

DEPARTMENT OF EDUCATION

34 CFR Part 106

RIN 1870-AA11

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

AGENCY: Office for Civil Rights, Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to amend the regulations implementing Title IX of the Education Amendments of 1972 (Title IX), which prohibits sex discrimination in federally assisted education programs. These proposed amendments would clarify and modify Title IX regulatory requirements pertaining to the provision of single-sex schools and classes¹ in elementary and secondary schools. The proposed amendments would expand flexibility for recipients that may be interested in providing single-sex schools or classes, and they would explain how single-sex schools or classes may be provided consistent with the requirements of Title IX.

DATES: We must receive your comments on or before April 23, 2004.

ADDRESSES: Address all comments about our proposed regulations to Kenneth L. Marcus, U.S. Department of Education, 400 Maryland Avenue, SW., room 5000, Mary E. Switzer Building, Washington, DC 20202-1100. If you prefer to send your comments through the Internet, you may address them to us at the U.S. Government Web site: www.regulations.gov.

Or you may send your Internet comments to us at the following address: singlesexcomments@ed.gov.

For all comments submitted, you should specify the subject as "Single-Sex Proposed Regulations Comments."

FOR FURTHER INFORMATION CONTACT: Sandra G. Battle, U.S. Department of Education, 400 Maryland Avenue, SW., room 5036, Mary E. Switzer Building, Washington, DC 20202-1100. Telephone: (202) 205-5526.

If you use a telecommunications device for the deaf (TDD), you may call 1-877-521-2172. For additional copies of this document, you may call the Customer Service Team for the Office for Civil Rights (OCR) at (202) 205-5413 or 1-800-421-3481. This notice of proposed rulemaking will also be

available at OCR's Web site on the Internet at: www.ed.gov/ocr.

Individuals with disabilities may obtain this document in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

SUPPLEMENTARY INFORMATION:**Invitation to Comment**

We invite you to submit comments regarding these proposed regulations.

We invite you to assist us in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from these proposed regulations.

During and after the comment period, you may inspect all public comments about these proposed regulations in room 5036, 330 C Street, SW., Washington, DC 20202-6132, between the hours of 9:30 a.m. and 4 p.m., Eastern time, Monday through Friday except Federal holidays.

Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review comments or other documents in the public rulemaking record for these proposed regulations. If you want to schedule an appointment for this type of aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**. (If you use a TDD, you may call 1-877-521-2172.)

Overview

Title IX prohibits discrimination on the basis of sex in education programs and activities that receive Federal financial assistance.² The statute and existing regulations contain specific provisions regarding single-sex classes, schools, and extracurricular activities.

After almost 30 years of progress under Title IX and our regulations, we have reexamined our regulatory provisions applicable to single-sex elementary and secondary education. For the reasons described in this preamble, we are proposing amendments to our regulations that would provide additional flexibility in permitting single-sex schools and classes at the elementary and secondary education levels consistent with the requirements of Title IX. The proposed regulations would provide the

framework for determining under what circumstances single-sex schools and classes may be provided in elementary and secondary education and for ensuring that, when they are provided, they are provided in a manner that ensures nondiscrimination on the basis of sex consistent with recipients' Title IX obligations.

When Title IX was enacted in 1972 and when the current regulations were issued in 1975, discrimination against female students was widespread at all levels of education, including elementary and secondary education. Since then, the educational opportunities for young women and girls, and the commitment of educators to those opportunities, have increased.

Thus, at the time that the current regulations were issued, it was not unreasonable to base the regulations on a presumption that, if recipients were permitted to provide single-sex classes beyond the most limited of circumstances, discriminatory practices would likely continue.

Over the past 30 years, the situation has changed dramatically. While there are still more gains to be made, schools are now far more equitable in their treatment of female students. Those changes are due in no small measure to Title IX and our regulations. In the meantime, educational research has suggested that in certain circumstances, single-sex education provides educational benefits for some students.³ Therefore, we have determined that

³ See, e.g., U.S. Department of Education, Office of Educational Research and Improvement, *Single-Sex Schooling: Perspectives From Practice and Research* (1993) (stating that "[t]he research synthesis produced for this conference and the summary of the conference proceedings suggest that single-sex education provides educational benefits for some students"). We recognize that there is presently a debate among researchers and educators regarding the effectiveness of single-sex education. Compare Cornelius Riordan, *What Do We Know About the Effects of Single-Sex Schools in the Private Sector?: Implications for Public Schools, in Gender in Policy and Practice: Perspectives on Single-Sex and Coeducational Schooling*, 10, 13-22, 24-28 (Amanda Datnow & Lea Hubbard eds., 2002) (stating that "[s]ingle-sex schools remain an effective form of school organization for disadvantaged students"); Herbert W. Marsh, *Effects of Attending Single-Sex and Coeducational High Schools on Achievement, Attitudes, and Sex Differences*, *Journal of Educational Psychology*, 1989, Vol. 81, No. 1, 70, 80 (finding in study of Catholic schools that when outcomes for seniors were controlled for background characteristics in their sophomore year "almost no school-type effects were statistically significant" * * * [and] there was no tendency favoring students from single-sex or coed schools"). See also American Association of University Women, *Separated by Sex: A Critical Look at Single-Sex Education for Girls 2* (1998) (stating "[t]here is no evidence that single-sex education in general 'works' or is 'better' than coeducation" but also stating that "[s]ingle-sex educational programs produce positive results for some students in some settings").

¹ The current regulations use the terms "class," "course," "course offering," and "extracurricular activity." For the sake of simplicity, we solely use the term "class" in this preamble.

² 20 U.S.C. 1681(a).

amendments permitting additional flexibility in providing single-sex educational options, while incorporating appropriate safeguards, are appropriate. When the current regulations were issued, it may have been appropriate to provide limited flexibility for single-sex educational opportunities, as discriminatory practices were still prevalent. However, given the current environment, we believe that additional flexibility is warranted, and that this flexibility will not compromise equal educational opportunities for male and female students. In fact, these amendments will help provide educational benefits to some students.

These proposed amendments reflect our analysis of the Title IX statute, its legislative history, and the current regulations, as well as relevant case law under Title IX.⁴ The proposed amendments describe standards that, if adopted, would be used by the Office for Civil Rights of the U.S. Department of Education (Department) in making determinations about whether recipients' single-sex schools and classes are consistent with our Title IX regulations for the purposes of continued receipt of Federal financial assistance.⁵ OCR would make these

⁴ Because the requirements of the Equal Protection Clause of the 14th Amendment to the U.S. Constitution also protect the rights of public school students who may be subject to sex-based classifications, in developing the proposed amendments, we have also considered Supreme Court decisions involving constitutional challenges to single-sex education. The Supreme Court has issued no opinions regarding single-sex programs in elementary and secondary school education. Soon after the original Title IX regulations were adopted in 1975, the Court, by an evenly divided vote and without an opinion, let stand a decision of the Third Circuit Court of Appeals allowing, under the Equal Protection Clause, a school district that also operated coeducational high schools to have two comparable single-sex high schools. *Vorchheimer v. School District of Philadelphia*, 532 F.2d 880 (3d Cir. 1976), affirmed by an equally divided Court, 430 U.S. 703 (1977) (per curiam). We also considered the Court's decisions in two more recent constitutional challenges in the context of single-sex postsecondary education, *United States v. Virginia (Virginia)*, 518 U.S. 515 (1996), and *Mississippi University for Women v. Hogan (Hogan)*, 458 U.S. 718 (1982).

⁵ In addition, recipients that are public entities, such as public school districts, are subject to the sex discrimination prohibitions of the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. Public elementary and secondary schools are also subject to the requirements of the Equal Educational Opportunities Act of 1974 (EEOA), 20 U.S.C. 1701–1721, which, among other things, contains prohibitions against the involuntary assignment of students to schools on the basis of sex. 20 U.S.C. 1703(c), 1705, and 1720(c). Public school and private school recipients may also be subject to State or local laws prohibiting single-sex classes or schools. Recipients may wish to consult legal counsel regarding how these additional legal authorities may affect any particular single-sex schools or classes they propose to offer.

determinations in resolving any complaints related to these issues.⁶ The proposed amendments do not require single-sex schools or classes but provide additional flexibility to offer them, and they require that recipients continue to ensure that their policies and practices do not result in discrimination on the basis of sex. Recipients that chose to operate single-sex schools or classes would be required to comply with our final regulations, but we are not proposing to require recipients to apply to OCR for approval of a proposed single-sex school or class. OCR will provide technical assistance to recipients, upon request, when the Department approves final regulations.

Pursuant to a provision of the No Child Left Behind Act of 2001,⁷ on May 8, 2002, the Department published guidelines on the existing regulatory requirements in a document entitled "Guidelines on current Title IX requirements related to single-sex classes and schools" (Guidelines).⁸ Simultaneously, we published a notice of intent to regulate (NOIR), indicating that the Secretary intends to propose amendments to our Title IX regulations in order to provide more flexibility to educators to establish single-sex schools and classes at the elementary and secondary levels and to provide additional public educational choices to parents.⁹ The purpose of the NOIR was to begin the process of obtaining early input from the public on this issue prior to amending the regulations.

In response to this invitation we received approximately 170 comments. We are pleased with this response and the public interest expressed regarding this issue. We have found that the comments fulfilled the aim of the NOIR to focus public attention and comment on key issues. In summary, the comments reflected a spectrum of opinion, ranging from enthusiastic support for amending the regulations to

⁶ Similarly, OCR would make these determinations if OCR were to initiate a compliance review on these issues. See 34 CFR 100.7, made applicable to Title IX by 34 CFR 106.71.

⁷ On January 8, 2002, the President signed into law the No Child Left Behind Act of 2001 ("No Child Left Behind" or "NCLB"), which reauthorized the Elementary and Secondary Education Act of 1965 (ESEA). Section 5131(c) of the ESEA required the Department to issue guidelines for local educational agencies (LEAs) regarding the applicable law on single-sex classes and schools within 120 days of the enactment of NCLB. Section 5131(a) of the ESEA describes permissible uses for Innovative Assistance Programs funds, and the guidelines were required because section 5131(a)(23) permits "programs to provide same-gender schools and classrooms (consistent with applicable law)."

⁸ 67 FR 31102–03 (2002).

⁹ 67 FR 31098–99 (2002).

permit recipients more flexibility in providing single-sex schools and classes to opposition against any additional flexibility. In preparing these proposed regulations, we considered comments on both the critical issues raised in the NOIR and on other issues raised by commenters.

Application

In summary, and unless otherwise noted, the proposed amendments for classes and schools would apply to elementary and secondary education and to both public or private¹⁰ recipients. The proposed amendments exempt certain charter schools from certain proposed requirements related to single-sex schools. Furthermore, under the proposed amendments public and private recipients would be prohibited from operating single-sex elementary and secondary vocational institutions and from offering single-sex vocational education classes in coeducational elementary and secondary schools.

We discuss the substantive issues under the sections of the proposed amendments to which they pertain. We discuss our proposed non-substantive changes in the technical amendments section at the end of the preamble.

Current Requirements and Proposed Substantive Changes for Single-Sex Classes

Current Regulations (34 CFR 106.34) Generally Prohibit Single-Sex Classes

There are limited exceptions to the general prohibition on single-sex classes and activities in the current regulations in 34 CFR 106.34.¹¹ For coeducational

¹⁰ Private elementary and secondary schools are subject to the proposed requirements pertaining to classes if they receive a grant or subgrant of Federal funds from the Department. Private schools with students who participate in programs conducted by LEAs that are funded under Federal programs such as Title I of the Elementary and Secondary Education Act or the Individuals with Disabilities Education Act are not considered recipients of Federal funds unless they otherwise receive a grant or subgrant of Federal funds. Such private schools are not subject to these regulations, but the LEA must ensure that its programs, including services to private school students, are consistent with Title IX. Also, the proposed amendments pertaining to single-sex schools do not apply to recipients that operate private, nonvocational elementary or secondary schools.

¹¹ These exceptions allow (1) single-sex groupings within physical education classes that result from the application of objective standards of physical ability, 34 CFR 106.34(b); (2) separation of students by sex in physical education classes during participation in contact sports, 34 CFR 106.34(c); (3) separation of students by sex for portions of classes in elementary and secondary schools dealing exclusively with human sexuality, 34 CFR 106.34(e); or (4) choruses based on vocal range or quality, which may result in a single-sex or predominantly single-sex grouping, 34 CFR 106.34(f).

elementary and secondary schools, the existing regulations in 34 CFR 106.34 prohibit recipients from conducting single-sex classes or activities or requiring or refusing participation in classes or activities on the basis of sex.

Application of Proposed Single-Sex Class Amendments (Proposed 34 CFR 106.34(b))

Except for specified exceptions, the prohibitions against excluding any student from classes on the basis of sex as set out in the current regulations apply to all classes and activities, including extracurricular activities, and to all coeducational recipient institutions at all levels of education. Our proposed substantive changes would apply both to elementary and secondary public¹² and private¹³ recipients. The proposed amendments also would specify that the recipient that operates the school is responsible for ensuring compliance with the proposed provisions for single-sex classes.

Proposed 34 CFR 106.34(b) would not apply to postsecondary education. Coeducational postsecondary schools would continue to be subject to the requirements of the general prohibition contained in the existing regulations, and they would not be permitted to offer single-sex classes pursuant to the provisions of these proposed amendments. The existing general prohibition is in 34 CFR 106.34(a) of the proposed regulations.

Since vocational education schools were the only type of elementary and secondary schools to which Congress specifically applied Title IX admissions requirements, we have limited the prohibition on single-sex classes to vocational education.

Recipients operating vocational schools would continue to be subject to the general prohibition against excluding students from classes on the basis of sex, and, thus, would not be permitted to offer single-sex classes pursuant to the proposed amendments.

Some school districts offer their vocational education curriculum in comprehensive coeducational schools, rather than in separate vocational schools. Even in these elementary and secondary schools that are not vocational schools, the proposed amendments do not change the applicability of the current general regulatory prohibition against single-sex vocational education classes. These

schools would be able to apply the proposed substantive amendments to their nonvocational classes, but the proposed amendments would not apply to vocational classes.

Recipient's Important Governmental or Educational Objective (Proposed 34 CFR 106.34(b)(1)(i))

The proposed amendments would require that a single-sex class be based on a recipient's important governmental or educational objective,¹⁴ which may be either—(1) to provide a diversity of educational options to students and parents, provided that the single-sex nature of the class is substantially related to achievement of that objective; or (2) to meet the particular, identified educational needs of its students, provided that the single-sex nature of the class is substantially related to meeting those needs.¹⁵ In either case, the recipient's important governmental or educational objective in providing a single-sex class must be implemented evenhandedly. We have identified and incorporated into the proposed regulations these two important objectives—diversity of educational options and meeting the particular, identified needs of its students—either of which could be the basis for single-sex classes. Because there may be differences in the way achievement of these two important objectives work, we discuss them separately in paragraphs that follow. In our discussion of the proposed procedural requirement to conduct periodic evaluations of single-sex classes, we provide suggestions as to the types of information that a recipient might use to determine whether a single-sex class could be created or maintained consistent with these proposed amendments.

We invite specific comments on whether there may be additional important governmental or educational objectives that could also be the basis for single-sex classes that should be incorporated into our final regulations.

¹⁴ In two cases, under the 14th Amendment to the Constitution, in the public postsecondary education school context where there were allegations of denial of equal opportunity because of sex, the Supreme Court has required that the proponent of a sex-based classification demonstrate that the classification serves an important governmental objective and that the sex-based classification is substantially related to the achievement of that objective. *Virginia*, 518 U.S. at 532–533; *Hogan*, 458 U.S. at 724.

¹⁵ Our proposed amendments for classes differ in this regard from those for schools due to differences in the Title IX statute. Classes in recipient elementary and secondary schools are covered by the statute and our existing regulations. As explained further in the following section on schools, admissions to a recipient's nonvocational elementary and secondary schools are not covered by the Title IX statute.

Diversity of Educational Options (Proposed 34 CFR 106.34(b)(1)(i)(A))

A recipient may have an important governmental interest to evenhandedly support diverse educational options. Thus, the proposed amendments would permit a recipient to offer single-sex classes based on its objective to provide a diversity of educational options from which individual students and their parents may choose.¹⁶ For example, a recipient may determine that students and parents would prefer the option of single-sex classes because they believe they would provide a benefit not available in coeducational classes. A recipient may also determine that it would be appropriate to offer single-sex classes because it has reliable information that single-sex classes would meet its educational objective.

These proposed amendments, as further described in the following paragraphs, also require that a recipient that operates a nonvocational coeducational elementary or secondary school may not authorize or offer a nonvocational single-sex class unless it provides a substantially equal coeducational class¹⁷ in the same subject pursuant to 34 CFR 106.34(b)(1)(ii).

A recipient may also provide a substantially equal single-sex class in the same subject for the other sex. Furthermore, as discussed in the following paragraphs under proposed 34 CFR 106.34(b)(1)(iii) and (2), to provide a diversity of options in an evenhanded manner, a substantially equal single-sex class may be required in some circumstances.

¹⁶ This process includes a determination that the single-sex nature of the class is substantially related to meeting the objective identified.

¹⁷ In *Virginia*, in response to a lower court ruling that an institution's policies restricting admission to males unlawfully discriminated against females, the State attempted to remedy the discrimination by establishing a separate program for females at a neighboring women's college. There was no substantially equal coeducational program. The Court found that the women's program was not substantially equal to the men's program. *Virginia*, 518 U.S. at 554. In *Hogan* the male plaintiff was denied admission on the basis of his sex, and the State did not offer either an all-male or a coeducational nursing program within a reasonable traveling distance from his residence. The only option available was a coeducational institution at a considerable distance. The Court stated: "A similarly situated female would not have been required to choose between forgoing credit and bearing that inconvenience." *Hogan*, 458 U.S. at 723, n.8. The U.S. Supreme Court has not addressed the issue of whether for constitutional purposes substantial equality would require a public entity to provide a substantially equal single-sex school or class for students of the excluded sex or whether providing those students the opportunity to attend a substantially equal coeducational school or class would be sufficient.

¹² Proposed 34 CFR 106.34(b) applies to recipients that operate coeducational nonvocational public charter schools.

¹³ See footnote 10.

The recipient must provide a diversity of educational options in an evenhanded manner. However, a single-sex class for each sex, in the same subject, generally is not required. For example, if the rationale for a single-sex class is the school's desire to provide a diversity of options based on parental or student preference and the school uses surveys of parents and students to determine which options would be desirable, the survey must include parents and students of both sexes. If the results of the survey show a strong preference for a single-sex class in chemistry for girls, while for boys there is no expressed interest in any single-sex classes, the school in this example would not violate these proposed provisions by creating a single-sex chemistry class for girls without creating a single-sex class for boys. However, the school would be required to provide a substantially equal coeducational chemistry class.

As discussed in later paragraphs, consistent with the requirement that single-sex classes be provided in an evenhanded manner, OCR will examine situations in which recipients offer significantly more single-sex class opportunities to students of one sex than to students of the other sex to determine if they are the result of discrimination. A recipient that offers single-sex classes solely in the context of evenhandedly providing substantially equal single-sex classes, as well as coeducational classes, to both boys and girls is not likely to experience compliance problems with proposed 34 CFR 106.34.

Meeting Students' Particular, Identified Educational Needs (Proposed 34 CFR 106.34(b)(1)(i)(B))

The proposed amendments would also permit a recipient, under appropriate circumstances, to offer single-sex classes based on its objective to meet the particular, identified educational needs of its students. In order to carry out this objective 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.¹⁸ A recipient must treat male and female students in an evenhanded manner in the process of identifying particular educational needs, determining if a single-sex class would be substantially related to meeting those needs, and meeting the educational needs of both sexes.

The proposed amendments provide that a single-sex nonvocational class may be provided only if a substantially equal coeducational class is provided to the other sex in the same subject. (See 34 CFR 106.34(b)(1)(ii) of the proposed amendments.) A recipient may also choose to provide a substantially equal single-sex class for the other sex in the same subject. Furthermore, under proposed 34 CFR 106.34(b)(1)(iii), a recipient must provide a substantially equal single-sex class for the other sex if such a class is necessary to implement its objectives in an evenhanded manner.¹⁹

Under the proposed amendments, if the particular, identified educational needs of both sexes are the same, and a single-sex class is substantially related to meeting those needs for each sex, then students of both sexes must be provided substantially equal single-sex classes in the same subject if a single-sex class is provided for one sex. However, there may be legitimate differences in particular, identified educational needs between some male and female students, as well as legitimate differences in whether those needs may best be addressed in single-sex classes. Thus, depending on a recipient's evenhanded assessment of the particular, identified educational needs of male and female students, a recipient may provide a different single-sex class to girls, as compared to boys. Thus, the result might be differences in subject area or in numbers of single-sex classes offered to girls, as compared to boys.

For example, a school decides to identify and address the highest priority need of sixth grade male and female students who are working below grade level and to determine if single-sex classes may be substantially related to meeting the identified need. The school makes a supportable determination that the highest priority educational need of these girls is in science and that a single-sex science class would best address that need. If, as part of its evenhanded assessment process, the school also makes a supportable determination that a subject other than science is the highest priority need of the male students working below grade level, the proposed amendments would not require the school to offer a single-sex science class for these boys. The school would be required to offer a substantially equal coeducational science class. The school also would, however, be required to address the highest priority educational need of these boys, to consider whether a single-

sex class would best address that need, and to address that need appropriately.

Finally, although different results for boys and girls, in some instances, may be permissible under the proposed amendments, a recipient must treat male and female students equally in identifying whether they have particular educational needs that may be met by providing single-sex classes and in responding to those needs.

As discussed in later paragraphs, OCR will examine situations in which a recipient provides significantly more single-sex class opportunities to students of one sex than to students of the other sex to determine if they are the result of discrimination. A recipient that offers single-sex classes solely in the context of evenhandedly providing substantially equal single-sex classes, as well as coeducational classes, to both boys and girls is not likely to experience compliance problems with proposed 34 CFR 106.34.

Substantially Equal Coeducational Class Required (Proposed 34 CFR 106.34(b)(1)(ii))

The proposed amendment to the regulations in 34 CFR 106.34(b)(1)(ii) would require that student participation in single-sex classes be on a voluntary basis. This provision clarifies for recipients that the general prohibition in the existing regulations against assigning students to single-sex classes continues to apply and is not substantively affected by these proposed amendments.²⁰ Unless a substantially equal coeducational class is provided, enrollment in a single-sex class is not voluntary. Thus, the proposed amendments require that if a recipient provides a single-sex class, it must also provide students with the opportunity to enroll in a coeducational class in the same subject that is substantially equal to the single-sex class. For example, if a high school provided a single-sex Advanced Placement Calculus class for boys, it would need to provide a coeducational Advanced Placement Calculus class for boys and girls.

In order to ensure that participation in any single-sex class is voluntary, a recipient should notify parents or guardians of their option to enroll their children in a single-sex class on a voluntary basis and receive authorization from parents or guardians

²⁰ The current regulations, in 34 CFR 106.34(a), state, in part: "A 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." The proposed amendments include this provision in proposed 34 CFR 106.34(a) without substantive revisions.

¹⁸ See footnote 16.

¹⁹ See also 34 CFR 106.34(b)(2).

to place their children in a single-sex class.

Implementing the Recipient's Objective in an Evenhanded Manner (Proposed 34 CFR 106.34(b)(1)(iii))

As mentioned previously, under proposed 34 CFR 106.34(b)(1)(iii), a recipient must implement its objective in an evenhanded manner. Evenhandedness requires the recipient 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. As the examples in the section on educational needs illustrate, this provision generally does not require a single-sex class for each sex in the same subject. However, a recipient must provide a substantially equal single-sex class for the other sex if such a class is necessary to implement its objectives in an evenhanded manner. Even if a substantially equal single-sex class is not required for the other sex, the recipient may choose to provide such a class consistent with Title IX and the proposed amendments.

If a recipient provides significantly more single-sex opportunities to students of one sex than to students of the other sex, OCR will examine whether this is the result of discrimination, taking into account the reasonable period of time needed to plan and establish single-sex classes. A recipient that offers single-sex classes solely in the context of evenhandedly providing substantially equal single-sex classes, as well as coeducational classes, to both girls and boys is not likely to experience compliance problems with proposed 34 CFR 106.34(b)(1)(iii).

We invite specific comments on whether OCR needs more information on how to assess if a recipient is implementing its objective in an evenhanded manner.

Single-Sex Class for Excluded Sex (Proposed 34 CFR 106.34(b)(2))

Proposed 34 CFR 106.34(b)(2) clarifies that in some circumstances the requirements of proposed paragraph (b)(1) of this section may require a recipient to provide a substantially equal single-sex class for the excluded sex.

Factors for Determining Substantially Equal (Proposed 34 CFR 106.34(b)(3))

The proposed amendments in 34 CFR 106.34(b)(1) permit a recipient to provide a single-sex class as long as the recipient provides students who are excluded from that class on the basis of sex a substantially equal class. This requirement to have substantially equal

classes does not mean that the classes would need to be identical; the proposed amendment requires that policies applicable to the classes and benefits provided in them be substantially equal. The proposed amendments in 34 CFR 106.34(b)(3) outline the types of factors that the Department will consider in comparing single-sex classes to each other and to coeducational classes in making the determination of whether they are "substantially equal." That is, we will use these factors to evaluate whatever combination of single-sex and coeducational classes a recipient is providing in a given subject to determine if they are substantially equal. The list of factors is not intended to be exhaustive and other relevant factors that affect the educational benefits provided in these classes will be considered on a case-by-case basis. The list includes the following factors:

- Admissions policies and criteria.²¹
- 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.²²
- Qualifications of faculty and staff.
- Quality, accessibility, and availability of facilities and resources provided for the class.

Under the proposed standard, each factor evaluated does not need to be identical, but each must be substantially equal.

Procedural Safeguard: Periodic Evaluations (Proposed 34 CFR 106.34(b)(4))

Proposed 34 CFR 106.34(b)(4) would require that recipients periodically evaluate their single-sex classes to ensure nondiscrimination. Specifically,

²¹ This factor covers prerequisites to admission such as prior course requirements or grade point average.

²² The factors describe the types of educational benefits that the Department will compare in determining whether recipients are treating male and female students in a nondiscriminatory manner. The assessment is solely to determine whether equality of opportunity in access to curricular offerings is provided in compliance with Title IX and is not intended to require any particular curricular offerings by a school district. Thus, the provision is consistent with the Department of Education Organization Act (as well as similar provisions in the Elementary and Secondary Education Act, as amended by the No Child Left Behind Act of 2001), which provides in relevant part: "No provision of a program administered by the Secretary or by any other officer of the Department shall be construed to authorize the Secretary or any such officer to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system * * * except to the extent authorized by law." 20 U.S.C. 3403(b).

this proposed section would require that evaluations of all single-sex classes be conducted to ensure that single-sex classes are based upon genuine justifications and that they do not rely on overly broad generalizations about the different talents or capacities of male and female students. In addition, this proposed section would require that evaluations be conducted to ensure that any single-sex classes offered are substantially related to achievement of the objective for the classes as required by proposed 34 CFR 106.34(b)(1)(i).

The proposed amendments do not prescribe the type of information that a recipient must use in making decisions to provide single-sex classes or in conducting evaluations, but the following are types of information that may be useful and appropriate. For example, a recipient may identify particular educational needs using district or school-based data including standardized test scores; class grades; attendance; suspension and expulsion rates; incidence of pregnancy;²³ and low levels of participation among members of one sex in certain curriculum areas. Research or other reliable evidence may be the basis for determining that a single-sex class is substantially related to meeting the particular, identified needs. Research, developed by an agency, organization, social scientist, or by another school district, may assist a recipient in making that determination if it is reliable and applicable to the recipient's circumstances. Similarly, the recipient may conduct its own district or school-based research. In addition, a recipient may have other reliable evidence such as teacher, parental, or student feedback.

We invite specific comments as to how often a recipient should be required to conduct periodic evaluations pursuant to proposed 34 CFR 106.34(b)(4).

Current and Proposed Requirements for Single-Sex Schools

Current Regulations (Current 34 CFR 106.35)

The current regulations describe requirements related to admissions to elementary and secondary schools operated by LEAs.²⁴ Paragraph (a) of 34 CFR 106.35 of the current regulations specifies that recipients that are LEAs are prohibited from discriminating on the basis of sex in admissions to

²³ Cf. 34 CFR 106.40, which is not affected by the proposed amendments.

²⁴ 34 CFR 106.35.

vocational education institutions.²⁵ Consistent with the Title IX statute as discussed later, we are proposing to amend this portion of the regulations to make clear that all public and private vocational institutions that receive Federal financial assistance are prohibited from discriminating on the basis of sex in admissions.

Paragraph (b) of the current 34 CFR 106.35 describes requirements applicable to recipients that are LEAs that operate single-sex public schools. The current regulations do not prohibit recipients from having single-sex admissions for these types of schools.²⁶ The Title IX statute, which only covers admissions to specified types of educational institutions, does not include elementary and secondary schools among the types of institutions with covered admissions (except with respect to those that are also institutions of vocational education, for which admissions are covered as discussed in previous paragraphs).²⁷ As a result, our current regulations do not prohibit single-sex admissions to public nonvocational elementary and secondary schools. The equal protection requirements of the 14th Amendment to the Constitution apply to admissions to public entities, such as school districts and State educational agencies (SEAs).²⁸

The current regulations require that, in the event that an LEA provides a nonvocational elementary or secondary school or educational unit for students of one sex, then it must provide students of the other sex, under the "same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools."²⁹

Proposed Amendments for Single-Sex Schools (Proposed 34 CFR 106.34(c) and 34 CFR 106.35)

We are proposing to amend the current compliance provisions applicable to admissions to elementary and secondary vocational schools in 34 CFR 106.35(a), which will be redesignated as 34 CFR 106.35, to remove the reference to LEAs. Recipients of Federal financial

assistance, including private schools, may not offer single-sex institutions of vocational education.³⁰

We are proposing to amend existing 34 CFR 106.35(b) to remove from that section the requirements pertaining to nonvocational schools operated by LEAs and to move those requirements, with substantive amendments, to proposed 34 CFR 106.34. Under the proposed amendments, subject to conditions and requirements described in the following paragraphs, a recipient that operates public nonvocational elementary or secondary schools may not operate a single-sex nonvocational elementary or secondary school unless it provides students of the other sex substantially equal opportunities in a single-sex school, single-sex educational unit,³¹ or a coeducational school. The proposed amendments also provide for an exception to this requirement for certain charter schools. The requirements pertaining to single-sex elementary and secondary schools are in paragraph (c) of proposed 34 CFR 106.34.

While Title IX does not prohibit a district from assigning students to single-sex schools because admissions to nonvocational elementary and secondary schools are exempt from Title IX coverage, recipients are cautioned that assigning students to single-sex schools—rather than allowing students to voluntarily select between those schools and substantially equal coeducational schools—could violate the Constitution and the requirements of the Equal Educational Opportunities Act of 1974 (EEOA),³² which prohibits the assignment of students to schools on the basis of sex.

Substantially Equal Educational Opportunities Required (Proposed 34 CFR 106.34(c))

The proposed amendments do not regulate admissions to public nonvocational elementary and secondary schools.³³ Thus, unlike our proposed amendments for single-sex classes, they do not propose to require a recipient to justify establishing a single-sex school. The proposed

amendments permit a recipient to provide a single-sex public school as long as the recipient provides students who are excluded from that school on the basis of sex substantially equal opportunities in another school.

The proposed amendments substitute the phrase "substantially equal" for the term "comparable" used in the existing regulations for comparing the policies applicable to and benefits provided to students in a single-sex school and students excluded from the school on the basis of sex. The Supreme Court applied a "substantially equal" standard in the context of evaluating the constitutionality of single-sex postsecondary institutions,³⁴ and we have adopted this standard here. We intend to convey the concept that although the policies and benefits compared do not need to be identical, they do need to be substantially equal. As discussed in the next section, the proposed amendments would expand the list of factors to be considered in making a determination as to whether the benefits provided are substantially equal.

The proposed amendments specifically provide that the substantially equal opportunities may be provided in a single-sex school or in a coeducational school.³⁵ Thus, the proposed amendments would change our interpretation of 34 CFR 106.35(b) of the current regulations that the benefits provided to students excluded from a single-sex school must be provided in a single-sex setting.³⁶ Our prior interpretation was based upon the premise that Title IX required recipients to provide a single-sex school for each sex to ensure that students of both sexes were provided an equal opportunity to attend a single-sex school.

Upon further analysis, we have determined that, since Title IX is silent regarding its application to admissions to nonvocational elementary and secondary schools, creation of an unequal number of single-sex schools for girls and boys does not implicate Title IX. The basis for this interpretation is Congress's decision not to cover admissions to nonvocational elementary and secondary schools in Title IX.³⁷

²⁵ This provision implements the Title IX statute, which provides specifically that admissions to certain types of educational entities, including institutions of vocational education, are covered by Title IX. 20 U.S.C. 1681(a)(1).

²⁶ See 34 CFR 106.15(d).

²⁷ 20 U.S.C. 1681(a)(1).

²⁸ See footnote 14 for information about the equal protection requirements that apply to admissions requirements for public entities.

²⁹ 34 CFR 106.35(b).

³⁰ Our interpretation is based on the Title IX statute, which covers admissions to vocational schools. 34 CFR 106.15(c) and (d).

³¹ Both the current regulations and the proposed amendments use the phrase "education unit." For the purposes of these provisions we interpret the term "education unit" to mean a "school within a school," and we are specifically referring to a school that is housed within another school. For the sake of clarity and simplicity, we will generally use the term "school" instead of either "school within a school" or "education unit" in explaining the requirements of the proposed amendments.

³² 20 U.S.C. 1703(c); see footnote 5 on consulting legal counsel.

³³ 20 U.S.C. 1681(a)(1).

³⁴ In evaluating educational benefits and opportunities provided to male and female students in single-sex postsecondary education institutions for 14th Amendment equal protection purposes, the Supreme Court has required a standard of "substantial equality." *Virginia*, 518 U.S. at 554.

³⁵ See footnote 15.

³⁶ 67 FR 31103 (2002).

³⁷ The legislative history of Title IX supports this interpretation. When admissions coverage under Title IX was being considered, Congress was aware that single-sex nonvocational elementary and

Because Title IX does not cover admissions to these types of educational institutions, we have determined that Title IX does not impose an obligation on these recipients to avoid sex-based disparities in providing the opportunity to attend a single-sex nonvocational elementary or secondary school.

The lack of coverage of admissions to public nonvocational elementary and secondary schools does not relieve recipients from all obligations to students of the excluded sex. Consistent with Title IX, students of both sexes must be provided nondiscriminatory access to substantially equal educational benefits. This means that students excluded from a single-sex school, on the basis of sex, must be provided substantially equal educational benefits in another school. However, based on our analysis of the Title IX statute, under the proposed amendments the other school may be coeducational or single-sex.

Factors for Determining Substantially Equal (Proposed 34 CFR 106.34(c)(3))

The current regulations provide a description of the types of factors that OCR would consider in determining whether two schools, a single-sex school and a school available to students excluded on the basis of sex from that school, are substantially equal. The proposed regulations, in 34 CFR 106.34(c)(3)(i), expand upon the current description of factors that OCR would consider in comparing schools for this purpose.³⁸ Furthermore, the list of factors is not intended to be exhaustive, but it is intended to provide recipients with a more specific set of criteria. Other relevant factors that affect the educational benefits provided in these schools will be considered on a case-by-case basis. The list includes the following factors:

- Admissions policies and criteria.³⁹
- Educational benefits provided, including the quality, range, and

secondary schools existed. Because information about these schools was not sufficient to support a decision regarding admissions coverage, at least one member of Congress urged the Department of Health, Education and Welfare (HEW) to conduct a study and indicated that Congress then could make an informed decision. 92nd Cong., 118 Cong. Rec. 5804, 5807, 5812–13 (1972). HEW did not conduct such a study. Moreover, although several substantive amendments to Title IX have been enacted since that time, Congress has not amended this provision of the statute.

³⁸ We have added additional factors consistent with the Court's opinions addressing single-sex education at postsecondary institutions. See *Virginia*, 518 U.S. at 547–54; *Hogan*, 458 U.S. at 723 n.8.

³⁹ This factor covers prerequisites to admission such as prior course requirements or grade point average.

content of curriculum and other services and the quality and availability of books, instructional materials, and technology.⁴⁰

- Quality and range of extra-curricular offerings.
- Qualifications of faculty and staff.
- Geographic accessibility.
- Quality, accessibility, and availability of facilities and resources.⁴¹

Each factor does not have to be identical in order for two schools to be substantially equal. As specified in proposed 34 CFR 106.34(c)(3)(ii), OCR will assess the aggregate of benefits provided by each school as a whole in making these determinations.

Exception for Certain Charter Schools (Proposed 34 CFR 106.34(c)(2))

Title IX does not apply to admissions to nonvocational elementary and secondary schools under 20 U.S.C. 1681(a)(1); therefore, these types of single-sex charter schools are not prohibited by Title IX. If a public, nonvocational single-sex charter school is part of a school district or LEA that includes other schools, the proposed amendments would hold the LEA that operates the schools responsible for ensuring that students in the LEA who are excluded on the basis of sex from the single-sex charter school are provided substantially equal opportunities and benefits consistent with proposed 34 CFR 106.34(c)(1) and (c)(3). An LEA will be considered to be “operating” a charter school that is part of the LEA. Accordingly, the LEA must ensure that it provides the sex excluded from a charter school substantially equal educational opportunities in a single-sex school or coeducational school.

The proposed amendments exempt nonvocational charter schools that are single-school LEAs from the requirements that apply to other recipients that operate public nonvocational elementary and secondary schools. A chartering authority that receives Federal funds, and that charters a nonvocational, single-sex public charter school that is its own LEA, may charter a single-sex charter school for one sex without ensuring that the other sex is provided substantially equal educational opportunities in a single-sex school or coeducational school. A chartering authority that receives Federal financial assistance, of course, must review and

approve or reject proposed charter school applications on a non-discriminatory basis. Such a chartering authority is not required to provide substantially equal educational opportunities to the other sex if the chartering authority is merely reviewing and approving charter school applications and is not independently operating those schools itself. Moreover, the chartering authority may have no control over what types of programs are proposed as charter schools, including whether they are single-sex. Therefore, requiring a chartering authority to provide the other sex substantially equal educational opportunities in a single-sex school or coeducational school would require the chartering authority to find an additional group of community leaders, developers, or parents who would meet the required application criteria and would be willing to provide to the other sex substantially equal educational opportunities in another charter school. Similarly, a group of community leaders, developers, or parents who wish to establish a single-sex charter school that is its own LEA should not be required to establish two schools in order to meet Title IX requirements.

Given the Title IX exemption for admissions to nonvocational elementary and secondary schools and the functions some chartering authorities perform, we have determined that Title IX does not impose such an obligation on these chartering authorities and that such an obligation on chartering authorities would unduly burden and inhibit the creation of single-sex charter schools that are their own LEAs. Therefore, the proposed amendments exempt nonvocational charter schools that are single-school LEAs from the requirements that apply to other recipients that operate public nonvocational elementary and secondary schools. We note that the obligations of public chartering authorities, including LEAs and SEAs, may differ under the U.S. Constitution, since admissions policies are covered under the 14th Amendment.⁴²

Current Requirements Related to Classes and Proposed Technical Changes

General Requirements and Other Modifications (Proposed 34 CFR 106.34(a) and 34 CFR 106.43)

With respect to classes and activities in physical education, the existing regulations in 34 CFR 106.34(a) provided transition periods for

⁴⁰ See footnote 22.

⁴¹ The new factors in the proposed amendment are—the educational benefits provided; the quality and range of extra-curricular offerings; the qualifications of faculty and staff; geographic accessibility; and the availability of classroom facilities and resources.

⁴² See footnote 5 on consulting legal counsel.

recipients to comply with the regulations. Recipients at the elementary school level had to comply within one year from the effective date of the regulations, and recipients at the secondary level and postsecondary level had to comply within three years. Because these timeframes for compliance expired many years ago, this provision is obsolete. Existing paragraph (a) of 34 CFR 106.34 will be removed when final regulations are issued, and the regulations will be renumbered.

Some of the existing provisions of 34 CFR 106.34 apply to postsecondary, as well as elementary and secondary, coeducational schools. Our proposed amendments would not affect the continued applicability of those existing provisions to postsecondary institutions. However, because we are proposing other amendments, the numbering of these existing exceptions would change, as discussed in the following paragraphs.

We are proposing to retain the general prohibition against separation on the basis of sex, which applies to coeducational schools at all levels of education, that is in the existing regulations prior to paragraph (a) of 34 CFR 106.34. Due to other modifications that we are proposing, the general prohibition would be renumbered and become paragraph (a) of 34 CFR 106.34. Because our proposed amendments provide an exception to allow for single-sex classes in nonvocational elementary and secondary schools that may apply to classes of any type, except for vocational education classes, we are also proposing to delete the introductory listing of specific types of classes to which the general prohibition applies.

Recipients are generally prohibited from separating students on the basis of sex within coeducational physical education classes or activities by 34 CFR 106.34(a). We are proposing to retain in 34 CFR 106.34(a)(1) the exception currently provided in 34 CFR 106.34(c) that permits separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact. Other physical education classes in elementary and secondary schools would be covered by proposed 34 CFR 106.34(b) regardless of whether the purpose or major activity involves bodily contact. These classes may be offered on a single-sex basis consistent with the requirements of our proposed amendments.

Similarly, the exception provided in the proposed amendments in 34 CFR 106.34(a)(2) is the same exception provided in the current regulations in 34 CFR 106.34(b). This provision permits grouping of students in physical education classes by ability as assessed by objective standards of individual performance developed and applied without regard to sex. This exception would also continue to apply to elementary and secondary education and postsecondary education.

The exception provided in the proposed amendment to the regulations in 34 CFR 106.34(a)(3) is similar, but not identical, to the exception provided in the current regulations in 34 CFR 106.34(e). The proposed amendment permits separation by sex in classes or portions of classes in elementary and secondary schools that deal “primarily” with human sexuality. The current regulations require that “portions of the classes” in elementary and secondary schools must deal “exclusively” with human sexuality in order to separate students by sex. The proposed amendment changes “exclusively” to “primarily” because we recognize that issues of human sexuality that may require privacy may be raised in situations that are not devoted exclusively to human sexuality, such as sexual assault or harassment counseling or defense classes. In addition, we recognize that recipients may choose to offer classes that focus on issues of human sexuality that may require privacy. This provision continues to apply only to elementary and secondary education, and it is based on issues of privacy.⁴³

We are also proposing to retain in 34 CFR 106.34(a)(4) the exception currently provided in 34 CFR 106.34(f), which permits grouping students for chorus based on vocal range or quality even if it results in a single-sex or predominantly single-sex chorus. This exception continues to apply to elementary and secondary education and postsecondary education, and it is based on real differences between the sexes.

Paragraph (d) of existing 34 CFR 106.34 does not address access to classes, but rather addresses nondiscrimination in assessments of skills or progress in physical education classes. It applies to elementary, secondary, and postsecondary physical education classes, and it applies to both single-sex and coeducational physical education classes in coeducational schools. In order to avoid confusion about the application of this provision,

we are proposing to move it, with no modifications, to Subpart D of our regulations, as a separate provision, proposed 34 CFR 106.43, entitled “Standards for measuring skill or progress in physical education classes.”

Executive Order 12250

Pursuant to Executive Order 12250, which provides for the Attorney General to review proposed regulations implementing Title IX, the Acting Assistant Attorney General for Civil Rights has reviewed this notice of proposed rulemaking and approved it for publication.

Executive Order 12866

This rule is considered by the Department to be a “significant regulatory action” under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, this rule has been submitted to the Office of Management and Budget (OMB) for review.

1. Potential Costs and Benefits

Under Executive Order 12866, we have assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the proposed regulations are those resulting from statutory requirements and those we have determined to be necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of this regulatory action, we have determined that the benefits would justify the costs for those recipients that would choose to provide single-sex schools or classes.

We have also determined that this regulatory action would not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

Summary of Potential Costs and Benefits

The proposed regulations do not require recipients to provide single-sex schools or classes and thus do not require recipients to incur any additional costs. Rather, the benefit of the proposed regulations is the expanded flexibility to provide single-sex schools or classes, if such classes are desired. If recipients choose to continue to operate schools or classes under their current policies or practices and choose not to provide single-sex schools or classes, no added costs will be incurred. Those recipients that choose to provide single-sex schools or classes may incur the additional expense to administer them. The costs associated with

⁴³ 92nd Cong., 118 Cong. Rec. 5803 (1972).

providing single-sex schools or classes under the proposed regulations will range from minimal to substantial, depending on what options recipients choose to provide.

2. Clarity of the Regulations

Executive Order 12866 and the Presidential memorandum on "Plain Language in Government Writing" require each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interfere with their clarity?
- Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections? (A "section" is preceded by the symbol "§" and a numbered heading; for example, § 106.35 Access to institutions of vocational education.)
- Could the description of the proposed regulations in the **SUPPLEMENTARY INFORMATION** section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?
- What else could we do to make the proposed regulations easier to understand?

Send any comments that concern how the Department could make these proposed regulations easier to understand to the person listed in the **ADDRESSES** section of the preamble.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities. These proposed regulations do not require recipients to provide single-sex classes or schools, but rather expand flexibility for recipients that may be interested in doing so.

Paperwork Reduction Act of 1995

These proposed regulations do not contain any information collection requirements.

Intergovernmental Review

This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79 because it is not a program or activity of the Department that provides Federal financial assistance.

Assessment of Educational Impact

The Secretary particularly requests comments on whether these proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

Federalism

Executive Order 13132 requires us to ensure meaningful and timely input by State and local elected officials in the development of regulatory policies that have federalism implications. "Federalism implications" means substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. The proposed regulations in 34 CFR 106.34 and 34 CFR 106.35 may have federalism implications, as defined in Executive Order 13132. We encourage State and local elected officials to review and provide comments on these proposed regulations.

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(Catalog of Federal Domestic Assistance Number does not apply.)

List of Subjects in 34 CFR Part 106

Education, Sex discrimination.

Dated: March 3, 2004.

Rod Paige,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary proposes to amend part 106 of title 34 of the Code of Federal Regulations as follows:

PART 106—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

1. The authority citation for part 106 continues to read as follows:

Authority: 20 U.S.C. 1681 *et seq.*, unless otherwise noted.

2. Section 106.34 is revised to read as follows:

§ 106.34 Access to classes and schools.

(a) Except as provided for in this section or otherwise in this part, a recipient shall not provide or otherwise carry out any of its education programs or activities separately on the basis of sex or require or refuse participation therein by any of its students on the basis of sex.

(1) This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.

(2) This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(3) Classes or portions of classes in elementary and secondary schools that deal primarily with human sexuality may be conducted in separate sessions for boys and girls.

(4) Recipients may make requirements based on vocal range or quality that may result in a chorus or choruses of one or predominantly one sex.

(b)(1) *Classes. General standard.* Subject to the requirements in this paragraph, a recipient that operates a nonvocational coeducational elementary or secondary school may provide nonvocational single-sex classes, if—

(i) Each single-sex class is based on the recipient's objective—

(A) To provide a diversity of educational options to parents and students, provided that the single-sex nature of the class is substantially related to meeting that objective; or

(B) To meet the particular, identified educational needs of its students, provided that the single-sex nature of the class is substantially related to meeting those needs;

(ii) In accordance with the requirements of paragraph (a) of this section, the recipient provides a substantially equal coeducational class in the same subject; and

(iii) The recipient implements its objective in an evenhanded manner.

(2) *Single-sex class for excluded sex.* A recipient that provides a single-sex class may be required, subject to the requirements of paragraph (b)(1) of this section, to provide a substantially equal single-sex class for the excluded sex.

(3) *Substantially equal.* Factors that the Department will consider in determining whether classes are substantially equal include 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; and the quality, accessibility, and availability of facilities and resources provided to the class.

(4) *Periodic evaluations.* The recipient must conduct periodic evaluations to ensure that single-sex classes are based upon genuine justifications and do not rely on overly broad generalizations about the different talents or capacities of male and female students and that any single-sex classes are substantially related to achievement of the objective for the classes.

(5) *Definition.* For purposes of this paragraph, the term “classes” includes all education activities provided for students by a school or in a school.

(c)(1) *Schools.* Except as provided in paragraph (c)(2) of this section, a recipient that operates a public nonvocational elementary or secondary school shall not, on the basis of sex, exclude any person from admission to any school that it operates unless it provides the other sex substantially equal educational opportunities in a single-sex school, single-sex education unit, or coeducational school.

(2) *Exception.* A nonvocational public charter school that is not part of a local educational agency with other schools may be operated as a single-sex charter school without regard to the requirements in paragraph (c)(1) of this section.

(3) *Substantially equal.* (i) Factors that the Department will consider in determining whether schools or education units are substantially equal include 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 quality and range of extra-curricular offerings; the qualifications of faculty and staff; geographic accessibility; and the quality, accessibility, and availability of facilities and resources; and

(ii) This determination involves an assessment in the aggregate of the

educational benefits provided by each school as a whole.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

3. Section 106.35 is revised to read as follows:

§ 106.35 Access to institutions of vocational education.

A recipient shall not, on the basis of sex, exclude any person from admission to any institution of vocational education operated by that recipient.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

4. Section 106.43 is added to subpart D to read as follows:

§ 106.43 Standards for measuring skill or progress in physical education classes.

If use of a single standard of measuring skill or progress in physical education classes has an adverse effect on members of one sex, the recipient shall use appropriate standards that do not have that effect.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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