



# Briefing Paper

## Restoring Equal Opportunity in Education: An Analysis of Arguments for and Against the Bush Administration Single-Sex Education Regulations

IWPR #C368

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July 30, 2009

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## EXECUTIVE SUMMARY

In 2006, the George W. Bush Administration issued new Title IX regulations that allow for sex segregated classrooms and schools in public, non-vocational elementary and secondary schools. These regulations provide schools with another condition that allows them to provide sex segregated programs as long as they meet an “important governmental objective” (US Department of Education 2006). The Administration justified this policy by claiming that sex segregated education programs met “important government objectives” including improving educational achievement of its students through a recipient’s overall established policy to provide diverse educational opportunities and meeting the particular, identified educational needs of a recipient’s students. Sex segregated programs are also to be completely voluntary and implemented in an evenhanded manner with regard to gender (US Department of Education 2006).

On the surface, these regulations appear benign, but they actually allow schools to implement sex segregated programs based on little evidence that such programs work and they open the door for future sex discrimination against women and girls in education. The Bush Administration’s regulations are not legal and Constitutional. Given the limited accountability and evidence that these programs work, combined with the threat to equal opportunity and the potential legal issues regarding these regulations, the Obama Administration should seek to repeal them. This report provides an overview of the history of Title IX and then examines the arguments for and against sex segregated education. It argues that the Obama Administration should work to repeal the Bush Administration’s regulations by arguing that they violate the principle that separate programs are inherently unequal established in *Brown v. Board of Education* and threaten the availability of equal opportunities for women and girls in education and emphasizing the fact that it would be imprudent to invest limited government funds in an untested program.

To allow the Obama Administration to best prepare for the debate around repealing the Bush Administration’s regulations, this report details the following arguments for and against the Bush Administrations regulations:

### The “Boy Crisis” Argument

*“In America, boys are struggling academically, yet politicians and special interests have it the other way around. Convinced that schools shortchange girls, they intend to siphon another 2.9 million from the budget to fix a phony equity problem...It is time to face the facts: boys, not girls, are falling behind” (Kafer 2007, 16).*

- Major issue for First Lady Laura Bush.
- Received a great deal of coverage in the popular media.
- Uses indicators of academic success such as boys’ lower grades, school engagement, achievement scores, graduation rates, presence in gifted and talented classes, participation in advanced placement exams, and number of Bachelor’s and Masters’ degrees, and boys’ higher ADD and ADHD diagnoses, participation in special education, use of drugs and alcohol, suspensions and expulsions, and time spent watching television or playing video games as evidence boys are faring worse in school.
- Implies boys are actually now victims of discrimination in education; need affirmative action sex-segregated programs to overcome that discrimination.

### The “Sex Differences Matter” Argument

*“Differences between boys and girls are natural. These differences should be acknowledged, accepted, and exploited for educational purposes. Instead, many educators today seek to eradicate gender-specific behaviors” (Sax 2005, 63).*

- Closely related to the “boy crisis” argument.
- Uses pseudoscientific studies to argue that sex differences exist between boys and girls and have important consequences for educational outcomes.
- Focuses on so-called sex differences in brain development to argue curricula are developmentally inappropriate for boys.
- Implies boys are not biologically prepared to succeed in current curricula which reduce their self-esteem and academic engagement; sex segregated programs could tailor curricula to better align with sex differences.

### **The “School Choice and Flexibility” Argument**

*“Parents and educators are increasingly frustrated with the public school system’s one-size-fits-all approach to education. The new Title IX regulations offer schools much-needed flexibility and offer parents more options in determining the best educational environment for their children. As long as these single-sex programs remain voluntary, all parents should applaud the fact that more options are available for education” (Kasic 2008b, 13).*

- Closely related to “sex differences matter” argument because it suggests schools need flexibility to deal with those differences.
- Appeals to parents who like the idea of schools that respond to their child’s unique needs.
- Emphasizes that sex segregated programs are necessary, but voluntary; just a choice for people trying to help children succeed.

### **The “Sex Segregated Education is Beneficial for Women” Argument**

*“Girls’ school classrooms are places where education is prized, where teachers feel empowered, where girls are excited about being in school.” (The National Coalition of Girls Schools; NCGS 2009).*

- Girls-only classes and schools can be empowering.
- Feminist groups believe that sex segregated programs can be effective when they are used in an affirmative way to combat existing sex discrimination. Such affirmative sex segregated programs are allowed under the 1975 regulations and would continue to be allowed if the 2006 regulations are rescinded.
- Responds to the discrimination that girls face in co-ed classrooms including: sex stereotyping, receiving less attention, having access to fewer opportunities for learning, participating less in class, being less extroverted, having fewer interactions with teachers, having fewer opportunities for learning and problem solving, and experiencing more harassment than boys.
- Feminist groups agreed with the Department of Education’s early reports that indicated sex segregated programs may be effective in some situations, but there is a lack of scientific evidence proving that it is more effective than co-educational programs.

### **The “Sex Segregated Education Benefits Low-Income and Minority Boys” Argument**

*“All-Black, all-male programs and classes, their proponents say, are geared toward building self-esteem and self-confidence, and would promote a love of learning, all elements that seem to be missing in the educational experiences of many Black male children.” (Whitaker 1991).*

- Response to the fact that not all boys are performing worse than girls on indicators of academic success. For example, low-income, minority boys fare worse on most indicators of academic success including: lower grades, behavioral problems, and high dropout rates.

- Argument that low-income, minority boys fare worse has been used by feminist groups to prove there is not a “boy crisis.” Boys comparatively poor performance on indicators of academic success can be attributed to low-income, minority boys. Therefore, all boys do not fare worse than all girls.
- Argument did not appear in debates likely because race and sex segregated schools are highly controversial and minority and feminist groups distrusted the Bush Administration.

### **The “Sex Segregated Education is Inherently Unequal” Argument**

*“The Supreme Court held that separate educational facilities are ‘inherently unequal.’ This principle has been repeatedly reinforced since 1954. It is, quite simply, the bedrock of United States constitutional law, and indeed of our society. Notwithstanding this deeply embedded principle, the United States Department of Education’s Office for Civil Rights has proposed regulations that will facilitate the reintroduction of segregation into the public educational system – this time in the form of segregation by sex, instead of race” (Gandy 2004).*

- Should be emphasized by the Obama Administration.
- Relies on the principle from *Brown v. Board of Education* that separate is inherently unequal.
- Emphasizes the history of separate and unequal programs for girls and boys.
- Notes that sex discrimination continues to exist requiring strict guarantees that sex segregated programs are not discriminatory.

### **The “Single-Sex Regulations Violate Title IX and the Equal Protection Clause” Argument**

*“Because both Title IX and the United States Constitution limit the use of single-sex programs, the Department lacks the authority to expand the circumstances or terms on which schools may permissively offer such programming” (Samuels and Annexstein 2002).*

- The 1975 Title IX regulations already allowed for sex segregated classes in music classes that depend on vocal range, remedial classes, or classes based on affirmative action to overcome the effects of past discrimination and there is no need for additional sex segregated classes.
- Bush Administration regulations may violate the Equal Protection Clause of the Constitution because they do not meet the “exceedingly persuasive justification” test established in *United States v. Virginia*.
- Could result in costly legal battles.

### **The “Sex Segregated Education Has Not Been Proven Effective” Argument**

*“Contrary to the ‘scientifically-based evidence’ that this Administration demands to support other educational innovations, this proposal would allow schools to operate on hunches or simply on parental or student preferences. This would be unprecedented” (Greenberger and Samuels 2004).*

- Single-Sex Regulations do not require strict evaluation and accountability from the Department of Education; only requires schools to complete self-evaluations.
- Little evidence in research that sex segregated education programs work better than coeducational programs.
- Government should not invest in unproven programs such as sex segregated education.

## **FULL REPORT**

Imagine your daughter, a bright, dedicated high school student returned home after school upset that she could not take a certain math class with many of her fellow math classmates because her school recently implemented sex segregated math classes. Furthermore, her male friends told her they were happy she would not be in class with them because she would ruin the “all-guys” environment that the class would enjoy. As a result, your daughter, a gifted math student, stopped taking math classes altogether. While this scenario is hypothetical, it is an increasingly likely possibility since the Bush Administration issued regulations that would allow for sex segregated classes in 2006. Under these new regulations, many American woman and girls may be denied an equal opportunity to participate in education free from discrimination. In 1972, Title IX of the Education Amendments was passed to ensure that American women and girls would not face gender discrimination in education. It states, “No person in the United States, shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance” (US Department of Labor 1972). Since 1972, Title IX has been enormously successful in terms of providing women with access to higher education and opportunities in education as women earn 53 percent of all Bachelors degrees (US Census Bureau 2007). Unfortunately, the George W. Bush Administration undermined Title IX’s previous successes, when it implemented its 2006 Title IX regulations that allow educational agencies and recipients of federal funding to provide sex segregated, non-vocational classes and schools at the elementary and secondary school-level. As the Obama Administration completes its review of existing programs and policies for women and girls within the departments, it should work with Department of Education’s Office for Civil Rights to repeal the Bush Administration’s 2006 regulations to continue to ensure equal opportunities for women and girls in education. To help the Administration develop a strategy for repealing the single-sex education regulations, this memo will provide a brief history of the development and implementation of the Title IX regulations and it will provide an overview of the arguments that were made for and against the Bush Administration’s 2006 single sex regulations. This paper suggests that the Obama Administration can gain support for repealing the single-sex education regulations by arguing that sex segregated education creates programs that are separate and

inherently unequal, to provide the rationale for reversing this damaging policy. It should also note that these revoking the single-sex regulations would save the government money by preventing further investments in an unproven and untested approach to improving educational outcomes.

### **Title IX History**

Though Title IX is most commonly associated with sports in the public mind, its broad wording makes it clear that it covers all aspects of education, and when the statute passed in 1972, Congress made it clear that it intended the law to prevent discrimination in as many aspects of education as possible. Thus, the law made the Department of Health, Education, and Welfare (HEW; the Department of Education became responsible for Title IX when it was established in 1980) responsible for Title IX and provided it with specific exemptions that allowed the law to broadly prohibit discrimination in education, while allowing for sex segregation in a few unique, carefully monitored situations (US Department of Labor 1972). Therefore, Title IX allowed for sex segregation only in religious institutions, military institutions, the merchant marine, public institutions that have been traditionally single-sex, Greek organizations, and beauty pageants. Other than providing those exemptions, Congress provided HEW with little guidance about how to implement the law making it clear that the Department had great flexibility in creating Title IX's regulations as long as it closely monitored all cases of sex segregation. Congress also reviewed and approved HEW's 1975 regulations and in doing so, it confirmed that it believed in HEW's interpretation that sex segregated programs should only be provided in the few unique, carefully monitored situations mentioned above.

Congress' lack of guidance on the Title IX regulations resulted in the HEW, and later the Department of Education, spending most of Title IX's 37-year history attempting to create regulations that eliminate gender discrimination while also recognizing existing sex differences, largely through separate but equal sports programs. The Title IX regulations regarding athletics have been especially plagued by the tension between eliminating gender discrimination and recognizing sex differences. For example, in 1974, Senator John Tower (R-Texas) proposed the Tower Amendment in a failed attempt to exempt revenue-producing sports, such as college football and men's basketball, from Title IX (Hogshead-Makar and Zimablist 2007). The Tower Amendment provided a precedent for the idea that Title IX created a zero-sum game by putting men and

women in direct competition for the limited funds in school athletics budgets; this helped lay the foundation for arguments that it was impossible to provide separate but equal programs for men and women because men and women were inherently different. In the sports track of Title IX, this notion of sex difference and gender competition led to the development of a system of participation in athletics that attempts to provide men and women with separate but equal opportunities to participate. Since the sports regulations for Title IX allow separate but equal sports programs they are very unique in anti-discrimination law and they create a great deal of controversy that continues to this day and suggests that it is extremely difficult, if not impossible, to ensure sex segregated programs actually provide equal opportunities for females and males.

Unsurprisingly, HEW and the Department of Education have had a difficult time defining what separate but equal sports programs look like and many of the regulatory clarifications, revised regulations, and Supreme Court cases on Title IX have focused on these issues. Likely, many of these difficulties are due to precedent the Supreme Court's 1954 decision in *Brown v. Board of Education* that separate programs for whites and African Americans were inherently unequal. The early discussions about ending gender discrimination in education did not include these arguments that pitted inherently different men and women in competition with each other until the late 1990s and early 2000s when conservatives began to push for federally-funded, public sex segregated education.

Sex segregated education arose as an important issue in the mid-to-late 1990s when single-sex admissions policies in military institutions, such as the Virginia Military Institute and the Citadel garnered a great deal of public attention, culminating in the Supreme Court's 1996 decision in *United States v. Virginia* that requires the government to have an "exceedingly persuasive justification for that action [single-sex educational programs]" that is based on a compelling government interest, a program that is narrowly tailored to serve the government interest, and a program that achieves the interest in the least restrictive means possible. Though this test is not as stringent as the strict scrutiny test required for distinctions based on race and origin, it does suggest that there are a very limited number of situations where sex segregated education is permitted. Though the case related to the Equal Protection Clause of the 14<sup>th</sup> Amendment, it has important implications for sex segregated education and Title IX. In the case, the United States sued Virginia because it

felt the Virginia Military Institute's (VMI) male-only admissions policy violated the Equal Protection Clause of the 14<sup>th</sup> Amendment. The Court agreed and held that Virginia's remedy of providing a separate, but equal program for women, called the Virginia Women's Institute for Leadership at Mary Baldwin College was not an adequate remedy. The Court felt the separate program violated the protections guaranteed by the Court in *Brown v. Board of Education* (1954) and that the program was inherently unequal because it did not provide the same benefits, prestige, or educational opportunities that VMI did. In his dissent, Justice Antonin Scalia seethed that the decision violated a tradition of male-only military schools and opportunities for sex segregated education, opening the door for a debate on sex segregated education that began under the Bush Administration in the 2000s.

On May 3, 2002, the Bush administration built on Scalia's dissent in *US v. Virginia* by issuing its intentions to regulate to allow sex segregated non-vocational classes and schools at the elementary and secondary levels. The letter of intent explained, "The Secretary intends to propose amendments to the regulations implementing Title IX of the Educational Amendments of 1972 to provide more flexibility for educators to establish sex segregated classes and schools at the elementary and secondary levels. The purpose of the amendments would be to support efforts of school districts to improve educational outcomes for children and to provide public school parents with a diverse array of educational opportunities that respond to the educational needs of their children" (US Department of Education 2002). On October 26, 2006, the Bush administration followed through on that promise by issuing its Final Regulations on Single-Sex Education. Even though Title IX was originally intended to help eliminate gender distinctions in schools, the Bush Administration's new regulations would allow for the exclusion of students from classes based on gender, as long as they are provided in a "non-discriminatory" manner. The 2006 regulations mask the threats sex segregated programs pose to equal opportunity with language about school choice and flexibility, making the policy sound like a benign solution to challenges American children face in education. For example, the regulations state, "Like the former regulations, the new regulations do not require that recipients provide single-sex education. Single-sex education is merely an option" (US Department of Education 2006). The Bush Administration also argued that the regulations would continue to provide safeguards against abuse

of sex segregated educational options because sex segregated programs must be justified by two important objectives. First, the programs must be used to improve educational achievement and second, they must meet the particular identified needs of a recipient's students (US Department of Education 2006). They also implied that boys who lag behind girls on most indicators of academic success need affirmative, sex segregated programs to improve their educational outcomes.

On the surface, the Bush Administration's regulations appear to be a simple solution to a simple problem; if parents and students have more educational tools at their disposal, then it will be easy to improve student achievement. They recognize gender discrimination is an issue, but present the idea that the Department of Education and our nation's educators simply want to help children achieve, not create programs that discriminate against women. Unfortunately, the issue is not that simple. Feminist groups have correctly argued against the regulations asserting that they violate the intention of Title IX and *Brown v. Board of Education*. They also assert that Title IX has always provided flexibility when there is a legitimate reason for separate groups or when separate groups would help address sex discrimination. Thus, they argue the new regulations would unnecessarily undermine Title IX. Feminist groups are also rightly concerned that the new regulations will allow for sex segregated education that is justified using old sex stereotypes. According to the National Women's Law Center (2006), of the 5,000 comments the administration received about the proposed single-sex regulations, 96 percent felt the changes were unnecessary. Interestingly, when the Department of Education responded to those comments, it did not dispute this number; it simply brushed off many of the negative comments it received. Many of the feminist groups have provided very convincing arguments against the single-sex regulations that will be detailed in later in this paper. It is also important to note that there is no evidence that sex-segregated education programs are effective. In 2008, the Department of Education released an extensive, systematic review of the literature on sex segregated education and was unable to find causal evidence that sex segregated classes or schools improve educational outcomes (Riordan et al. 2008). The report also noted that many of the existing studies on sex segregated education suffer from severe methodological problems such as a lack of random assignment to sex segregated programs and a poor understanding of which variables to study (Riordan et al. 2008). The AAUW's (1998) work on sex segregated

education also confirms it is a difficult topic to study because it takes place in limited arenas and under a variety of circumstances. In its research, the AAUW found that there is no compelling evidence that sex segregated education is more effective than coeducation, even though sex segregated education programs, such as those that serve an affirmative or remedial purpose, can be beneficial for some students in some settings (AAUW 1998). Moreover, AAUW asserts that educators should work to identify the key variables of a good education, instead of assuming that gender is a key variable that determines educational effectiveness (AAUW 1998).

Though this attempt to support sex segregated education passed under Bush, it could easily change under the Obama administration. Given the limited evidence that sex segregated education works and the many concerns that the Bush Administration regulations created separate and inherently unequal programs that could be based on harmful gender stereotypes, the Obama Administration should revoke the 2006 regulations. Revoking these regulations could save government and schools the money they might lose by investing in programs that are at best unproven and at the worst, based on stereotypes that could result in sex discrimination. Moreover, revoking the regulations could save the government and educational institutions money by preventing costly lawsuits challenging the Bush Administration's regulations. Since the single-sex regulations were implemented, some groups, such as the Women's Rights Project of the American Civil Liberties Union (ACLU), has successfully challenged sex-segregated programs established under the regulations. In Alabama in 2008, the ACLU issued a request under the Alabama Open Records Act requesting any and all documents relating to sex-segregation policies. Following that request, nine of the ten districts operating sex segregated programs ended those programs. The ACLU made a similar request for records from the Greene County School District in Georgia in 2008. In Louisiana, the Livingston Parish School Board planned to end co-educational classes and replace them with sex segregated classes one day after the ACLU filed a lawsuit challenging those plans. Finally, in the case of *A.N.A. et al. v. United States Department of Education et al.*, the ACLU filed a class action lawsuit on behalf of five families asserting that the Breckinridge County (Kentucky) School District's sex-segregation program violates Title IX, the Equal Educational Opportunities Act, and state sex equity laws. In Breckinridge County, the sex segregated classes

differ significantly. Girls and boys use different textbooks and they cover material at different rates. Students are also assigned to sex-segregated or co-educational classes without any input from parents or students. Students were allowed to opt-out of sex segregated courses only after parents complained. Perhaps most significantly, the ACLU also argues that the US Department of Education violated the law when it issued the 2006 single-sex regulations. This case is still pending in court. Thus, these recent cases along with the history of separate but equal development of athletic programs shows that attempting to develop separate but equal programs for women and girls will result in a long, controversial process marked by costly lawsuits. Simply revoking the single-sex regulations could help prevent government from making that same mistake in academics. The remainder of this paper will focus on the arguments that were used to justify the implementation of the 2006 regulations and how those arguments transformed conservative ideas about sex segregated education into our nation's Title IX policy. It will also focus on the policy alternatives that were left out of the debate to provide the Obama Administration with guidance on how to change our understandings of sex segregated education to reverse the Bush Administration's harmful policy.

### **From an Idea to Policy: Models of the Public Policy Process**

Though models of the public policy process often focus on rational choice and economic analyses, it is also important to understand how ideas make the transition to policy alternatives and then to actual policies. The Bush Administration's single-sex education regulations were implemented in a time when conservative ideology played an important role in the policy process. Thus, this analysis is based on the work of scholars, such as John Kingdon and Deborah Stone that considers the role of ideas in the public policy process. Deborah Stone (2001) explains, "Ideas are a medium of exchange and a mode of influence even more powerful than money and votes and guns" (11). She believes ideas are at the center of all political conflicts and that policy arguments about equity, such as the debate over sex segregated education, are fundamentally debates over how the competing groups define equity and how people understand sameness and difference. The single-sex regulations are an example of a policy argument that is anchored in the American beliefs about sameness and difference because they reflect the "common sense" belief that there are benign differences between boys and girls that require separate, but equal, approaches to education. John

Kingdon's (2002) "Trash Can Model of the Public Policy Process" adds to Stone's emphasis on ideas in the public policy process by explaining how ideas become policies. In Kingdon's model, policies are created in an environment he calls the trash can. For Kingdon, three streams exist within the trash can and interact with each other to create policy. The first stream is the problem recognition stream and this stream consists of members of the community who work to identify issues and refine proposals for addressing those issues. In the case of the single-sex education regulations, the problem recognition stream is largely composed of two groups with two different understandings of how to address sex discrimination in education. Conservatives identified the problem as a "boy crisis" in education. They asserted that boys were falling behind girls in terms of education and that the problem needed a solution that addressed boys' unique issues in education. Meanwhile, feminists continued to focus on existing issues for women in education, including sexual harassment and under representation in science, technology, math, and engineering (STEM) fields. The second stream consists of the policy community. In 2006, when the single-sex education regulations were implemented, the policy community consisted of the members of the Bush Administration, Congress with Republican majorities, a number of conservative scholars and the media actively pushing the idea that there was a "boy crisis" in education, and a largely frustrated minority of liberal and feminist scholars who were mostly ignored in public policy discussions. The third is the political stream that accounts for changes in the national mood, public opinions, and pressure campaigns. Though the 2006 mid-term elections represented a shift to a Democratic majority in Congress, the regulations were implemented before that change and much of the discussion about the regulations just before their implementation took place in a climate that was dominated by the Conservative agenda and its focus on issues of national security and terrorism. Sex segregated education and changes in the Title IX regulations largely flew under the radar and when issues of gender and education were discussed, the "boy crisis" dominated the debate. In Kingdon's model, when the three streams in the trash can interact, they can open a policy window that allows for the creation of a policy. He states, "Ideas, proposals, or issues may rise into or fall from favor from time to time...Ideas can come from anywhere actually, and the critical factor that explains the prominence of an item on the agenda is not its source, but instead the climate in government or the receptivity to ideas of a given type" (Kingdon 2002,

72). In the case of the single-sex regulations, it is clear they became policy because conservative dominance in government made policymakers very receptive to conservative ideas about sex segregated education and the “boy crisis.” While the rest of the nation was focused on other issues such as national security, the war in Iraq, or the economy, the debate about sex segregated education occurred largely under the radar. The media focused on those issues and only covered issues of gender in education when it was focused on the “boy crisis.” The Republican majority also stifled debate. Thus, Kingdon’s model explains why sex segregated education rose to prominence and it shows that many other ideas were left out of the popular debate. Now that the political climate has changed, the Obama Administration has the opportunity to examine all the arguments for and against sex segregated education on their merits and overturn a policy that undermines the spirit of Title IX and its promise to end gender discrimination in education.

### **Conservative Arguments for Sex Segregated Education**

Given that the conservative arguments for sex segregated education were able to become policy by dominating the debate, it is important to understand these ideas to understand the challenges they present in terms of overturning the single-sex education regulations. This section will review these arguments and explain their appeal.

#### **The “Boy Crisis” Argument**

*“In America, boys are struggling academically, yet politicians and special interests have it the other way around. Convinced that schools shortchange girls, they intend to siphon another 2.9 million from the budget to fix a phony equity problem...It is time to face the facts: boys, not girls, are falling behind” (Kafer 2007, 16).*

The discussion of the “boy crisis” far and away has dominated the press coverage of the debate about gender in education in recent years, and it is likely that the Bush Administration’s focus on improving educational achievement was code for improving boys’ educational achievements. The “boy crisis” was a priority issue for First Lady Laura Bush, and her popularity, background as a teacher and a librarian, and power to influence media coverage and control the agenda as the First Lady likely helped depict the “boy crisis” as a serious and credible issue that required government intervention. The power of the “boy crisis” story and Mrs. Bush’s attention to the issue helped it garner more media coverage than any other argument about the need for gender equity in education. The “boy crisis” was covered prominently in newspapers

throughout the country in articles and op-eds in major newspapers, such as the *Washington Post* and *The New York Times* and helped provide the Bush Administration with a rationale for Title IX regulations that would improve educational achievement. The “boy crisis” was also featured as the cover story of *Newsweek* in January 2006, only nine months before the single-sex regulations were implemented. The discussion of the “boy crisis” is often first presented as a measurable problem. For example, the *Newsweek* (2006) article, “The Trouble with Boys,” states, “Boys across the nation and in every demographic group are falling behind. In elementary school boys are two times more likely than girls to be diagnosed with learning disabilities and twice as likely to be placed in special-education classes. High school boys are losing ground on standardized writing tests. The number of boys who said they didn’t like school rose 71 percent between 1980 and 2001, according to a University of Michigan study. Nowhere is the shift more evident than on college campuses. Thirty-years ago, men represented 58 percent of the undergraduate student body. Now they’re a minority at 44 percent.” The measures presented in the *Newsweek* article are only the tip of the iceberg. Other indicators that have been cited as evidence of the “boy crisis” include: boys’ lower grades, school engagement, achievement scores, graduation rates, presence in gifted and talented classes, participation in advanced placement exams, and number of Bachelor’s and Masters’ degrees. Boys also outnumber women on a number of disturbing indicators such as: attention deficit disorder (ADD) and attention-deficit hyperactivity disorder (ADHD) diagnoses, participation in special education, use of drugs and alcohol, suspensions and expulsions, and time spent watching television or playing video games (Kafer 2007). These measurements are important for popular understandings of gender in education. Because it relies on measurements, the “boy crisis” falsely appears to be a scientific fact, and a measurable problem requiring a solution. Since the numbers compare females and males, they also imply that females and males are in direct competition with each other for educational opportunities and limited school funds. In the sports track of Title IX, similar ideas about men and women competing for limited resources in athletics budgets created conflict that engaged the public in a controversial debate about gender equity in athletics (English 2004). A Gallup Poll (2003) reveals 29 percent of men (compared to 12 percent of women) believe Title IX should be weakened, likely because of the incorrect assumption that Title IX requires schools to cut men’s sports. The “boy crisis”

that is reported in the popular press creates a similar misconception that girls' opportunities to advance in the classroom have come at the expense of boys. Thus, the "boy crisis" could be used to create a gendered conflict that mobilizes support for provisions, such as the single-sex regulations, that weaken Title IX.

Arguments about the "boy crisis" also go deeper with some conservative ideologues incorrectly blaming women and girls for men's and boy's failures in education. Christina Hoff Sommers of the American Enterprise Institute has led this charge. She feels that women wrongly attribute boys' failures in education to masculinity and she claims that boys do not need to be rescued from masculinity (Hoff Sommers 2000, 15). She also believes that the "pro-girl campaign" in education has gone unchecked and distorted public opinion on sex differences in schools so that people believe girls are actually worse off than boys (Hoff-Sommers 2000). She cites the \$75 million in funding for the Women's Educational Equity Program as evidence that girls have an unfair advantage in school (Hoff-Sommers 2000). While \$75 million dollars for gender equity accounts for only a small fraction of the Department of Education's \$159.4 billion dollar budget, Hoff-Sommers, attempts to dramatically use this number to illustrate her belief that women and girls are not only hoarding educational funds, they are also fundamentally changing schools in ways that advantage girls and harm boys. The Independent Women's Forum also picks up on this argument by stating that Congress has appropriated as much as \$10 million dollars per year for research, curricula development, and teaching strategies that promote gender equity (Kafer 2007). Hoff-Sommers is also particularly concerned by the move towards eliminating recess, "the one time during the school day when boys can legitimately engage in rowdy play" because she claims advocates for women and girls believe boys' play during recess is too violent. The focus on discrimination against girls in education is also blamed for forcing schools to treat boys as "sexist culprits" because schools fear lawsuits and believe that they cannot tolerate any of the boys' antics (Hoff Sommers 2000, 55). Many articles in the media have picked up on the idea that education has changed to unfairly advantage girls. For example, the *Christian Science Monitor* presented an op-ed that claims, "When young boys arrive at school today, they enter a world dominated by women teachers and administrators as the percentage of male teachers in the nation's public schools is at the lowest level in 40 years" (Gilbert 2007). The increased presence of women along with a new focus on test scores means that education now

advantages girls because schools are more focused on academic performance instead of activity; essentially boys no longer remain in school because women and educational experts are forcing them to sit still all day so they can perform well on standardized tests.

The “boy crisis” arguments are designed to provoke conflicts that pit girls and boys against each other while firing up the conservative base. These “boy crisis” arguments are also disturbing because they look to cut back opportunities for women while failing to acknowledge the continued existence of male privilege in American society. It is difficult to believe the “boy crisis” is all that detrimental when women continue to earn 77 percent of what men earn (US Census Bureau 2008) and women continue to be outnumbered in higher-paying jobs, including jobs in the STEM fields. The National Organization for Women has promoted this idea stating, “Only a handful of women are Fortune 500 CEO’s. Of the 535 members of Congress, just 84 are women. Women working full-time make only 77 cents to a man’s dollar” despite the fact that they outperform boys in school (Gandy 2006). Perhaps an increased focus on the numerous ways women still experience discrimination by a sympathetic administration can help counter “boy crisis” arguments. Indeed, the feminist movement tried to counter the myth of the “boy crisis” with op-eds and publications refuting it, but these articles were dismissed as conservative policymakers were able to dominate the debate.

Since many of the arguments against the existence of the “boy crisis” also focused on how to measure and define the problem, many Americans may have been lost or uninterested in that debate about measurement. The American Association of University Women (AAUW) issued a report that asserted that while girls are outperforming boys on some measures of educational achievement, the gap between girls and boys is largely the result of large disparities in educational achievement of minorities and low-income boys. In general, AAUW found that girls and boys from similar backgrounds have similar levels of academic success (Corbett, Hill, and St. Rose 2008). The Education Sector released similar findings. Their report showed that most boys are not failing and are in fact, doing better on most indicators of academic success. They found that the only boys who were doing worse were African American, Hispanic, and low-income boys (Mead 2006). *The New York Times* and the *Washington Post* provided coverage of these two reports that

countered the notion of the “boy crisis,” but this coverage about academic reports buried deep within the newspapers was not as visible as the glossy *Newsweek* cover story about the “boy crisis” in education.

### **The “Sex Differences Matter” Argument**

*“Differences between boys and girls are natural. These differences should be acknowledged, accepted, and exploited for educational purposes. Instead, many educators today seek to eradicate gender-specific behaviors” (Sax 2005, 63).*

The “sex differences matter” argument is closely linked with the arguments conservatives make about the “boy crisis.” As the quote above illustrates, many conservatives believe that for the past 37 years, the focus on eliminating gender discrimination in education has eliminated any discussion about the ways sex differences matter in education. Those arguing that policymakers should embrace notions of sex differences use pseudoscientific arguments to argue that a deeper understanding of the pseudoscience of sex difference will allow educators to develop materials and curricula in ways that are more appropriate for boys and girls than gender neutral materials. Consequently, many of the arguments about sex differences are based on pseudoscientific studies. Brain research has been especially important for these arguments. For example, in *Taking Sex Differences Seriously*, Steven Rhoads (2004) states, “Brain research also reveals inherent sex differences. For example, neuroscientists have determined that men have fewer neurons connecting the left and right hemispheres of the brain...more important than physical differences between male and female brains are differences in the ways the sexes use their brains and effect of their brains’ hormones...The typical woman’s brain seems to be ‘networked,’ the typical man’s compartmentalized. The woman’s way seems better for many verbal tasks and for recovery from strokes, the man’s for spatial tasks (27-28). Leonard Sax also contends that boys have more trouble hearing than girls do, therefore they are mistakenly diagnosed with ADD and they do not perform as well in school. Boys are believed to see differently as well.

Perhaps the most repeated “sex differences matter argument” is the idea that because girls and boys brains develop differently, boys and girls learn differently. The National Association for Single Sex Public Education (NASSPE) explains, “The most profound difference between girls and boys is not in any brain structure per se, but rather in the sequence of development of the various brain regions. The different regions of the brain develop in a different sequence in girls compared with boys” (no date). As a result, many argue, as Leonard Sax (2007) does, that girls are better positioned to succeed in school; girls are believed to be

biologically predisposed to develop fine motor skills and language skills earlier than boys do. Thus, the argument goes, girls enter kindergarten with the skills they need to learn to read and write. As kindergarten has become more academic, this means girls' educational advantages over boys develop early, as boys are forced to participate in classes that are developmentally inappropriate for them. Therefore, boys begin school feeling discouraged and they disengage as they realized they have been placed in the 'dumb' group (Sax 2007, 9). For those making this argument, sex segregated education is seen as appropriate because it would allow schools to respond to boys and girls' unique developmental differences with appropriately different coursework. Troublingly, many conservatives put enough credence into these pseudoscientific studies that they used them to justify sex segregated educational programs and a new sex segregated Title IX policy without critically examining or evaluating the validity of the pseudoscientific studies or the programs that were implemented based on their fallacious conclusions.

This argument has also been widely covered in the popular press. *Newsweek* eagerly embraced Leonard Sax's argument that girls develop earlier stating, "It's easy for middle-school boys to feel outgunned. Girls reach sexual maturity two years ahead of boys, but other less visible differences put boys at a disadvantage, too. The prefrontal cortex is a knobby region of the brain directly behind the forehead that scientists believe helps humans organize complex thoughts, control their impulses, and understand the consequences of their own behavior... in girls it reaches its maximum thickness by the age of 11, for the next decade or so, it continues to mature. In boys, this process is delayed by 18 months" (Tyre et al. 2006). A number of op-eds have also appeared in major national newspapers in support of these arguments. Many assert that schools have failed because they fail to recognize sex differences and account for them in the classroom (Ambridge 2008; Evans 2007; Kasic 2008a; Marshall 2007; *USA Today* 2008).

It is clear that this argument was successful as the Bush Administration pushed their single-sex education regulations because they resonated with conservative beliefs about gender differences. But, these arguments might have also helped garner public support for the regulations by appealing to something people believe they fundamentally know and combining it with pseudoscientific proof. It is likely that many Americans who encountered this argument responded to it because it appealed to common sense; anyone can

see girls and boys and women and men are different, why shouldn't educational programs account for that? Those without a strong background in gender issues or scientific research may not have had the tools they needed to critically examine these arguments and understand the dangers associated with essentialized notions of what it means to be male and female. Even if people were skeptical that males and females are essentially different, the argument also provided what appears to be scientific proof for relying on sex differences. This emphasis on pseudoscience transforms the argument from one relying on sex stereotypes to one based in objective fact. It is difficult to counter without a strong background in the scientific research on sex differences and without a deep understanding of science and methodologies used in these studies. As a result, many Americans may have accepted these sex differences as fact and responded well to programs that take those differences into account.

### **The “School Choice and Flexibility” Argument**

*“Parents and educators are increasingly frustrated with the public school system’s one-size-fits-all approach to education. The new Title IX regulations offer schools much-needed flexibility and offer parents more options in determining the best educational environment for their children. As long as these single-sex programs remain voluntary, all parents should applaud the fact that more options are available for education”* (Kasic 2008b, 13).

Conservatives have been eager to embrace sex segregated education as simply one more option for parents and educators looking to boost educational achievement. This argument is also closely related to arguments about the importance of sex differences. As the quote above illustrates, school choice is necessary because different children have different needs; the Independent Women’s Forum makes this connection clear. They state, “No one school can serve every student equally well. School choice allows parents to find the right school for their children, and encourages greater innovation within the educational sector...Policymakers must embrace school choice laws and programs that make it easier for parents to choose alternatives to the traditional government-run public schools” (Kafer 2007). The NASSPE also feels that these sex segregated programs add to the educational experience by creating new opportunities that do not exist in co-educational classrooms.

Because this argument makes it appear that conservatives simply want more options that respond to each unique child, they may be especially appealing to parents who believe their children are unique and

special and want that reflected in their education. Indeed, media coverage on school choice and flexibility suggests that parents are responding positively to this argument. For example, an op-ed in the *Christian Science Monitor* notes, “Many parents were thrilled by the newly relaxed rules, which opened up more opportunities for single-sex education” and it continues, “Parents, in large numbers, are tired of the same one-size fits all public education system. They crave more flexibility and control over where, and under what circumstances, their children are taught” (Kasic 2008a). An article in *USA Today* also reports that the classes have been so popular in South Carolina that there are waiting-lists for sex segregated classes (no date). In Washington, DC, the *Washington Times* published an op-ed encouraging the city to embrace sex segregated education in the city’s failing schools. It states, “Charter schools freed from a one-size-fits all model and much of the city’s notorious school bureaucracy, have more flexibility to utilize the ‘innovative programs’ which are essential for reform” (Brand 2008)

A second key component of this argument for sex segregated programs is that they would be voluntary. For example, the Independent Women’s Forum explains, “Key to the new regulations [the 2006 Bush Administration Title IX regulations] is the voluntary nature of these programs. Schools are not forced to offer single-sex programs, and when schools do offer such an option, student participation must be completely voluntary. In other words, these programs are merely a new option for schools and parents” (Kasic 2008b). Conservatives focus on the voluntary nature of sex segregated programs in an attempt to preempt opposing arguments that the Bush Administration regulations actually require schools to be segregated, which would likely lead to discrimination and potential legal issues under Title IX and the Equal Protection Clause of the 14<sup>th</sup> amendment. Focusing on the voluntary nature of these programs also allows conservatives to paint those who are opposed to sex segregated education as people who are overly paranoid about gender discrimination. The Independent Women’s Forum is especially fond of this argument; they feel that allegations of discrimination under the Bush Administration’s regulations, “are without merit, reflect the deep paranoia of women-as-victim mindset, and are an insult to the many educators and administrators who are working hard to educate students in a single-sex environment. There is no reason to believe that these individuals have anything but the best intentions” (Kasic 2008b).

### **Liberal Arguments in Favor of Sex Segregated Education**

In some cases, liberals have also argued that sex segregated education could be beneficial for boys and girls, but these ideas did not appear in the popular debates between feminist groups and the Department of Education. It is likely that liberals made the strategic decision not to emphasize these benefits of sex segregated education because they were so concerned that the Bush Administration was going to use their Title IX regulations to support discriminatory sex segregated programs and they did not want to appear to support the administration's policy. Moreover, as feminist groups have already argued, the original 1975 Title IX regulations already provided them with the flexibility they needed to provide sex segregated classes. The 1975 regulations also allow for a sex segregated program if it "constitutes remedial or affirmative action." Thus, Department of Education should rescind the 2006 regulations and return to the 1975 regulations because they require a carefully defined to implement sex segregated programs and a method that is used to ensure sex segregated programs are only used to remedy existing discrimination (Smeal 2004). Moreover, the National Women's Law Center (2006) explained, "The Constitution and Title IX provide ample flexibility for schools to pursue single-sex programs where they are appropriate – where they are compensatory and will help to overcome barriers to equal educational opportunity and historic gender stereotypes. The law contains strong legal protections to ensure that single sex programs do not, even with good intentions, perpetuate harmful stereotypes that limit girls' or boys' opportunities." The 1975 regulations, thus, provided for sex segregated programs which could be effective for certain people in certain, carefully monitored situations; the Bush regulations loosening these restrictions were unnecessary.

#### **The "Sex Segregated Education is Beneficial for Women" Argument**

*"Girls' school classrooms are places where education is prized, where teachers feel empowered, where girls are excited about being in school." (The National Coalition of Girls Schools; NCGS 2009).*

Advocates in favor of sex segregated education programs for girls, such as the National Coalition for Girls Schools, emphasize the advantages that sex segregated classrooms can offer girls and many of them argue that these programs are not based on simply removing boys or focusing on sex stereotyped

expectations of girls. Instead, they argue that sex segregated classrooms provide unique benefits for girls by empowering them. For example NCGS states, “At girls' schools, we believe that single-sex education is not merely a matter of separating girls and boys. It's about making sure girls take center stage, while drawing upon all that we know about the way they grow and learn. It's not just the classroom. It's the combination of the community, the culture and the climate girls' schools offer that makes all-girl education such a powerful and transformative experience” (2009). The National Coalition of Girls Schools and other advocates have been strongly influenced by the work of Carol Gilligan. Gilligan (1982) argues that girls think and act based on an ethic of care. Advocates for separate classes for girls believe that Gilligan’s work implies that successful educational environments are uniquely situated to girls’ needs. Others have noted that some studies have shown that girls in co-ed, elementary and secondary school classrooms experience more sex stereotyping, receive less attention, have access to fewer opportunities for learning, participate less in class, are less extroverted, have fewer interactions with teachers, have fewer opportunities for learning and problem solving, and experience more harassment than boys (AAUW 1998). Advocates in favor of sex segregated schools have also argued that graduates from women’s colleges earn more degrees in fields such as economics, life science, physical science, and math suggesting that sex segregated schools will help reduce sex segregation by field of study (Sadker, Sadker, and Zittleman 2009).

Given the perceived benefits of all-girls schools and classes and the perceived challenges that girls face in co-ed environments, it seems that feminist groups would be eager to support programs that empower girls. However, feminist groups did not emphasize these arguments in the debate on sex segregated education, likely because they felt the same educational benefits could be achieved in co-educational schools and they were nervous that sex segregated programs could easily be discriminatory when implemented improperly. David and Myra Sadker and Karen Zittleman (2009) also argued that, “Segregating children by sex is not a long-term solution to gender bias in school and society.” Instead, they felt that schools should learn from the good educational practices of sex segregated schools, such as smaller classes, a strong academic focus, a willingness to experiment, and strong personal connections between teachers and students. Sex segregated schools, they argue, ignore these best practices and instead invite a whole new set of problems,

such as new discipline problems, larger classes with less teacher interaction for the girls, and classes taught based on sex-stereotypes (Sadker, Sadker, and Zittleman 2009). Given the outright hostile relationships between feminist groups and the Bush Administration, it is likely that feminist groups chose not to emphasize the ways girls could benefit from sex segregated education because they did not want to allow the Administration the chance to use the regulations to discriminate against women and girls. As a result, feminist groups were very cautious in their endorsement of sex segregated education. For example, the AAUW (1998) does not clearly endorse sex segregated classes as a policy solution for the challenges girls face in education. The AAUW makes six statements that suggest it would be unwise to promote single sex education in elementary and secondary schools. First, it states, “There is no evidence that single-sex education in general ‘works’ or is ‘better’ than coeducation” (AAUW 1998, 2). Second, they note that sex segregated education can be beneficial in some settings, but they are careful to caution that “researchers do not know for certain whether the benefits derive from factors unique to single-sex programs, or whether these factors exist or can be reproduced in co-educational settings” (AAUW 1998, 2). Third, the AAUW believes policymakers should instead work to identify the components of a good education. Fourth, it notes that the long-term impact of sex segregated education is unknown. Fifth, the AAUW states, “No learning environment, single-sex or coed, provides a sure escape from sexism.” (AAUW 1998, 3). Sixth, they note that there is a wide variety of sex segregated programs in a variety of settings so it is difficult, if not impossible to make generalizations about them. Many of the other feminist groups repeated these arguments in their discussions of the issue suggesting that they agreed with the AAUW’s strategic decision to be cautious about emphasizing the benefits of sex segregated education for girls. They also believed that the 1975 Title IX regulations already allowed for sex segregated programs that could benefit women by providing affirmative or remedial programs in a carefully monitored and carefully defined situation.

### **The “Sex Segregated Education Benefits Low-Income and Minority Boys” Argument**

*“All-Black, all-male programs and classes, their proponents say, are geared toward building self-esteem and self-confidence, and would promote a love of learning, all elements that seem to be missing in the educational experiences of many Black male children.” (Whitaker 1991).*

Since the early 1990s, educators have been concerned that low-income, minority males face unique challenges in education as they are more likely to fail, have behavior problems (including high suspension and expulsion rates), and dropout of school. As discussed above, many feminist groups and educational advocates have used this information to argue that there is not a “boy crisis” in education; instead there is a crisis among minority males. While most feminist groups leave it at that, others have used this information to argue that sex segregated education could actually be beneficial for low-income, minority males. An AAUW report notes that educators in Milwaukee proposed African-centered schools to address these issues. In Milwaukee, these schools were also initially intended to be sex segregated schools, but that proposal was met with a huge public outcry (AAUW 1998). Milwaukee educators wanted to establish the schools to promote African American culture and use it to encourage children to see themselves as members of a larger national and international community (AAUW 1998). They also hoped African-centered schools would help empower students by preparing them to overcome the difficulties presented by an oppressive community (AAUW 1998). *Ebony* magazine dedicated an article to this issue and noted a great deal of support for such programs among those looking to address the unique concerns of low-income, minority boys in education. According to the article, proponents of these programs believe that they will help build self-esteem and self-confidence and promote a love of learning, which they believe are missing in the educational experiences of low-income, minority boys (Whitaker 1991).

When presented in this light, it is easy to see why sex segregated education could be beneficial for such boys, but this idea was never discussed in the popular discussions of the debate between the feminist groups and the Bush Administration over the single-sex regulations. Likely, this argument in favor of sex segregated education was excluded from the debate because it is highly controversial. As the AAUW revealed, there was a huge outcry when African-centered schools were proposed in Milwaukee. Furthermore, some liberal advocates actually believe that such schools would further violate the *Brown v. Board of Education* decision by creating schools that could be segregated by race and gender (Whitaker 1991). This idea also may have been left out of the debate because much of the discussion about this issue seemed to occur in the early 1990s and therefore, it was not being discussed as much in 2006. Lastly, minority groups, like feminist groups

deeply distrusted the Bush Administration and they also may not have wanted to support the Bush Administration regulations for fear that they could be used to allow racist and sexist programs to be established under the 2006 regulations.

### **Feminist Arguments Against Public Sex Segregated Education**

Feminists face many challenges in responding to the conservative arguments in favor of the Bush Administration's single-sex education regulations. While many reports have discredited the "boy crisis," the crisis received prominent media coverage and was able to tell a story of boys as victims who need sex segregated education to succeed in school. Otherwise, boys will fall further behind girls because classes are not addressing their unique needs. Arguments about the importance of sex differences are simple and appeal to what people believe they know and experience as truth; females and males are fundamentally different and have unique needs. School choice sounds like an appealing option for parents looking to address their children's unique needs. Despite these challenges, many feminists have made powerful arguments against sex segregated education and now that President Obama is in office, he can help shine a light on these issues that were ignored when the Bush Administration controlled government and garnered far more press attention than feminists and liberals against the regulations could. The following section will review some of the feminist arguments against sex segregated education, with a special focus on the "sex segregated education is inherently unequal" argument. President Obama should focus on that argument against single sex education as it appeals to American ideals about equality that all Americans share. Furthermore, as the nation's first African American president, President Obama is uniquely positioned to speak about fulfilling the nation's strong commitment to civil rights and an end to discrimination.

#### **The "Sex Segregated Education is Inherently Unequal" Argument**

*"The Supreme Court held that separate educational facilities are 'inherently unequal.' This principle has been repeatedly reinforced since 1954. It is, quite simply, the bedrock of United States constitutional law, and indeed of our society. Notwithstanding this deeply embedded principle, the United States Department of Education's Office for Civil Rights has proposed regulations that will facilitate the reintroduction of segregation into the public educational system – this time in the form of segregation by sex, instead of race" (Gandy 2004).*

As Kim Gandy of the National Organization for Women states above, the “sex segregated education is inherently unequal” argument builds on the legacy of *Brown v. Board of Education* (1954) to suggest that segregation of any kind is inherently unequal and that the Bush Administration’s 2006 single-sex regulations do constitute segregation. In making this argument, feminist groups have had to contend with the notion that the single-sex regulations allow for inequities to exist as long as the programs are “substantially equal” overall (US Department of Education 2006). Therefore, this argument centers on invoking *Brown* to argue that “substantial equality” cannot exist. As part of this effort, liberals note that the *Brown* case discredited the idea that “separate but equal” policies can work (Hodge 2004). The Parent Teacher Association also reminded Department of Education officials that in the *Brown* case Chief Justice Earl Warren stated that segregation generates a feeling of inferiority that could haunt children throughout their lives. The *Brown* case and the precedent for the idea that segregated schools are inherently unequal were repeated in a huge number of the comments that feminist groups sent to the Department of Education. Organizations making this argument included, the Citizens Commission for Civil Rights (CCCR), the Feminist Majority Foundation (FMF), the AAUW, and the National Coalition of Girls and Women in Education (NCGWE) (AAUW 2007; NCWGE 2004; Smeal 2004; Taylor and Piche 2004; Zirkin, Pueschel, and Annexstein 2002).

Feminist groups also explain how segregated classes and schools specifically harm women and girls. According to the AAUW, “Historically public single-sex education has often harmed girls by depriving them of equal educational opportunities. Where programs are established separately for boys and girls, they have tended to be distinctly unequal, with fewer resources allocated for girls programs and stereotypical notions limiting vocational opportunities” (AAUW 2007). The NCWGE also adds the idea that harmful stereotypes are often used to limit girls’ aspirations (Zirkin, Pueschel, and Annexstein 2002). Additionally, many feel that the regulations, as written, allow for such stereotyped programs. For example, the National Education Association (NEA) states, “As the proposal now stands, a school could provide a single-sex option for boys and not for girls, or cutting-edge science equipment for boys and an up-to-date cosmetology center for girls” (Hodge 2004). Essentially, because the Department of Education provides a vague definition for substantial equality, it is possible for programs to develop with unequal opportunities, resources, and educational

experiences (Smeal 2004). The Feminist Majority Foundation explains that the result is that such programs are stereotyped and “force people to know each other only through stereotypes, not as competent people who can perform a variety of tasks and roles” (Smeal 2004).

Many feminist groups also made it clear that sex discrimination in education continues to exist today, even though Title IX has been quite successful in reducing sex discrimination in education. The NCWGE provides the best overview of issues that persist today. They state, “Ongoing problems include rampant sexual harassment in our nation’s schools; underrepresentation of females in math, science, and high-technology programs; female students’ significantly lower scores on a variety of standardized tests; highly sex-segregated vocational education programs with female students overwhelmingly enrolled in programs that are ‘traditionally female’ and lead to low wage jobs; exclusion of female students from many athletic opportunities, including athletic scholarships worth millions of dollars; and discrimination against pregnant and parenting young women” (NCWGE 2004). The NCWGE also noted that a study of California’s sex segregated program found that it reinforced sex stereotyping despite a clear government objective and honest efforts from teachers and schools to create equal educational opportunities (NCWGE 2004).<sup>1</sup> Sex segregated education could exacerbate these existing problems by allowing discrimination to persist. For example, NOW argues that sex segregated education could be used to justify removing girls from classes to prevent sexual harassment; thus instead of working to eliminate sexual harassing behaviors and change beliefs about the acceptance of sexual harassment, the program would simply keep boys and girls away from each other (Gandy 2004). The Feminist Majority Foundation also argues that “Because the proposed regulations never question the real reason for the selection of gender segregated education, the regulations would allow gender segregation if the motivation was a principal...who thought girls science classes should include only examples related to cooking and boys should include only ones related to rockets” (Smeal 2004). Ultimately, feminist

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<sup>1</sup> California was the first state to operate a large scale sex segregated education program. In 1997, six California school districts open sex segregated schools at the middle school and high school level after legislation passed that provided funding for a sex segregated schools pilot program in the public school system. The program was framed as option that would increase school choice and provide additional educational opportunities for boys and girls (Datnow, Hubbard, and Woody 2001).

groups suggest that sex segregated education regulation will create classes that will by definition be sex stereotyped, and therefore inherently unequal.

The “sex segregated education is inherently unequal” argument is quite powerful, but it received little to no attention during the implementation of the single-sex regulations. The idea was rarely, if ever, covered in the popular press and can only really be found in the comments that feminist groups submitted to the Department of Education. In its published response to these comments, the Department of Education brushed off many of these concerns. For example, it states, “A recipient that chooses to provide single-sex classes or extracurricular activities is required to implement its important objective in an evenhanded manner with respect to male and female students” (US Department of Education 2007; 2006). Thus, the Department of Education felt that since sex segregated programs were required to meet objectives related to academic achievement and to implement programs evenhandedly, discrimination would not result. Furthermore, the Department noted that all schools with sex segregated programs must conduct self-evaluations every two years to ensure that programs are “based on genuine justifications and do not rely on overly broad generalizations about the different talents or capacities about either sex” (US Department of Education 2006). Ultimately, the Department’s response meant that they believed educators with the best intentions would not discriminate so a strong enforcement mechanism, such as Department-level compliance reviews, was not necessary. Since the Department of Education was the target audience of the feminists’ argument that the single-sex regulations were inherently unequal and the Department did not take this argument seriously, the public was largely denied the opportunity to hear and respond to this concern.

Given the limited visibility of this argument during the Bush Administration, President Obama and First Lady Michelle Obama now have an enormous opportunity to use the bully pulpit here to reverse the single-sex regulations by citing *Brown*. They should also refer to single-sex programs as sex segregated programs to emphasize the way that these programs are separate and inherently unequal. In many ways, the President and the First Lady are products of *Brown v. Board of Education*, so there would be enormous symbolic power to statements they make about segregation of any kind in educational programs. Moreover, it is an argument that the general public could be very receptive towards. Many Americans grow up learning

segregation is inherently unequal and they can easily understand how such segregation limits equal opportunity. Thus, the Obamas can appeal broadly to these ideals. In his race speech following the Jeremiah Wright controversy, President Obama also proved he has an amazing ability to appeal to American ideals while having a frank conversation about the dangers of discrimination. His unique talents for delivering such speeches along with his symbolic power as a product of the successes of civil rights movements make him the perfect spokesperson to address sex segregated education as a program that is separate and inherently unequal.

### **The Single-Sex Regulations Violate Title IX and the Equal Protection Clause Argument**

*“Because both Title IX and the United States Constitution limit the use of single-sex programs, the Department lacks the authority to expand the circumstances or terms on which schools may permissively offer such programming”* (Samuels and Annexstein 2002).

Many feminist groups also argued that the 2006 Bush Administration regulations posed legal problems under Title IX and the Equal Protection Clause of the 14<sup>th</sup> Amendment. Many groups argued that the existing 1975 Title IX regulations provided adequate opportunities for sex segregated education with careful oversight. For example, the National Women’s Law Center (NWLC) explains that Title IX allows for sex-segregated classes in carefully defined circumstances, such as in music classes that depend on vocal range, remedial classes, or classes based on affirmative action to overcome the effects of past discrimination (Greenberger and Samuels 2004; Samuels and Annexstein 2002). Therefore, “Title IX’s implementing regulations provide ample flexibility for educators to establish single-sex programming at the elementary and secondary level, while simultaneously providing strong legal protections against programs what would reinforce stereotypes or subject students to discrimination in the educational opportunities they receive” (Samuels and Annexstein 2002). In making these arguments, feminists also note that the new regulations undermine the spirit of Title IX and shift away from a policy that has been proven to be effective. The Feminist Majority Foundation credits Title IX with drastically improving the number of women enrolled in college and graduate programs (Smeal 2004).

Many feminists’ arguments about the Equal Protection Clause focus on the constitutionality of the 2006 Bush Administration regulations. For example, the National Alliance for Partnerships in Equity’s

(NAPE) comments state, “The proposed regulations raise constitutional concerns, including the constitutionality of sex-segregated general education classes and schools. Because the regulations propose a vague standard of ‘substantial equality’ that is unlikely constitutional and far from the equality required by law, school districts’ practices of creating sex segregated environments under the proposed regulations will surely be challenged by lawsuits. It is irresponsible for the Department to expose schools to legal liability, which harms girls and boys by taking already scarce resources away from children” (Conrad and Lufkin 2004). NAPE is concerned with the constitutional standard of the ruling from *United States v. Virginia* (1996) that all sex based classifications must be based on an “exceedingly pervasive justification” and must be “substantially related to the achievement” of the government’s objectives. Feminists argue that the regulations will not meet this challenge because sex-segregated classes are often based on false assumptions about sex differences in learning or sex stereotypes (Feminist Majority Foundation 2009; Gandy 2007; Greenberger and Samuels 2004; NOW 2006; NWLC 2006). The Bush Administration regulations also fall short of meeting this standard because they only require that programs meet a vague standard of substantial equality that could allow for such stereotyping and discrimination to take place (Conrad and Lufkin 2004). Others noted that the lack of scientific evidence proving that there is a relationship between sex-segregation and academic achievement would make it impossible for the regulations to pass the “exceedingly pervasive justification” test (Gandy 2004). Finally, NOW suggests that providing sex segregated programs on a voluntary basis will not help the regulations survive constitutional scrutiny, because just the presence of such programs in schools would have an impact on all students, regardless of whether or not they participate (Gandy 2004).

While these arguments are quite compelling from a legal standpoint, they also did not have the opportunity to reach the public. Again, many of these comments were embedded in comments sent to the Department of Education and did not receive media attention. Upon receiving these comments, the Department of Education again brushed off feminist groups. For example, the Department contended that the new regulations were simply building on the old regulations by adding a new condition where sex segregated education would be allowed (US Department of Education 2006). The Department also argued that the new regulations were related to achieving the important governmental objective of improving the

educational achievement of students with more diverse educational opportunities, which was code for improving the educational outcomes of the boys they incorrectly believed were facing an educational crisis (US Department of Education 2006). The regulations also require programs to be “substantially equal.” (US Department of Education 2006). Thus, according to the Department of Education, Title IX and the Equal Protection Clause are not issues because the regulations simply expand an existing provision of Title IX to meet an important governmental objective. The Department of Education, therefore, failed to provide any significant proof that sex-segregation would provide improved educational outcomes and that the substantial equality provision would survive a Constitutional challenge. Unfortunately, feminist groups were only able to make this argument in their comments submitted to the Department of Education so the public is largely unaware of these issues and will likely remain that way until the regulations face a significant challenge in Court. However, the Obama Administration can and should begin reviewing the Constitutionality and legality of these regulations. It could begin by providing support to those who wish to challenge these regulations in Court. Perhaps, a significant challenge to the regulations in court, such as the case of *A.N.A et al. vs. United States Department of Education et al.* combined with the Obama Administration’s public commitment to the idea that the regulations allow for programs that are separate and inherently unequal could go a long way in reversing this harmful policy.

### **The “Sex Segregated Education Has Not Been Proven Effective” Argument**

*“Contrary to the ‘scientifically-based evidence’ that this Administration demands to support other educational innovations, this proposal would allow schools to operate on hunches or simply on parental or student preferences. This would be unprecedented” (Greenberger and Samuels 2004).*

The final argument that feminists have made against the single-sex regulations is that sex segregated education has not been proven to be effective and the regulations do not require such evaluation and accountability. In many ways, this argument is an attempt by feminists to co-opt the right’s focus on improved educational outcomes and accountability that can be found in the No Child Left Behind Act (NCLB). For example, the NEA explains that NCLB requires schools to use instructional approaches that have been proven to work. The NEA states, “The proposed changes to Title IX clearly do not meet this

standard. In fact, there is no consistent research demonstrating that single-sex education produces significant educational benefits or enhances student achievement” (Hodge 2004). At best, sex segregated education has been proven to be effective in some carefully defined and carefully monitored programs that serve an affirmative or remedial purpose. For many feminists, this argument is closely related to the idea that the new regulations would not survive a challenge in court. Since the regulations are based on scientifically unproven strategies, feminists believe that the government cannot use them to achieve an important government objective. Without more information about the value of sex segregated education programs, the Department has also not been able to provide much guidance for how to implement sex segregated programs. As a result, the Feminist Majority Foundation argues that, “Given the free-for-all that will occur if schools follow the suggestions in the proposed regulations on how and why they may segregate students by sex, the research value of this enterprise will be completely compromised” (Smeal 2004). So, the single-sex regulations are not based on any scientific evidence that students in sex segregated classrooms perform better than students in co-educational classrooms and the Department of Education does not require sex segregated education programs to be developed in a way that would be conducive to a large scale, controlled, and federally funded study about the effectiveness of sex segregated education programs. The Department of Education is also not required to carefully review and approve plans for sex segregated programs before they are implemented. Therefore, it is difficult to ensure that programs are not based on fallacious, pseudoscientific claims about gender difference and that they do not actual promote sex discrimination instead of remedying it.

The feminist groups also provide a brief overview of what is known about sex segregated education programs. NAPE reveals that there has not been a national comprehensive controlled study of K-12 sex segregated programs (Conrad and Lufkin 2004). NAPE also found that the studies of sex segregated programs that do exist have found that, “Most, if not all, of the academic outcomes in the single-sex research are identical to outcomes in schools with strong and research-based pedagogy, small class sizes, quality educators, adequate school resources, and parent and community involvement” (Conrad and Lufkin 2004). In its report *Separated by Sex*, the AAUW found no evidence that sex segregated education in K-12 works better than co-ed education, so they suggest that educators and policymakers need to identify components of

good education since sex segregated programs produce positive results only for “*some* students in *some* settings” (AAUW 1998). In many cases, these positive results are found in the carefully defined and carefully monitored sex segregated educational programs that serve an affirmative or remedial purpose and that were already permissible under the 1975 Title IX regulations. The AAUW also notes that the absence of longitudinal data on students’ participation in sex segregated education means there is little information available about the long-term effects of such programs (AAUW 1998). Given the lack of evidence about the effectiveness of sex segregated education programs, the AAUW and other feminist groups argue that sex segregated education programs do not meet the “exceedingly pervasive justification” test set forth in *United States v. Virginia*; therefore schools must improve educational outcomes with methods that do not include sex segregated classes.

Not only is there little evidence about the effectiveness of sex segregated education available, the regulations also do not require federal funding recipients to evaluate whether or not sex segregated education improves student achievement, produces desirable educational outcomes, or achieves definable goals (NEA 2004 letter). While the regulations do call for periodic self-evaluations, many feminist groups feel that more rigorous evaluation is needed. As a result, schools are able to identify their own goals and evaluate themselves based on those goals, allowing for a wide-variety of programs with little centralized oversight (AAUW 2007; Feminist Majority Foundation 2009; Gandy 2004). For example, the AAUW states, “The goals of single-sex education will not be uniform, and the most basic safeguards are thrown out. The regulations allow each school to identify the educational objective for sex segregation. Schools do not have to justify segregation and can identify a range of objectives for why segregation is necessary” (AAUW 2007). The National Women’s Law Center believes that this lack of oversight will lead to a number of programs based on untested beliefs, stereotypes, and assumptions. It is also troubling since many of the justifications for sex segregated education rely on the pseudoscience of sex differences.

Feminist groups rightly directed these concerns to the Department of Education. While the public may not find arguments about program evaluation compelling, policymakers should take such concerns seriously. Unfortunately, the Bush Administration did not and the number of sex segregated schools and

classrooms is growing. In 1995, there were only two, public sex segregated schools operating in the country. As of 2008, there were 49 sex segregated schools, 65 percent of which opened since 2005 (Weil 2008). There is no official record of the number of schools offering sex segregated classrooms, but as of May 2009, the National Association for Single Sex Public Education reported that 542 public schools offered sex segregated courses.<sup>2</sup> With the numbers of sex segregated programs on the rise, the Department of Education should have rigorously evaluated new programs to ensure that they did not discriminate against women and girls. However, the Department of Education responded to these concerns by simply stating, “Although there is a debate among educators on the effectiveness of single-sex education, the final regulations permit each recipient to make an individualized decision about whether single-sex educational opportunities will achieve the recipient’s important objective and whether the single-sex nature of those opportunities is substantially related to the achievement of that important objective consistent with the nondiscrimination requirements of these regulations” (US Department of Education 2006). Essentially, the Department stood by its regulations without incorporating the feminist’s concerns about program effectiveness and evaluation. While it is unlikely the Obama Administration could successfully create a message about reversing the single-sex regulations on these terms alone, it is an important consideration for the Administration going forward. When this message is added to the feminists’ other messages, it conveys the impression that this policy was created in a haphazard way that could harm many girls and boys going forward.

### **Conclusions**

The Bush Administration was able to successfully implement the single-sex regulations in Title IX because their messages about the “boy crisis,” the importance of sex differences, and the need for school choice resonated with the Republicans and the public in a time when the Republicans controlled the White House and Congress, and by extension, media coverage of such issues. The three stories the Republicans told are challenging to counter because the “boy crisis” tells the story of a victim who needs unique forms of help.

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<sup>2</sup> It should be noted that there is not a reliable number for how many single-sex classes and schools currently exist as the Department of Education does not provide that information. The National Association for Single Sex Public Education calculates their number of programs and classes using self-reports and press accounts of single sex programs, so it may actually underestimate the existing number of single-sex programs.

The “sex differences matter” argument supports the idea that these boys differ from girls and need unique interventions. School choice appeals to parents who want their child to receive an education that is tailored to his/her unique needs. But, the challenge is not insurmountable. Now, President Obama and the Democrats control both the executive and legislative branches, they can garner media coverage for reversing the Bush Administration regulations and they can use the government to do so. To promote this agenda, President Obama and First Lady Michelle Obama should use the bully pulpit to provide more information about how the single-sex regulations create programs that are separately and inherently unequal. As products of the civil rights movement, the Obamas are uniquely situated to speak about anti-discrimination policies and his unique talents as an orator have proven he can effectively communicate messages about American ideals, such as equal opportunity, to the broader public. The Obama Administration should also provide some support for those looking to challenge the regulations through the courts as a significant court case would provide him with an event that would allow him to talk about reversing this damaging policy. The Obama Administration should take feminist concerns about the legality and effectiveness of the sex segregated education recommendations to heart as they move forward. Additionally, the Administration should educate the public that the 1975 Title IX regulations already provided for sex segregated educational programs that served an affirmative or remedial purpose in carefully monitored situations. Lastly, the Administration should remind Americans that it would be unwise to continue to invest in unproven, untested, potentially discriminatory sex segregated programs when state governments and schools are feeling the budget crunch of the current recession. These arguments together provide the Obama Administration with a well-grounded argument that reversing the single-sex education regulations is not only morally right, but it is also good policy.

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\* This briefing paper began as a writing requirement for a graduate seminar on Women and Public Policy at The George Washington University. It has since benefited from comments and input from researchers at the Institute for Women's Policy Research and, like all IWPR products, it has been reviewed by peers at other institutions, in this case by experts on Title IX.

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