men or women.<sup>161</sup> Accordingly, in order for a state to justify instituting educational sex-based segregation, it must have an "exceedingly persuasive justification" for doing so, and the solution must be directly tied to the problem it confronts.<sup>162</sup>

The Court further held that Virginia's proposed remedy, the formation of a Virginia Women's Institute for Leadership (VWIL), could not provide an experience and benefits similar to those of VMI.<sup>163</sup> Thus, the proposed remedy failed to adequately cure the state's violation.<sup>164</sup> "A remedial decree . . . must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally

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153. *Id.* at 541 (cautioning reviewing courts to take a "hard look" at generalizations or "tendencies" of the kind pressed by Virginia).

154. *Id.* at 536–37.

155. *Id.*

156. *Id.* at 537.

157. *Id.* at 539.

158. *Id.* at 541.

159. *Id.* at 540 (referencing VMI's allegations that "[a]lterations to accommodate women would necessarily be . . . so 'drastic' . . . [as to] 'destroy' VMI's program").

160. *Id.* at 540–41.

161. See Cornelia T.L. Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 EMORY L.J. 941, 948 (2007). As Judge Pillard notes, Justice Ginsburg's analysis prevents "even statistically accurate" stereotypes regarding male and female abilities from entering into a justification for state-supported sex segregation. See *id.*

162. *VMI*, 518 U.S. at 546.

163. *Id.* at 547–48.

164. *Id.*



denied an opportunity or advantage in the position they would have occupied in the absence of [discrimination].”<sup>165</sup> VWIL students would not benefit from VMI’s superior alumni network, prestigious degree, expansive endowment, and superior athletic facilities.<sup>166</sup> Thus, female students seeking specific benefits from VMI could not obtain them through VWIL; the proposed school failed to place female students in a position they would have occupied absent VMI’s discrimination.<sup>167</sup> Therefore, Virginia’s proposed remedy failed to directly address the sex-based discrimination.<sup>168</sup> The Court compared the situation to that of *Sweatt v. Painter*, in which Texas’s decision to establish a law school for “Negro students” rather than admit African-American students to the University of Texas School of Law failed the “substantially comparable test” because the newly established school could not provide educational opportunities similar to those at the University of Texas.<sup>169</sup> Just as no solution offered by Texas other than integration could possibly provide African-Americans with an experience equal to that of white students attending the University of Texas, no solution other than integration could provide young women with the same opportunities available to young men at VMI.<sup>170</sup>

While the Supreme Court has never returned to Justice Brennan’s strict scrutiny standard for sex classifications,<sup>171</sup> the Court did indicate a preference for heightening the level of scrutiny applied to gender cases in its *VMI* opinion.<sup>172</sup> Although the Court majority explained this language using the traditional intermediate scrutiny test, Justice Scalia’s *VMI* dissent argued that the Court effectively heightened the scrutiny afforded sex classifications by using the “exceedingly persuasive” language.<sup>173</sup> He argued that the majority’s language incorrectly introduced a new element into intermediate scrutiny; that is, the Court appeared to be requiring a “least-restrictive-means analysis, [rather than] only a substantial relation between the classification and the state interests that it serves.”<sup>174</sup> The Supreme Court has continued to apply traditional “intermediate scrutiny” analysis while using the “exceedingly persuasive” language, effectively

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165. *Id.* at 547 (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 (1977)).

166. *Id.* at 526–27.

167. *Id.*

168. *Id.*

169. *Id.* at 553 (referencing *Sweatt v. Painter*, 339 U.S. 629 (1950)).

170. *Id.* at 554.

171. *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973).

172. *VMI*, 518 U.S. at 533. *But see id.* at 567–68 (Scalia, J., dissenting) (describing the opinion of the majority as improperly applying strict scrutiny to its assessment of VMI’s justifications for maintaining a single-sex atmosphere).

173. *See id.*

174. *See id.* at 573. In his dissent, Justice Scalia argues that, if any change is to be made to the standard of review applied to gender classifications, “the stronger argument would be not for elevating the standard to strict scrutiny, but for reducing it to rational-basis review. The latter certainly has a firmer foundation in our past jurisprudence: Whereas no majority of the Court has ever applied strict scrutiny in a case involving sex-based classifications, we routinely applied rational-basis review until the 1970’s . . . .” *Id.* at 575 (citation omitted).

subjecting the educational institutions to a functionally higher standard.<sup>175</sup> While the *VMI* opinion hinted at heightening scrutiny for sex classifications, it did not explicitly promote a stricter standard of review. At least for the present time, then, traditional “intermediate scrutiny” requiring application of a “substantial relationship” test controls; it remains to be seen whether the Court, in future cases, will choose to use “exceedingly persuasive” when applying intermediate scrutiny, or return to the substantial relationship standard unmodified by the “exceedingly persuasive language” or even use the “exceedingly persuasive” precedent as a stepping stone to justifying a shift to a strict scrutiny standard.

## V. PUBLIC POLICY CONSIDERATIONS

In many ways, the debate over single-sex schooling mirrors struggles within feminist movements. For decades, feminists have debated whether gender-neutral laws or gender-sensitive laws are more likely to achieve substantive equality for women.<sup>176</sup> There are obvious biological differences between the sexes, but courts and legislative bodies have struggled to determine when those differences justify or necessitate disparate or separate treatment. While the Department of Education does not maintain a comprehensive list of schools providing single-sex education,<sup>177</sup> Education Week Research Center estimated that at least 283 public schools provided single-sex opportunities as of the 2014-2015 school year.<sup>178</sup> That number will likely continue to grow as educators dissatisfied with current teaching methods continue to search for more effective approaches.

### A. THE ARGUMENT FOR SINGLE-SEX SCHOOLS

There are several explanations for the renewed interest in single-sex schooling. For educators seeking to combat challenging conditions in public schools, single-sex education provides a possible solution.<sup>179</sup> In some urban areas, educators often consider single-sex education a way to address the systemic challenges facing

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175. See Nancy Chi Cantalupo, *Comparing Single-Sex and Reformed Coeducation: A Constitutional Analysis*, 49 SAN DIEGO L. REV. 725, 728 (2012).

176. See generally Rosemary C. Salomone, *Feminist Voices in the Debate Over Single-Sex Schooling: Finding Common Ground*, 11 MICH. J. GENDER & L. 63, 67 (2004); Jason M. Skaggs, *Justifying Gender-Based Affirmative Action under United States v. Virginia’s “Exceedingly Persuasive Justification” Standard*, 86 CALIF. L. REV. 1169 (1998).

177. Juliet Williams, *The Separation Solution?: Single-Sex Education and the New Politics of Gender Equality* 7 (2016).

178. While federal data points to more than 1,000 single-sex public schools, that figure includes “juvenile justice facilities, alternative, special education, and vocational schools.” Corey Mitchell, *Single-Gender Public Schools in 5 Charts*, EDUC. WK. (Nov. 2, 2017), <https://www.edweek.org/ew/section/multimedia/single-gender-public-schools-in-5-charts.html>. The National Association for Single Sex Public Education (“NASSPE”) removed its database of single-sex schools in 2011 after learning that the ACLU was using it to identify programs potentially operating in violation of federal law. Williams, *supra* note 177, at 7.

179. See Chris Moran, *Benefits, Drawbacks Seen in Gender-Separate Classes*, SAN DIEGO UNION TRIB. (Dec. 20, 2004), [http://legacy.sandiegouniontribune.com/uniontrib/20041220/news\\_1n20gender.html](http://legacy.sandiegouniontribune.com/uniontrib/20041220/news_1n20gender.html) (“There’s no consensus on whether it works better than fully integrated schooling. But while that’s being figured out, educators are experimenting.”).

young men of color.<sup>180</sup> The arguments for single-sex education generally fall into one of three categories. The first and most controversial argument is that boys and girls learn differently.<sup>181</sup> The second argument deals with social relationships in the classroom and includes both distractions caused by members of the opposite sex and subtle differences in the ways that boys and girls are treated in co-educational settings.<sup>182</sup> Third is the idea that parents should have diverse options.<sup>183</sup>

Some proponents of single-sex schools argue that girls and boys learn differently. They point out that male and female brains develop in different patterns and, therefore, that separating boys from girls allows educators to teach more effectively to each group. Much of this argument is premised on the research of Carol Gilligan. Her seminal work, *In a Different Voice: Psychological Theory and Women's Development*, provides a thorough exploration of differences in the ways boys and girls approach problem-solving.<sup>184</sup> She argues that our culture tends to value, reward, and take as the norm male development.<sup>185</sup> Her research has been buoyed in recent years by medical research that has catalogued the differences between male and female brains at various stages of development.<sup>186</sup> The National Association for Single Sex Public Education (“NASSPE”) has collected considerable research suggesting physical differences between the male and female brain and differences in the ways boys and girls learn.<sup>187</sup>

180. See Catherine Gewertz, *Black Boys' Educational Plight Spurs Single-Gender Schools; New Federal Rules Seen as Chance for Innovation*, Educ. WK. (June 20, 2007) (suggesting proponents of single-sex education aim to implement “instructional strategies that research suggests might work well for boys”).

181. *Learning Style Differences*, NAT'L ASS'N FOR SINGLE-SEX PUB. EDUC., <https://www.singlesexschools.org/research-learning.htm> (last visited Oct. 13, 2018).

182. See, e.g., AM. ASS'N OF UNIV. WOMEN, *How Schools Shortchange Girls* (1992); Myra Sadker & David Sadker, *Failing at Fairness: How America's Schools Cheat Girls* (1994).

183. See David S. Cohen & Nancy Levit, *Still Unconstitutional: Our Nation's Experiment with State-Sponsored Sex Segregation in Education*, 44 SETON HALL L. REV. 339, 352 (2014) (noting, with some disapproval, that “parental choice” is a primary argument of single-sex education proponents).

184. Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (2d ed. 1993).

185. *Id.* at 14.

186. See, e.g., Leonard Sax, *Unexpected Sex Differences in Brain Development*, PSYCHOLOGY TODAY (Dec. 11, 2010), <https://www.psychologytoday.com/us/blog/sax-sex/201012/unexpected-sex-differences-in-brain-development> (noting a study conducted by the National Institute of Health finding significant differences in the trajectories of brain development between boys and girls).

187. Educational psychologists have found that girls tend to be excessively critical of their academic performance, while boys tend to overestimate their academic abilities. This finding has led some to the conclusion that girls and boys would benefit from different teaching styles, namely, one that encourages girls and gives boys a “reality check.” See generally *Learning Style Differences*, NAT'L ASS'N FOR SINGLE-SEX PUBLIC EDUC., <http://www.singlesexschools.org/research-learning.htm> (last visited Oct. 13, 2018). Additionally, research has found structural differences between the brains of men and women. For example, female brains have a larger hippocampus, the brain's memory center. Female brains also typically featured more cross-hemisphere coordination, whereas males' brain activity was more “closely coordinated within local brain regions.” Bruce Goldman, *Two Minds: Cognitive Differences Between Men and Women*, STAN. MED. (SEX, GENDER & MED.) (Spring 2017).

Furthermore, some proponents of single-sex education express concern about social interactions in co-educational classrooms. In 1991, the American Association of University Women conducted a groundbreaking study of girls in co-educational settings in grades K-12.<sup>188</sup> They found evidence of bias among teachers and curricula that undermine girls' self-esteem and discourage them from pursuing non-traditional careers, such as those involving math and science.<sup>189</sup> Myra and David Sadker also researched the effects of co-educational classrooms for years and found that males tend to receive more attention—both positive and negative—in the classroom.<sup>190</sup> Accordingly, they became strong advocates for thoughtfully structured single-sex public education.<sup>191</sup>

The upsurge in schools experimenting with single-sex programs has correlated with the explosion of “school choice” policies around the country.<sup>192</sup> The No Child Left Behind Act (“NLCB”) played some role in this trend, requiring failing schools to give students the option of transferring to better-performing public schools.<sup>193</sup> This phenomenon is particularly noticeable in urban districts where chronic underfunding has contributed to failing schools.<sup>194</sup>

NCLB clarified a landscape in which uncertain legal status for single-sex education discouraged experimentation. In *Garrett v. Board of Education*, a group of female students sought to enjoin the Detroit Board of Education from opening three all-male academies within the Detroit public school system.<sup>195</sup> In addition to raising an equal protection claim, the plaintiffs attacked the academies under Title IX, asserting that the all-boys schools treated “students unequally on the basis of sex.”<sup>196</sup> The Detroit Board of Education argued that the admission policies of elementary and secondary schools were expressly exempt from Title IX.<sup>197</sup> The Eastern District of Michigan disagreed—relying on legislative history, it held that the exemption to which the Board referred applied “primarily to historically pre-existing single sex schools,” and was “not viewed as authorization to

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188. See AM. ASS'N OF UNIV. WOMEN, *supra* note 182.

189. See *id.* at 45.

190. See Sadker, *supra* note 182, at 48–50.

191. See, e.g., *id.* at 232 (“Single-sex schools, once dismissed as an anachronism, are now seen by many as a model for educating girls.”).

192. See Alia Wong, *Public Opinion Shifts in Favor of School Choice*, THE ATLANTIC (Aug. 21, 2018); see generally *Fast Facts on School Choice*, EDCHOICE (last modified Apr. 24, 2018), <https://www.edchoice.org/resource-hub/fast-facts/>.

193. See Ronald Brownstein, *Locked Down*, EDUC. NEXT (Summer 2003) at 40, available at <https://www.educationnext.org/lockeddown/>.

194. See *id.* While No Child Left Behind required school choice options for students in failing urban public schools, those options often failed to reach students. More than seventy percent of parents in a sample of eight urban school districts reported not being notified of school choice options, despite all eight districts producing notification letters. *Research Brief, Title I School Choice and Supplemental Educational Services Under No Child Left Behind*, RAND CORPORATION (2008).

195. See *Garrett v. Bd. of Educ.*, 775 F. Supp. 1004, 1005 (E.D. Mich. 1991).

196. *Id.* at 1008.

197. *Id.*; see also 20 U.S.C. § 1681(a)(1) (2012).

establish new single sex schools.”<sup>198</sup> Finding a likelihood of success on the merits, the court granted the plaintiffs’ motion for preliminary injunction.<sup>199</sup> Shortly thereafter, the Detroit Board of Education abandoned plans for the three all-boys academies, primarily citing the cost of litigation and the unlikelihood of success.<sup>200</sup>

While Title IX does not expressly prohibit single-sex schools, *Garrett* signaled that single-sex schools faced questionable legal protection at best, thus making further experiments like the one attempted in Detroit a rarity. A decade after *Garrett*, Congress took a first step towards alleviating the confusion.<sup>201</sup>

Although NCLB was supplanted in 2015, its successor, the Every Student Succeeds Act, neither prohibits nor expressly discourages single-sex education.<sup>202</sup> Moreover, the Department of Education continues to permit single-sex public schools, so long as students of the excluded sex have access to “a substantially equal single-sex school or coeducational school.”<sup>203</sup> Thus, advocates of single-sex education claim to enjoy sufficient legal protection in a post-NCLB era.

#### B. THE ARGUMENT AGAINST SINGLE-SEX SCHOOLS

Critics have objected to the growing prevalence of single-sex education on several grounds, including: (1) concerns that single-sex education will perpetuate negative stereotypes about females, (2) concerns about whether separate education can ever be equal, (3) concerns about the relevance of single-sex education in light of new ideas about gender fluidity, and (4) concerns about the lack of empirical research regarding single-sex education.

First, in light of historical discriminatory treatment of women, some worry about the ways in which sex-segregation could perpetuate stereotypes. As Professor Gary J. Simson notes, single-sex schooling has historically been “dominated by gender role stereotyping, with all-boys schools typically oriented to training for professional and economic success and all-girls schools commonly oriented to training to be wives and mothers and to fill certain low-paying, low-status jobs.”<sup>204</sup> Proponents of single-sex schools, stressing the biological differences between boys and girls, sometimes exacerbate these concerns.<sup>205</sup>

198. See *Garrett*, 775 F. Supp. at 1009.

199. *Id.* at 1014.

200. See *Detroit Plan to Aid Blacks with All-Boy Schools Abandoned*, L.A. TIMES (Nov. 8, 1991), [http://articles.latimes.com/print/1991-11-08/news/mn-944\\_1\\_black-male](http://articles.latimes.com/print/1991-11-08/news/mn-944_1_black-male) (“[T]he legal battles involved were too costly and probably could not be won.”).

201. No Child Left Behind Act of 2001, Pub. L. 107-110, 115 Stat. 1425 § 5131(a)(23) (repealed Dec. 10, 2015).

202. See 20 U.S.C. § 6301 *et seq.*

203. 34 C.F.R. § 106.34 (2006).

204. Gary J. Simson, *Separate But Equal and Single-Sex Schools*, 90 CORNELL L. REV. 443, 449 (2005) (summarizing Professor Hasday’s work tracing evolution of single-sex institutions).

205. Research using biology to justify existing differences in males and females, often empirically flawed, nonetheless tends to reinforce and exacerbate those differences. Kelsey R. Chapple, Note, *Sports for Boys, Wedding Cakes for Girls: The Inevitability of Stereotyping in Schools Segregated by Sex*, 94

Single-sex education has raised concerns about entrenching racial stereotypes as well as gender stereotypes. For example, in *Garrett*, the court acknowledged that “[t]he [single-sex] Academies were developed in response to the crisis facing African-American males manifested by high homicide, unemployment, and drop-out rates,”<sup>206</sup> but nonetheless held that the school system had not demonstrated that the exclusion of girls was “substantially related” to that crisis.<sup>207</sup> The district court in *Garrett* was particularly concerned about the potential of the planned all-male academies to encourage stereotypes rather than undermine them.<sup>208</sup> For this reason, organizations including the American Civil Liberties Union and the National Organization for Women have vocally opposed single-sex education.<sup>209</sup>

A second argument against single-sex schooling stems from skepticism that separate-but-equal education can realistically exist in any context.<sup>210</sup> Opponents of single-sex education argue that sex segregation in education “creates the risk of breeding second-class citizens.”<sup>211</sup> Separation “represents subordination and inferiority, it perpetuates harmful stereotypes, and in the case of single-sex programs, it stigmatizes girls.”<sup>212</sup> In fact, concerns about such stigma seemed to be a motivating factor for both the district court in *Garrett* and the Supreme Court in *VMI*. In *Garrett*, the court found that the proposed all-male academies risked stigmatizing girls in two ways:<sup>213</sup> first, by acknowledging the difficulties for both sexes but only responding to male challenges, male academies create a false

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TEX. L. REV. 537, 548 (2016) (“Essentially, when stereotypes are backed by a biological justification, we are more likely to accept them as true and perform in accordance with the stereotypes.”).

206. *Garrett v. Bd. of Educ.*, 775 F. Supp. 1004, 1007 (E.D. Mich. 1991).

207. *Id.*

208. *See id.* (noting that plaintiff’s argument that the proposed “Rites of Passage” curriculum at the all-male academies, which teaches that men need vision and a plan for living, “suggests a false dichotomy between the roles and responsibilities of boys and girls”).

209. *See Moran, supra* note 179 (noting that the ACLU and NOW contributed to more than 5,000 comments received on proposed changes to the Department of Education’s regulations, arguing that those changes are unconstitutional); Galen Sherwin, *Treating School Kids Differently Based on Sex = Discrimination*, AM. CIVIL LIBERTIES UNION (Dec. 4, 2014, 1:15 PM), <https://www.aclu.org/blog/speakeasy/treating-school-kids-differently-based-sex-discrimination> (arguing that single-sex classrooms across the country rely on “precisely such” generalizations); *c.f.* Christina Hoff Sommers, *The Bizarre, Misguided Campaign to Get Rid of Single-Sex Classrooms*, THE ATLANTIC (Oct. 4, 2013, 7:46 AM), <https://www.theatlantic.com/education/archive/2013/10/the-bizarre-misguided-campaign-to-get-rid-of-single-sex-classrooms/280262/> (discussing ACLU’s “Teach Kids, Not Stereotypes” campaign, which was launched to “discredit and terminate gender-specific programs in American schools”).

210. *See, e.g., Salomone, supra* note 176, at 74 (“Women’s advocates remember all too well the Philadelphia litigation where it became apparent that Girls’ High School was receiving significantly fewer resources than the all-boys Central High”).

211. *See* Sean Alfano, *Single-Sex Education Gets More Leeway*, CBS NEWS (Oct. 24, 2006, 1:30 PM), <https://www.cbsnews.com/news/single-sex-education-gets-more-leeway/> (citing the National Organization for Women).

212. *See* Salomone, *supra* note 176, at 73.

213. *See Garrett v. Bd. of Educ.*, 775 F. Supp. 1004, 1007 (E.D. Mich. 1991).



dichotomy between the sexes;<sup>214</sup> and second, using single-sex schools as a remedy for low levels of male achievement may imply that success requires the absence of females.<sup>215</sup> The *VMI* Court expressed concern that Virginia officials were perpetuating stereotypes about traditional female careers by excluding women from the state's historically all-male military academy.<sup>216</sup>

Furthermore, opponents of single-sex education regard it as increasingly out of touch with contemporary notions of gender fluidity.<sup>217</sup> Both academic literature<sup>218</sup> and popular culture<sup>219</sup> have progressively rejected a strict gender binary (i.e., male-bodied men and female-bodied women) in favor of an understanding of gender identity as a masculine-feminine spectrum, with an individual's position on that spectrum not predetermined by biology. Critics of single-sex education argue that it affirms and entrenches the gender binary and categorizes those outside of that binary as "an exception to the rule."<sup>220</sup> Indeed, opponents have expressed concern that transgender and gender-nonconforming students may be incompatible with the core mission of single-sex education, often premised on the notion that there are fundamental, biological differences between boys and girls.<sup>221</sup> Transgender and gender-nonconforming students who desire single-sex education may experience intense psychological pressure trying to locate themselves within the binary on which single-sex programs are largely based.<sup>222</sup>

214. *Id.* ("Urban girls drop out of school, suffer loss of self-esteem and become involved in criminal activity. Ignoring the plight of urban females institutionalizes inequality and perpetuates the myth that females are doing well in the current system.")

215. *Id.* ("Even more dangerous is the prospect that should the male academies proceed and succeed, success would be equated with the absence of girls rather than any of the educational factors that more probably caused the outcome.")

216. *See United States v. Virginia*, 518 U.S. 515, 550 (1996).

217. *See, e.g., Williams, supra note 177*, at 160 ("While long consigned to the margins of the [single-sex education] debate, questions concerning the educational interests and needs of gender nonconforming students have been gaining visibility in recent years.")

218. *See, e.g., Julie L. Nagoshi, Stephanie Brzuzy & Heather K. Terrell, Deconstructing the Complex Perceptions of Gender Roles, Gender Identity, and Sexual Orientation Among Transgender Individuals*, 22 *FEMINISM & PSYCHOL.* 405, 412–14 (2012); *see also* Richard A. Friedman, *Opinion: How Changeable is Gender?*, *N.Y. TIMES* (Aug. 22, 2015), <https://www.nytimes.com/2015/08/23/opinion/sunday/richard-a-friedman-how-changeable-is-gender.html?module=inline> ("Recent neuroscience research suggests . . . that gender identity has a neural basis and that it exists on a spectrum, like so much of human behavior.")

219. *See Friedman, supra note 218.*

220. Janna Jackson, *'Dangerous Presumptions': How Single-Sex Schooling Reifies False Notions of Sex, Gender, and Sexuality*, 22 *GENDER & EDUC.* 227, 228 (2008).

221. *Id.* at 236 ("The diversity within genders and of genders and the diversity of anatomical sexes renders assumptions behind single-sex education overly simplistic and limiting."); *see also Williams, supra note 177*, at 163 ("[O]ne question we might consider is whether continued public support for single-sex public education will reinforce the idea that most children naturally fit into the categories 'girls' and 'boys'").

222. *See Williams, supra note 177*, at 163. Transgender and non-binary students may also face legal challenges in accessing single-sex education consistent with their gender identity. The Trump Administration has signaled that it does not consider gender identity to be protected under Title IX's prohibition of discrimination "based on sex," rolling back Obama-era guidance requiring access to sex-segregated facilities based on gender identity. Sandra Battle & T.E. Wheeler, *Dear Colleague Letter on*

Finally, even supporters of single-sex schooling have voiced concern that empirical research has not been properly utilized. While ample research on single-sex education exists, implementing adequate single-sex programs has proved challenging. Some proponents argue that research supports specific kinds of educational strategies, but that the government's current approach does not consider those strategies.<sup>223</sup>

### C. THE NEED FOR ADDITIONAL RESEARCH

The Department of Education, while noting considerable academic debate on the subject, has acknowledged “educational research [suggesting] that in certain circumstances, single-sex education provides educational benefits for some students.”<sup>224</sup> However, there are various questions that remain: what circumstances and which students? Many scholars agree that the validity of single-sex approaches should depend on the demonstrable, empirical benefits of single-sex schooling.<sup>225</sup> The Department of Education has conducted a meta-analysis of quantitative studies comparing single-sex schooling to co-educational schooling.<sup>226</sup> Not surprisingly, given the academic discord over the past thirty years, the results were generally mixed. The Department of Education found limited support for single-sex schooling.<sup>227</sup> However, it is important to note that the majority of the surveyed studies compared girls' single-sex schools to co-educational ones, and most of the studies were conducted in private, often parochial, schools.<sup>228</sup> Many other individuals and groups have conducted similar comprehensive surveys of the major studies comparing single-sex education to

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*Transgender Students*, U.S. DEP'T OF EDUC. (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

223. See David Sadker & Karen Zittleman, *Single-Sex Schools: A Good Idea Gone Wrong?*, THE CHRISTIAN SCI. MONITOR (Apr. 8, 2004), available at <https://www.csmonitor.com/2004/0408/p09s02-coop.html>.

224. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 69 Fed. Reg. 11,276 (Mar. 9, 2004) (to be codified at 34 C.F.R. pt. 106).

225. See, e.g., Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 GEO. WASH. L. REV. 451, 454 (1999) (“Whether single-sex classes and schools ultimately are upheld as constitutional probably will turn on the social science evidence justifying their efficacy”). There seems to be implicit support for this logic even in federal guidance. See U.S. DEP'T OF EDUC., OFF. FOR C.R., QUESTIONS AND ANSWERS ON TITLE IX AND SINGLE-SEX ELEMENTARY AND SECONDARY CLASSES AND EXTRACURRICULAR ACTIVITIES, (Dec. 1, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf> (holding that the justification for single-sex education, and the evidence cited, “may not rely on overbroad generalizations about the different talents, preferences, or capacities of either sex”).

226. U.S. Dep't of Educ., *Single-Sex Versus Coeducation Schooling: A Systematic Review* (2005), <https://www2.ed.gov/rschstat/eval/other/single-sex/index.html>.

227. But see Leonard Sax, *Department of Education Study is “Seriously Flawed”*, NASSPE, <http://www.singlesexschools.org/EdDeptStudy.htm> (last visited Oct. 14, 2018) (asserting that the survey misses several important studies, does not consider sample sizes, and ignores the possibility that boys and girls learn differently).

228. *Id.*

co-education.<sup>229</sup> Few, however, were able to find evidence of a significant advantage to single-sex institutions. While self-esteem may improve in single-sex contexts, social skills may decrease, and gender stereotypes might increase. For example, a report by Diane Halpern and colleagues argued that single-sex education does not generate academic success,<sup>230</sup> lacks scientific support,<sup>231</sup> and leads to “increase[d] gender stereotyping and legitimize[d] institutional sexism.”<sup>232</sup> The report asserted that the strongest argument against single-sex education is not that it fails to produce academic improvement but rather that it reduces opportunities for boys and girls to work together purposefully. According to its authors, “[i]nstitutionalizing gender-segregated classrooms limits children’s opportunities to develop a broader range of behaviors and attitudes.”<sup>233</sup> This assertion reinforces the notion that schooling is not purely academic; it is an important component of an individual’s social growth.<sup>234</sup> Thus, single-sex education may have harmful, unintended consequences for those who choose to forego the co-educational route.

Other case studies have produced contrary findings regarding academic achievement in the single-gender context. The Irma Lerma Rangel Young Women’s Leadership School in Dallas, which opened its doors in 2004, has been met with “dazzling” success.<sup>235</sup> In recent years, its students have far exceeded

229. See, e.g., Erin Pahlke, Janet Shibley-Hyde & Carlie M. Allison, *The Effects of Single-Sex Compared with Coeducational Schooling on Students’ Performance and Attitudes: A Meta-Analysis*, 140 PSYCHOL. BULL. 1042 (2014), <https://www.apa.org/pubs/journals/releases/bul-a0035740.pdf>.

230. See Diane F. Halpern et al., *The Pseudoscience of Single-Sex Schooling*, 333 SCIENCE 1706, 1706 (Sept. 23, 2011), <http://www.feminist.org/education/pdfs/pseudoscienceofsinglesexschooling.pdf> (“[A]lthough excellent public [single-sex] schools clearly exist, there is no empirical evidence that their success stems from their [single-sex] organization, as opposed to the quality of the student body, demanding curricula, and many other features also known to promote achievement at coeducational schools.”).

231. See *id.* (“Neuroscientists have found few sex differences in children’s brains beyond the larger volume of boys’ brains and the earlier completion of girls’ brain growth, neither of which is known to relate to learning.”).

232. *Id.* at 1707 (“[G]ender divisions are made even more salient in [single-sex] settings because the contrast between the segregated classroom and the mixed-sex structure of the surrounding world provides evidence to children that sex is a core human characteristic along which adults organize education.”).

233. *Id.*; see also Tamar Lewin, *Single-Sex Education is Assailed in Report*, N.Y. TIMES (Sept. 22, 2011), <https://www.nytimes.com/2011/09/23/education/23single.html>.

234. The social impact of single-sex education is a topic of popular debate, given the controversy surrounding the alleged high school behavior of Justice Brett Kavanaugh. Critics argue that the culture at the all-male Georgetown Preparatory School, which Justice Kavanaugh attended, was one in which students were “inevitably steered toward” gender reinforcing behavior, including the objectification of women. See Kim Elssesser, *Brett Kavanaugh and the Downside of Single-Sex Schools*, FORBES (Oct. 4, 2018, 2:51 PM), <https://www.forbes.com/sites/kimelssesser/2018/10/04/brett-kavanaugh-and-the-downside-of-single-sex-schools/#5db121575809>.

235. See Christina Hoff Sommers, *Fight Proposed Ban on Single-Sex Schools*, USA TODAY (Oct. 12, 2011, 3:50 PM), <http://www.aei.org/article/education/fight-proposed-ban-on-single-sex-schools/>. In 2018, the school was ranked twenty-third among Texas high schools, earning a “gold medal” from the *U.S. News & World Report*. See *Irma Lerma Rangel Young Women’s Leadership School*, U.S. NEWS & WORLD REPT., <http://www.usnews.com/education/best-high-schools/texas/districts/dallas-independent->

state and district averages on state standardized tests and have received statewide distinction for postsecondary readiness.<sup>236</sup> In another instance, a Tampa school district chose to establish separate boys' and girls' academies in 2011.<sup>237</sup> Students at these two schools jumped two full grade levels in a single grading period between 2012 and 2013.<sup>238</sup> Teachers and administrators at the Tampa schools contend that significant differences exist between boys and girls and that each school offers certain resources and specialized teaching methods in order to accommodate these purported differences.<sup>239</sup> However, these Tampa schools have received several complaints from organizations like the American Civil Liberties Union for relying on "junk science" that promotes gender stereotypes.<sup>240</sup>

Notwithstanding empirical uncertainty, it is evident that many parents see the option of single-sex education as a welcome alternative to traditional co-educational methods. Parents who wish to enroll their children in public single-sex institutions and classes often face waiting lists, even as the number of single-sex schools and schools offering single-sex curricula skyrockets.<sup>241</sup> In addition, parents are pursuing home education and enrollment in charter schools at increasingly high rates: over two million students are currently homeschooled, while nearly three million attend charter schools.<sup>242</sup> The increased demand for alternative education methods reflects a widespread desire for educational reform. With any luck, the current range of educational options will provide state education boards and the U.S. Department of Education with a more robust empirical foundation on which to judge these methods.

## VI. LOOKING TO THE FUTURE

We are in the midst of major changes in the American education system. Even in light of the recent legislative attempts to provide more opportunities for school

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school-district/irma-lerma-rangel-young-womens-leadership-school-18942 (last visited October 14, 2018).

236. *2015-16 School Report Card: Irma Lerma Rangel Young Women's Leadership School*, TEX. EDUC. AGENCY (2016), [https://www.dallasisd.org/cms/lib/TX01001475/Centricity/Domain/98/data/nclb/2016/TEA\\_SCHOOL\\_REPORT\\_CARD\\_1516\\_35.pdf](https://www.dallasisd.org/cms/lib/TX01001475/Centricity/Domain/98/data/nclb/2016/TEA_SCHOOL_REPORT_CARD_1516_35.pdf).

237. *See* Marlene Sokol, *Federal complaint alleges Hillsborough's single-gender schools discriminate*, TAMPA BAY TIMES (May 14, 2014), <https://www.tampabay.com/news/education/k12/federal-complaint-alleges-hillsboroughs-single-gender-schools-discriminate/2179639>.

238. *See id.*

239. *See id.*

240. *See id.*

241. *See* Heather Hollingsworth & Jessie L. Bonner, *Why Single-Sex Education Is Spreading Across the US*, CHRISTIAN SCI. MONITOR (July 8, 2012), <https://www.csmonitor.com/USA/Latest-News-Wires/2012/0708/Why-single-sex-education-is-spreading-across-the-US>.

242. *See*, Brian D. Ray, *Research Facts on Homeschooling*, NAT'L HOME EDUC. RES. INST. (Jan. 13, 2018), <http://www.nheri.org/research/research-facts-on-homeschooling.html>; *Fast Facts on School Choice*, EDCHOICE (last modified Apr. 24, 2018), <https://www.edchoice.org/resource-hub/fast-facts/> (as of 2016, "there are more than 6,800 charter schools serving nearly [three] million children across the country").

districts to explore single-sex education, the judicial fate of these actions remains in question. The Court in *Hogan* made clear that although deference is given to “congressional decisions and classifications, neither Congress nor a state can validate a law that denies the rights guaranteed by the Fourteenth Amendment.”<sup>243</sup> Further, any justification for gender-based policies “must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”<sup>244</sup> The “genuine” requirement seems to suggest that any successful claims must have concrete empirical evidence behind them.<sup>245</sup> If current research trends continue, it does not seem likely that decisive empirical results will ever exist.

It is also important to note that trends toward single-sex schooling historically tend to occur in cycles. While many more single-sex opportunities are becoming available on the elementary and secondary levels, many private single-sex postsecondary institutions are struggling to stay afloat. Students have been unsuccessful at legally preventing some lesser-known single-sex institutions from going co-ed.<sup>246</sup> Even the American Association of University Women, whose groundbreaking research prompted much of the current trend toward single-sex schooling, has recently voiced its skepticism about using single-sex schooling as a response to perceived gender biases in the classroom.<sup>247</sup> Unless significant advantages to single-sex schooling are proven, single-sex elementary and secondary schools may fade away as quickly as they have appeared.

Under President Trump’s administration, education legislation has significantly reduced federal oversight of state policymaking.<sup>248</sup> During his first one hundred days, President Trump signed a congressional resolution to repeal the Obama administration’s State Plan and Accountability rule, which had specified

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243. *Miss. Univ. of Women v. Hogan*, 458 U.S. 718, 732–33 (1982).

244. *United States v. Virginia*, 518 U.S. 515, 533 (1996); see *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 75 (2001).

245. The Department of Education seems to agree with this interpretation implicitly through its proposed regulations. See *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 69 Fed. Reg. 11,276, 11,279 (2004) (“[A] recipient may, using reliable information and sound educational judgment, determine that a single-sex class in a given subject is likely to provide some students educational benefits.”).

246. See, e.g., *Dodge v. Trustees of Randolph-Macon Women’s College*, 661 S.E.2d 801, 804 (Va. 2008) (holding that female students attending Randolph-Macon Women’s college, which began admitting men in 2006, did not have a cause of action when they sued the school alleging an implied contract between the school and its students to remain an all-women’s institution); Lisa Wogan, *When Wells Run Dry*, *MS. MAGAZINE*, Spring 2005, at 16 (describing student protests of Wells College going co-ed, after students failed to secure an injunction).

247. See AM. ASS’N OF UNIV. WOMEN, *Separated by Sex: A Critical Look at Single-Sex Education for Girls* (1998).

248. See Michael Hansen, Elizabeth Mann Levesque, and Jon Valant, *Reflecting on Education Policy During Trump’s First 100 days—and Predicting What’s Next*, BROOKINGS INST. (May 2, 2017), <https://www.brookings.edu/blog/brown-center-chalkboard/2017/05/02/reflecting-on-education-policy-during-trumps-first-100-days-and-predicting-whats-next/>.

requirements for state accountability plans under ESSA.<sup>249</sup> With the repeal of the rule, Secretary of Education Betsy DeVos seems to have delivered on her promise to grant states maximum flexibility to implement ESSA—“the Department of Education’s newly released state accountability plan application template is shorter and includes fewer requirements than an earlier application released by the Obama administration in November [of 2016].”<sup>250</sup> Although neither Trump nor DeVos has shared a position on federally-funded single-sex education, their focus on eliminating “guidance and regulations that they see as duplicative, outdated, and overly prescriptive”<sup>251</sup> may provide school districts with more freedom to implement such programs.

## VII. CONCLUSION

This Article has mapped the legal and social landscape of public single-sex schooling in the United States. Although recent data suggest that single-sex education is becoming more common,<sup>252</sup> it is important to remember where the legal challenges began—the Equal Protection Clause of the Fourteenth Amendment remains a strong deterrent against the segregation of students by sex. While it is clear that single-sex schools are permissible under current legislation, at least at the primary and secondary levels, much of their constitutionality depends on a fact-specific inquiry into whether or not boys and girls have equal opportunities and whether gender separation promotes harmful stereotypes. The difficulty of this inquiry is exacerbated by the relative silence of the Supreme Court on sex-based classifications in the area of education. The Court has yet to state explicitly whether the “separate-but-equal” treatment prohibited in *Brown*<sup>253</sup> on the basis of race is in fact allowable in the context of gender. As new data become available on the effects of single-sex schooling, the legislature and the judiciary can make more informed decisions about the best way to achieve legal equity and substantive equality for both sexes.

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249. *Id.*

250. *Id.*

251. Alyson Klein, *Trump Administration Considering ESSA Spending Guidance*, *Advocates Say*, EDUC. WK. (June 4, 2018, 5:08 PM), [http://blogs.edweek.org/edweek/campaign-k-12/2018/06/trump\\_administration\\_supplement\\_not\\_supplant\\_ESSA.html](http://blogs.edweek.org/edweek/campaign-k-12/2018/06/trump_administration_supplement_not_supplant_ESSA.html).

252. See Grace Chen, *Why Single-Sex Public Schools are Growing in Popularity*, PUB. SCH. REV. (last updated Dec. 1, 2017), <https://www.publicschoolreview.com/blog/why-single-sex-public-schools-are-growing-in-popularity> (stating that “[o]ne of the fastest growing trends in 21st-century America is single-sex education”); see also Ray, *supra* note 242.

253. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).