Single-Sex Classes

In the perpetual efforts to improve the effectiveness of schooling, some districts have introduced the option of single-sex classes, schools, or charters. Congress passed Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex in any federally funded education program or activity, and the lower courts issued a series of decisions extending the context to K-12 public schools. More specifically, these decisions ruled that single-sex male and female high schools did not violate the equal protection clauses where the programs were voluntary and offered essentially equal opportunities (*Vorcheimer v. School District of Philadelphia,* 1976); the conversion of an all-girls high school to coeducational status did not violate the 14th Amendment or Title IX (*Jones v. Board of Education of New York City,* 1986); and the establishment of male-only elementary and middle schools did not have sufficient justification to pass muster under either the equal protection clause of Title IX (*Garrett v. Board of Education of Detroit,* 1991).

The most recent step in the backdrop for current male- or female-only programs was the issuance in 2006 of regulations under Title IX that authorized single-sex classes and extracurricular activities under certain limited circumstances, including having a substantial relationship to the overall purpose of improving academic achievement via diverse educational opportunities; evaluation to ensure continuing fulfillment of this genuine justification without relying on sex stereotypes; enrollment on a completely voluntary basis; and provision to other students, including the excluded sex, a substantially equally coeducational class or extracurricular activity.

The Case

In the fall of 2008, the principal of a grade 5-8 middle school in Louisiana obtained approval from the school board to initiate, for his doctoral dissertation, an experimental program of single-sex classes for some of the eighth graders. He conducted the program, with mandatory assignments to the experimental classes during the second semester of the 2008-2009 school year. In June 2009, he reported to the school board a significant improvement in academic achievement and a significant decline in behavioral problems. Impressed with these data, the school board and the superintendent approved expansion of the program.

For the 2009-2010 school year, the principal established two all-boys, two all-girls, and one coeducational class for the core subjects at each grade. He informed the parents of their children's assignments at the August 2009 orientation. Upon learning of their two daughters' assignments to single-sex classes, Mr. and Mrs. Doe hired an attorney, who informed school officials that the new program was in violation of the 2006 regulations, including the requirement that the program be voluntary.

After consulting with legal counsel, the superintendent admitted ignorance and violation of these regulations. The principal quickly established a choice procedure. Mr. and Mrs. Doe sought to have both daughters opt out. However, only the sixth grader transferred to coeducation classes; the eighth grader remained in the single-sex classes after the principal talked with her.

Upon investigating the program with their attorney, the Does learned that the principal's reported results were flawed; the coeducational classes had a disproportionate representation of students with individualized education plans (IEPs), particularly those with severe needs, and of males generally; and the average GPA of the students in the coeducation classes was notably lower than that of the students in the single-sex classes. The district officials countered that the core classes in both programs were uniform with regard to teachers, state-mandated curriculum, testing, schedule, resources, and facilities. They admitted one deliberate difference in their "equal but separate" concept—sex-based differential teaching strategies, such as "action techniques" for boys and a more quiet environment for girls.

Undaunted, the Does filed suit in federal court, claiming that the sex-based classes violated the equal protection clause and/or the Title IX regulations. In response to their motion for a preliminary injunction, the district court issued its ruling. Finding "significant flaws" in the principal's data and "extreme lack of oversight over this program," the court denied the motion to abolish the program but ordered a 10-step plan for 2009-2010 that included

better parental notice, more even distribution of IEP and male students, and more availability of coeducational classes. The parents appealed to the Fifth Circuit Court of Appeals.

What do you think was the court's decision?

In *Doe v. Vermilion Parish School Board* (2011), the Fifth Circuit affirmed the district court's decision, but on narrow technical grounds that did not end the proceedings. Rather than squarely address the 14th Amendment and Title IX issues, the appeals court left the trial court's limited decision undisturbed for two adjudicative reasons.

First, since the 2009-2010 school year had already passed, it was unclear whether the plaintiffs still met the judicial prerequisite of standing—that is, a direct stake in the outcome of the case; their older child had graduated from the middle school and the record did not reveal whether their younger child was still at the school. Second, without a corresponding record of the continued existence and current nature of the single-sex classes, the matter could be moot or at least without a sufficient factual foundation for a judicial review of the merits. Thus, the Fifth Circuit remanded the case to the district court for further proceedings to determine whether the single-sex classes continued and, if so, whether they met the standards of the equal protection clause and the Title IX regulations.

Does the Title IX regulation for completely voluntary choice require an opt-in rather than opt-out procedure?

Although an opt-in procedure would be obviously preferable, it is not necessarily required or sufficient. Instead, the answer at this point, subject to more relevant case law, is "it depends on the circumstances." In *Doe v. Woods* (2012), a federal district court in West Virginia ruled that an opt-out procedure did not satisfy the Title IX regulations. However, the legal force of this ruling is limited by not only the level of the court and the scope of its jurisdiction, but also the preliminary-injunction posture of the case, which is an expedited proceeding, and the particular facts the courts relied on, which included last-minute timing of the opt-out process.

Moreover, observing that the commentary accompanying the regulations "strongly encouraged" parental notification and authorization, the *Doe v. Woods* court carefully conditioned its "affirmative assent" requirement as "preferably," not necessarily, being in the form of a written, signed opt-in form. Conversely, although in the main case the Fifth Circuit did not specifically address the issue of voluntary participation, the court commented on the similarly late timing of the choice procedure and its possibly coercive implementation by the principal.

Would the lack of equality between the single-sex and coeducational classes be the basis for monetary relief?

No. The Title IX regulations only require "substantial" equality of opportunity. In *A.N.A. v. Breckinridge County Board of Education* (2011), a federal district court in Kentucky dismissed parent claims for money damages, concluding that the differences in the case, such as larger class sizes for the coeducation classes, were insufficient to constitute the concrete injuries necessary for liability.

Although the court reasoned that "equivalent educational opportunities do not mandate identical classroom experiences," it did not directly address the main case's differences with regard to teaching strategies. However, like the other recent decisions, the court rejected a complete ban on such classes, concluding that "no legal authority supports the conclusion that optional single-sex programs in public schools are ipso facto injurious to the schools' students."

Does the recent case law also apply to single-sex schools?

Not without qualification, because both the Title IX regulations and the cases were limited to single sex-classes (or extracurricular activities), not to entire schools. In the only recent case (*S.M. v. Delaware Department of Education*, 2015), the federal district court in Delaware dissolved a preliminary injunction, thus allowing the nonrenewal of the only all-girls charter school in the state despite the continuance of an all-boys charter school. The key was that the original injunction that prevented the nonrenewal was a state statute that would have foreclosed any new single-sex charters, and the legislature changed the law to allow the future possibility of an all-girls charter. Other than the principle of equal opportunity, the decision does not provide specific generalizable guidance for establishing single-sex schools.

Conclusion

Single-sex classes may well provide the prospect of improved academic and behavioral performance for some students. But doing so depends on not only tailoring the fit to the specific context and students, but also meeting applicable legal requirements. Whether as a matter of professional practice or legal requirements, principals should avoid the belated admission of the administrator in the main case: "We didn't go back and research it to see the proper way of doing [it]." On the legal side, check with legal counsel regarding the pertinent provisions of the 2006 Title IX regulations, and any relevant requirement of state law. On the professional side, consider going beyond the legal requirements to optimize the successful buy-in of parents, teachers, and students. P

Perry A. Zirkel is professor emeritus of education and law at Lehigh University.