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Re: Willard School Single-Sex Classes

Dear Superintendent Theoharides,

Thank you for your prompt response to our public records request. Based on your responses to the records requested, it appears that the Willard School, a coeducational middle school within the Sanford School District, operated a single-sex education program in academic classes in the sixth grade at least through the end of the 2010-2011 school year.¹ News reports suggest that the program was expanded to the fifth grade in the 2011-12 school year.² We write to alert you that your response to our request strongly suggests that the Willard School single-sex education program may violate numerous provisions of federal law, including Title IX of the Education Amendments of 1972 and the United States Constitution.

Our analysis of the documents produced demonstrates that the single-sex programs at Willard School is based upon and promotes harmful stereotypes about the different learning styles and development of boys and girls. Such stereotypes limit educational opportunities for both boys and girls, and are legally impermissible in public schools. Because of these serious legal concerns, which are outlined in detail below, we request that the Sanford School Department enter into an agreement with the ACLU of Maine to cease all single-sex (and gender-specific) programs or activities, effective at the start of the next school year, and to cease all gender-specific instruction effective immediately.³

1. The Willard School program appears to violate the Constitution because it lacks sufficient justification, and appears to be based in large part on impermissible “overbroad generalizations about the different talents, capacities, [and] preferences” of boys and girls.

¹ The records include data through October 2011 and are thus current through the end of the 2010-2011 school year.
³ We exempt from this request single-sex programs and activities permitted by Title IX, 20 U.S.C. § 1681(a)(6-9), and by 34 C.F.R. § 106.34(a)(1)--(a)(4).
Under the United States Constitution, the Sanford School Department may not provide any single-sex education program or activity that fails to meet constitutional standards. In *United States v. Virginia*, a case challenging the all-male admission policy at the Virginia Military Institute, the United States Supreme Court made clear that to comply with the Equal Protection Clause, a governmental actor instituting a single-sex education program must demonstrate an “exceedingly persuasive justification,” and the single-sex nature of the program must be substantially related to the achievement of that justification. *Virginia*, 518 U.S. 515 533 (1996); accord *Doe v. Vermilion Parish School Board*, No. 10–30378, 2011 WL 1290793, at **5 (Apr. 6, 2011). That justification must be “genuine, not hypothesized or invented post hoc in response to litigation.” *Virginia*, 518 U.S. at 533. Single-sex education may not be justified solely by the goal of offering a single-sex option for parents and students—there must be a sufficiently compelling justification separate and apart from that goal that independently justifies the decision to include a single-sex option among the choices that are offered to parents. See id. at 545.

Moreover, the Court held that the Constitution does not permit single-sex education to be based on “overbroad generalizations about the different talents, capacities, or preferences of males and females.” *Virginia*, 518 U.S. at 533. Despite claims that the form and structure of the sex-segregated program at VMI was “‘justified pedagogically,’ based on ‘important differences between men and women in learning and developmental needs,’ [and] ‘psychological and sociological differences,’” the Court held that generalizations about a “typical” woman (or man), are not constitutionally adequate to justify a sex-segregated program. See id. at 549-50. Unproven theories of learning style differences between boys and girls are, therefore, an impermissible basis to support sex segregation.

Documents produced in response to our Freedom of Access Act request of October 31, 2011, which sought “documents relied upon by Sanford School Department in choosing to institute single-sex educational programs” and “documents presenting results or outcomes of single-sex instruction in a public school system used by Sanford School Department either for public education or internal decision-making” do not clearly indicate any governmental interest, “substantial” or otherwise, that the Sanford School Department aimed to serve in implementing the “gender-specific” classes at Willard School. According to the documents produced, this program was implemented because the principal at a different school read an article or articles (that were not produced) that led him to believe that single-sex education was a good idea because “boys’ and girls’ learning styles were different.” He shopped this idea around and “it was decided” that it would be better to try the program at a middle school—Willard School was ultimately selected, in part because of a concern regarding sexual harassment and self-esteem of female students in the sixth grade.

The documents suggest this program was justified in large part based on broad and unproven generalizations about the supposedly different ways in which boys and girls learn and develop. The summary of the “Single-Gendered Sixth Grade Classroom Pilot” asserts that it is “[i]t is known that male’s [sic] and females’ social/emotional needs are different.” In another document produced—the slides from a presentation given to the Sanford School Department’s School Committee on May 11, 2009—the presentation reiterates that the proposal was initiated based on articles claiming that “boys’ and girls’ learning styles are different,” and further asserts that “[t]he brain development of boys and girls are uniquely different.”

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The documents produced also suggest that these gender stereotypes were incorporated into the curriculum in the single-sex classrooms. The presentation notes that an “[o]bjective of the program is to create a safe learning environment where each gender is able to reach his/her potential by having . . . the students be more mindful of what their culture says is appropriate for each gender.” In the description of the “Single-Gendered Sixth Grade Classroom Pilot,” the description states that “[i]nstruction may best be differentiated and enhanced through the exploration and tailoring of how each gender learns.” Another document suggests how this played out in the boys and the girls’ classrooms: the Willard School December News describes the sixth-grade girls class: “young ladies have developed some important routine [sic] for themselves one [sic] is a daily cup of cocoa as they read the Portland Press Herald and discuss local, national and global events.” Over on the boys’ side, there are different routines: “The class has created an exercise area within the class and all the young men have the opportunity to exercise . . . Ms. Wagenfield’s class has signed up with the NFL Experience which is a free program sponsored by the National Football League where students can earn points towards prizes by tracking and increasing their daily activity.”

In sum, these documents suggest that the program was based in large part on unproven and impermissible theories about the supposedly “different” brains and learning styles of boys and girls, and that the classroom curricula and activities were infused with impermissible sex stereotypes. While there are unquestionably biological and developmental differences between boys and girls, those differences cannot be translated into the use of different teaching methods in sex segregated classrooms. See Diane Halpern, et al., The Pseudoscience of Single-Sex Schooling, 333 Science 1706 (2011). This flawed educational theory has been widely discredited by reputable scientific research, and has been definitively foreclosed in public schools by the Supreme Court in U.S. v. Virginia.

Although it is far from clearly articulated, there is also some suggestion in the documents that an additional basis for the institution of the program may have been harassment of girls—namely, “a concern about the effects boys’ comments have on the girls’ self-esteem,” and “a strong core of girls in the sixth grade whose perception of their self-worth centers around their sexuality.” Reducing sexual harassment and increasing self-esteem of female students are undoubtedly important government interests. However, separating girls from boys is not substantially related to serving these interests, for several reasons. First, it fails to address or respond to individual disciplinary issues, such as specific incidents of harassment, or to correct inappropriate behavior. Second, it sends the message that boys are incapable of ceasing harassing behaviors with girls present, that girls are incapable of raising their self-esteem with boys present, and that girls are the problem. Schools would not be permitted to segregate students to prevent one group from harassing the other based on any other form of classification (e.g. hair-color, height, disability, sexual orientation, left-handedness)—nor is it likely that they would even contemplate doing so—under even a rational-basis standard of review. It should certainly not be permitted based on a classification like sex that gets heightened scrutiny under the Constitution.

Moreover, the documents that were produced would not support the conclusion that single-sex education was substantially related to any important or even legitimate educational interests, because they are entirely biased, anecdotal, and non-scientific. Although district officials made claims that students benefit from sex segregated instruction, no valid studies or educational data were produced showing any link between single-sex education and any
improved academic or behavioral outcomes. The district produced only one 2009 research report from the National Association of Elementary School Principals, *Single Sex Classrooms*, in which the author concluded that the results of existing studies were “equivocal” and cautioned that schools should “have a clearly articulated rationale and specific program goals before implementation efforts begin”—both of which were absent here.

2. **The Willard School program appears to violate the statutory prohibition in Title IX on segregation on the basis of sex within coeducational institutions, as well as the implementing regulations of numerous regulatory agencies from which the Sanford School Department receives federal funds.**

   Under Title IX, “No person in the United States shall, on the basis of sex, be excluded from participation in . . . any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a). Separation of students by sex within coeducational institutions violates this prohibition on discrimination. Accordingly, numerous federal agencies have promulgated regulations to implement this Title IX mandate. For example, regulations issued by the United States Department of Agriculture (USDA) flatly prohibit single-sex classes. 7 C.F.R. § 15a.34 (“A [USDA funding] recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis . . .”). USDA regulations apply to all Maine schools as a result of their participation in the USDA-funded school lunch program.

3. **The Willard School program appears to violate regulations promulgated by the United States Department of Education.**

   While Title IX regulations promulgated by the United States Department of Education permit sex segregation under certain limited circumstances as a matter of federal enforcement of Title IX by the Department, its regulations require at a minimum that any single-sex class within a coeducational school must be based on specific, identified objectives; must be completely voluntary; must ensure that a substantially equal coeducational option is available;4 and must be periodically evaluated “to ensure that single-sex classes or extracurricular activities are based upon genuine justifications and do not rely on overly broad generalizations about the different talents, capacities, or preferences of either sex and that any single-sex classes or extracurricular activities are substantially related to the achievement of the important objective for the classes or extracurricular activities.” 34 C.F.R. §106.34(b)(1),(4). The gender-specific program at Willard School violates the regulations of the Department of Education for substantially the same reasons it violates the Constitution, namely because it is not justified based on the two permissible justifications enunciated in the regulations (either by an assessment of individual student need, or by an established policy to improve educational

4“Factors the Department will consider, either individually or in the aggregate as appropriate, in determining whether classes or extracurricular activities are substantially equal include, but are not limited to, the following: the policies and criteria of admission, the educational benefits provided, including the quality, range, and content of curriculum and other services and the quality and availability of books, instructional materials, and technology, the qualifications of faculty and staff, geographic accessibility, the quality, accessibility, and availability of facilities and resources provided to the class, and intangible features, such as reputation of faculty.” 34 C.F.R. §106.34(b)(3).
outcomes by offering diverse educational options, and because it is based on impermissible sex stereotypes. In addition, it failed to meet the evaluation requirement in the regulation, and may fail to offer a substantially equal coeducational alternative.

It is clear from the documents that the Sanford School Department lacks any established policy of offering diverse educational options to parents. See 71 Fed. Reg. at 62534 (explaining that in order for “diversity” justification to be valid under the regulation, there must actually be a diversity of educational options of which single-sex classes is only one). Rather, as detailed above, the program was implemented due to the beliefs on the part of administrators that boys and girls brains were different. Moreover, it is clear that no individualized assessment of student needs was performed; rather, the school decided to implement a pilot in which sixth grade students who chose to participate in the program were entirely segregated for all academic subjects—a wholesale approach that the U.S. Government has indicated is impermissible under the regulations. See Doe v. Vermilion Parish School Board, Brief for the United States as Amicus Curiae Supporting Appellants (June 4, 2010), http://www.justice.gov/crt/about/app/briefs/vermillion_brief.pdf.

To the extent that an evaluation was performed, it appears to have been focused on student grades and disciplinary incidents, as well as parent and student attitudes. While the significance of the results is difficult to discern from the data provided, it is clear that the evaluation did nothing to ensure that the program was not based on overbroad generalizations about boys and girls. Nonetheless, apparently on the basis of this evaluation alone, the board voted to expand the program to the 5th grade the following year.

Finally, the documents raise significant questions about whether the coeducational alternative offered is substantially equal. The documents suggest that special education and Title I students are only permitted to enroll in the coeducation classes. (See May 19, 2009 presentation to parents, stating that “Title I and SPED will be co-ed”). The reasons for this are not explained, and the meaning ambiguous—elsewhere, the documents appear to reflect an intention to integrate students of different ability levels in both types of class. However, if the coeducational classes are indeed used to warehouse students receiving Title I services or students with special educational needs, then that would potentially lead to significant inequities between the coeducational and single-sex classes. Furthermore, it is unclear how selection for inclusion in the program operated once parental selections had been submitted. Cherry-picking the top students for single-sex classes would skew the composition of the classes and would be impermissible. For these reasons, similarly organized programs in other jurisdictions have not been permitted to continue. See Doe v. Vermilion Parish School Bd., 2010 WL 440637, No. CIV.A 09-1565 (W.D. La. Feb. 04, 2010), aff’d on other grs. and remanded by Doe ex rel. Doe v. Vermilion Parish School Bd., 2011 WL 1290793, No. 10–30378 (5th Cir. Apr. 6, 2011).

4. The No Child Left Behind Act does not authorize otherwise impermissible single-sex education programs.

Proponents of single-sex education commonly point to a provision of No Child Left Behind that states that funds available for “innovative programs” were available for single-sex programs. However, No Child Left Behind does not amend or supersede Title IX, and it explicitly states that any single-sex program must be consistent with existing applicable law. See
20 U.S.C. § 7215(a)(23). For the reasons discussed above, the program at the Willard School does not satisfy that requirement.

In light of these serious legal concerns, we therefore respectfully request that the Sanford School Department agree to cease all single-sex programs and activities with the exception of those permitted under Title IX by the start of the next school year. A proposed agreement is enclosed for your consideration. Should the Board fail to agree to take the steps outlined therein, the ACLU will consider pursuing legal action, including the filing of a lawsuit and/or an administrative complaint with the pertinent federal agency or agencies.

We expect your response no later than June 4, 2012.

Very truly yours,

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ENCLOSURE