

# William & Mary Law Review

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Volume 39 (1997-1998)  
Issue 2 Symposium: 1997 W. M. Keck  
Foundation Forum on the Teaching of Legal  
Ethics

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Article 11

February 1998

## Urban, Single-Sex, Public Secondary Schools: Advancing Full Development of the Talent and Capacities of America's Young Women

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### Repository Citation

Amanda E. Koman, *Urban, Single-Sex, Public Secondary Schools: Advancing Full Development of the Talent and Capacities of America's Young Women*, 39 Wm. & Mary L. Rev. 507 (1998), <https://scholarship.law.wm.edu/wmlr/vol39/iss2/11>

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# NOTES

## URBAN, SINGLE-SEX, PUBLIC SECONDARY SCHOOLS: ADVANCING FULL DEVELOPMENT OF THE TALENT AND CAPACITIES OF AMERICA'S YOUNG WOMEN

Wearing white blouses and navy blue skirts and blazers while sitting upon metal stools around shiny, rectangular, wooden laboratory tables, eighteen seventh-grade girls quietly listened to their science teacher. She asked them to describe the weather outside. Several girls called out "cloudy" and "cold." The teacher asked a nonparticipating student if she agreed with her classmates' descriptions. When the girl did not respond, the teacher walked over to her, led her to a window whose sill was filled with plants and homemade experiments, and asked her to look out and describe what she saw. The student whispered "partly cloudy." The teacher replied "excellent." She then asked for a volunteer to give a weather forecast to the class. Many girls raised their hands. In turn, each volunteer ventured to the front of the room, stood before a colorful map of the United States of America, held an imaginary microphone in her hand, and gave her forecast. All weatherpersons predicted "sunny, hot weather in Florida" and "cold, cloudy weather in New York."<sup>1</sup>

Tucked away on one of the top three floors of a twelve-story commercial building<sup>2</sup> three blocks from the 103rd Street subway station in the Hispanic and African American working class neighborhood of East Harlem, this seventh-grade science class is causing legal controversy.<sup>3</sup> It is part of The Young Women's Leadership School of East Harlem (TYWLS), an all-girl, public

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1. The following account is based on a January 17, 1997, visit to The Young Women's Leadership School of East Harlem and an observation of Suzanne Kerho's morning science class.

2. See Jacques Steinberg, *Just Girls, and That's Fine With Them*, N.Y. TIMES, Feb. 1, 1997, at L21.

3. See Rene Sanchez, *In East Harlem, a School Without Boys*, WASH. POST, Sept. 22, 1996, at A1.

secondary school<sup>4</sup> that opened on September 4, 1996, with a seventh-grade class of fifty girls.<sup>5</sup> Founded in a joint effort between Community District Four, the New York Board of Education, Ann Rubenstein Tisch, and her husband, Andrew Tisch, TYWLS seeks to help adolescent girls in East Harlem "build self-esteem, become more assertive and take on new leadership roles."<sup>6</sup>

TYWLS is a response to "[r]ecent studies [that] have shown that girls and boys tend to respond to different teaching styles."<sup>7</sup> One such study is the 1992 American Association of University Women (AAUW) report that revealed instruction in America's coeducational, public elementary and secondary schools disadvantaged girls.<sup>8</sup> The study found that formal curriculum materials excluded, stereotyped, or subordinated women.<sup>9</sup> Teachers paid more attention to boys than to girls.<sup>10</sup> As a result, girls lacked confidence in their math and science abilities and chose not to pursue math and science careers.<sup>11</sup> Further, school authorities failed to treat boys' sexual harassment of girls as serious misconduct.<sup>12</sup> Finally, no instruction took place on "matters central to the lives of [female] students" such as the

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4. See *id.* Only two other all-girls public schools exist in the United States—in Philadelphia and Baltimore. See Steinberg, *supra* note 2, at L21. TYWLS does not have an all-boys counterpart, see Dewayne Wickham, *New York's Single-Sex Schools Are Laudable*, FLA. TODAY, Dec. 16, 1996, at A7, available in 1996 WL 14116088, as do the Philadelphia and Baltimore schools. The all-girls public school in Philadelphia is Girls High School, and its all-boys counterpart is Central High School. See *Vorchheimer v. School Dist. of Philadelphia*, 532 F.2d 880, 881 (3d Cir. 1976), *aff'd*, 430 U.S. 703 (1977) (*per curiam*); see also *infra* notes 287-89 and accompanying text (discussing *Vorchheimer*). In Baltimore, boys and girls attend the same public elementary schools, but they receive selected instruction in separate classrooms. See Michael John Weber, Note, *Immersed in an Educational Crisis: Alternative Programs for African-American Males*, 45 STAN. L. REV. 1099, 1100 n.5 (1993).

5. See *Girls Only?*, CHRISTIAN SCI. MONITOR, Sept. 5, 1996, at 20. TYWLS "intends to add a grade each year until it is a high school for several hundred girls." Sanchez, *supra* note 3, at A8.

6. Steinberg, *supra* note 2, at L21.

7. Sanchez, *supra* note 3, at A8.

8. See AMERICAN ASS'N OF UNIVERSITY WOMEN, *HOW SCHOOLS SHORTCHANGE GIRLS—THE AAUW REPORT 3-5* (1995) [hereinafter AAUW REPORT].

9. See *id.* at 109; *infra* notes 41-52 and accompanying text.

10. See *infra* notes 53-57 and accompanying text.

11. See *infra* notes 67-78 and accompanying text.

12. See *infra* notes 79-88 and accompanying text.

physical and emotional changes experienced during puberty.<sup>13</sup>

According to the report, America's public schools' biased instruction had consequences.<sup>14</sup> It exacerbated girls' decline in self-esteem that occurred "as they move[d] from childhood to early adolescence."<sup>15</sup> This decline was severe among white, Hispanic, and African American girls.<sup>16</sup> Low self-esteem led to eating disorders, depression, suicide, substance abuse, early sexual activity, teenage pregnancy, and sexually transmitted diseases.<sup>17</sup>

Studies have shown that in contrast to instruction in America's coeducational public schools, instruction in America's private, single-sex schools benefitted girls.<sup>18</sup> Without boys, teachers paid attention to girls, and girls competed and excelled in all subjects and activities.<sup>19</sup> Consequently, "[r]esearchers . . . found that women in single-sex schools . . . tend[ed] to demonstrate greater self-confidence, hold less stereotypical attitudes about the role of women, take more math and science courses on higher levels, and outscore their coeducational counterparts on general academic and science tests."<sup>20</sup> Further, the studies indicate that "[t]he effects of single-sex schools [were] greatest among [poor] Hispanic and [African American] female students."<sup>21</sup>

The founders of TYWLS intended to build self-esteem, assertiveness, and leadership in Hispanic and African American adolescent girls in East Harlem. Nevertheless, the New York City chapter of the National Organization for Women, the New York Civil Liberties Union, and the New York Civil Rights Coalition filed a complaint with the United States Department of Education alleging that the "school's gender-based exclusionary admissions policy and practices" violated Title IX of the Education Amendments of 1972.<sup>22</sup> Title IX states that "[n]o person in the

13. AAUW REPORT, *supra* note 8, at 131; see *infra* note 88 and accompanying text.

14. See AAUW REPORT, *supra* note 8, at 3-5.

15. *Id.* at 19; see *infra* notes 89-128 and accompanying text.

16. See *infra* notes 96-99 and accompanying text.

17. See *infra* notes 129-50 and accompanying text.

18. See CORNELIUS RIORDAN, *GIRLS & BOYS IN SCHOOL: TOGETHER OR SEPARATE?* 147-50 (1990).

19. See *id.* at 50, 54-55; *infra* note 177 and accompanying text.

20. Rosemary C. Salomone, *All-Girls School for Spanish Harlem? Yes*, N.Y. L.J., Aug. 5, 1996, at 2.

21. RIORDAN, *supra* note 18, at 148; see *infra* notes 178-80 and accompanying text.

22. Administrative Complaint at 1, *NOW v. New York City Bd. of Educ.* No. 02-

United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."<sup>23</sup> The complainants requested that the "Department of Education take all appropriate steps to remedy any and all violations of Title IX and its accompanying regulations."<sup>24</sup> The complainants asserted that "separate has never been equal and the goal should be to improve schooling for girls in more realistic co-educational environments."<sup>25</sup> To them, "[t]he idea that boys are innately disruptive is a 'despicable stereotype.'"<sup>26</sup>

Whether urban, single-sex, public secondary schools such as TYWLS violate Title IX is undecided. In *Vorchheimer v. School District of Philadelphia*,<sup>27</sup> the Third Circuit held, and an equally divided U.S. Supreme Court affirmed without opinion,<sup>28</sup> that Title IX applied "to only specified types of educational institutions and exclude[d] from its coverage the admission policies of

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96-1184 (U.S. Dep't of Educ., Office for Civil Rights filed Aug. 22, 1996).

23. 20 U.S.C. § 1681(a) (1994); see *infra* notes 229-39 and accompanying text.

24. Administrative Complaint at 12, NOW, No. (02-96-1184).

25. Tamara Henry, *A New Push for Girls-Only Public Schools*, N.Y. *Experiment in Leadership*, USA TODAY, Sept. 18, 1996, at 1D, available in 1996 WL 2069083.

26. *Id.* (quoting Michael Meyers of the New York Civil Rights Coalition). On September 18, 1997, the United States Department of Education's Office of Civil Rights notified the New York City School Board that TYWLS appeared to violate federal civil rights laws. See Jacques Steinberg, *All-Girls School May Violate Rights of Boys, Officials Say*, N.Y. TIMES, Sept. 18, 1997, at B1. The office, however, did not issue a formal finding of violation against TYWLS or order TYWLS to close. See *id.* Instead, it asked the school board to begin negotiations on a possible solution—either admit boys to TYWLS or establish a separate program for boys only. See *id.* New York Schools Chancellor Rudy Crew responded to this notification by stating that "he has no intention of either admitting boys or establishing a separate program for them." Susan Estrich, *Sometimes, Single Sex Schools Educate Best*, DENVER POST, Sept. 24, 1997, at B7, available in LEXIS, News Library, Curnws File. "He said that if the Education Department sought to impose a solution on the city, 'We'll just take this to court.'" Jacques Steinberg, *Crew Says No to Compromise On All-Girls Middle School*, N.Y. TIMES, Sept. 25, 1997, at B3. "Michael Meyers, executive director of the New York Civil Rights Coalition, and Patricia Ireland, president of the National Organization of Women, have pledged that they will settle only for recruitment of boys." Estrich, *supra*, at B7.

27. 532 F.2d 880 (3d Cir. 1976), *aff'd*, 430 U.S. 703 (1977) (per curiam); see *infra* notes 306-09 and accompanying text.

28. Justice Rehnquist did not take part in the decision. See *Vorchheimer*, 430 U.S. at 703.

secondary schools."<sup>29</sup> The school employing a gender-based exclusionary admissions policy in *Vorchheimer*, however, was a public, all-male academic high school that had an all-female counterpart.<sup>30</sup> TYWLS does not have an all-male counterpart.<sup>31</sup> In a case involving urban, public, all-male elementary schools with no all-female counterparts, *Garrett v. Board of Education*,<sup>32</sup> the United States District Court for the Eastern District of Michigan deferred to the Department of Education's Office of Civil Rights opinions that concluded that "all male public elementary and secondary school programs violate Title IX."<sup>33</sup> These schools, though, were all African American, all-male, public elementary schools with Afrocentric curricula.<sup>34</sup>

Also unresolved is whether urban, single-sex, public secondary schools violate the Equal Protection Clause of the Fourteenth Amendment.<sup>35</sup> The U.S. Supreme Court has examined single-sex education only in the context of higher education. Most recently in *United States v. Virginia*,<sup>36</sup> the Court held that Virginia violated the Equal Protection Clause of the Fourteenth Amendment because it failed to show an "exceedingly persuasive justification" for excluding women from Virginia Military Institute's (VMI) citizen-soldier program.<sup>37</sup> Justice Ginsburg's majority opinion in that case, however, did not explicitly state whether the "exceedingly persuasive justification" applied to all gender classifications, even ones that "advance full development of the talent and capacities of [America's young women]" such as TYWLS's or only to gender classifications that "perpetuate the legal, social, and economic inferiority of women" such as VMI's.<sup>38</sup>

29. *Vorchheimer*, 532 F.2d at 883.

30. *See id.* at 881.

31. *See Wickham*, *supra* note 4, at A7.

32. 775 F. Supp. 1004 (E.D. Mich. 1991); *see infra* notes 291-306 and accompanying text.

33. 775 F. Supp. at 1009.

34. *See id.* at 1006. *See generally* Note, *Inner-City Single-Sex Schools: Educational Reform or Invidious Discrimination?*, 105 HARV. L. REV. 1741, 1743 n.10 (1992) (noting that African Americans constitute a majority in Detroit schools).

35. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

36. 116 S. Ct. 2264 (1996).

37. *See id.* at 2276.

38. *Id.*; *see infra* notes 270-78 and accompanying text.

This Note explores the legal controversy surrounding urban, single-sex, public secondary schools for adolescent girls such as TYWLS. The first section reports the findings of research on co-educational, public elementary and secondary schools and their impact on girls. This section asserts that addressing these findings by educating urban, adolescent girls, in particular, is an important governmental objective. The second section focuses on TYWLS and describes how it is using a gender-based admissions policy along with curriculum and classroom reform measures to educate adolescent girls in East Harlem. The third section outlines the statutory and constitutional law governing single-sex schools such as TYWLS. The fourth section analyzes this law and argues that single-sex, public secondary schools such as TYWLS are statutorily permissible. This section further argues that under Justice Ginsburg's majority opinion in *United States v. Virginia*,<sup>39</sup> the appropriate equal protection standard of review for schools such as TYWLS is intermediate scrutiny—the gender classification needs to serve an important governmental objective and be substantially related to the achievement of that objective.<sup>40</sup> The fourth section of this Note also examines TYWLS's gender classification and determines that it is substantially related to the achievement of the important governmental objective introduced in the first section. Finally, this Note concludes that urban, single-sex, public secondary schools for adolescent girls are constitutional.

#### EDUCATING URBAN, ADOLESCENT FEMALES: AN IMPORTANT GOVERNMENTAL OBJECTIVE

##### *America's Public Elementary and Secondary Schools*

In 1992, the American Association of University Women issued a report that revealed that "girls [were] not receiving the same quality, or even quantity, of education as their brothers" in America's coeducational, public elementary and secondary schools.<sup>41</sup> The report disclosed that America's public schools'

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39. 116 S. Ct. 2264 (1996).

40. See *Craig v. Boren*, 429 U.S. 190, 199 (1976) (defining intermediate scrutiny).

41. AAUW REPORT, *supra* note 8, at x.

formal curriculum—"the central message-giving instrument of the school" that "creates images of self and the world for all students"—contained sex bias.<sup>42</sup> Specifically, the report identified six common forms of sex bias in instructional materials: "*exclusion of girls, stereotyping of members of both sexes, subordination or degradation of girls, isolation of materials on women, superficiality of attention to contemporary issues or social problems, and cultural inaccuracy*, through which most of the people active in a culture are excluded from view."<sup>43</sup>

Myra and David Sadker captured the effects sex-biased curriculum has on students in a study they conducted in the spring of 1992.<sup>44</sup> They went to sixteen fourth- fifth- and sixth-grade classes in Washington, D.C., Maryland, and Virginia and asked the students to do the following assignment:

In the next five minutes write down the names of as many famous women and men as you can. They can come from anywhere in the world and they can be alive or dead, but they must be real people. They can't be made up. Also—and this is very important—they can't be entertainers or athletes. See if you can name at least ten men and *ten* women.<sup>45</sup>

The Sadkers observed that the students, on average, listed eleven male names but only three female names.<sup>46</sup> Whereas the male names consisted of historical figures, the female names included "Mrs. Fields, Aunt Jemima, Sarah Lee, Princess Di, Fergie, Mrs. Bush, Sally Ride, and children's book authors such as Beverly Cleary and Judy Blume."<sup>47</sup> Many students could not think of a single famous female.<sup>48</sup>

Surprised by these results, the Sadkers decided to examine these students' textbooks.<sup>49</sup> They discovered that these students

42. *Id.* at 105.

43. *Id.* at 109.

44. See MYRA & DAVID SADKER, *FAILING AT FAIRNESS: HOW OUR SCHOOLS CHEAT GIRLS* 71 (1994).

45. *Id.* (emphasis added).

46. See *id.*

47. *Id.*

48. See *id.*

49. See *id.* at 72.



learned history from textbooks such as *Exploring Our World, Past and Present*, a sixth-grade text published in 1992.<sup>50</sup> In this textbook, "only eleven female names were mentioned, and not a single American adult woman was included. In the entire 631 pages of a textbook covering the history of the world, only *seven* pages related to women, either as famous individuals or as a general group."<sup>51</sup> Such instructional materials "deliver the message [day in and day out to girls] that women's lives count for less than men's."<sup>52</sup>

In addition to their curriculum, America's public school classrooms also disadvantaged girls according to the AAUW report.<sup>53</sup> The report noted that "[c]lassroom interactions, both with the teacher and other students, are critical components of education."<sup>54</sup> The report described how in America's public schools' classrooms, boys receive more teacher attention, time, and energy, than girls.<sup>55</sup> When boys call out answers, teachers listen to their comments, whether they are insightful or irrelevant.<sup>56</sup> When girls call out answers, however, teachers suddenly remember their rule about raising a hand before talking and instruct girls to raise their hands.<sup>57</sup>

Not being allowed to call out like her male classmates . . . will not psychologically scar [a girl]; however, the system of silencing operates covertly and repeatedly. It occurs several times a day during each school week for twelve years and even longer if [girls] go to college, and most insidious of all, it happens subliminally. This micro-inequity eventually has a powerful cumulative impact.<sup>58</sup>

Girls learn not to participate in class.<sup>59</sup>

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50. *See id.*

51. *Id.* (emphasis added).

52. AAUW REPORT, *supra* note 8, at 117.

53. *See id.* at 118.

54. *Id.*

55. *See id.*

56. *See* SADKER, *supra* note 44, at 43.

57. *See id.*

58. *Id.* at 43-44.

59. *See* PEGGY ORENSTEIN, SCHOOLGIRLS: YOUNG WOMEN, SELF-ESTEEM, AND THE

The consequence of girls' passiveness is that they miss the teacher feedback that is crucial to achievement and self-esteem.<sup>60</sup> Teachers typically respond to students' comments and work in four ways: they praise, "good job"; they remediate by "encouraging a student to correct a wrong answer or expand and enhance thinking"; they criticize by "explicit[ly] stat[ing] that something is not correct"; and they accept by saying "okay."<sup>61</sup> White boys, followed by minority boys, receive praise, remediation, and criticism the most.<sup>62</sup> These reactions foster achievement.<sup>63</sup> White girls, followed by minority girls, receive primarily acceptance.<sup>64</sup> Acceptance does not operate to inform girls when they are wrong.<sup>65</sup> If girls do not know when they are wrong, then "they [do not] have the luxury of learning from [their] mistakes and . . . develop[ing] the perspective to see failure as an educational tool" necessary for long-term academic success.<sup>66</sup>

Besides not exposing them to failure, acceptance does not teach girls that academic performance correlates with ability.<sup>67</sup> In the area of math, for example, teachers may say to boys who performed poorly on an exam: "I'm afraid you didn't do too well on that math test. I know you can get it. Just turn off that TV and study a little more."<sup>68</sup> This comment signals to boys that they scored low because they did not try, and that, because they are capable, if they try, they will succeed.<sup>69</sup> In contrast, teachers, may tell girls who performed poorly on a math exam: "I'm afraid you didn't do too well on that math test."<sup>70</sup> This comment, unlike the response to the boys' performance, does not signal to girls that they have the ability to achieve more, but that they just need to

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CONFIDENCE GAP 14 (1994).

60. See SADKER, *supra* note 44, at 54.

61. *Id.*

62. See *id.* at 50, 55.

63. See *id.*

64. See *id.*

65. See *id.* at 55.

66. ORENSTEIN, *supra* note 59, at 12.

67. See SADKER, *supra* note 44, at 96.

68. *Id.*

69. See *id.*

70. *Id.*

try.<sup>71</sup> "[Girls] pick up on these subtle cues and internalize the attitudes of adults."<sup>72</sup> Girls begin to attribute their poor grades to lack of ability—"I'm just not smart in math."<sup>73</sup>

When girls lose confidence in their ability to learn math and science, they avoid these subjects. When they believe they can't succeed, they become less willing to attempt new science and math tasks. As they have fewer and fewer experiences with math and science, they become less capable. As their competence withers, so does their self-esteem, and the vicious, connected cycle continues: attenuation of self-confidence that leads to loss of mental ability and results in the diminishment of self-confidence. The order of this downward spiral is crucial. *The plunge in confidence comes first and is followed by the drop in achievement. It is during middle school that the fabled gender gap in math emerges and gets greater in science.*<sup>74</sup>

Educational Testing Service reports document the downward spiral of girl's confidence and ability in math.<sup>75</sup>

Third-grade girls and boys think they are good in math in about the same percentages (64 percent versus 66 percent); by seventh grade, 57 percent of the girls agree, compared to 64 percent of the boys; by eleventh grade the gap widens to 48 percent of girls versus 60 percent of boys.<sup>76</sup>

In high school, girls decide to abandon math and science courses to pursue language and humanities courses.<sup>77</sup> In a time of rapid technological advances in which technologically focused careers require a solid grounding in math and science, this decision prevents women from fully participating in future technological progress.<sup>78</sup>

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71. *See id.*

72. *Id.*

73. *Id.* at 97.

74. *Id.* (emphasis added).

75. *See* AAUW REPORT, *supra* note 8, at 46.

76. *Id.*

77. *See id.* at 46-50.

78. *See* ORENSTEIN, *supra* note 59, at 23. When teachers praise boys and allow them to dominate classrooms, boys also lose. *See id.* at 13-14. Boys learn self-cen-

Although girls are not receiving their teachers' attention, they *are* receiving unwelcome sexual comments and physical advances from boys in junior high and high schools.<sup>79</sup> Every day boys are "snapping girls' bras, lifting up or pulling down skirts, touching, pinching, poking at girls' bodies with fingers or pencils, [making] comments and jokes about parts of [girls'] bodies, [and drawing] bathroom graffiti depicting [girls] in obscene sexual acts."<sup>80</sup> A 1993 AAUW national middle and high school student survey, *Hostile Hallways*, revealed that "81 percent of girls and 76 percent of boys report[ed] they have been subjected to some form of unwanted sexual behavior."<sup>81</sup> "Minority girls are especially likely to be targets, with 42 percent of African Americans and 40 percent of Hispanics reporting sexual harassment by grade six or earlier as compared with 31 percent of white girls."<sup>82</sup> This harassment occurs "generally in public—in hallways, stairwells, the cafeteria, the gym, on the school bus, and even in classrooms."<sup>83</sup> Instead of handling sexual harassment as serious misconduct, school authorities treat it as a joke, as "boys being boys."<sup>84</sup>

Such treatment causes girls to lose faith in the ability of their school to protect them.<sup>85</sup> To escape harassment, girls transfer out of courses or even drop out of school.<sup>86</sup> Girls need protection. "They are at an age of confusion when they are struggling

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teredness and develop a lack of respect for their female classmates. *See id.* Left unchecked, boys who disrespect girls can become men who disrespect women. *See SADKER, supra* note 44, at 208. "Each year approximately 2 million wives are physically assaulted by their husbands and more than 100,000 women report they have been raped. Almost one-third of all female murder victims are slain by husbands and boyfriends." *Id.* Boys also learn that to command attention they must be a top student, an athlete, or a bottom student. *See id.* at 197. Boys who overachieve in academics become frustrated and depressed when they come in second in competitions. *See id.* at 201. Male peers ridicule boys who are not athletic. *See id.* at 211. Finally, boys who underachieve in academics cause classroom disturbances, fail courses, and drop out of school. *See id.* at 198.

79. *See* AAUW REPORT, *supra* note 8, at 127.

80. SADKER, *supra* note 44, at 111.

81. *Id.* at 111-12.

82. *Id.* at 112.

83. *Id.* at 113.

84. AAUW REPORT, *supra* note 8, at 128.

85. *See* SADKER, *supra* note 44, at 115.

86. *See id.*

to define their sexual identity. Sexual harassment can stunt and twist their normal development. Without the range of knowledge or experience that comes with maturity, female children are even more powerless and more defenseless than adults."<sup>87</sup> America's public schools can protect girls by not evading matters central to their lives such as "the functioning of bodies, the expression and valuing of feelings, and the dynamics of power" among men and women.<sup>88</sup>

### *The Consequences of Biased Instruction*

Predictably, biased instruction has consequences.<sup>89</sup> It exacerbates the decline in girls' self-esteem that occurs "as they move from childhood to early adolescence."<sup>90</sup> For girls, the onset of menstruation begins their change into womanhood.<sup>91</sup> In the United States, the average age for first menstruation is 12.8 years.<sup>92</sup> The pubertal period usually ends for girls just as it begins for boys.<sup>93</sup> Puberty can be a trying time for girls who mature early.<sup>94</sup> Early maturers tend to be heavier than their classmates, and their social and emotional development may not match their physical appearance.<sup>95</sup> A 1990 nationwide AAUW survey recorded the impact puberty has on girls' self-esteem.<sup>96</sup> The survey found that "on average 69 percent of elementary school boys and 60 percent of elementary school girls reported that they were 'happy the way I am,' among high school students the percentages were 46 percent for boys and only 29 percent for girls."<sup>97</sup> This survey revealed sharp differences in the decline in self-esteem among white, African American, and Hispanic girls.<sup>98</sup>

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87. *Id.*

88. AAUW REPORT, *supra* note 8, at 131.

89. *See id.* at 3-5.

90. *Id.* at 19.

91. *See id.* at 18.

92. *See id.*

93. *See id.*

94. *See id.*

95. *See id.* at 18-19.

96. *See id.* at 19.

97. *Id.*

98. *See id.*

Among elementary school girls, 55 percent of white girls, 65 percent of [African American] girls, and 68 percent of Hispanic girls reported being 'happy as I am.' But in high school, agreement with the statement came from only 22 percent of the white girls and 30 percent of the Hispanic girls, compared to 58 percent of the [African American] girls.<sup>99</sup>

Lyn Mikel Brown and Carol Gilligan have studied girls' pubertal decline in self-esteem.<sup>100</sup> Between 1986 and 1990, they interviewed nearly 100 girls, ages seven to eighteen, at the private, single-sex Laurel School in Cleveland, Ohio.<sup>101</sup> They found that young girls, seven and eight years old, freely expressed with strong voices how they felt and what they wanted.<sup>102</sup> As girls turned ten and eleven years old, Brown and Gilligan noticed that they began to struggle with their strong feelings.<sup>103</sup> In interviews, these girls spoke about taking their feelings and thoughts out of relationships in order to preserve the relationships.<sup>104</sup> They associated approval with silence, love with selflessness, anger and strong feelings with danger and disruption, and relationships with lack of conflict.<sup>105</sup> By the time girls reached ages twelve and thirteen and began menstruation, they did not voice their strong feelings and thoughts.<sup>106</sup> The girls believed that if they spoke their minds and brought themselves fully into relationships, they would lose those relationships because no one would want to be with them.<sup>107</sup> The girls also began to change their looks, voices, and behavior to conform to the looks, voices, and behavior of others in the world in which they lived.<sup>108</sup> They disconnected from their own feelings and

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99. *Id.* at 19-21.

100. See LYN MIKEL BROWN & CAROL GILLIGAN, MEETING AT THE CROSSROADS: WOMEN'S PSYCHOLOGY AND GIRLS' DEVELOPMENT 4-5 (1992).

101. *See id.*

102. *See id.* at 43-45, 53.

103. *See id.* at 97.

104. *See id.*

105. *See id.*

106. *See id.* at 163-65.

107. *See id.* at 165.

108. *See id.* at 169.

desires and relied upon others to tell them how they felt and what they wanted.<sup>109</sup> "I don't know" became a common answer to interviewers' questions.<sup>110</sup> By middle school, girls silenced their own voices.<sup>111</sup>

In a later three year study, Jill McLean Taylor, Carol Gilligan, and Amy M. Sullivan focused on the voices of twenty-six "at-risk" girls, girls who "attended [middle] school in a large, urban area, came from diverse racial and ethnic backgrounds, and were economically disadvantaged."<sup>112</sup> From interviewing these girls, the researchers learned that in contrast to the white middle and upper-class Laurel School girls, African American girls expressed their strong feelings.<sup>113</sup> They did not worry about hurting other people's feelings.<sup>114</sup> African American girls did not silence their own voices because their mothers raised them to survive in a racist world.<sup>115</sup> Their mothers encouraged them to be strong and self-sufficient, to stand up for themselves, and to fight back.<sup>116</sup> These attributes, however, caused African American girls to ignore their need to be connected with others.<sup>117</sup> Consequently, by the time they entered high school, they felt alone.<sup>118</sup>

Taylor, Gilligan, and Sullivan found that, unlike African American girls, Hispanic parents raised their girls to be respectful, conforming, dependent, obedient, and virtuous—to silence their voices.<sup>119</sup> Hispanic families protected their girls and expected them to be loyal to traditional cultural values in return.<sup>120</sup> These values include strictly defined sex roles.<sup>121</sup> Un-

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109. *See id.*

110. *Id.* at 4.

111. *See* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 51 (1982).

112. JILL MCLEAN TAYLOR ET AL., BETWEEN VOICE AND SILENCE: WOMEN AND GIRLS, RACE AND RELATIONSHIPS 19 (1995).

113. *See id.* at 43.

114. *See id.*

115. *See id.*

116. *See id.*

117. *See id.* at 49.

118. *See id.*

119. *See id.* at 60.

120. *See id.*

121. *See id.* at 61.

der *marianismo*, based on the worship of the Virgin Mary, women are morally and spiritually superior to men.<sup>122</sup> They are to be *decente*, virtuous and proper, and *verguenza*, modest or embarrassed about their bodies.<sup>123</sup> Girls, according to Hispanic culture, should not know about sexuality.<sup>124</sup> Through their interviews, Taylor, Gilligan, and Sullivan discovered that Hispanic girls struggled to adhere to these strict cultural values while simultaneously adopting new and conflicting values learned at school.<sup>125</sup> Often, Hispanic girls could not discuss this struggle with their mothers.<sup>126</sup> Their mothers did not speak English and did not understand American schools and values.<sup>127</sup> These Hispanic girls had no one in whom they could confide about what they thought and felt.<sup>128</sup>

When adolescent girls feel alone and uncertain about their personal identities and abilities as a result of puberty and biased instruction, they become vulnerable to their surroundings.<sup>129</sup> They allow magazine pictures to tell them that to attract boys they must be "lithe, lean, long-legged beaut[ies]" at a time when their bodies are gaining weight in their bust and hips.<sup>130</sup> To attain this unattainable shape, girls diet.<sup>131</sup> "It is estimated that at any given time approximately one-half to three-quarters of adolescent girls . . . are on a diet."<sup>132</sup> Dieting can lead to anorexia nervosa, "the refusal to maintain an adequate body weight," and bulimia, "binge eating followed by forced vomiting."<sup>133</sup> "From 90 percent to 95 percent of bulimics and anorexics are girls and women."<sup>134</sup>

"Low self-esteem and negative body image set the stage for

122. *See id.*

123. *See id.*

124. *See id.*

125. *See id.* at 63.

126. *See id.* at 62.

127. *See id.*

128. *See id.* at 115.

129. *See* BROWN & GILLIGAN, *supra* note 100, at 185.

130. SADKER, *supra* note 44, at 103.

131. *See id.*

132. *Id.*

133. AAUW REPORT, *supra* note 8, at 140.

134. SADKER, *supra* note 44, at 104.



depression in teenage girls."<sup>135</sup> "Adolescent girls are four to five times more likely than boys to attempt suicide . . . ."<sup>136</sup> Low self-esteem also leads girls to substance abuse.<sup>137</sup> Many girls experiment with cigarettes, alcohol, and drugs before they enter high school.<sup>138</sup>

Besides substances, adolescent girls often turn to sexual activity and motherhood in order to feel good about themselves and to give purpose to their lives.<sup>139</sup>

More than a million teenage girls become pregnant every year. . . . In 1989 one of every twenty-one white females and almost one of every nine [African American] females between fifteen and nineteen years of age gave birth. Approximately one in ten Latinos in that age range gave birth, with girls of Mexican and Puerto Rican origin most likely to become mothers.<sup>140</sup>

Girls who have children usually drop out of school permanently.<sup>141</sup> Without an education, these girls have difficulty finding jobs to support them and their children.<sup>142</sup> In 1990, the average yearly income for female dropouts was \$3,109, less than half that of male dropouts.<sup>143</sup> When the government intervenes to support these girls and their children, the cost is high.<sup>144</sup> "In

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135. *Id.* at 105.

136. AAUW REPORT, *supra* note 8, at 138.

137. *See id.* at 131-32.

138. *See id.* at 132-33.

139. *See* SADKER, *supra* note 44, at 117, 119. Adolescent girls searching for their personal identities will have difficulty attending to the daily needs of their children. *See id.* at 119.

Understanding less than older mothers about how children are supposed to develop, teenagers talk less to their children and show them less warmth. As their children grow older, they exhibit more behavior and learning problems. By the time their daughters reach adolescence, this next generation of teenage girls is primed to continue the cycle of pregnancy and poverty by becoming single mothers themselves.

*Id.*

140. *Id.* at 115-16.

141. *See id.* at 119.

142. *See id.*

143. *See id.*

144. *See* AAUW REPORT, *supra* note 8, at 64.

1989, the United States spent nearly \$21.5 billion on Aid to Families with Dependent Children (AFDC), Medicaid, and food-stamp benefits for families begun by teenage mothers."<sup>145</sup>

Motherhood is not the only consequence of unprotected, adolescent sexual activity.<sup>146</sup> "More than 1 million teens each year suffer from chlamydia infections, the most common [sexually transmitted disease] among adolescents."<sup>147</sup> "Nearly 715 teenagers age thirteen to nineteen have diagnosed cases of AIDS. The number with HIV infection, which normally precedes AIDS, is much higher."<sup>148</sup> "A 1989 study in the District of Columbia report[ed] the HIV infection rate at 4.7 per 1,000 for girls, almost three times the 1.7 rate for boys."<sup>149</sup> Teenage girls, thirteen to nineteen, represent 24.9% of reported AIDS cases among females.<sup>150</sup>

### *Addressing Adolescent Girls' Low Self-Esteem*

To decrease girls' vulnerability to sexually transmitted diseases, teenage pregnancy, early sexual activity, depression, suicide, and eating disorders, their self-esteem decline during adolescence must be addressed.<sup>151</sup> One way to address this decline, which studies show is more severe among urban, economically disadvantaged, African American and Hispanic adolescent girls,<sup>152</sup> is to eliminate that which exacerbates it—the biased instruction in America's coeducational public schools. Girls, especially urban, adolescent girls, need an education equivalent in quality and quantity provided to boys in America's public schools.<sup>153</sup> Girls' education is an important governmental objective. They are one-half of America's future.<sup>154</sup>

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145. *Id.*

146. *See id.* at 136.

147. *Id.*

148. *Id.* (citation omitted).

149. *Id.* at 137.

150. *See id.*

151. *See id.* at 141-44.

152. *See supra* notes 96-128 and accompanying text.

153. *See* AAUW REPORT, *supra* note 8, at 141-44.

154. *See id.* at 147.

### *Formal Curriculum*

The sex-biased formal curriculum in public schools must be replaced by a gender-fair curriculum.<sup>155</sup> A gender-fair curriculum has six attributes:

It acknowledges and affirms *variation*, i.e., similarities and differences among and within groups of people. It is *inclusive*, allowing both females and males to find and identify positively with messages about themselves. It is *accurate*, presenting information that is data-based, verifiable, and able to withstand critical analysis. It is *affirmative*, acknowledging and valuing the worth of individuals and groups. It is *representative*, balancing multiple perspectives. And, finally, it is *integrated*, weaving together the experiences, needs, and interests of both males and females.<sup>156</sup>

### *Classrooms*

In classrooms, teachers need to give attention to girls.<sup>157</sup> Rather than call on boys who wildly wave their hands in the air and shout "Ooh! Ooh! Me! Me! Ooooh!",<sup>158</sup> teachers need to call on girls and give them time to respond.<sup>159</sup> Girls need more time to think.<sup>160</sup> They are more likely to think about their answers and how they want to respond to questions.<sup>161</sup> Giving girls time to respond shows girls that their teachers have confidence in them.<sup>162</sup> It is a way for teachers to say, "I have high expectations for you, so I will wait a little longer. I know you can get it if I give you a chance."<sup>163</sup>

Teachers also must not be afraid to outwardly praise, remediate, and criticize girls.<sup>164</sup> These reactions will not upset

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155. See *id.* at 110-11.

156. *Id.* at 111.

157. See SADKER, *supra* note 44, at 42-43, 57-58.

158. *Id.* at 44.

159. See *id.* at 57.

160. See *id.* at 58.

161. See *id.*

162. See *id.* at 57.

163. *Id.*

164. See *id.* at 54-55.

girls; they will foster achievement in them.<sup>165</sup> To help girls excel in the subjects of math and science in particular, teachers need to let them know that they have the ability.<sup>166</sup> Further, teachers need to increase girls' interest in these subjects with more hands-on experiences such as meeting and working with female scientists and mathematicians, performing science experiments, and learning math in relaxed, cooperative work groups.<sup>167</sup> Additionally, schools should work with youth-serving organizations that have developed successful out-of-school math and science programs for girls and encourage girls to attend them.<sup>168</sup>

### *Evaded Curriculum*

Schools should not insist upon a dichotomy between feelings and emotions and logic and rationality.<sup>169</sup> "Classrooms must become places where girls and boys can express feelings and discuss personal experiences."<sup>170</sup> One way schools can encourage girls to express their feelings is to have them write journals.<sup>171</sup> By writing, girls can voice "their real fears, their anger, and their longing."<sup>172</sup> Schools should also offer comprehensive health and sex-education programs that address the topics of reproduction, prevention of sexually transmitted diseases such as AIDS, sexual abuse, drug and alcohol use, and general mental and physical health issues.<sup>173</sup> Finally, schools must develop and enforce strong policies against sexual harassment.<sup>174</sup>

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165. *See id.*

166. *See* AAUW REPORT, *supra* note 8, at 50.

167. *See id.* at 53.

168. *See id.* at 53, 151.

169. *See id.* at 141.

170. *Id.*

171. *See* MAUREEN BARBIERI, SOUNDS FROM THE HEART: LEARNING TO LISTEN TO GIRLS 27 (1995).

172. *Id.*

173. *See* AAUW REPORT, *supra* note 8, at 154.

174. *See id.* at 153.

*Single-Sex Schools*

In addition to reforming formal curriculum, classrooms, and evaded curriculum, studies suggest that single-sex schools may help girls receive the quality and quantity of education that is provided currently to boys in America's public schools.<sup>175</sup> Without boys, teachers pay attention to girls, and they achieve in all subjects and activities.<sup>176</sup> Consequently, "[r]esearchers have found that women in single-sex schools . . . tend to demonstrate greater self-confidence, hold less stereotypical attitudes about the role of women, take more math and science courses on higher levels, and outscore their coeducational counterparts on general academic and science tests."<sup>177</sup>

The effects of single-sex schools are greatest among poor, African American, and Hispanic girls.<sup>178</sup> These girls have three low-status characteristics: female status, low socioeconomic status, and racial/ethnic minority status.<sup>179</sup> For girls who come from low socioeconomic and minority households, "the potential effects of the home [on learning] are small and probably even negative. When the potential influence of the home on learning is minimal or negative, the potential effects of the school increase. When the influence of the home is large, schools have only minimal influence."<sup>180</sup>

Single-sex schools expose African American and Hispanic girls to positive female role modeling.<sup>181</sup> Women teach and administer the schools.<sup>182</sup> Girls are successful in all subjects.<sup>183</sup> Heroines are not athletes or homecoming queens, but female, not male, valedictorians and scholarship winners.<sup>184</sup> Further, sex bias in the form of male dominance and teachers favoring males in

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175. See RIORDAN, *supra* note 18, at 50, 54-55.

176. See *id.* at 50.

177. Salomone, *supra* note 20, at 2.

178. See RIORDAN, *supra* note 18, at 148.

179. See *id.*

180. *Id.*

181. See *id.* at 149.

182. See *id.*

183. See *id.*

184. See *id.*

mixed-sex classrooms does not exist.<sup>185</sup> Finally, at single-sex schools, African American and Hispanic girls, their parents, and their teachers all believe in the importance of family and education.<sup>186</sup> Parents have chosen to send their girls to single-sex schools.<sup>187</sup> They have chosen academics over the adolescent subculture at America's coeducational, public schools.<sup>188</sup> This choice is a financial sacrifice for low socioeconomic families because single-sex schools, with few exceptions,<sup>189</sup> are private.<sup>190</sup> African American and Hispanic girls recognize their parents' sacrifice and commit themselves to achieve academically.<sup>191</sup>

### THE YOUNG WOMEN'S LEADERSHIP SCHOOL

#### *TYWLS's Purpose*

Growing up in East Harlem, New York, a Hispanic and African American working-class neighborhood,<sup>192</sup> girls perceive a dim future for themselves.<sup>193</sup> Poverty, teenage pregnancy, single motherhood, and a lifetime of dependency on public assistance surround them.<sup>194</sup> In the one area that can brighten their future, education, they do not achieve.<sup>195</sup> "In January 1994, the New York City Board of Education Chancellor's Task Force on Sex Equity issued a report that examined the academic performance of boys and girls in New York City public schools."<sup>196</sup> This report disclosed that in the city's three special-

185. *See id.*

186. *See id.* at 150.

187. *See id.*

188. *See id.*

189. *See supra* note 4 and accompanying text.

190. *See* RIORDAN, *supra* note 18, at 149.

191. *See id.* at 149-50.

192. *See* Sanchez, *supra* note 3, at A8.

193. *See* Salomone, *supra* note 20, at 2.

194. *See id.*

195. *See* Administrative Complaint Ex. I, NOW v. New York City Bd. of Educ. (No. 02-96-1184) (U.S. Dep't of Educ., Office for Civil Rights filed Aug. 22, 1996) (discussing academic performance rates for African American and Hispanic female students); *see also supra* notes 178-91 and accompanying text (describing how African American and Hispanic girls are disadvantaged by America's coeducational, public elementary and secondary schools).

196. Administrative Complaint at 9, NOW (No. 02-96-1184).

ized schools that required verbal and math entrance exams for admittance, there were 13% more males than females, 43.3% female, 56.7% male.<sup>197</sup> The racial and ethnic breakdowns at these specialized high schools revealed an underrepresentation of African American and Hispanic students relative to the city-wide enrollment of 36.6% and 30.8% respectively.<sup>198</sup> "[African American] students compris[ed] only 21.5% of the students in the specialized high schools, while Hispanic students ma[de] up only 9.7% of the students in these schools."<sup>199</sup> The report noted that "[s]ome groups of girls [were] particularly underrepresented. Hispanic girls comprise[d] 51% of the Hispanic high school student population citywide, yet only 40.8% of the Hispanic population in the specialized high schools."<sup>200</sup>

In addition to a gender gap in student enrollments, New York City public schools had a gender gap in achievement.<sup>201</sup> On the Regents Physics and Chemistry tests for 1992, the subjects "viewed as gatekeepers for continuing study in science . . . 70.9% of the male students passed compared with 62.6% of the female students. Female pass rates were lower than male pass rates for all ethnicities. [African American] females had the lowest pass rate at 45%."<sup>202</sup> In contrast to science, the male and female pass rate differences for math were small, 60.2% and 57.7% respectively.<sup>203</sup> "When analyzed by race and ethnicity as well as gender, the gender gap for certain groups of girls [was] larger. In the specialized schools, Hispanic and [African American] girls pass[ed] at lower rates than Hispanic and [African American] boys."<sup>204</sup>

To close these gender gaps, the report made several recommendations.<sup>205</sup> These recommendations included:

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197. See *id.* Ex. I, at 9.

198. See *id.*

199. *Id.*

200. *Id.* at 11.

201. See *id.* at 13.

202. *Id.* at 16. Regents exams are proficiency tests in New York City. See *id.* at 13.

203. See *id.* at 18.

204. *Id.*

205. See *id.* at 23-26.

[d]irect[ing] middle and high school guidance counselors and administrators to motivate, prepare, and recruit more female students to enter math and science courses and programs, . . . [c]reat[ing] parent involvement and education programs which emphasize the links to career opportunities and college admissions for female students who enroll in . . . specialized high schools and pursue advanced study in math, science, and technical areas, . . . [and] [p]rovid[ing] strategies to eliminate bias in classroom interaction, curriculum materials, and career guidance programs, and develop inquiry-based approaches to math and science education.<sup>206</sup>

The founders of TYWLS, Community District Four, the New York Board of Education, and New York's Tisch family, recognized the dim future faced by African American and Hispanic girls in East Harlem, and they decided to address it<sup>207</sup> by enacting the suggestions made by the New York City Board of Education Chancellor's Task Force and numerous studies.<sup>208</sup> To accomplish this important governmental objective,<sup>209</sup> they employed a gender-based admissions policy along with curriculum and classroom reform measures.<sup>210</sup>

TYWLS's gender-based admissions policy is voluntary.<sup>211</sup> Adolescent girls in East Harlem can choose to apply to and, if accepted, attend TYWLS, a public, secondary school, or they can attend nearby, public, coeducational Junior High School 13.<sup>212</sup> To be admitted to TYWLS, candidates must go through TYWLS's application process, which includes an application form, an interview, a parent and student visit, a teacher recommendation, and an academic profile.<sup>213</sup> In the application pro-

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206. *Id.* at 24-25.

207. See Sanchez, *supra* note 3, at A1; Steinberg, *supra* note 2, at L21.

208. See Administrative Complaint Ex. I, *NOW* (No. 02-96-1184); *supra* notes 155-91 and accompanying text.

209. See *supra* notes 151-54 and accompanying text.

210. See Sanchez, *supra* note 3, at A1; Steinberg, *supra* note 2, at L21.

211. See Sanchez, *supra* note 3, at A1.

212. See Administrative Complaint at 7, *NOW* (No. 02-96-1184).

213. See The Young Women's Leadership School Application (on file with author). The application consists of a student information section, a parent's questionnaire, and a student's questionnaire. See *id.* The parent's questionnaire asks four questions:



cess, parent commitment is important.<sup>214</sup> TYWLS prefers students whose parents will be involved actively in their education.<sup>215</sup> TYWLS also gives priority to candidates residing in its district, District Four.<sup>216</sup>

### *Classroom and Curriculum Reform Measures*

TYWLS's commitment to educating East Harlem adolescent girls does not end with its gender-based admissions policy. It has eliminated sex bias from its formal curriculum and classrooms, and it encourages students to explore and express their thoughts and feelings, thus implementing recommendations from numerous sources.<sup>217</sup> Once a TYWLS student steps off the elevator on the ninth floor of 105 East 106th Street, she leaves behind the impoverished, noisy, busy, dirty streets of East Harlem and enters the clean, bright, calm, pastel hallways of TYWLS. These hallways and the rooms that adjoin them are open to TYWLS students at all times.<sup>218</sup> TYWLS does not have bells or hall passes. It trusts students to behave responsibly. The rooms available to TYWLS students include math, science, and humanities classrooms.<sup>219</sup> In their math classroom, math teacher Linda Metnetsky used a six-pack of Diet Coke and sec-

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"What are your daughter's favorite activities? What aspects of your daughter's development are you pleased with? What do you consider to be your daughter's strengths? [and] Why do you think The Young Women's Leadership School is an appropriate school for your daughter?" *Id.* The student's questionnaire must be answered by the student and it consists of two questions: "How did you find out about The Young Women's Leadership School?" and "Why are you interested in The Young Women's Leadership School?" *Id.*

214. See Interview with Celenia Chevere, Project Director of TYWLS, in East Harlem, N.Y. (Jan. 17, 1997).

215. See *id.*

216. See The Young Women's Leadership School Application (on file with author).

217. See *supra* notes 155-74 and accompanying text.

218. Unless otherwise indicated, the descriptions of TYWLS rely upon observations of and conversations with TYWLS faculty on January 17, 1997.

219. Besides their math, science, and humanities classrooms, TYWLS students also have available to them: a library with books, tables, chairs, and computer workstations; a dance studio with hardwood floors, a full-length mirrored wall, and a dance bar; a dining hall with a kitchen that prepares hot lunches and tables and chairs arranged to encourage teacher and student interaction; an art classroom with numerous art supplies and an adjoining studio displaying student artwork; and a "students only" room with a couch, a bed, computer workstations, and games.

tions of a cantaloupe to help TYWLS students understand fractions.<sup>220</sup> Science teacher Suzanne Kerho engaged her students by asking them to describe the weather outside and by having them give weather forecasts.<sup>221</sup> This summer, Ms. Kerho's weatherpersons will be spending two weeks at a Smith College science program.<sup>222</sup>

The same kind of commitment to students' needs occurs in TYWLS's other classes as well. In a large, rectangular room with a couch, a large rattan chair, cushioned arm chairs, and an oriental rug, grouped together at one end of the room, humanities teacher Madelene Geswaldo teaches English and history lessons to classes of approximately eighteen seventh-grade students. These lessons have included stories of girls who lived in medieval Europe, such as a twelfth-century homeless girl who apprenticed as a midwife<sup>223</sup> and a fictional story about a girl's eleventh birthday.<sup>224</sup> In the latter story, "Eleven," the narrator described how at age eleven she still felt that she was age ten, nine, eight, seven, and even six.<sup>225</sup> After reading this story, an example of an experience essay, Ms. Geswaldo asked her students if they could ever feel like they were fifteen at age eleven. One student raised her hand and said "yes." She, aged twelve, wanted to have a baby. Her comment sparked an open, in-depth, and personal discussion about teenage pregnancy and its negative consequences. In this discussion, Ms. Geswaldo made sure that every student had an opportunity to speak and that when a student spoke she did so in a loud voice so that her peers could hear her.

220. See Steinberg, *supra* note 2, at L25.

221. See *supra* note 1 and accompanying text (illustrating classroom reform, specifically a teacher waiting for a girl to answer a question and then praising her for her response).

222. See Steinberg, *supra* note 2, at L25.

223. See *id.*

224. See Sandra Cisneros, *Eleven*, in *WOMEN HOLLERING CREEK AND OTHER STORIES* 6-9 (1992).

225. See *id.* at 6. The narrator explains:

Like some days you might say something stupid, and that's the part of you that's still ten. Or maybe some days you might need to sit on your mama's lap because you're scared, and that's the part of you that's five. And maybe one day when you're all grown up maybe you will need to cry like if you're three, and that's okay.

*Id.*

After this discussion, Ms. Geswaldo reminded her students that they could continue the discussion with their faculty advisors. She then gave them fifteen minutes of quiet time to write in their journals. Ms. Geswaldo instructed the students to write their personal reactions to the story and discussion as well as their own experience essay. Every TYWLS student has a journal. As students wrote in their journals, Ms. Geswaldo talked with the student who had started the discussion and who was visibly upset with her classmates' reactions to her comment. She had left her peers and gone to the opposite end of the room to write her journal entry.

## STATUTORY AND CONSTITUTIONAL LAW GOVERNING SINGLE-SEX SCHOOLS

### *Statutory Law*

Two federal statutes govern single-sex, public schools such as TYWLS.<sup>226</sup> Title IX of the Education Amendments of 1972 ("Title IX")<sup>227</sup> and the Equal Education Opportunities Act of 1974 (EEOA).<sup>228</sup>

### *Title IX*

There are two widely recognized interpretations of Title IX. Under a plain meaning approach, Title IX permits single-sex, public secondary schools.<sup>229</sup> Under the Department of Education's regulatory interpretation, Title IX prohibits single-sex, public secondary schools.<sup>230</sup>

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226. See *United States v. Hinds County Sch. Bd.*, 560 F.2d 619 (5th Cir. 1977); *Vorchheimer v. School Dist. of Philadelphia*, 532 F.2d 880 (3d Cir. 1976), *aff'd*, 430 U.S. 703 (1977) (per curiam); *Garrett v. Board of Educ.*, 775 F. Supp. 1004 (E.D. Mich. 1991).

227. 20 U.S.C. § 1681 (1994).

228. 20 U.S.C. § 1601 (1994).

229. See *infra* notes 231-35 and accompanying text.

230. See *infra* notes 236-39 and accompanying text.

### *Plain Meaning Approach*

Title IX proclaims: "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."<sup>231</sup> The statute then narrows this broad prohibition against discrimination on the basis of gender in federally assisted education programs.<sup>232</sup> It says that "in regard to *admissions to educational institutions*" the broad prohibition "shall apply *only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education.*"<sup>233</sup> Public secondary schools do not fall into one of these categories. Congress expressly excluded them from the broad prohibition in regard to admissions.<sup>234</sup> Title IX, consequently, permits single-sex, public secondary schools.<sup>235</sup>

### *Department of Education's Approach*

"Title IX gives the Department of Education the authority to issue regulations 'to effectuate the provisions' of the statute."<sup>236</sup> These regulations state in part: "[a] recipient shall not provide any course or otherwise *carry out any of its education program* or activity separately *on the basis of sex, or require or refuse participation* therein by any of its students on such basis."<sup>237</sup> The regulations further declare:

*A recipient which is a local educational agency shall not, on the basis of sex, exclude any person from admission to . . . [a]ny other school or educational unit operated by such recipi-*

231. 20 U.S.C. § 1681(a).

232. *See id.* § 1681(a)(1).

233. *Id.* (emphasis added). The statute defines an "educational institution" as "any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education." *Id.* § 1681(c) (emphasis added).

234. *See* Respondent's Motion to Dismiss at 2-3, *NOW v. New York City Bd. of Educ.* (No. 02-96-1184) (U.S. Dep't of Educ., Office for Civil Rights filed Sept. 27, 1996).

235. *See id.*

236. *Id.* at 7.

237. 34 C.F.R. § 106.34 (1996) (emphasis added).

ent, unless such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through *such schools*.<sup>238</sup>

In response to letters written by public school officials asking the Department of Education's Office for Civil Rights what types of schools and programs Title IX and its accompanying regulations allow, the Department of Education informed them that Title IX prohibits public, single-sex schools.<sup>239</sup>

### *Equal Education Opportunities Act*

Unlike Title IX, the EEOA applies only to elementary and secondary schools.<sup>240</sup> The EEOA promotes the policy that "all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin."<sup>241</sup> To carry out this policy, the EEOA declares certain practices unlawful.<sup>242</sup> One of these unlawful practices appears to be the establishment of public, single-sex schools:

No State shall deny equal educational opportunities to an individual on account of his or her race, color, *sex*, or national origin, by—

(a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools . . .

(c) *the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place*

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238. *Id.* § 106.35 (1996) (emphasis added).

239. See Administrative Complaint at 11-12, *NOW* (No. 02-96-1184).

240. See Kristin S. Caplice, *The Case for Public Single-Sex Education*, 18 HARV. J.L. & PUB. POL'Y 227, 269 (1994).

241. 20 U.S.C. § 1701(a)(1) (1994).

242. See 20 U.S.C. § 1703 (1994).

of residence within the school district of such agency providing the appropriate grade level and type of education for such student . . . .<sup>243</sup>

## *Constitutional Law*

### *The United States Supreme Court*

The U.S. Constitution does not contain provisions that explicitly govern single-sex, public schools. Rather, when the U.S. Supreme Court confronts a gender classification such as the TYWLS gender-based admissions policy, the Court looks to the Fifth Amendment's Due Process Clause or the Fourteenth Amendment's Equal Protection Clause.<sup>244</sup> The Court usually finds that the classification either perpetuates a stereotype of women's dependency or attempts to remedy specific, objectively verifiable past discrimination against women.<sup>245</sup>

Classifications that were found to perpetuate stereotypes of female dependency include: an Idaho statute that provided that as between persons equally qualified to administer estates, males must be preferred to females;<sup>246</sup> a federal statute, enacted solely for administrative convenience, that discriminated against male spouses of females in the armed services regarding qualifying for additional benefits and allowances;<sup>247</sup> a Social Security Act provision that paid benefits to a deceased woman's surviving minor children, but not to her widower;<sup>248</sup> Oklahoma statutes, based upon statistical evidence as to the incidence of drunk driving among males and females between the ages of eighteen and twenty-one, which prohibited the sale of 3.2% beer to males under the age of twenty-one and to females under the

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243. *Id.* § 1703(a), (c) (emphasis added).

244. See *United States v. Virginia*, 116 S. Ct. 2264, 2274-76 (1996). The Fifth Amendment provides that: "[N]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. The Fourteenth Amendment provides that "[N]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

245. See *Virginia*, 116 S. Ct. at 2274-76.

246. See *Reed v. Reed*, 404 U.S. 71, 76 (1971).

247. See *Frontiero v. Richardson*, 411 U.S. 677, 678-79 (1973).

248. See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653 (1975).

age of eighteen,<sup>249</sup> and a Social Security Act provision that paid survivor benefits to a widower only if he received at least half of his support from his spouse, but paid such benefits to a widow regardless of her dependency.<sup>250</sup> The Supreme Court determines whether such classifications are constitutional by applying intermediate scrutiny to them—the classification must serve important governmental objectives and must be substantially related to the achievement of those objectives.<sup>251</sup> Gender stereotype classifications usually do not survive intermediate scrutiny, and the Supreme Court often finds them unconstitutional either under the Fifth Amendment's Due Process Clause<sup>252</sup> or the Fourteenth Amendment's Equal Protection Clause.<sup>253</sup>

The Supreme Court also applies intermediate scrutiny to determine whether classifications that attempt to remedy specific, objectively verifiable past discriminations against women are constitutional.<sup>254</sup> Unlike gender classifications that perpetuate stereotypes of women's dependency, these classifications usually survive intermediate scrutiny analysis.<sup>255</sup> The Supreme Court has found such classifications constitutional either under the Fifth Amendment's Due Process Clause<sup>256</sup> or the Fourteenth Amendment's Equal Protection Clause.<sup>257</sup> Constitutional gender classifications include: a Florida statute that gave widows a \$500 exemption from property taxation because the statute sought to remedy economic effects of past gender discrimination,<sup>258</sup> a federal statutory scheme that accorded women naval officers a thirteen-year tenure of commissioned service before mandatory discharge for want of promotion because male and

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249. See *Craig v. Boren*, 429 U.S. 190, 204 (1976).

250. See *Califano v. Goldfarb*, 430 U.S. 199, 204 (1977).

251. See *Craig*, 429 U.S. at 199-200.

252. See *Goldfarb*, 430 U.S. at 201-02; *Wiesenfeld*, 420 U.S. at 638; *Frontiero*, 411 U.S. at 679.

253. See *Craig*, 429 U.S. at 199; *Reed v. Reed*, 404 U.S. 71, 76 (1971).

254. See *Califano v. Webster*, 430 U.S. 313, 316-17 (1977); *Schlesinger v. Ballard*, 419 U.S. 498, 509 (1975); *Kahn v. Shevin*, 416 U.S. 351, 352 (1974).

255. See *Webster*, 430 U.S. at 317; *Schlesinger*, 419 U.S. at 509; *Kahn*, 416 U.S. at 356.

256. See *Webster*, 430 U.S. at 316; *Schlesinger*, 419 U.S. at 500.

257. See *Kahn*, 416 U.S. at 352.

258. See *id.* at 352-53.

female line officers in the Navy are not similarly situated with respect to opportunities for professional service;<sup>259</sup> and a Social Security Act provision that allowed women, who had been unfairly hindered from earning as much as men, to eliminate additional low-earning years from the calculation of their retirement benefits because the act worked to directly remedy some part of the effect of past discrimination.<sup>260</sup>

In the context of public education, the Supreme Court has examined only cases that involved gender classifications that perpetuated the stereotypes of women's dependency. These cases, *Mississippi University for Women v. Hogan*<sup>261</sup> and *United States v. Virginia*,<sup>262</sup> involved higher education. In *Hogan*, Joe Hogan applied for admission to the Mississippi University for Women's (MUW) School of Nursing.<sup>263</sup> The School of Nursing denied Hogan admission because of his sex.<sup>264</sup> The Court applied intermediate scrutiny to the School of Nursing's gender-based admissions policy<sup>265</sup> and found Mississippi's important governmental objective for the policy "unpersuasive."<sup>266</sup> Mississippi's "primary justification for maintaining the single-sex admissions policy of MUW's School of Nursing [was] that it compensate[d] for discrimination against women and, therefore, constitute[d] educational affirmative action."<sup>267</sup>

The Court acknowledged that "a State c[ould] evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification actually suffer[ed] a disadvantage related to the classification."<sup>268</sup> The Court then stated that "Mississippi ha[d] made no showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field when the MUW School of Nursing opened its door or that

259. See *Schlesinger*, 419 U.S. at 508-09.

260. See *Webster*, 430 U.S. at 317-18.

261. 458 U.S. 718 (1982).

262. 116 S. Ct. 2264 (1996).

263. See *Hogan*, 458 U.S. at 720.

264. See *id.* at 720-21.

265. See *id.* at 724-26.

266. *Id.* at 727.

267. *Id.*

268. *Id.* at 728.



women currently are deprived of such opportunities."<sup>269</sup> The Court pointed out that:

Rather than compensate for discriminatory barriers faced by women, MUW's policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job. By assuring that Mississippi allots more openings in its state-supported nursing schools to women than it does to men, MUW's admissions policy lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy.<sup>270</sup>

After *Hogan*, the Supreme Court appears to have changed its method of analyzing gender classifications. In *United States v. Virginia*, Justice Ginsburg wrote for the majority that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action."<sup>271</sup> She recognized, however, that:

"Inherent differences" between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," to "promot[e] equal employment opportunity," [and] to *advance full development of the talent and capacities of our Nation's people*. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.<sup>272</sup>

Virginia gave two justifications for VMI's exclusion of women in its citizen-soldier program: first, diversity in educational approaches; and second, VMI's unique adversative method of training that could not survive admission of women.<sup>273</sup> The

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269. *Id.* at 729.

270. *Id.* at 729-30 (footnote omitted).

271. 116 S. Ct. 2264, 2274 (1996) (emphasis added).

272. *Id.* at 2276 (emphasis added) (footnote and citations omitted).

273. *See id.*

Supreme Court found that these two justifications were not exceedingly persuasive justifications.<sup>274</sup> Justice Ginsburg explained that "Virginia [did] not [show] that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the State."<sup>275</sup> She added that:

Women's successful entry into the federal military academies, and their participation in the Nation's military forces indicate that Virginia's fears for the future of VMI may not be solidly grounded. The State's justification for excluding all women from "citizen-soldier" training for which some are qualified, in any event, cannot rank as "exceedingly persuasive" . . . .<sup>276</sup>

Justice Ginsburg did not explicitly address, however, whether all gender classifications needed an exceedingly persuasive justification. According to a loophole in her opinion, the exceedingly persuasive justification may not apply to all gender classifications. This loophole lies in footnote seven:

We do not question the State's prerogative evenhandedly to support diverse educational opportunities. We address *specifically and only an educational opportunity recognized by the District Court and the Court of Appeals as "unique,"* an opportunity available only at Virginia's premier military institute, the State's sole single-sex public university or college.<sup>277</sup>

Footnote seven suggests that the exceedingly persuasive justification standard may only apply to gender classifications that "perpetuate the legal, social, and economic inferiority of women" such as VMI's.<sup>278</sup> Gender classifications that "compensate women 'for particular economic disabilities [they have] suffered,'" "promot[e] equal employment opportunity," and "advance full development of the talent and capacities of our Nation's people"

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274. *See id.*

275. *Id.* at 2277.

276. *Id.* at 2281 (footnotes omitted).

277. *Id.* at 2276 n.7 (emphasis added) (citation omitted).

278. *Id.* at 2276.

may not require an exceedingly persuasive justification.<sup>279</sup> Rather, they may be subject to the Court's previous, less heightened, gender standard, the important government objective standard of intermediate scrutiny.

Dissenting in *United States v. Virginia*, Justice Scalia argued that footnote seven was not such a loophole.<sup>280</sup> He claimed that:

Under the constitutional principles announced and applied today, single-sex public education is unconstitutional. By going through the motions of applying a balancing test—asking whether the State has adduced an “exceedingly persuasive justification” for its sex-based classification—the Court created the illusion that government officials in some future case will have a clear shot at justifying some sort of single-sex public education. Indeed, the Court seeks to create even a greater illusion than that: It purports to have said nothing of relevance to *other* public schools at all. “We address specifically and only an educational opportunity recognized as ‘unique’ . . . .”

The Supreme Court of the United States does not sit to announce “unique” dispositions. Its principal function is to establish *precedent* . . . .

And the rationale of today's decision is sweeping: for sex-based classifications, a redefinition of intermediate scrutiny that makes it indistinguishable from strict scrutiny. *Indeed, the Court indicates that if any program restricted to one sex is “unique[er],” it must be opened to members of the opposite sex “who have the will and capacity” to participate in it.*<sup>281</sup>

To Justice Scalia, therefore, *all* gender classifications now must have an exceedingly persuasive justification. He believed that the majority's “exceedingly persuasive” standard was synonymous with strict scrutiny.<sup>282</sup> That standard requires gender classifications to serve *compelling* governmental objectives and be *necessary* to the achievement of those objectives, as opposed to intermediate scrutiny, under which gender classifications must serve only

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279. *Id.*

280. *See id.* at 2306 (Scalia, J., dissenting).

281. *Id.* at 2305-06 (Scalia, J., dissenting) (third emphasis added) (citation omitted).

282. *See Korematsu v. United States*, 323 U.S. 214, 216 (1944) (defining strict scrutiny).

important governmental objectives and be substantially related to the achievement of those objectives.<sup>283</sup>

### *Lower Courts*

Until Justice Ginsburg's exceedingly persuasive justification standard in *Virginia*, lower courts applied intermediate scrutiny to gender classifications in public, single-sex secondary education.<sup>284</sup> In the context of primary and secondary public education, some gender classifications survived intermediate scrutiny,<sup>285</sup> and some did not.<sup>286</sup> In *Vorchheimer v. School District of Philadelphia*,<sup>287</sup> an all-male, academic high school denied a female high school student admission because of her sex.<sup>288</sup> She did, however, have the opportunity to attend an all-female, academic high school or any of Philadelphia's comprehensive, technical, or magnet schools.<sup>289</sup> Because attendance at both of the two single-sex high schools was voluntary and the educational opportunities offered at the two schools were essentially equal, the Third Circuit held that the gender classification did not offend the Fourteenth Amendment's Equal Protection Clause.<sup>290</sup>

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283. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (defining intermediate scrutiny).

284. See *Garrett v. Board of Educ.*, 775 F. Supp. 1004, 1006-08 (E.D. Mich. 1991); *Vorchheimer v. School Dist. of Philadelphia*, 400 F. Supp. 326, 332, 343 (E.D. Pa. 1975) (applying a "fair and substantial relationship test to the alleged gender discrimination"), *vacated*, 532 F.2d 880 (3d Cir. 1976) (refusing to determine the applicable standard of review, but finding the admissions policy constitutional under both rational basis and intermediate review).

285. See, e.g., *Vorchheimer*, 532 F.2d at 880.

286. See, e.g., *Garrett*, 775 F. Supp. at 1004.

287. 532 F.2d 880 (3d Cir. 1976).

288. See *id.* at 881.

289. See *id.*

290. See *id.* at 888. A court examining the *Vorchheimer* facts today could reach a different holding after *Virginia*. In its findings of fact, the *Vorchheimer* district court stated that "[m]any men who are currently prominent in the professional, political, and cultural life of this city and state are graduates of Central. Central has a deserved reputation for training men who will become local and national leaders in all fields of endeavor." *Vorchheimer*, 400 F. Supp. at 328.

In *Virginia*, the Supreme Court cited VMI's alumni network as one of the main reasons Virginia's all-female, parallel program at Mary Baldwin College, Virginia Women's Institute for Leadership (VWIL), was not equal to VMI. See *United States v. Virginia*, 116 S. Ct. 2264, 2284 (1996). The district court and the Third Circuit also acknowledged that the "academic facilities are comparable, with the exception of those

In contrast, the United States District Court for the Eastern District of Michigan in *Garrett v. Board of Education*,<sup>291</sup> a case involving facts more similar to the ones surrounding TYWLS, held that the Detroit Board of Education's gender classification violated the Fourteenth Amendment's Equal Protection Clause.<sup>292</sup> To address "the high unemployment rates, school dropout levels and homicide among urban [African American] males," the Detroit Board of Education decided to open three male academies that would "serve approximately 250 boys in preschool through fifth grade."<sup>293</sup> The Board intended to select students with "criteria [that] included seven variables from which an at-risk point value was derived. Applicants were then separated into three categories: high need, mid-level and low need. One-third of the students admitted were randomly selected from each need category."<sup>294</sup> "The Academies offer[ed] special programs including a class entitled 'Rites of Passage', an Afrocentric (pluralistic) curriculum, futuristic lessons in preparation for 21st century careers, an emphasis on male responsibility, mentors, Saturday classes, individualized counseling, extended classroom hours, and student uniforms."<sup>295</sup> Girls enrolled in Detroit schools and their parents challenged the opening of the academies because their special offerings "[did] not require a uniquely male atmosphere to succeed" and they "address[ed] issues that face all children and adolescents, including females."<sup>296</sup> Further, the "[a]cademies [did] not target 'at-risk' males; rather, they serve[d] a mix of boys from all achievement levels."<sup>297</sup>

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in the scientific field where Central's [the all-male academic high school] are superior." *Vorchheimer*, 532 F.2d at 882. In *Virginia*, the Court found VMI's faculty, course offerings, and facilities superior to VWIL and thus, VWIL was not equal to VMI. See *Virginia*, 116 S. Ct. at 2284.

In light of *Virginia*, especially given Justice Scalia's view of footnote seven, a court examining the *Vorchheimer* facts today most likely would hold—as the district court held—that Central's gender-based admissions policy violates the Fourteenth Amendment's Equal Protection Clause. See *Vorchheimer*, 400 F. Supp. at 343.

291. 775 F. Supp. 1004 (E.D. Mich. 1991).

292. See *id.* at 1008.

293. *Id.* at 1006.

294. *Id.* at 1006 n.3.

295. *Id.* at 1006.

296. *Id.*

297. *Id.*

The court applied intermediate scrutiny to the Detroit Board of Education's gender classification.<sup>298</sup> The court agreed that the objective of the male academies was important.<sup>299</sup> The court, however, did not see "how the exclusion of females from the Academies [was] necessary to combat unemployment, dropout and homicide rates among urban males. There [was] no evidence that the educational system [was] failing urban males because females attend schools with males. In fact, the educational system [was] also failing females."<sup>300</sup> "Urban girls drop[ped] out of school, suffer[ed] loss of self esteem and bec[ame] involved in criminal activity."<sup>301</sup>

## ANALYSIS OF STATUTORY AND CONSTITUTIONAL LAW GOVERNING SINGLE-SEX SCHOOLS

### *Statutory Law*

#### *Title IX*

Besides holding that the Detroit Board of Education's gender classification violated the Fourteenth Amendment's Equal Protection Clause, the court in *Garrett* also deferred to the Department of Education's Office for Civil Rights opinions that concluded that "all male public elementary and secondary school programs violate Title IX."<sup>302</sup> This deference was not warranted. The Department of Education regulations enforcing Title IX<sup>303</sup> exceed the requirements of Title IX's plain language.<sup>304</sup> Title IX "expressly *excludes* admissions to [elementary and] secondary schools from its gender discrimination prohibitions. However, the regulation[s] *include*[] admissions to [elementary and] secondary schools in its requirement that comparable facilities must exist for persons excluded on the basis of sex."<sup>305</sup>

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298. *See id.* at 1006-08.

299. *See id.* at 1008.

300. *Id.*

301. *Id.* at 1007.

302. *Id.* at 1009.

303. 34 C.F.R. § 106.1-106.71; *see supra* notes 236-38 and accompanying text.

304. *See* Respondent's Motion to Dismiss at 9, *NOW v. New York City Bd. of Educ.* (No. 02-96-1184) (U.S. Dep't of Educ., Office for Civil Rights filed Sept. 27, 1996).

305. *Id.*; *see supra* notes 231-35 and accompanying text.

Case law and legislative history support this plain meaning reading of Title IX.<sup>306</sup> In *Vorchheimer*, the Supreme Court affirmed without an opinion the Third Circuit Court of Appeals's holding that Title IX applies "*only [to] specified types of educational institutions and excludes from its coverage the admission policies of secondary schools.*"<sup>307</sup> The Third Circuit reached this holding after studying Title IX's legislative history.<sup>308</sup> The court noted that "[t]he bill which passed the House applied to all educational establishments and, if it had become law, would have required that all single-sex schools, primary and secondary, public and private, become coeducational. However, the Senate proposal, *which was the one enacted, eliminated these provisions.*"<sup>309</sup>

Because Title IX "exempts admissions to secondary schools without any limitation, the Department of Education cannot impose a more stringent obligation on school systems by exempting admissions to secondary schools *only if* comparable facilities exist for the excluded gender."<sup>310</sup> "[A]n agency does not have the power to make new law, but must regulate within the confines of the law it is meant to implement."<sup>311</sup> By its plain meaning, Title

306. See *Vorchheimer v. School Dist. of Philadelphia*, 532 F.2d 880, 883 (3d Cir. 1976), *aff'd*, 430 U.S. 703 (1977) (per curiam).

307. *Id.* (emphasis added).

308. See *id.*

309. *Id.* (emphasis added). *Vorchheimer's* Central High School might have survived the Department of Education's regulations. It had an all-female counterpart, Girls High School, but this counterpart may not have been truly equal. See *supra* note 290.

310. Respondent's Motion to Dismiss at 9, *NOW* (No. 02-96-1184).

311. *Id.* at 8 (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976)). In *Ernst & Ernst v. Hochfelder*, the Supreme Court examined the Security and Exchange Commission's (the "Commission") rule 10b-5, which provided:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud . . . .

17 C.F.R. § 240.10b-5 (1997). The Commission had authority to make this rule under the Securities and Exchange Act of 1934, section 10(b) that made it

unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78(j)(a)-(j)(b) (1994). At issue in *Hochfelder* was whether an action for civil

IX permits public, single-sex secondary schools even when a similar single-sex option is not provided for the opposite sex.<sup>312</sup> TYWLS is a public, secondary school.<sup>313</sup> As such, its gender-based admissions policy is excluded expressly from Title IX's gender discrimination prohibitions.<sup>314</sup> The Department of Education's regulations enforcing Title IX exceed the parameters established by the plain language of Title IX. The Department has no authority to regulate outside the confines of the law it is meant to implement; therefore, TYWLS does not need an all-male counterpart.<sup>315</sup>

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damages existed under section 10(b) of the Securities and Exchange Act of 1934 and the Commission's rule 10b-5 "in the absence of an allegation of intent to deceive, manipulate, or defraud on the part of the defendant." *Hochfelder*, 425 U.S. at 188.

The Commission maintained that rule 10b-5 was not limited to knowing or intentional practices. *See id.* at 198. The Supreme Court disagreed. *See id.* at 197. Looking at the plain meaning of section 10(b) and its legislative history, the Court found that by using the words manipulative or deceptive in conjunction with device or contrivance in section 10(b), Congress intended section 10(b) to "proscribe knowing or intentional misconduct." *Id.* at 197. The Court then pointed out how "[t]he rulemaking power granted to an administrative agency charged with the administration of a federal statute [was] not the power to make law. Rather, it [was] 'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'" *Id.* at 213-14. Including negligent conduct in rule 10b-5 exceeded the power granted to the Commission by Congress under section 10(b). *See id.* at 214.

312. Even though Title IX would allow all-male public schools without all-female counterparts, the Fourteenth Amendment's Equal Protection Clause most likely would not. *See infra* notes 344-46 and accompanying text. Additionally, all-male, urban, public schools such as the academies envisioned in *Garrett* most likely would have entirely minority, African American student bodies. *See Note, supra* note 34, at 1743 n.10. The Department of Education's Office for Civil Rights' letters relied upon by the court in *Garrett* and the plaintiff in *NOW* specifically addressed questions concerning the legality of creating all-African American, all-male public schools. *See Garrett v. Board of Educ.*, 775 F. Supp. 1004, 1009-10 n.9 (E.D. Mich. 1991); Administrative Complaint Exs. J & K, *NOW v. New York City Bd. of Educ.* (No. 02-96-1184) (U.S. Dep't of Educ., Office for Civil Rights filed Aug. 22, 1996). The Office for Civil Rights stated that if school districts separated students by race, then they would violate Title VI. *See Administrative Complaint Exs. J & K, NOW* (No. 02-96-1184). Title VI is beyond the scope of this Note. This Note, however, does differentiate *Garrett's* Academies' and TYWLS's minority student bodies from the African American student bodies discussed in the Office of Civil Rights' letters. *See infra* notes 358-65 and accompanying text.

313. *See supra* notes 207-12 and accompanying text.

314. *See supra* notes 229, 231-35 and accompanying text.

315. *See supra* notes 310-11 and accompanying text.



*EEOA*

The EEOA also allows public, single-sex secondary schools even when a similar single-sex opportunity is not provided for both sexes. EEOA's section (a), the portion that forbids deliberate segregation, does not contain a reference to sex.<sup>316</sup> Rather, sex only appears in section (c), the portion that forbids assignment of a student to a school for reasons such as race, color, or sex.<sup>317</sup> This ambiguous use of the word sex suggests that Congress did not intend to prohibit single-sex education.<sup>318</sup> If Congress had intended to do so, then it would have added sex to section (a).<sup>319</sup> All section (c) prohibits, therefore, is the assignment of students to schools based on sex.<sup>320</sup> Section (c) does not "preclude a voluntary decision to attend a single-sex school. As long as there were enough substantially equal options from which a parent and student could choose, there would be no discriminatory 'assignment' in violation of the statute."<sup>321</sup>

In *Vorchheimer*, the Third Circuit reached this same conclusion: "the statute does not prohibit the states from segregating schools on the basis of sex although there is a specific proscription on segregation based on race, color or national origin."<sup>322</sup> The Third Circuit arrived at this conclusion after studying EEOA's legislative history.<sup>323</sup> The court claimed that:

Section 204(c), 20 U.S.C. § 1703(c), [was] intelligible if read against the background of the busing controversy which spawned it. . . . The thrust [of § 1703 (c)] is directed toward the "neighborhood school" concept, which was so much a part of the busing dispute, and against assignment of students to non-neighborhood schools to achieve segregation on any of the forbidden bases.<sup>324</sup>

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316. See *Caplice*, *supra* note 240, at 270; *supra* notes 242-43 and accompanying text.

317. See *Caplice*, *supra* note 240, at 270.

318. See *id.*

319. See *id.*

320. See *id.*

321. *Id.*

322. *Vorchheimer v. School Dist. of Philadelphia*, 532 F.2d 880, 884 (3d Cir. 1976), *aff'd*, 430 U.S. 703 (1977) (per curiam).

323. See *id.* at 883-85.

324. *Id.* at 885.

If Congress had intended to prohibit sex segregation at all, then it most likely sought to prohibit sex segregation when used as a proxy for race segregation.<sup>325</sup> "[S]ex segregation became common in the south after *Brown*, as a way to comply with racial integration orders but still keep [African American] boys and teachers away from white girls."<sup>326</sup> Further, Congress did not discuss reversing Title IX's exempting of elementary and secondary schools from its prohibition of gender discriminatory admissions.<sup>327</sup> "If Congress had intended such a dramatic change in the law, presumably Congress would have at least discussed the issue."<sup>328</sup>

The Third Circuit's examination of the EEOA's legislative history serves as a means to reconcile its holding with the Fifth Circuit's holding in *United States v. Hinds County School Board*.<sup>329</sup> In *Hinds*, the Fifth Circuit held that:

Congress intended to prohibit the assignment of students on the basis of race, color, sex, or national origin. Within a single school, however, Congress prohibited separation of students only on the basis of race, color or national origin, thus permitting sex-segregation to continue in instances similar to those in the past such as physical education and home economics classes.<sup>330</sup>

At issue in *Hinds* was Amite County's desegregation plan that assigned students to four of its schools on the basis of sex.<sup>331</sup> *Hinds* involved the integration problem that Congress sought to address with the EEOA—a school district attempting to conceal its intentional racial discrimination by accomplishing the same result through separation of the sexes.<sup>332</sup> The Fifth Circuit

325. See Caplice, *supra* note 240, at 271.

326. *Id.* (quoting Bennett L. Safenstein, *Revisiting Plessy at the Virginia Military Institute: Reconciling Single-Sex Education with Equal Protection*, 54 U. PITT. L. REV. 637, 675 (1993)).

327. See *id.*

328. *Id.*

329. 560 F.2d 619 (5th Cir. 1977).

330. *Id.* at 624.

331. See *id.* at 621.

332. See Caplice, *supra* note 240, at 271.

recognized this fact and distinguished *Hinds* from *Vorchheimer*.<sup>333</sup> The court noted that *Vorchheimer* involved:

a large city school system which maintained two *voluntary*, sexually segregated high schools . . . in an *otherwise coeducational system*. The two schools had been in existence in the system for over 100 years. . . . In Amite County, on the other hand, *all students* in the system are *assigned to sexually segregated schools at every level*, from entry through graduation. Such a system can neither pass muster under *Vorchheimer's* analysis or our own.<sup>334</sup>

Read together, *Vorchheimer* and *Hinds* suggest that:

so long as race discrimination is not at the foundation of the policy, and the choice to attend sex-segregated schools is truly voluntary and not forced either by the school district assignment or by default in the absence of any other option, then single-sex education at the primary and secondary level is not prohibited by the EEOA.<sup>335</sup>

At TYWLS, the founders employed a gender-based admissions policy in order to educate adolescent girls in East Harlem.<sup>336</sup> Attendance at TYWLS is voluntary.<sup>337</sup> Adolescent girls can choose to apply and, if accepted, attend TYWLS, or they can attend nearby, public, coeducational Junior High School 13.<sup>338</sup> Because racial discrimination is not the foundation of TYWLS's gender-based admissions policy and because New York City does not assign adolescent girls to TYWLS, TYWLS does not violate the EEOA.

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333. See *Hinds*, 560 F.2d at 624-25 n.7.

334. *Id.* (second, fifth, and sixth emphases added).

335. Caplice, *supra* note 240, at 271.

336. See *supra* notes 207-10 and accompanying text. Although the first class of TYWLS is mostly African American and Hispanic, this result does not mean that racial discrimination is the foundation of TYWLS gender-based admissions policy. See Sanchez, *supra* note 3, at A1; *infra* note 362 (explaining how TYWLS allows adolescent girls of all races to apply and that the adolescent girls in East Harlem happen to be mostly African American and Hispanic).

337. See *supra* note 211 and accompanying text.

338. See *supra* note 212 and accompanying text.

*Constitutional Law*

TYWLS would be unconstitutional according to Justice Scalia's application of Justice Ginsburg's test in *United States v. Virginia*.<sup>339</sup> TYWLS's gender-based admissions policy does not survive strict scrutiny. It is not necessary to educate East Harlem, adolescent girls in a single-sex setting. They can learn in a coeducational environment. Further, adolescent boys in East Harlem, like the female applicants in *Virginia*, have the will and capacity to attend TYWLS.

Interpreting Justice Ginsburg's standard in *Virginia* as Justice Scalia did in his dissent, so that all gender classifications are subject to strict scrutiny, is inaccurate. Granted, Justice Scalia's interpretation has merit. He was correct when he wrote that "[t]he Supreme Court of the United States does not sit to announce 'unique' dispositions. Its principal function is to establish precedent—that is, to set forth principles of law that every court in America must follow."<sup>340</sup> To focus exclusively on a single footnote in *Virginia* in order to limit the holding of that opinion to its facts appears to misconstrue the role of the U.S. Supreme Court and its decisions. Such analysis also seems to misinterpret the opinion. If the content of footnote seven was so important to the holding in *Virginia*, then why was it relegated to a footnote? Because the content of footnote seven was not in the text, it must not be important. *Virginia*, therefore, should be read without footnote seven. When *Virginia* is read without footnote seven, strict scrutiny seems to apply to *all* gender classifications as Justice Scalia suggested.<sup>341</sup>

This standard appears to be more workable in practice than the standard created in footnote seven. Justice Scalia's strict scrutiny interpretation is a bright-line rule. Footnote seven, however, would allow intermediate scrutiny for gender classifications that "compensate women 'for particular economic disabilities [they have] suffered,'" "promot[e] equal employment opportunity," and "advance full development of the talent and capacities of our

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339. 116 S. Ct. 2264, 2305-06 (1996) (Scalia, J., dissenting) (equating the "exceedingly persuasive justification" test with strict scrutiny).

340. *Id.* at 2305 (Scalia, J., dissenting) (emphasis omitted).

341. See *supra* notes 280-83 and accompanying text.

Nation's people."<sup>342</sup> Compensating women for economic disabilities and promoting equal employment opportunity are identifiable and understandable concepts. Advancing full development of talent and capacities is neither easily identifiable nor understandable. Unfortunately, *Virginia* offers no guidance regarding identifying classifications that promote development of the talent and capabilities of our Nation's people.

Despite this lack of guidance, urban, single-sex, public secondary schools for adolescent girls, such as TYWLS, seem to fit this standard. The founders of TYWLS intended to address the biases against girls in America's public schools and in turn, to advance full development of the talent and capacities of East Harlem's young women.<sup>343</sup> TYWLS should, therefore, receive intermediate scrutiny. Similarly, Detroit's all-male academies in *Garrett* advanced full development of the talent and capacities of African American males, a subordinate group in America.<sup>344</sup> The academies in *Garrett*, however, excluded another subordinated group, African American females, "one of the most marginalized and disempowered groups in our society."<sup>345</sup> Because all-male public schools inevitably perpetuate gender inequities, they should not receive intermediate scrutiny.<sup>346</sup>

Although the Court's desire in *Virginia* to "advance full development of the talent and capacities of our Nation's people"<sup>347</sup> creates a nebulous standard implicating a case-by-case inquiry, following this standard *is warranted* despite Justice Scalia's arguments to the contrary. *Virginia* adheres to and advances Supreme Court gender precedent.<sup>348</sup> The Court has declared unconstitutional gender classifications that perpetuate a stereotype of women's dependency.<sup>349</sup> The "exceedingly per-

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342. *Virginia*, 116 S. Ct. at 2276 (citations omitted) (quoting *Califano v. Webster*, 430 U.S. 313, 320 (1997) and *California Federal Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 289 (1987)).

343. See *supra* notes 207-10 and accompanying text.

344. See *supra* notes 293-96 and accompanying text.

345. Sharon K. Mollman, Note, *The Gender Gap: Separating the Sexes in Public Education*, 68 IND. L.J. 149, 172 (1992).

346. See *id.*

347. *Virginia*, 116 S. Ct. at 2276.

348. See *supra* notes 244-83 and accompanying text.

349. See *supra* notes 245-53 and accompanying text.

suasive justification" standard for these stereotyping classifications, what Justice Scalia calls strict scrutiny, insures that courts will continue to find such stereotypes unconstitutional. Conversely, the Court has held that gender classifications that attempt to remedy specific, objectively verifiable past discrimination against women are constitutional.<sup>350</sup> The standard used for these classifications, intermediate scrutiny, preserves them and their constitutionality.

Further, despite what Justice Scalia may believe, *Virginia* is a unique case. It involved one of two, all-male, state-supported military colleges in the United States.<sup>351</sup> Unless the Supreme Court stepped into the controversy to help the disadvantaged minority, the female applicants, as it did with African American children in *Brown v. Board of Education*,<sup>352</sup> VMI most likely would not have become coeducational. The lower courts would have allowed it to remain all-male because Virginia had established a separate but unequal, female, military program at Mary Baldwin College.<sup>353</sup>

Justice Scalia's failure to recognize *Virginia* as a unique case produces a perverse result. By rectifying one injustice against women, the Court would have created other injustices against women by banning urban, single-sex, public secondary schools for adolescent girls like TYWLS. Justice Scalia's reading of the law would punish women for Justice Ginsburg's failure to incorporate the content of footnote seven into the text of the opinion and for her failure to state explicitly that *Virginia* was a unique case. Moreover, TYWLS was also established to confront and to solve the consequences of the bias against girls in America's public schools: eating disorders, depression, suicide, substance abuse, early sexual activity, teenage pregnancy, and sexually transmit-

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350. See *supra* notes 254-60 and accompanying text.

351. See Donald P. Baker, *By One Vote, VMI Decides To Go Coed*, WASH. POST, Sept. 22, 1996, at A1.

352. 347 U.S. 483 (1954).

353. Both lower courts approved the Commonwealth of Virginia remedial plan that created a separate "leadership" school for women. See *United States v. Virginia*, 44 F.3d 1229 (4th Cir. 1995), *aff'g* 852 F. Supp. 471 (W.D. Va. 1994), *rev'd*, 116 S. Ct. 2264 (1996).

ted diseases.<sup>354</sup> Reading *Virginia* as Justice Scalia did discourages public, urban school systems like New York City from experimenting with different educational options to address and solve social and educational problems. Experimentation is needed. The status quo is not solving America's social and educational problems.<sup>355</sup>

TYWLS'S GENDER CLASSIFICATION: SUBSTANTIALLY RELATED TO  
THE ACHIEVEMENT OF AN IMPORTANT GOVERNMENTAL  
OBJECTIVE

Under Justice Ginsburg's majority opinion in *Virginia*, TYWLS is constitutional if its gender classification survives intermediate scrutiny.<sup>356</sup> TYWLS's gender classification must be substantially related to the achievement of its important governmental objective of educating East Harlem's adolescent females, which it is.<sup>357</sup>

Unlike the Detroit all-male academies' gender-based admissions policy in *Garrett*, social science research supports TYWLS's gender-based admissions policy.<sup>358</sup> This research shows that the public education system particularly fails African American and

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354. See *supra* notes 129-50 and accompanying text.

355. Justice Scalia dissented because he recognized that the Court's decision as literally written would discourage beneficial experimentation in the field of education such as that occurring at TYWLS. See *Virginia*, 116 S. Ct. at 2306 (Scalia, J., dissenting). He wrote:

[E]ducational experts in recent years have increasingly come to "support[t] [the] view that substantial educational benefits flow from a single-gender environment, be it male or female, that cannot be replicated in a coeducational setting." . . . Until quite recently, some public officials have attempted to institute new single-sex programs, at least as experiments. In 1991, for example, the Detroit Board of Education announced a program to establish three boys-only schools for inner-city youth; it was met with a lawsuit, a preliminary injunction was swiftly entered by a District Court that purported to rely on *Hogan*, see *Garrett v. Board of Education of School Dist. of Detroit*, 775 F. Supp. 1004, 1006 (E.D. Mich. 1991), and the Detroit Board of Education voted to abandon the litigation and thus abandon the plan . . . . Today's opinion assures that no such experiment will be tried again.

*Id.* (Scalia, J., dissenting) (emphasis omitted) (citations omitted).

356. See *supra* notes 278-79 and accompanying text.

357. See *supra* note 251 and accompanying text.

358. See, e.g., *supra* notes 175-91 and accompanying text.

Hispanic girls because boys attend school with them.<sup>359</sup> Further, it reveals that the benefits of single-sex secondary schools, such as encouraging girls to take more advanced science and math courses and fostering higher self esteem, are greatest among poor, African American and Hispanic girls.<sup>360</sup> TYWLS's admissions procedure, consisting of an application and an interview actually targets and enrolls these at-risk students, unlike the Detroit all-male academies' admissions procedure, which selected students somewhat at random.<sup>361</sup> The first class of TYWLS is mostly African American and Hispanic.<sup>362</sup> Moreover, TYWLS's admissions procedure promotes parental involvement, which was a New York City Board of Education Chancellor's Task Force recommendation as well as an explanation for African American and Hispanic girls' success in single-sex schools.<sup>363</sup>

TYWLS's commitment to the advancement of its important governmental objective does not end with its gender-based admissions policy. From its clean, bright, calm, pastel hallways to its dedicated teachers like Ms. Metnetsky, Ms. Kerho, and Ms. Geswaldo and their instructional methods, TYWLS has eliminated sex bias from its formal curriculum and classrooms and encouraged its students to explore and express their thoughts and feelings.<sup>364</sup>

359. See *supra* notes, 196-204 and accompanying text.

360. See *supra* notes 178-90 and accompanying text.

361. See *supra* note 294 and accompanying text.

362. See Sanchez, *supra* note 3, at A1. This result is not the racial discrimination the Department of Education's Office for Civil Rights deemed illegal in *Garrett*. See *Garrett v. Board of Educ.*, 775 F. Supp. 1004, 1009 n.9 (E.D. Mich., 1991); Administrative Complaint at Exs. J & K, *NOW v. New York City Board of Educ.* (No. 02-96-1184) (U.S. Dep't of Educ., Office for Civil Rights filed Aug. 22, 1996). The Office for Civil Rights letters relied upon in *Garrett* said that school districts could not create all African American, all-male schools—that is, limit admissions *only* to black, male students and intentionally segregate them. See *Garrett*, 775 F. Supp. at 1009 n.9; Administrative Complaint at Exs. J & K, *NOW* (No. 02-96-1184). TYWLS does not limit admissions to only African American and Hispanic girls. See The Young Women's Leadership School Application (allowing adolescent girls of all races to apply to TYWLS to achieve racial and ethnic balance). TYWLS gives preference to girls who live near its East Harlem location in District Four to fulfill its goal to helping these girls. See *id.* The residents of the district just happen to be mostly African American and Hispanic. See Sanchez, *supra* note 3, at A1. *De facto* segregation is at work here, not *de jure* segregation.

363. See *supra* notes 186-91 and accompanying text.

364. See *supra* notes 217-25 and accompanying text.



Public schools that mirror TYWLS are constitutional and statutorily permissible.<sup>365</sup> These schools seek to advance full development of the talent and capacities of America's young women. They are voluntary, single-sex, secondary schools without opposite sex counterparts for students who *happen to have* three low-status characteristics: female status, low socioeconomic status, and racial/ethnic minority status. They have eliminated sex bias from their curricula and classrooms.

These mostly urban, single-sex, public, secondary schools, deserve constitutional and statutory protection. Research reveals that the adolescent girls who attend them are at a critical junction in their lives.<sup>366</sup> They have the potential to become anorexics, bulimics, teenage mothers, welfare dependents, AIDS victims, and drug addicts.<sup>367</sup> They need immediate attention to prevent their transformation into societal and governmental burdens. According to current studies, the best attention they can receive is at a single-sex school with gender-fair curricula and classrooms.<sup>368</sup> Any disadvantage to boys resulting from this opportunity for girls must be allowed by courts and legislatures.<sup>369</sup> The societal harm that would otherwise result is too great.<sup>370</sup>

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365. See *supra* notes 305-55 and accompanying text.

366. See *supra* notes 89-150 and accompanying text.

367. See *supra* notes 89-150 and accompanying text.

368. See *supra* notes 155-91 and accompanying text.

369. Urban, adolescent boys should not be ignored; however, because cities often have limited educational funding, cities may have to choose between funding an all-girls, secondary school or an all-boys secondary school. These cities should fund the former because social science research indicates that girls are more disadvantaged educationally. See *supra* notes 41-88 and accompanying text. To fund only the all-boys schools would be unconstitutional. See *supra* notes 344-46 and accompanying text. If cities have the finances, they probably should have all-girls, all-boys, and coeducational secondary schools; however, public, single-sex secondary schools for urban, adolescent boys and their impact is beyond the scope of this Note.

370. The resulting societal harm may not be as great when adolescent girls with only one or two low-status characteristics are involved. Although they too are at an important junction in their lives, their situation is not as critical. See *supra* notes 96-98, 112-28 and accompanying text. These girls have some home influence on their learning, and thus, they may not benefit as much from single-sex schools as urban, adolescent girls will. See *supra* notes 178-91 and accompanying text. All-female, secondary schools with student bodies that happen to have one or two low-status characteristics may be less substantially related to the important objective of neutralizing biased instruction than schools whose student bodies happen to have three low-status characteristics.

## CONCLUSION

TYWLS and schools that mirror it are constitutional under both the Fifth Amendment's Due Process Clause and the Fourteenth Amendment's Equal Protection Clause. They are statutorily permissible under Title IX and the EEOA as well. These schools are voluntary, single-sex, secondary schools without opposite sex counterparts for students who happen to have three low-status characteristics: female status, low socioeconomic status, and racial/ethnic minority status. They have eliminated sex bias from their curriculum and classrooms.

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Despite this less exacting ends and means fit of the intermediate scrutiny test, local school boards should not deliberately look for low socioeconomic, racial/ethnic neighborhoods and establish all-female secondary schools in these neighborhoods in order to more precisely satisfy intermediate scrutiny's ends and means test. If school boards did, then the all-female schools created would have used race as a proxy for determining at-risk students. These schools would violate Title IX, EEOA, the Fifth Amendment's Due Process Clause, and the Fourteenth Amendment's Equal Protection Clause.

Rather, school boards should recognize that biased instruction exists in America's public schools. To protect this problem, they should consider establishing all-female secondary schools. All-female secondary schools do not violate the Title IX or EEOA. See *supra* notes 303-08 and accompanying text. If these schools happen to have low socioeconomic, racial/ethnic minority student bodies such as TYWLS, then they still do not violate Title IX, or EEOA, nor the Fifth Amendment's Due Process Clause or the Fourteenth Amendment's Equal Protection Clause. *De facto* segregation, not *de jure* segregation is at work. See *supra* note 362.

If school boards are concerned about not precisely satisfying intermediate scrutiny's ends and means test, then they should commission studies as New York City did with its Chancellor's Task Force on Sex Equity. Studies will reveal the students who are most affected by biased instruction. Like New York City, the school boards then can open schools that address the studies' results. With specific research, school boards should be able to prove a more precise ends and means fit for the intermediate scrutiny test. As school boards prove this test, courts should be careful not to read Title IX, EEOA, the Fifth Amendment, or the Fourteenth Amendment as prohibiting needed state assistance to a population identified by legitimate research just because the identified population also may happen to be a suspect class. Finally, school boards concerned about the intermediate scrutiny test also may want to consider other options available to address biased instruction such as opening all-male counterparts to their all-female, public secondary schools; replacing gender biased curricula and classrooms with gender-fair curricula and classrooms; or offering all-male classes, all-female classes, and coeducational instruction under one roof such as Marsteller Middle School does in suburban, Prince William County, Virginia. See Ann O'Hanlon, *A Double Take On Single-Sex Education*, WASH. POST, Feb. 19, 1997, Prince William Extra, at 3.

Schools such as TYWLS serve an important governmental objective. They advance full development of the talent and capacities of America's young women. The discriminatory means employed by them through their gender-based admissions policy and their curriculum and classroom reform measures are substantially related to the achievement of this important governmental objective. Research supports these programs. Given the biased instruction that exists in America's public schools, schools such as TYWLS balance educational opportunities for urban, adolescent girls.

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