

# THE YOUNG WOMEN'S LEADERSHIP SCHOOL: A VIABLE ALTERNATIVE TO TRADITIONAL COEDUCATIONAL PUBLIC SCHOOLS

## INTRODUCTION

The need for alternative styles of schooling has emerged as one of the most debated topics in large cities throughout the country due to the decaying quality of public school education.<sup>1</sup> The failure of the urban public school system has been attributed to many societal problems. Primarily, there has been a demographic change in large cities, resulting in the racial and economic stratification of education<sup>2</sup>; predominantly, poorer minorities attend public schools while middle- and upper-class children attend private or parochial schools.<sup>3</sup> The failure to educate minority students with privileged students, who are able to afford better educational institutions, places them at a disadvantage and deprives them access to equivalent educational opportunities.<sup>4</sup>

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<sup>1</sup> See *The Forbidden School*, WALL ST. J., July 31, 1996, at A14 (discussing the benefits of single-sex education and the possible effects of the highly publicized Supreme Court decision, *U.S. v. Virginia*, 116 S. Ct. 2264 (1996), which forced the admittance of women to the all-male military college, Virginia Military Institute (VMI), on the Young Women's Leadership School which is the first proposal for a public school solely for girls since the highly publicized Supreme Court decision).

<sup>2</sup> See Daniel Gardenswartz, *The Expansion of Constitutional and Statutory Remedies for Sex Segregation in Education: The Fourteenth Amendment and Title IX of the Education Amendments of 1972*, 42 EMORY L.J. 591, 601 (1993).

Perhaps the most important change affecting our public school system is a drastic alteration in the basic demographic trends in the United States, making it increasingly difficult for teachers to play their traditional roles and for American public schools to maintain broad-based public support. "[S]chools are experiencing . . . [a major] demographic shock the present time. . . . The most important demographic shift involves the increasing number of students from minority backgrounds, particularly in the large urban areas." This increase in minority students will require teachers to alter both their existing expectations and their curricula in ways which are more practical "for those students who may find school devastating, difficult or irrelevant to their lives."

*Id.* (quoting RICHARD I. ARENDS, *LEARNING TO TEACH* 9-10 (1980)).

<sup>3</sup> See *id.* ("[T]he increase in minority children in the public school system has led to an exodus of middle- and upper-class children whose parents prefer to send their children to private schools and who become less willing to finance the public school system.")

<sup>4</sup> See *id.* at 600-01 ("[A]s increased minority enrollment in the United States' urban school system continues, the efforts to create equal educational opportunities will become much more complex and confrontational.")

Different reforms will be directed at different classifications in an effort to achieve general equality for the entire student population. However every effort aimed at increasing the opportunity of a given group will tend to decrease the relative equality of another category of individuals, and this problem will only increase because of the disadvantages that different groups are encountering can be directly attributed to multiple cause and effects.

*Id.* at 601.

Another factor contributing to the failure of public education is the dysfunctional, yet increasingly more common, family structure consisting of a single mother and an absentee father.<sup>5</sup> The single parent family structure has drastic repercussions for young women, since teenage pregnancy and parenthood, which are so rampant in today's urban public schools, usually leaves them no option but to drop-out due to their child-rearing responsibilities and their inability to afford child care.<sup>6</sup> These troubled teenagers are less productive economically as a result of their inability to complete school which forces them to acquire jobs providing insufficient salaries to support a family.<sup>7</sup> Their inability to support themselves and their children causes a drain on the state's and country's resources due to their reliance on welfare.<sup>8</sup> This dependence on state assistance is perpetuated by the children of single teenage mothers who are more prone to violent lifestyles and to dropping out of high school.<sup>9</sup>

This educational crisis has led many legislators on both the federal and state levels to support single-sex education as a means to overcome the vast challenges women face and increase the percentage of women who successfully complete high school, especially in minority communities.<sup>10</sup> Although single-sex schools serve an important purpose, legislators have realized that single-sex schools face many legal challenges under discrimination laws which could be eased by clarifying applicable statutory language to expressly allow single-sex schools.

Single-sex schooling has been supported by members of Congress through legislation which would fund several pilot single-sex programs in public schools and change the wording in Title IX of

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<sup>5</sup> See *id.* at 601.

<sup>6</sup> See *id.*

<sup>7</sup> See Rosemary C. Salamone, *All-Girls School for Spanish Harlem?*, N.Y.L.J., Aug. 5, 1996, at 1 (contemplating that the Young Women's Leadership School is a means to end the "welfare cycle" plaguing many disadvantaged females).

<sup>8</sup> See *id.*

<sup>9</sup> See Gardenswartz, *supra* note 2, at 601.

[B]oys raised without a nurturant, involved father in the home are at greater risk for anti-social behavior and violence. In the past 30 years, there has been a 350 percent increase in births to single (often teenage) mothers and divorce rates have soared, with close to half the divorced fathers not taking emotional or financial responsibility for their children. During the same timespan, we have experienced a 100 percent increase in violent crime.

Myriam Miedzian, *Breeding Violent Boys*, ATLANTA J. CONST., Oct. 13, 1991, *quoted in* Gardenswartz, *supra* note 2, at A14.

<sup>10</sup> See Susan Weiner, *Boys and Girls Together*, CHI. TRIB., July 18, 1996, at 21, *available in* 1996 WL 2690669 (a commentary on school districts reinstating single-sex education to overcome the distractions of the opposite sex and low self-esteem of girls).

the 1992 Education Amendments.<sup>11</sup> The Danforth Amendment to the Improvement of American Education Act encouraged ten demonstration programs throughout the country implementing single-sex schools for girls and boys.<sup>12</sup> Unfortunately, this amendment was never passed into law.<sup>13</sup>

The idea of federal funding for single-sex educational opportunities was recently reintroduced by Senator Kay Bailey Hutchison.<sup>14</sup> Senator Hutchison's amendment would provide federal funding for single-sex classrooms and schools as long as there are comparable opportunities for both sexes.<sup>15</sup> The amendment would change the language of Title VI to expressly state that single-sex education programs could be eligible to receive grants available through the Department of Education for innovative education reform projects.<sup>16</sup> Senator Hutchison discussed single-sex schools and the legal challenges they face during her statements on the Senate floor and concluded that they do not violate Title XI or the Equal Protection Clause, because these laws "were intended to be protection against discrimination, not against educational enhancements for students who choose to learn in an environment where they can excel."<sup>17</sup> This time around the amendment was

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<sup>11</sup> See Tamara Henry, *A New Push for Girls-only Public Schools: N.Y. Experiment in Leadership*, USA TODAY, Sept. 18, 1996, at 1D (presenting the background of the Young Women's Leadership School, the views of the School's opponents, the insights of the parents and students, and the reemergence of single-sex schooling in the United States); see also John Borkowski, *Speeches, Single Gender Education & the Constitution*, 40 LOYOLA L. REV. 253, 276 (1994) (stating that the Senate had considered an amendment to form single-sex programs). Title IX prohibits the discrimination of persons due to their gender in certain educational settings. See 20 U.S.C.A. § 1681(a)(1) (West 1990); see also discussion *infra* notes 267-73 and accompanying text.

<sup>12</sup> See Anne Marie Whitmore, *Speeches, Single Gender Education & the Constitution*, 40 LOYOLA L. REV. 253, 266 (1994) (stating that public funds would be used for single-sex experimental programs on the secondary school level for both boys and girls); see also Borkowski, *supra* note 11, at 276 (stating that the bill suspends "the operation of Title IX and Title VII with respect to these demonstration projects . . . [in order] to try to promote more research concerning the impact of single-sex education.").

<sup>13</sup> See Susan Estrich, *Ideologues Decry Single-Sex Education, But Girls Benefit*, DENV. POST, May 22, 1998, at B11, available in 1998 WL 6111774 [hereinafter Estrich, *Ideologues Decry Single-Sex Education*].

<sup>14</sup> See *id.*

<sup>15</sup> See *id.* The amendment was made to the Coverdell A+ Education Opportunity Act. *Congress Approves Hutchison Proposal for Voluntary Single-Sex Classrooms*, GOV'T PRESS RELEASES, June 24, 1998, available in 1998 WL 7324865 (reporting the details of the Hutchison Amendment and Senator Hutchison's sentiments concerning the benefits and legality of single-sex schools). This Act passed in the Senate by a 59 to 36 vote. See *id.* The text of the bill can be found at S. 1590, 105th Cong. (1998).

<sup>16</sup> See 144 CONG. REC. S6923 (daily ed. June 24, 1998) (statement of Sen. Kay Bailey Hutchison). For an explanation of Title VI, see *infra* note 238.

<sup>17</sup> *Id.*

more successful — both the Senate<sup>18</sup> and the House of Representatives<sup>19</sup> passed the Hutchison amendment.<sup>20</sup>

Individual states have also supported the revival of single-sex schools. In California, five million dollars was allotted in the 1997 budget to establish twenty single-sex schools.<sup>21</sup> Many other states have tried to open single-sex public school programs in urban ghettos in order to curb violence and high drop-out rates, but these programs have met great resistance.<sup>22</sup> Most of these programs were for male minorities, but they closed as a result of political pressure or court action.<sup>23</sup>

New York came into the forefront of the single-sex education controversy when the Young Women's Leadership School opened

<sup>18</sup> The Senate passed the amendment by a vote of 69 to 29. See *Congress Approves Hutchison Proposal for Voluntary Single-Sex Classrooms*, *supra* note 15; see also 144 CONG. REC. S6923 (June 24, 1998) (statement of Sen. Kay Bailey Hutchison).

<sup>19</sup> The House passes the amendment by a vote of 225 to 197. See *Congress Approves Hutchison Proposal for Voluntary Single-Sex Classrooms*, *supra* note 15.

<sup>20</sup> See *id.*

<sup>21</sup> See Henry, *supra* note 11, at 1D. For further description of the California single-sex schools, see *infra* notes 193-201 and accompanying text.

<sup>22</sup> See John Hildebrand, *Bush Backs Inner-City Male Schools*, *NEWSDAY*, Sept. 10, 1991, at 17 (discussing President George Bush's support of the reemergence of single-sex public schools as an alternative for males in urban ghettos in order to provide a disciplined environment, with role models, and no distractions). All-male schools for minority students were attempted in New York, Detroit, Milwaukee, Miami, Baltimore, Washington, D.C., and Chicago. See *id.* (discussing the struggles and debates concerning urban schools for black males in New York, Detroit, Milwaukee, and Miami); see also Carol Innerst, *ACLU, NOW Sue Over Idea of Schools for Black Males Only*, *WASH. TIMES*, Aug. 7, 1991, at A1 (discussing the lawsuit brought against all-male minority public schools in Detroit and other all-male minority programs throughout the country).

The concept of separate, all-male schools and classes has taken root as an educational philosophy in a number of urban school districts desperate to salvage the lives of young black males, or in the case of New York City, black and Hispanic males.

Besides New York[,] . . . Milwaukee, Baltimore, the District [of Columbia], San Diego and Chicago either have considered separate schools or classes or are in various stages of implementing such classes. Most are built on an Afrocentric curriculum aimed at improving the self-esteem of black students. They also stress discipline and civic responsibility.

*Id.* For further discussions of these programs for African-American males, see *infra* notes 167-78 and accompanying text.

<sup>23</sup> Detroit attempted to open male academies for at-risk students, but this program was abandoned after a Michigan Court granted a preliminary injunction. See *Garrett v. Bd. of Educ. of the School Dist. of Detroit*, 775 F. Supp. 1004 (E.D. Mich. 1991). "At-risk students" was coined in response to the high rate of homicide, unemployment, and high school drop out rates facing African American males. See *id.* at 1007. New York also tried to open male academies in Brooklyn, but the city did not pursue the program due to political pressures. See Hildebrand, *supra* note 22, at 17; see also Jacques Steinberg, *Plan for Harlem Girls School Faces Concern Over Sex Bias*, *N.Y. TIMES*, July 16, 1996, at A1 [hereinafter Steinberg, *Plan for Harlem Girls School Faces Concern Over Sex Bias*] (introducing the Leadership School and the legal questions raised immediately upon its founding).

in East Harlem's District 4 on September 4, 1996.<sup>24</sup> Single-sex education is particularly attractive in New York where nearly fifty percent of high school students drop-out, with most of these students being young women who leave school due to pregnancy and motherhood.<sup>25</sup> The situation in District 4 is even more distressing since it is one of the poorest districts in the nation, which translates into teenagers who are more susceptible to failing to complete high school due to their poverty.<sup>26</sup> In 1993, one out of every three people residing in District 4 was on public assistance and the number of violent crimes was twice as high as in other New York districts.<sup>27</sup>

The situation for females in the nation's public schools has led to the need for alternative schooling, especially in East Harlem. Although it seems obvious that something needs to be done and that single-sex education for women could be an effective solution, many criticize the formation of single-sex schools as promoting segregation and argue that it is unconstitutional.<sup>28</sup> This Note will argue that single-sex education is a beneficial and a constitutional alternative to traditional coeducational programs, and uses the Young Women's Leadership School and the legal challenges it is now facing (and that it may face in the future) as a prime example. Part I discusses other factors, besides teenage pregnancy and subsequent high drop out rates, which result in girls receiving inadequate educations. It explores the discrimination girls face in a coeducational classroom and the benefits derived to girls in a single-sex educational atmosphere. Part II introduces the background of the Young Women's Leadership School, including its

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<sup>24</sup> See, e.g., Steinberg, *Plan for Harlem Girls School Faces Concern Over Sex Bias*, *supra* note 24, at A1; *CBS This Morning* (CBS television broadcast, Sept. 4, 1996), available in 1996 WL 3482074.

<sup>25</sup> See *The Forbidden School*, *supra* note 1, at A14 (justifying the formation of the Young Women's Leadership School by advocating that girls perform better in a single-sex environment and that girls in East Harlem are particularly vulnerable dropping out of school).

<sup>26</sup> See *id.* (citing the results from a 1993 City University of New York study which found that District 4 was the poorest district in the country).

<sup>27</sup> See *id.*

<sup>28</sup> The Young Women's Leadership School is being challenged by the New York Civil Liberties Union, the New York Civil Rights Coalition and the New York Chapter of the National Organization of Women. See generally Administrative Complaint, National Organization for Women—New York City Chapter. *New York Civil Liberties Union, and New York Civil Rights Coalition v. New York City Board of Education* [hereinafter Administrative Complaint] (on file with the *Cardozo Women's Law Journal*). Critics argue that single-sex education is illegal due to the decision in *U.S. v. Virginia* and because separate is inherently not equal. See Weiner, *supra* note 10, at 21. They propose that instead of segregating the sexes, educators should improve coeducation, the behavior of boys should be modified, and the curriculum should be reformed to help the girls achieve and learn. The also advocate that single-sex education is unrealistic because the sexes have to learn to get along with each other in the real world. See *id.* "To return to gender segregation in the name of education reform is to backtrack on our national progress." *Id.*

formation and the administrative complaint filed against the school by the New York Civil Liberties Union, the New York Civil Rights Coalition, and the New York Chapter of the National Organization of Women. In Part III, this Note analyzes the Title IX challenges alleged in the administrative complaint. Part IV discusses any possible challenges that could arise under the Equal Protection Clause of the Fourteenth Amendment if a lawsuit is filed.<sup>29</sup> Part V investigates the effect of the Equal Educational Opportunities Act<sup>30</sup> on the Leadership School, and further demonstrates congressional intent to allow single-sex education by examining the Women's Educational Equity Act.<sup>31</sup> Part VI considers the New York State and City laws that could be applicable to the Leadership School, and argues that these laws would have a negligible effect on the school. This Note will assert that single-sex education is a viable constitutional alternative to the existing coeducational public school system and that it should exist as an alternative choice for parents and students, both male and female.

### I. THE STUDIES ON SINGLE-SEX EDUCATION: THE JUSTIFICATION FOR THE YOUNG WOMEN'S LEADERSHIP SCHOOL

Although boys and girls attend the same classes, read the same books, and listen to the same teachers, they receive remarkably different educations.<sup>32</sup> It has been determined by several studies that

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<sup>29</sup> The administrative complaint was submitted to the department of Education's Office of Civil Rights on the grounds that the Young Women's Leadership School violates Title IX. The Office of Civil Rights can hear cases on Title IX, but not on the Equal Protection Clause. A Fourteenth Amendment challenge may only be brought in a federal court by a boy who feels that he is not being treated equally under the law because of his inability to attend the Leadership School. This has yet to occur. See Julia Cohen, A Discussion of The Young Women's Leadership School in East Harlem, Symposium at the Benjamin N. Cardozo School of Law (Oct. 10, 1996) [hereinafter Symposium].

The symposium, organized by the *Cardozo Women's Law Journal*, was a panel discussion on the formation, purpose, and legal issues pertaining to the Young Women's Leadership School and included supporters and opponents of the school. The panelists speaking on behalf of the Leadership School were Ann Rubenstein Tisch, the founder of the school, Julia Cohen, the attorney for the Tisch family, and Coleman Genn, the Executive Director of the Center for Educational Innovation. In opposition to the school, the panelists were Anne Connors of the New York City Chapter of NOW, and Michael Meyers, the Executive Director of the New York Civil Rights Coalition. The moderator of the symposium was Frank Macchiarola, President of St. Francis College in New York, who has also served as the Chancellor of the Board of Education and is a former Dean of the Benjamin N. Cardozo School of Law.

<sup>30</sup> 20 U.S.C.A. §§ 1701-58 (West 1990).

<sup>31</sup> 20 U.S.C.A. §§ 3041-47 (West 1990).

<sup>32</sup> See MYRA SADKER & DAVID SADKER, FAILING AT FAIRNESS: HOW OUR SCHOOLS CHEAT GIRLS I (1994).

From grade school through graduate school[,] female students are more likely to be invisible members of classrooms. Teachers interact with males more frequently, ask them better questions, and give them more precise and helpful feedback. Over the course of years[,] the uneven distribution of teacher time,

girls are more intellectually curious, serious about their studies, and achieve greater success academically when in single-sex classrooms.<sup>33</sup> Studies have also shown that girls in minority and disadvantaged communities perform even better in single-sex classrooms than the average girl.<sup>34</sup>

The increased performance of girls in an all-female environment is clearly demonstrated by comparing the test scores of girls in single-sex and coeducational schools. In a coeducational atmosphere, girls traditionally lag behind boys in all standardized tests, and there is a significant gap between boys and girls in math and the sciences.<sup>35</sup> Whereas, girls educated in single-sex schools have been found to score higher on standardized tests and a half-grade above girls in coeducational schools overall, except in the sciences where they excel by a full grade.<sup>36</sup> The diminished capability of girls is especially tragic when one considers that, upon entering school in the elementary grades, the girls "are ahead of or equal to boys on almost every standardized measure of achievement and

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energy, attention, and talent, with boys getting the lion's share, takes its toll on girls.

*Id.*

<sup>33</sup> See *id.* at 233.

<sup>34</sup> See John Leo, *Boys on the Side*, U.S. NEWS & WORLD REP., Aug. 5, 1996, at 18 (espousing the formation of the Young Women's Leadership School based on research which supports the benefits of single-sex education for disadvantaged females). Leo states that it is unfortunate that "th[e] school is entangled in race and gender politics, because it deserves a chance to stand on its own merits," and advocates the option of single-sex schools in a community having so few options. *Id.* See also *The Forbidden School*, *supra* note 1, at A14 (stating that nationally girls do better in single-sex schools).

<sup>35</sup> See Susan Estrich, *Laws Stand in Way of Single-Sex Schools*, USA TODAY, July 25, 1996, at 15A [hereinafter Estrich, *Laws Stand in Way of Single-Sex Schools*] (discussing studies finding that females have been discriminated against in a coeducational setting since teachers call on boys more often, which causes girls' self-esteem to suffer dramatically and results in poor academic performance). Estrich states that single-sex education could be an answer to the discrimination against women in academia. See *id.* She is discontent with the New York Civil Liberties Union and the New York Civil Rights Coalition for attempting to "block this innovative effort to help underprivileged young women in the name of civil rights." *Id.* She also comments that Justice Ginsburg's *U.S. v. Virginia* decision recognizes that single-sex education affords benefits and diversity, but VMI did not serve any public objectives, whereas the purpose for the Leadership School is a strong case for single-sex education. See *id.*

<sup>36</sup> See *Inner-City Single-Sex Schools: Educational Reform or Invidious Discrimination*, 105 HARV. L. REV. 1741, 1756 (1992) (citing CORNELIUS RIORDAN, *GIRLS AND BOYS IN SCHOOL: TOGETHER OR SEPARATE?*, 101-06 (1990) (analyzing data from the National Center for Education Statistics)); see also Salamone, *supra* note 8, at 1 ("Researchers have found that women in single-sex schools, as compared to women attending coeducational institutions, demonstrate higher educational and career aspirations, . . . take more math and sciences courses on higher levels, and outscore their coeducational counterparts on general academic and science tests."); Julia Cohen and Coleman Genn, Symposium, *supra* note 29. Salamone admonishes the letter from the ACLU to Chancellor Rudy Crew as "a clear disregard for documented research and anecdotal findings of the benefits that women derive from single-sex education, but also a failure to appreciate the constraints placed upon young women caught in the cycle of property." Salamone, *supra* note 7, at 1.

psychological well-being,<sup>37</sup> but by the time they graduate from high school they have fallen significantly behind their male counterparts.<sup>38</sup>

Girls educated in single-sex schools also have higher educational and career aspirations, and take a greater number of advanced math and science courses.<sup>39</sup> They attend more selective post-secondary institutions, enter non-traditional and non-stereotypical careers,<sup>40</sup> such as the sciences,<sup>41</sup> and, ultimately, receive higher salaries.<sup>42</sup> This is even more noticable when observing Hispanic and minority women who are poorly represented in selective institutions, traditionally receive lower salaries, and rarely enter the fields of science or mathematics.<sup>43</sup>

The discrepancies in performance between boys and girls in coeducational schools have been attributed to many factors, such as the learning styles to which girls respond, teacher bias towards boys, stereotypes being reinforced in textbooks and lessons, the distractions boys create in the classroom, and sexual harassment. These factors, some of which are very subtle and not easily detected, result in coeducational schools placing the impetus of learning on the boys, while unjustly pushing the girls off to the side where they do not receive the same educational opportunities or reach the same level of achievement as male students. Unfortunately, "it is clear that gender bias against girls does occur, mostly because we, for the most part inadvertently, do things that bring about unequal treatment of some of our students."<sup>44</sup>

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<sup>37</sup> SADKER & SADKER, *supra* note 32, at 13.

<sup>38</sup> *See id.* This data was compiled from studies and reports by test publishers such as the Educational Testing Service, the Preliminary Scholastic Aptitude Test (PSAT), the Scholastic Aptitude Test (SAT), and the Achievement tests. *See id.* at 282-83 n.12.

<sup>39</sup> *See* Salamone, *supra* note 7, at 1; *see also* Cohen, Symposium, *supra* note 29.

<sup>40</sup> *See id.* ("Research further demonstrates that the gains made by girls in single-sex schools continue even when they choose coed colleges, not only attending more selective institutions, but ultimately choosing non-traditional careers."); *see also* SADKER & SADKER, *supra* note 32, at 233.

<sup>41</sup> *See* Cohen, Symposium, *supra* note 29.

<sup>42</sup> *See id.*; *see also* Eva Salomon, *Girls Don't Move Up*, 24 EUROPEAN EDUC. 57, 59 (Fall 1992) (stating that graduates of all-girls schools enter fields with higher salaries, such as medicine, law, engineering and computer programming, than girls educated in a coeducational setting).

<sup>43</sup> *See* Salomon, *supra* note 42, at 59 (stating that more women from all-girls schools enter the fields of engineering, science, economics, and politics); *see also* Genn, Symposium, *supra* note 29.

<sup>44</sup> William C. Perry, *Gender-Based Education: Why it Works at the Middle School Level*, 80 SCIENCE EDUC. 32, 32 (Feb. 1996) (discussing solutions to the problems of gender bias in the classroom).

### A. *Learning Styles*

Some researchers propose that there is a scientific difference in how boys and girls learn, and the teaching styles to which each gender responds.<sup>45</sup> These differences result in educational bias even though teachers will be unaware of their unequal treatment of girls.

For instance, boys and girls develop at different speeds and are receptive to learning different concepts at different times.<sup>46</sup> Girls also learn in a more cooperative atmosphere, whereas boys flourish in competitive atmospheres.<sup>47</sup> A competitive atmosphere is the norm in most standard classrooms and is often created when boys call out answers in class instead of waiting to be called on by the teacher.<sup>48</sup> This male trait leads to discrimination against girls in the classroom since they are less likely to call out in class and therefore receive less attention from their teachers.<sup>49</sup>

Even if boys do not call out the answers during class, their response time is quicker.<sup>50</sup> Girls respond more slowly to questions in the classroom, opting to think through their answers.<sup>51</sup> Therefore, boys will raise their hands faster and be called upon more readily by teachers preventing girls from participating in class discussion, since the answer is being discussed before the girls can think through the entire problem.<sup>52</sup> This behavioral difference allows

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<sup>45</sup> See Estrich, *Laws Standing in Way of Single-Sex Schools*, *supra* note 35, at 15A (stating that the Young Women's Leadership School uses techniques in courses which are "particularly effective with girls."); Rene Sanchez, *In East Harlem, a School Without Boys, Experiment with All-Girls Classes Taps New Mood in Public Education*, WASH. POST, Sept. 22, 1996, at A1 (discussing public educators' interest in the differences in how boys and girls learn, examining the benefits of single-sex education, and reconsidering the traditional public schooling in the light of studies showing discrimination of girls in elementary education and the domination of boys and harassment in the classroom).

<sup>46</sup> See Kristin S. Caplice, *The Case for Public Single-Sex Education*, 18 HARV. J.L. & PUB. POL'Y 227, 229 (1994).

A sizable and persuasive body of evidence suggests that same-sex education at an early age is an innovative method of effectively educating and socializing young children. It allows teachers and administrators the freedom to structure an educational program around the unique learning characteristics of boys and girls, who are acutely receptive to learning different things at different times.

*Id.*

<sup>47</sup> See Dr. Beth Willinger, *Speeches: Single Gender Education and the Constitution*, 40 LOYOLA L. REV. 253, 257 (1994) (stating that coeducational schools favor a masculine method of learning based on competition, instead of a cooperative atmosphere which focuses on studying together which is favored by women).

<sup>48</sup> See SADKER & SADKER, *supra* note 32, at 43.

<sup>49</sup> See Willinger, *supra* note 47, at 257.

<sup>50</sup> See *id.*

<sup>51</sup> See *id.* (recognizing that "women . . . plan their responses before speaking and do not give immediate responses."). The desire to plan ahead before responding is also noticeable in women's preference for written examinations over oral tests. See *id.* Women prefer to write out their thoughts. See *id.*

<sup>52</sup> See *id.* (stating that women respond to questions more slowly than men).

the male students to dominate classroom conversation allowing their ideas to be praised, criticized, or corrected, allowing them to get help when needed, and allowing them to progress academically.<sup>53</sup>

### B. Teacher Bias

Studies have found that teachers generally pay more attention to boys than to girls in the classroom.<sup>54</sup> Overall teachers are most likely to pay greatest attention to white males, then minority males, followed by white females, while the least amount of attention is paid to minority females.<sup>55</sup> Teachers call on boys in class more frequently, maintain eye contact with them, give them more positive feedback, interrupt them less in the classroom,<sup>56</sup> and give them more time to answer questions.<sup>57</sup> Teachers also allow boys to call out answers in class; whereas, they will correct girls who call out in class reminding them that they should raise their hands and wait to be called on by the teacher.<sup>58</sup> Over long periods of time, such discrimination diminishes the assertiveness of girls and leads to their passivity in the classroom.<sup>59</sup> The resulting diminished participation of girls also contributes to their dramatically lower self-esteem.<sup>60</sup>

<sup>53</sup> See SADKER & SADKER, *supra* note 32, at 42.

<sup>54</sup> See Estrich, *Laws Stand in Way of Single-Sex Schools*, *supra* note 35, at 15A (concluding that single-sex education may provide an answer to the discrimination women face in the classroom); see also Jacques Steinberg, *Where the Boys Aren't, Schoolgirls Both Eager and Not So*, N.Y. TIMES, Aug. 19, 1996, at B1 [hereinafter Steinberg, *Where the Boys Aren't*] (reporting that studies show that girls participate less in coeducational classrooms); Eva Salomon, *supra* note 40, at 58 (confirming that teachers devote more attention to male pupils).

The studies by Myra and David Sadker concerning the unfair treatment of girls in a coeducational academic setting were conducted over a year with researchers coding math, reading, English, and social studies classrooms. See SADKER & SADKER, *supra* note 32, at 2. They observed students from different racial and ethnic backgrounds and the lessons taught by male and female teachers of different races. See *id.* In analyzing America's classrooms, the Sadkers' "discovered a syntax of sexism so elusive that most teachers and students were completely unaware of its influence." *Id.*

The most noteworthy study was published by the American Association of University Women (AAUW) in their 1992 report entitled "How Schools Shortchange Girls," which stated that teachers pay more attention to boys and that girls are not encouraged to participate in math and science. See Connie Leslie, *Separate and Unequal?*, NEWSWEEK, Mar. 23, 1998, at 55 (discussing the AAUW report and the results of a subsequent report). The findings of this report would be called into question by a later AAUW report. See discussion *infra* note 192.

<sup>55</sup> See SADKER & SADKER, *supra* note 32, at 50 (basing this conclusion on their own studies and observations).

<sup>56</sup> See Willinger, *supra* note 47, at 257 (stating that teachers of both sexes generally give the control of the classroom to male students).

<sup>57</sup> See SADKER & SADKER, *supra* note 32, at 57-58.

<sup>58</sup> See *id.* at 43.

<sup>59</sup> See *id.*

<sup>60</sup> See Estrich, *Laws Stand in Way of Single-Sex Schools*, *supra* note 35, at 15A. Estrich reveals the views and experiences of the students attending the Leadership School concerning coeducational classrooms. See *id.* Students at the Leadership School recollect that

Boys receive more quality time and feedback from teachers.<sup>61</sup> Boys are more likely to be praised, corrected, helped, and criticized, whereas girls receive superficial okays from their teachers.<sup>62</sup> For example, boys are usually praised for their intelligence, but girls are often praised for their appearance.<sup>63</sup> The more specific academic feedback received by boys fosters greater student achievement.<sup>64</sup> Some teachers remarked in one study that they use superficial comments, instead of direct criticism, so that the girl's feelings are not hurt and so that she does not cry.<sup>65</sup> This type of treatment hinders girls' development because if they do not "receive negative feedback in school, they will be shocked when they are confronted by it in the workplace."<sup>66</sup>

### C. *Bias in Textbooks and Lesson Plans*

Textbooks and lessons play a fundamental role in the development of the next generation's knowledge and behavior.<sup>67</sup> "When children read about people in nontraditional gender roles, they are less likely to limit themselves to stereotypes. When children read about women . . . in history, they are more likely to feel [that women] have made important contributions to [society]."<sup>68</sup> Most textbooks do not accomplish this ideal since they are aimed towards male children and either ignore or degrade women.<sup>69</sup>

An example of sexism in textbooks is the noticeable exclusion of famous women in history and the sciences.<sup>70</sup> Studies show "that when women were left out of the curriculum, the students knew

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they felt uncomfortable around the aggressive boys and that they had been discriminated against in the classroom. *See id.*; *see also* Cohen, Symposium, *supra* note 29; SADKER & SADKER, *supra* note 32, at 1.

<sup>61</sup> *See* SADKER & SADKER, *supra* note 32, at 55.

<sup>62</sup> *See id.*

<sup>63</sup> *See id.* at 55-57 (stating that girls are praised for their hair and clothing, and for the appearance and neatness of their papers and assignments, but not for the substance of their work).

<sup>64</sup> *See id.*

<sup>65</sup> *See id.*

<sup>66</sup> *Id.*

<sup>67</sup> *See id.* at 69.

<sup>68</sup> *Id.*

<sup>69</sup> *See id.* at 7; *see also* Cohen, Symposium, *supra* note 29.

<sup>70</sup> *See* SADKER & SADKER, *supra* note 32, at 7.

[In a popular 1970's history textbook, m]ore space was given to the six-shooter than to the women's suffrage movement. In fact, the typical history text gave only two sentences to enfranchising half the population. Science texts confirmed the picture of a one-gender world, with the exception of Marie Curie who was permitted to stand behind her husband and peer over his shoulder as he looked into a microscope. Today's history and science texts are better — but not much.

nothing about them. Even worse, without real knowledge, the children filled in the gaps with stereotypes and distortions."<sup>71</sup> Young girls get the impression that historians, political leaders, and people of importance are male and that these roles are not appropriate for women.<sup>72</sup>

Textbooks also stereotype the career aspirations and behavior of women. They show men involved in many different professional jobs, but women are housewives, and if they do work outside of the home, their careers are limited to nursing and teaching.<sup>73</sup> Many textbooks stereotype girls as constantly looking in mirrors, crying, needing to be rescued, serving others, and being selfish.<sup>74</sup> Some textbooks and children's literature even have derogatory comments about girls.<sup>75</sup> Many girls will internalize and replicate these stereotypes by allowing males to dominate in the classroom and, later, in society.<sup>76</sup>

Many teachers unknowingly reinforce sexist stereotypes by using lesson plans that contain hidden sexist messages injuring the self-esteem of young girls,<sup>77</sup> and enhancing the stereotypical roles of women.<sup>78</sup> Such lessons may include the assignment of research papers using male scientists and historical figures,<sup>79</sup> and the use of

<sup>71</sup> *Id.* at 71.

<sup>72</sup> *See id.* at 8 ("When girls do not see themselves in the pages of textbooks, when teachers do not point out or confront the omissions, our daughters learn that to be female is to be an absent partner in the development of our nation.")

<sup>73</sup> *See id.*

<sup>74</sup> *See id.* at 70.

<sup>75</sup> *See id.* (stating that sexist books have led publishers to create guidelines to make sure that books would not include stereotypes and sexist language).

<sup>76</sup> *See id.* at 1 ("Until education sexism is eradicated, more than half our children will be shortchanged and their gifts lost to society . . . [T]he backlash 'is most powerful . . . when it lodges inside a woman's mind and turns her vision inward. . . ." (quoting SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* xxii (1991))).

<sup>77</sup> *See id.* ("What is even more terrifying is a curriculum of sexist school lessons becoming secret mind games played against female children, our daughters, tomorrow's women."); *see also* Salomon, *supra* note 42, at 58 ("Class instruction is planned and shaped more to fit the interests of boys.")

<sup>78</sup> *See id.* at 7-8 (stating that teachers add to the problem of lowering the self-esteem of girls by using sexist materials). One upset parent described an assignment given to two of her children in different years:

At the top of the worksheet were the faces of a man and a woman. At the bottom were different objects — nails, a saw, a sewing needle, thread, a hammer, a screwdriver, a broom. The directions said to draw a line from the man to the objects that belong to him and a line from the woman to the objects that go with her.

*Id.* In this particular household, the mother did the repair work and the father did the cooking. *See id.* Both of her children failed the assignment prompting the mother to make a complaint to the teacher. *See id.* Although she complained to the teacher about the project after the incident with her first child, a few years later her other child received the same project — nothing had changed. *See id.*

<sup>79</sup> *See* SADKER & SADKER, *supra* note 32, at 6-7 (stating that when children have to write papers on historical figures, most chose to write about men, since the contributions that

activity sheets stereotyping female roles, such as homemakers who do the dishes, instead of portraying women in government, science, or business.<sup>80</sup> In the classroom, teachers often allow boys greater access to academic tools, such as math blocks,<sup>81</sup> while telling the girls to move away.<sup>82</sup> While conducting lessons, teachers continue to favor the boys by calling on them more often than girls.<sup>83</sup> Some teachers have even been observed segregating the boys and girls into groups for their lessons, and then turning their backs on the girls or allowing the girls to be instructed by an assistant teacher while the boys get the teacher's full attention.<sup>84</sup>

#### D. Distractions

Girls also tend to be distracted by boys in the classroom, worrying about the impressions they make on the boys, and their physical appearance.<sup>85</sup> Many girls feel it is necessary to be popular, well-liked, cute, and be the cheerleader when boys are around, so as

women have made in science, history, and politics remain unknown to most students because they are neither discussed in textbooks nor in the classroom). The failure of teachers to instruct children about female scientists and inventors is particularly pervasive, and teachers do "not explain how hard it was in times past for women to obtain patents in their own names, and therefore we may never know how many female inventors are excluded from the pages of our history books." *Id.* at 7.

<sup>80</sup> *See id.* at 8. Occupational stereotyping also occurs — men are portrayed as pilots and women as stewardesses, men are doctors and women are nurses. *See id.* at 66.

<sup>81</sup> Math blocks are wooden visual aids in the shapes of blocks, colored balls, and counting sticks used in lesson plans. *See id.* at 2.

<sup>82</sup> *See id.* (recounting an incident where girls were examining and sorting the materials only to be interrupted by the teacher who told them to "[g]et [their] cotton-pickin' hands out of the math box. Move over so the boys can get in there and do their work.").

<sup>83</sup> *See id.* at 3 (recalling a librarian who called on all the boys whose hands were raised, including one that was scratching his head, before calling on a girl). The Sadkers also recount observations of the effect that being ignored has on girls. After raising her hand for more than three minutes with an animated expression and leaning forward yet receiving no recognition, the ignored girl lowered her head and spent the remainder of the class staring out the window, playing with another girl's hair, and resting her head on her arms, which were crossed on her desk. *See id.* at 44.

<sup>84</sup> *See id.* at 3. In observing one fifth grade classroom (along with the television show *Dateline*), the following incident was videotaped:

"Dateline" chose to show a segregated math group: boys sitting on the teacher's right side and girls on her left. After giving the math book to a girl to hold open at the page of examples, the teacher turned her back to the girls and focused on the boys, teaching them actively and directly. Occasionally she turned to the girls' side, but only to read the examples in the book. This teacher, although aware that she was being observed for sexism, had unwittingly transformed the girls into passive spectators, an audience for the boys. All but one, that is: The girl holding the math book had become a prop.

*Id.* "When girls go to single-sex schools, they stop being the audience & become players." *Where Have All the Smart Girls Gone?*, PSYCHOL. TODAY, Apr. 1989, at 20 (quoting Myra Sadker, dean of the school of Education at American University).

<sup>85</sup> *See* Rene Sanchez, *supra* note 45, at A1 (stating that girls at the Young Women's Leadership School waste no time flirting with guys in class, fixing their hair or clothes, or fighting over guys); *see also* Steinberg, *Where the Boys Aren't*, *supra* note 52, at B1 (remarking that some girls feel uncomfortable and insecure around boys and feel that they have to

they get older they place more emphasis on the social arena and their academic achievement is no longer a priority.<sup>86</sup> Overall, this problem is not only particular to girls since both boys and girls who are taught together tend to be more concerned with how they appear to each other than in what is being taught.<sup>87</sup> Male behavioral traits, such as aggressiveness and disruptiveness, are also blamed for distracting females from learning.<sup>88</sup>

### E. Sexual Harassment

The confidence and self-esteem of girls is further affected by the presence of sexual harassment in a coeducational environment.<sup>89</sup> Sexual harassment comes in the form of sexually denigrating comments, pinching, touching, and propositioning, all of which happen daily in the classroom.<sup>90</sup> Sexual harassment is ram-

look nice for them). "I don't want to go to school to be a model," [stated one student attending the Young Women's Leadership School]. "I want to go to school to learn." *Id.*

<sup>86</sup> See SADKER & SADKER, *supra* note 32, at 94.

<sup>87</sup> See Perry, *supra* note 44, at 34. "Without boys . . . there are no distractions. We can concentrate on learning.' Without boys, they have the freedom to focus their intellectual energy and less competition with one another over particular boys." Powell & Powell, *supra* note 84, at 56.

<sup>88</sup> See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 739 (Powell, J., dissenting). For instance, in a program where middle school students were grouped together for math and science classes, it was discovered that there were fewer discipline problems and the girls appeared to express their opinions more freely. See Perry, *supra* note 44, at 32. In addition, the boys felt no pressure to perform for the girls, and therefore, their behavior also improved. See *id.* at 33. The Myrtle Avenue Middle School in New Jersey, where falling grades and poor discipline had once plagued the school, is another perfect example of a situation where eliminating the distractions of the opposite sex improved the educational environment. See *CBS Evening News* (CBS television broadcast, Mar. 18, 1996), available in 1996 WL 7811086 (investigating the resurgence of single-sex education in the public schools and presenting both sides of the single-sex education issue). This school formed single-sex classes within the coeducational public school and thus improved discipline and promoted greater conversation amongst the students; a greater impetus on learning resulted in both sexes. See *id.* This program, and others in New Jersey, have also been threatened by lawsuits, and despite their successes, will most likely close due to political pressure. See *id.*

<sup>89</sup> See *The Pros and Cons of Single-Sex Education: Should Men and Women Learn Together?*, U.S. NEWS & WORLD REP. July 8, 1996, at 5153, available in 1996 WL 7811086 (covering a U.S. News & World Report panel consisting of representatives from VMI and the ACLU, the Citadel President, and others discussing the VMI decision and single-sex education); see also SADKER & SADKER, *supra* note 32, at 9.

Research continues to support the fact that women, even in coeducational settings, do not have equal opportunities. For example, on coeducational campuses many women find that . . . they're subjected to chilly climates that harass them physically, sexually and emotionally.

*The Pros and Cons of Single-Sex Education: Should Men and Women Learn Together?*, *supra*, at 5153.

<sup>90</sup> See SADKER & SADKER, *supra* note 32, at 9 (stating that while teachers and administrators ignore the behavior, the girls are so intimidated that they are forced to "suffer in silence"); see also Laura Williams et al., *Hands Off: Girls Pass a Gauntlet of Gropes in Schools*, N.Y. DAILY NEWS, June 15, 1997, at 4 (stating that "sexual harassment is rampant in city schools, leaving [girls] victims to groping, man handling and taunting by boys in hallways and classrooms."). Sexual harassment in one New York City school has included some girls

pant in today's middle schools, with more than seventy-five percent of all girls reporting that they had received sexual comments, jokes, gestures, or looks, and two-thirds of middle school girls have been touched, grabbed, or pinched.<sup>91</sup> The New York Board of Education recorded 343 sexual offenses for the 1996-1997 school year.<sup>92</sup> These offenses included rape, abuse, harassment, sodomy, and gang rape.<sup>93</sup>

Sexual Harassment is tolerated by many teachers who are "under the assumption that 'boys will be boys.'"<sup>94</sup> Many girls are so intimidated that they suffer in silence, while those who fight back merely open themselves up to additional harassment.<sup>95</sup> Those who do come forward with sexual harassment claims are dealt with swiftly, and many times the incidents are forgotten, pushed aside, or blamed on the girl.<sup>96</sup>

#### F. *The All-Girls School Solution*

The benefits of single-sex education have led many to rethink the idea of the common coeducational public school and whether it is right for all students.<sup>97</sup> It has been suggested that strictly equal education may not be the best option for all girls.<sup>98</sup>

Each time a girl opens a book and reads a womanless history, she learns she is worth less. Each time the teacher passes

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"feel[ing] a hand making its way up [their] thigh, being forced to reveal their sexual lives, and boys screaming derogatory comments, such as 'bitch,' 'hey shorty,' and 'chicken head' ([which is] slang for promiscuous)" as they walk down the hall. *Id.*

<sup>91</sup> See Williams et al., *supra* note 90, at 4.

<sup>92</sup> See *id.*

<sup>93</sup> See *id.*

<sup>94</sup> SADKER & SADKER, *supra* note 32, at 9, 13 (stating that this attitude has led sexual harassment to be a way of life in United States schools). See also Williams et al., *supra* note 90, at 4 (stating that girls do not report the harassment because teachers, guards and administrators do not do anything).

<sup>95</sup> See SADKER & SADKER, *supra* note 32, at 9, 13 (noting that these targeted girls become intimidated and feel like members of an inferior class); see also Williams et al., *supra* note 90, at 4 (stating that girls do not report harassment out of fear of retaliation).

<sup>96</sup> See SADKER & SADKER, *supra* note 32, at 9 (discussing that when girls "come forward, bringing school sexual harassment into the open, it is often dealt with quickly and nervously; it is swept under the rug, turned aside or even turned against the girl who had the courage to complain."). One account consists of a girl whose derriere was pinched by two boys and harassed verbally. See *id.* When the incident was reported, the principal informed her that she was dressed inappropriately and that she asked for it. See *id.*

<sup>97</sup> See Sanchez, *supra* note 45, at A1 (stating that educators are rethinking single-sex schools because they can increase academic achievement, reduce social pressures, and help self-esteem).

<sup>98</sup> See *id.* (stating that schools are reconsidering "the one-size-fits-all, fully integrated model of public schooling"). "There's a lot of rethinking about the whole idea of the common public school and whether it's absolutely right for everyone. . . . No one wants an entirely separate system, but on the other hand there are real differences between boys and girls." *Id.* (quoting Diane Pavitch, a public education scholar at New York University and a former Assistant Education Secretary under President George Bush).

over a girl to elicit the ideas and opinions of boys, that girl is conditioned to be silent and defer. As teachers use their expertise to question, praise, probe, clarify, and correct boys, they help these male students sharpen ideas, refine their thinking, gain their voice, and achieve more. When female students are offered the leftovers of teachers time and attention, morsels of amorphous feedback, they achieve less.

Then girls and women learn to speak softly or not at all; to submerge honest feelings, withhold opinions, and defer to boys; to avoid math and science as male domains; to value neatness and quiet more than assertiveness and creativity; to emphasize appearance and hide intelligence. Through this curriculum in sexism they are turned into educational spectators instead of players. . . .<sup>99</sup>

These problems are clearly reconcilable by an all-girls school education.<sup>100</sup> Many girls perform better when their teachers use different teaching styles, academic programs, and create a more friendly atmosphere from those used for boys. The content of the curriculum in an all-girls school can focus more on women who have achieved prominence in the past, as well as women who are current scholars, politicians, and high-profile persons.<sup>101</sup> Classes focused on the interests, strengths, and history of women have resulted in women with higher self-esteem and confidence, who are more interested in nontraditional subjects and less likely to stereotype careers, are more intellectually curious, more serious about their studies, and ultimately achieve more.<sup>102</sup> All-girls schools also provide role models for girls through a curriculum highlighting accomplished women and their careers.<sup>103</sup> Role models and men-

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<sup>99</sup> SADKER & SADKER, *supra* note 32, at 13.

<sup>100</sup> See, e.g., Barbara S. Powell & Arthur G. Powell, *For Girls, Schools of Their Own*, 43 INDEP. SCHOOL 55, 56 (Oct. 1983).

[G]irls' schools often can be especially powerful environments to address both of the key problems of female adolescent development: developing an assertive, risk-taking, active, questioning attitude toward learning, while at the same time enhancing supportive female qualities of nurturing and caring.

*Id.*

<sup>101</sup> See Willinger, *supra* note 47, at 257. As in women's colleges, the curricula in a single-sex secondary schools can center on successful women. See *id.* "Such learning validates one's self-experience." *Id.*

<sup>102</sup> See SADKER & SADKER, *supra* note 32, at 233; see also Salamone, *supra* note 7, at 1 ("[W]omen graduates of single-sex schools . . . will confirm how such institutions help women shed socially imposed limitations on their own capabilities."). "With alarming consistency girls learn as they grow up that their role requires giving over to boys leadership positions, the study of certain subjects such as mathematics and the sciences, and certain important attitudes toward learning — such as questioning, challenging, and risk taking." Powell & Powell, *supra* note 84, at 56.

<sup>103</sup> See Willinger, *supra* note 47, at 257-58.

tors are also more accessible in all-girls schools, because more of the teachers and administrators tend to be female.<sup>104</sup>

Girls may also benefit from being physically separated from boys. When there are no boys in the classroom, they will not be "educational spectators"<sup>105</sup> — they will automatically get the teacher's attention, boys will not be able to shout out answers, and they will be given the opportunity to answer questions. In addition, girls feel freer to speak out in a single-sex environment, because they do not feel that they need to impress the boys with clever remarks.<sup>106</sup> Single-sex schools "free [their] students of the burden of playing the mating game while attending classes."<sup>107</sup>

Although successful all-girls schools focus on intellectual growth, academic achievement, independence, and self-esteem,<sup>108</sup> many critics argue that single-sex education is unrealistic and unproductive since in the real world men and women work together.<sup>109</sup> While critics recognize the benefits of single-sex education, they say the gains are temporary and that the girls cannot "survive the transition to a male-dominated world."<sup>110</sup> Advocates refute these claims arguing that the girls develop assertiveness, confidence, and leadership skills that help them throughout their lives.<sup>111</sup> The advocate's assertions have been confirmed by educators who have found that college women who were educated in all-girls elementary and high schools were more assertive than women from coeducational schools, and were even more assertive than many men.<sup>112</sup>

Single-sex education is good for both women and society: "the United States can not afford to have 51% of the population [the percentage of women in the population] fail to meet their potential."<sup>113</sup> Girls comprise the majority of the nation's school children, and yet they are being treated as "second-class educational

<sup>104</sup> See *id.* at 258 (stating the benefits that "come about by having more women faculty, or at least faculty who are not prone to discriminate on the basis of sex, and women administrators."). In all-girls schools, women set policies for women and serve as mentors. See *id.*

<sup>105</sup> See SADKER & SADKER, *supra* note 32, at 234.

<sup>106</sup> See Perry, *supra* note 44, at 34.

<sup>107</sup> *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 739 (Powell, J., dissenting). See also Powell & Powell, *supra* note 100, at 56 ("Many girls in single-sex schools believe these schools provide a place apart for them to develop according to their own social, intellectual, and biological timetables, and to be judged on grounds other than how popular they are with boys.").

<sup>108</sup> See SADKER & SADKER, *supra* note 32, at 247.

<sup>109</sup> See *id.* at 248.

<sup>110</sup> *Id.*

<sup>111</sup> See *id.*

<sup>112</sup> See *id.* at 248-49 (citing Kathleen Welch who compared the assertiveness of students in classrooms at Wellesley, Smith, Brown, and Yale).

<sup>113</sup> Genn, Symposium, *supra* note 29.

citizens" by public schools.<sup>114</sup> The broadened educational and career opportunities enjoyed by economically advantaged women can have a profound effect on the lives of underprivileged women, "whose vision[s are] painfully dimmed by burdens of poverty that weigh disproportionately on women, specifically pregnancy, single motherhood, and a resulting lifetime of dependency on public assistance."<sup>115</sup> Single-sex education can broaden a girl's vision and self-reliance, address social problems, and break the welfare cycle.<sup>116</sup>

## II. THE BACKGROUND AND DEVELOPMENT OF THE YOUNG WOMEN'S LEADERSHIP SCHOOL

### A. *The Factual Background of the Young Women's Leadership School*

The Young Women's Leadership School, the first New York single-sex public school in over a decade,<sup>117</sup> is the brainchild of Ann Rubenstein Tisch, with help from the Manhattan Institute's Center for Educational Innovation and District 4.<sup>118</sup> The Leadership School was founded to combat the discrimination faced by girls within an inadequate and biased public school system, deal with emotional and scholastic problems resulting from teenage pregnancy, and prevent the continuous welfare cycle in which many minority women find themselves entangled.<sup>119</sup> Using New York private and parochial single-sex schools as models, the school is aimed at helping women become more "self-confident, self-reliant, and independent learners."<sup>120</sup> The founders of the Leader-

<sup>114</sup> SADKER & SADKER, *supra* note 32, at 1 (stating that the "problems [girls] face — loss of self-esteem, decline in achievement, and elimination of career options — are at the heart of the educational process.")

<sup>115</sup> Salamone, *supra* note 7, at 1.

<sup>116</sup> *See id.*

<sup>117</sup> *See* Macchiarola, Symposium, *supra* note 29; *see also* Anemona Hartocollis, *A Public School for Girls Only: It's Seen as a Haven Where They Will Excel*, N.Y. DAILY NEWS, July 15, 1996, at 4 (tracing the development of the first all-female school in New York in over ten years, and explaining that the purpose is to provide a school where high achieving girls from disadvantaged backgrounds can excel); Leo, *supra* note 32, at 18 (stating that the Leadership School is the first single-sex public school "since the civil rights movement virtually eliminated such schools across the country"). The last all-girls school in New York was Washington Irving High School which in 1986 was ordered by Chancellor Quinones to admit boys for fear it violated civil rights laws. *See* Steinberg, *Plan for Harlem Girls School Faces Concern Over Sex Bias*, *supra* note 23, at A1.

<sup>118</sup> *See, e.g.,* *The Forbidden School*, *supra* note 1, at A14; Steinberg, *Plan for Harlem Girls School Faces Concern Over Sex Bias*, *supra* note 23, at A1.

<sup>119</sup> *See* Salamone, *supra* note 7, at 1 ("The Young Women's Leadership School [provides] an opportunity to broaden [such a bleak] vision beyond their imagination, develop self-reliance, break the welfare cycle and thereby more successfully address social problems that until now have seemingly defied resolution."). For further discussion of the inadequacies of the current coeducational public school system, *see supra* Part I.

<sup>120</sup> *The Forbidden School*, *supra* note 1, at A14. *See also* Hartocollis, *supra* note 117, at 4.

ship School assert that the absence of boys will help girls' self-esteem and assertiveness in the classroom, and encourage them to emerge as leaders.<sup>121</sup> In providing these girls with a tailored education enabling them to reach their maximum potential, the founders of the Leadership School aver that girls will be able to rise above the poverty by which they are surrounded and become valuable leaders in their communities, in business, and in academia.<sup>122</sup>

Mrs. Tisch conceptualized the Leadership School while working as a journalist covering educational issues for NBC and while volunteering at a public school in South Ozone, New York.<sup>123</sup> These experiences allowed her to witness the academic problems faced by girls and the need to place women on a separate path in order to avoid teenage pregnancy.<sup>124</sup> She believed this tracking should begin in middle school, where the unraveling begins, rather than in high school, where women clearly have been found to have fallen behind their male counterparts and where teenage pregnancy has become commonplace.<sup>125</sup> Mrs. Tisch brought her idea for an all-girls public school to Coleman Genn, Director of the Center of Educational Innovation, who proposed District 4 as the future location for the only single-sex school in New York.<sup>126</sup>

This is not be the first time District 4 has participated in alternative educational programs. It maintains schools geared towards math and science, two for the performing arts, one focusing on writing, a prep school, and a maritime school.<sup>127</sup> These smaller programs in East Harlem have proven to be very successful.<sup>128</sup> There are now a total of fifty-two schools within District 4 housed in over twenty buildings.<sup>129</sup> The success of these programs has been partially attributed to the parents' ability to chose the appro-

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<sup>121</sup> See Jacques Steinberg, *Just Girls, and That's Fine with Them, At a New School, No Boys, Less Fussing, and a Freer Spirit*, N.Y. TIMES, Feb. 1, 1997, at 21 [hereinafter Steinberg, *Just Girls, and That's Fine with Them*] (covering the teaching strategies, programs, expansion, and successes of the Leadership School). The teachers are able to promote this goal by sending letters to the parents of students who are quiet in class urging them to speak out. *See id.* In addition, Steinberg comments that the girls attending the Leadership School have experienced changes in their attitudes and now believe that they can do anything they want with their lives and enter any occupation. *See id.*

<sup>122</sup> See Sanchez, *supra* note 45, at A1; *see also* Hartocollis, *supra* note 117, at 4.

<sup>123</sup> See Tisch, Symposium, *supra* note 29.

<sup>124</sup> *See id.*

<sup>125</sup> *See id.*; *see also* Steinberg, *Plan for Harlem Girls School Faces Concern Over Sex Bias*, *supra* note 23, at A1.

<sup>126</sup> See Tisch, Symposium, *supra* note 29; *see also* Steinberg, *Plan for Harlem Girls School Faces Concern Over Sex Bias*, *supra* note 23, at A1.

<sup>127</sup> See Leo, *supra* note 34, at 7.

<sup>128</sup> See Genn, Symposium, *supra* note 29. These programs have been successful, very popular, and have resulted in increased reading and math scores. *See id.*

<sup>129</sup> *See id.*

priate school for each student and to the small size of the programs, which is unlike the standard public middle school, where students are largely anonymous.<sup>130</sup>

On September 4, 1996, District 4 opened its newest innovative educational program, the Leadership School, on 106th Street in East Harlem.<sup>131</sup> The school emphasizes learning techniques tailored towards women, especially in math and the sciences.<sup>132</sup> These techniques include implementing a cooperative atmosphere for learning where students engage in conversational dialogue while seated around a table,<sup>133</sup> a curriculum emphasizing women in history,<sup>134</sup> a lab setup that allows greater student-teacher interaction,<sup>135</sup> and visual tools to help the girls achieve a greater understanding of complex mathematical and scientific concepts.<sup>136</sup> Additional care was taken to give the school a more relaxed feel, such as light pink walls, couches, rocking and wicker chairs, rugs, and classical music in the hallways to enhance the cooperative atmosphere proven to be more conducive to successfully educating women.<sup>137</sup> This cooperative atmosphere is furthered by limiting class size to eighteen students in order to encourage open discussion.<sup>138</sup>

The school opened with fifty seventh graders in the fall of 1996.<sup>139</sup> Since the school opened as a middle school, District 4, which has sole control over elementary and middle schools located

<sup>130</sup> See *id.*

<sup>131</sup> See *supra* note 24 and accompanying text (discussing the opening date of the school).

<sup>132</sup> See Estrich, *Ideologues Decry Single-Sex Education*, *supra* note 35, at 15A; see also CBS *Evening News*, *supra* note 88; CBS *This Morning*, *supra* note 24 (reporting a discussion between a parent of a Leadership School student, who supports the school, and Michael Myers of the NYCLU, who opposes the school and single-sex education in the public schools).

<sup>133</sup> See Sanchez, *supra* note 53, at A1 (stating that the girls sit at small tables creating a more cooperative atmosphere than sitting in desks arranged in rows).

<sup>134</sup> See Steinberg, *Just Girls, and That's Fine with Them*, *supra* note 121, at 21. Teachers use the stories of girls who lived in medieval Europe in order to help girls find positive role models. See *id.*

<sup>135</sup> See Estrich, *Ideologues Decry Single-Sex Education*, *supra* note 13, at 15A.

<sup>136</sup> See *id.* During math instruction, teachers use props such as six packs of Diet Coke or sections of cantaloupe to demonstrate fractions instead of relying exclusively on paper and pencils. See Steinberg, *Just Girls, and That's Fine with Them*, *supra* note 121, at 21. In science classes, there are discussions concerning the qualities of minerals where the girls are allowed to devise their own categories in order to set up a classification system. See *id.*

<sup>137</sup> See Steinberg, *Just Girls, and That's Fine with Them*, *supra* note 121, at 21; see also Henry, *supra* note 11, at 1D.

<sup>138</sup> See Steinberg, *Just Girls, and That's Fine with Them*, *supra* note 121, at 21.

<sup>139</sup> See Mohamad Bazzi & Dexter Chambers, *All-Girls Public School Gets Nod*, *NEWSDAY*, Aug. 22, 1996, at A27; see also Lawrence Goodman, *All-Girls Schools Win Approval*, *N.Y. DAILY NEWS*, Aug. 22, 1996, at 7 [hereinafter Goodman, *All-Girls Schools Win Approval*]. These two articles report the unanimous approval of the Board of Education and the subsequent filing of a federal civil rights complaint claiming that the school wrongly discriminates against boys and segregates girls.

within its borders,<sup>140</sup> did not require approval for the school from the New York Board of Education; nevertheless, the Board approved the school unanimously, even though they recognized the complex legal issues and challenges involved.<sup>141</sup> When the school opened, the Board approved the expansion of the Leadership School through the twelfth grade beginning in 1998.<sup>142</sup> In the fall of 1997, the Leadership School planned that an additional fifty-five seventh graders and fifty-five ninth graders would be accepted.<sup>143</sup> Eventually, the Young Women's Leadership School and the Board of Education envisioned that there would be a total of 330 students in grades seven through twelve.<sup>144</sup>

The school is representative of the students in District 4, and incorporates programs for students with limited English and special needs.<sup>145</sup> The school is attended mainly by Hispanic and black students,<sup>146</sup> who make up the majority of the district's population.<sup>147</sup> Eighty percent of the students come from the surrounding neighborhood.<sup>148</sup> The admissions criteria give preference to local girls from disadvantaged backgrounds who have strong academic records.<sup>149</sup> Therefore, even girls who are from District 4 do not receive automatic admission. All students are evaluated on the basis of their transcripts, recommendations, interviews, and pre-admission testing.<sup>150</sup>

A comparable all-male school, scheduled to open in the fall of 1997,<sup>151</sup> was originally proposed by the Center for Educational In-

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<sup>140</sup> See Hartocollis, *supra* note 117, at 4.

<sup>141</sup> See Bazzi & Chambers, *supra* note 139, at A27 (reporting statements by Chancellor Rudy Crew acknowledging the legal issues and declaring that he is confident the board's action will defeat any legal challenge); see also Administrative Complaint, *supra* note 28, at 7 (stating that the Leadership School was part of the local junior high school which allows the District "to open the school without having to seek the approval of the Board of Education.").

<sup>142</sup> See Goodman, *All-Girls Schools Win Approval*, *supra* note 139, at 7; see also Steinberg, *Plan for Harlem Girls School Faces Concern Over Sex Bias*, *supra* note 23, at A1; Jacques Steinberg, *Central Board Backs All-Girls School*, N.Y. TIMES, Aug. 22, 1996, at B3.

<sup>143</sup> See Steinberg, *Just Girls, and That's Fine with Them*, *supra* note 121, at 21.

<sup>144</sup> See *id.*

<sup>145</sup> See Genn, *Symposium*, *supra* note 29.

<sup>146</sup> See Stephanie Gutman, *Class Conflict*, NEW REPUBLIC, Oct. 7, 1996, at 12 (discussing the conflict between civil rights groups, who supposedly represent the interests and protect the rights of the underprivileged and yet are against single-sex schools, such as the Leadership School, and the poorer and minority classes who are in favor of these schools); see also George F. Will, *Secret of School Success*, WASH. POST, Sept. 15, 1996, at C7 (summarizing the unique educational programs that exist in East Harlem, including the Leadership School).

<sup>147</sup> See Leo, *supra* note 34, at 7.

<sup>148</sup> See Steinberg, *Where the Boys Aren't*, *supra* note 54, at B1.

<sup>149</sup> See Sanchez, *supra* note 45, at A1.

<sup>150</sup> See Gutman, *supra* note 146, at 12.

<sup>151</sup> See Lawrence Goodman with Anne E. Kornblut, *New School Agender Boys' HS*, N.Y. DAILY NEWS, Dec. 11, 1996, at 2 (stating that the all-male school would also be located in

novation at the Manhattan Institute, but this plan has been put on hold.<sup>152</sup> The boys school would have opened with sixty seventh graders and then, like the Leadership School, would eventually expand through the twelfth grade.<sup>153</sup> The school would also have a dress code, leadership classes, and a college preparatory curriculum.<sup>154</sup> However, this plan has been criticized by the New York Civil Liberties Union (NYCLU)<sup>155</sup> on the grounds that schools should be "improving the integrated model [where girls and boys attend school together] and not . . . institutionalizing segregated models."<sup>156</sup> Michael Meyers, Executive Director of the New York Civil Rights Coalition (NYCRC), claims that the proposed all-boys school is "as offensive and discriminatory as an all-girls school."<sup>157</sup> Single-sex school opponents say that the all-boys school was conceived merely to fend off a legal battle over the all-girls school.<sup>158</sup> Although school officials acknowledge that the all-male school would help protect the Leadership School from legal challenges, they maintain that the purpose of opening an all-boys school would be to provide male students with the same benefits of single-sex education experienced by the girls at the Leadership School.<sup>159</sup>

It has now been almost two years since the Young Women's Leadership School opened its doors. As planned, the school has expanded to the eighth and ninth grades, and it will continue to expand by adding a grade each year.<sup>160</sup> The school tripled its size

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District 4 and that it would be the first all-male school in New York in more than twenty years).

<sup>152</sup> See *id.* at 2; see also Liz Willen, *Boys-Only School, Proposal Triggers Civil Rights Concerns*, NEWSDAY, Dec. 11, 1996, at A4 [hereinafter Willen, *Boys-Only School*] (stating that the all-boys school will be based upon the Leadership School). For a discussion of the rejection of the all-boys school option, see *infra* notes 256-57 and accompanying text.

<sup>153</sup> See Goodman with Kornblut, *supra* note 151, at 2.

<sup>154</sup> See *id.*

<sup>155</sup> See *id.*; see also Willen, *Boys-Only School*, *supra* note 152, at A4.

<sup>156</sup> Goodman with Kornblut, *supra* note 151, at 2 (quoting Norman Siegel, the executive Director of the NYCLU).

<sup>157</sup> Willen, *Boys-Only School*, *supra* note 152, at A4 (stating that the New York Civil Rights Coalition "objects to any public school that excludes on the basis of gender" (quoting Michael Meyers)).

<sup>158</sup> See Rose Kim, *Not Making the Grade? All-Girl School's Foes Fault U.S. Probe*, NEWSDAY, Feb. 3, 1997, at A20 (discussing the opponents' of the Leadership School view that the Board of Education has withheld requested documents from the Office of Civil Rights in order to postpone the investigation until the all-boys school is established). Norman Siegel, of the NYCLU, agrees that the creation of an all-male equivalent could aid the Department of Education in finding that the school is legal: "The creation of an all-boys school in the district . . . could undermine the argument against the all-girls school because federal regulations, in certain cases, sanction single-sex schools if there is a comparable facility for the opposite gender." *Id.*

<sup>159</sup> See Goodman with Kornblut, *supra* note 151, at 2.

<sup>160</sup> See Ted Rueter, *Girls-Only is OK Single-Sex Schools are a Form of Diversity*, CHRISTIAN SCIENCE MONITOR, Oct. 23, 1997, at 19, available in 1997 WL 2804763.

in the 1997-98 school year to 163 students<sup>161</sup> and still maintains a sizeable waitlist for the seventh and eighth grades.<sup>162</sup>

The Leadership School has enjoyed great success in its short history. In fact, one student involved in the chess program went to the city championship,<sup>163</sup> and another student won a city science prize.<sup>164</sup> The school also offered a special two-week science program at Smith College in Northampton, Massachusetts during the summer.<sup>165</sup> Most importantly, however, is that the school is praised by both the students and their parents.<sup>166</sup>

### B. Other Programs That Are Similar to the Young Women's Leadership School

There has been a resurgence of single-sex education throughout the United States over the past decade, but most of the proposals have been for all-male schools for minority students.<sup>167</sup> Many of these schools created in the late 1980s and early 1990s were built on an Afrocentric curriculum aimed at improving the self-esteem of African-American boys.<sup>168</sup> The objective of these schools was to provide a disciplined environment, with no distractions, and male instructors to serve as role models for disturbed teenage males raised by single mothers.<sup>169</sup>

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<sup>161</sup> See Leslie, *supra* note 54, at 55.

<sup>162</sup> See *Harassed*, WALL ST. J., Oct. 6, 1997, at A22.

<sup>163</sup> See *id.*

<sup>164</sup> See *id.*

<sup>165</sup> See Steinberg, *Just Girls, and That's Fine with Them*, *supra* note 121, at 21.

<sup>166</sup> See *Harassed*, *supra* note 162, at A22.

<sup>167</sup> See *supra* note 22-23 and accompanying text.

<sup>168</sup> See Innerst, *supra* note 22, at A1. In Milwaukee, two African-American schools, an elementary and middle school, for the study of African heritage, and the special educational, social and emotional needs of young black males were created. See *id.* The purpose of the schools was to remedy the poor achievement of black males — less than 20% of the black males in Milwaukee had a C average or better and the suspension rates were very high. See *Public Schools for Black Males*, CHRISTIAN SCIENCE MONITOR, Feb. 4, 1991, at 20 (arguing that the all-male minority schools proposed in New York and Milwaukee could teach beneficial lessons on how to keep boys in school and off the streets). The school was eventually forced to go coeducational. See Isabel Wilkerson, *Detroit Schools Would be First of their Kind in U.S., Only Inner-City Boys Would Attend; Court Case Begins*, SAN DIEGO UNION-TRIB., Aug. 15, 1991, at D3 (discussing the formation of all-male minority schools in Detroit, the reasons they are necessary, and the opposing view). In Baltimore, three elementary schools had separate classes for black males within the schools. See Innerst, *supra* note 22, at A1.

<sup>169</sup> See Hildebrand, *supra* note 22, at 17. Detroit, a city where 70% of the students were raised by single mothers, and two out of three boys and one out of three girls do not graduate, created three schools for 560 boys. See Wilkerson, *supra* note 168, at D3. The schools' curricula were infused by African-centered instruction, black teachers as role models, Saturday classes, tutoring, and instruction to build self-esteem in order to prevent these students from falling through the cracks. See *id.*

In New York, the programs for African-American males dwindled due to criticism by civil rights groups and politicians.<sup>170</sup> New York introduced two single-sex programs in Brooklyn, one established all-male minority classrooms within a coeducational school,<sup>171</sup> and the Ujamaa Institute which was formed to educate African-American and Hispanic boys.<sup>172</sup> The Ujamaa Institute offered courses emphasizing African-American culture and history,<sup>173</sup> and classes were taught by black teachers who would instill pride and provide positive role models for these students.<sup>174</sup> Due to political pressure, however, the school changed its name to the Middle College High School at Medger Evers College, changed the curriculum, and admitted all ethnic and racial groups.<sup>175</sup> Opponents of the school argued that there is no proof that all-boys schools would be effective, or that removing girls would act as a solution to the high drop-out rates, violence, and crimes of young minority males.<sup>176</sup>

Although political pressures have closed the New York programs, several rulings have been made in the last decade by the Office of Civil Rights concerning the legality of other similar schools.<sup>177</sup> These rulings have found that all-male public schools are discriminatory,<sup>178</sup> but these schools were also declared discriminatory because they were segregating students by race and there were no equivalent opportunities for the girls in these districts.

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<sup>170</sup> See Innerst, *supra* note 22, at A1.

<sup>171</sup> See Hildebrand, *supra* note 22, at 17. This program was held at P.S. 137 in Brooklyn, where the principal created a third grade class of minority students. See *id.* The school was immediately challenged by local civil rights groups. See *id.*

<sup>172</sup> See Innerst, *supra* note 22, at A1.

<sup>173</sup> See Pam Belluck, *Complaint Against Newcomer School*, N.Y. TIMES, Nov. 14, 1995, at B4. Belluck discusses the opposition to a school established for immigrants with the goal of instructing the students in English, providing counseling, and aiding in the assimilation into American culture in order to mainstream them into regular public schools after one year. The students also have the opportunity to stay. This school was also challenged by Meyers and discusses the other New York schools that have been challenged in the last decade.

<sup>174</sup> See *Public Schools for Black Males*, *supra* note 168, at 20.

<sup>175</sup> See Belluck, *supra* note 173, at B4.

<sup>176</sup> See Hildebrand, *supra* note 22, at 17 (stating that critics argue that girls are not the problem and therefore removing them from the classroom will not rectify the problems; in addition, they argue that 45 percent of the drop-outs happen to be girls).

<sup>177</sup> See *id.* For examples of such rulings, see, e.g., Letter from Cathy H. Lewis, Acting Director, Policy and Enforcement Service, Office for Civil Rights, to Barbara A. Bitters, Cultural and Equity Section, Wisconsin Department of Public Instruction (May 18, 1990), in *Administrative Complaint*, *supra* note 28, at Exhibit J; Letter from Jesse L. High, Regional Civil Rights Director, Office of Civil Rights, to Joseph A. Fernandez, Superintendent of Schools, Dade County Public Schools (Aug. 31, 1988), in *Administrative Complaint*, *supra* note 28, at Exhibit K.

<sup>178</sup> See *id.*

Despite the lack of success for all-boys minority schools in New York and around the country, there are examples of highly successful all-girls public schools in the United States.<sup>179</sup> The Philadelphia High School for Girls ("Girls High") and Western High School in Baltimore, both of which have been in existence for over 150 years,<sup>180</sup> were founded when single-sex schools were the norm.<sup>181</sup> Girls High selects students from economically and racially diverse neighborhoods throughout the city of Philadelphia.<sup>182</sup> Since the 1980s, Girls High has suffered from an enrollment decline due to competition with coeducational schools, and its average SAT score has dropped slightly, but the school maintains a very low drop-out rate, there is never any violence on school grounds, and all of its graduates go on to college.<sup>183</sup> Girls High also boasts an impressive list of alumnae including prominent scholars, professionals, and politicians.<sup>184</sup> It is probable that Girls High and Western High outlived the coeducation movement because they only accepted top students, and maintained excellent reputations and high graduation rates.<sup>185</sup>

These schools have not avoided investigation by the Department of Education's Office of Civil Rights.<sup>186</sup> During the investiga-

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<sup>179</sup> See Steinberg, *Plan for Harlem Girls School Faces Concern Over Sex Bias*, *supra* note 23, at A1 (reporting that the supporters of the Young Women's Leadership School point to these schools as successful models of all-girls education); see also Mary B.W. Tabor, *Planners of a New Republic School for Girls' Look to Two Other Cities*, N.Y. TIMES, July 22, 1996, at B1 (presenting the Philadelphia High School for Girls and the Western High School in Baltimore as two successful all-girls public schools which have served as examples for the Leadership School). These schools have survived federal reviews and legal challenges, which can be used to help defend the School in New York. See *id.*

<sup>180</sup> See Steinberg, *Plan for Harlem Girls School Faces Concern Over Sex Bias*, *supra* note 23, at A1.

<sup>181</sup> See Tabor, *supra* note 179, at B1 (stating that Girls High and Western were found in the 1840s when all-girls schools were common place).

<sup>182</sup> See *id.*

<sup>183</sup> See *id.*

<sup>184</sup> See *id.* Girls High alumnae include Judith Rodin, the first female President of the University of Pennsylvania and the first female President of an Ivy League university. See *id.*

<sup>185</sup> See *id.*

<sup>186</sup> See *id.* The Office for Civil Rights, headed by the Assistant Secretary for Civil Rights, is a division of the Department of Education. See 20 U.S.C.A. § 3413(a) (West 1990). The duties of the Office include making annual reports to the Secretary of Education, Congress, and the President concerning "the compliance and enforcement activities of the Office for Civil Rights and identifying significant civil rights or compliance problems" where corrective action has been recommended. *Id.* § 3413(b)(1). Broadly, the Office "collect[s] or coordinate[s] the collection of data necessary to ensure compliance with civil rights laws within the jurisdiction of the Office of Civil Rights." *Id.* § 3413(c)(1). This delegation has provided the Office the power to "[p]rovide overall leadership, coordination and direction for the Department's programs of civil rights." 7 C.F.R. § 2.89 (1997). The Office is allowed to bring "[a]ctions to enforce Title VI of the Civil Rights Act of 1964" and "Title IX of the Education Amendments of 1972." *Id.* § 2.89(a)(1)(i), (iii). This power also includes the ability to "[c]onduct investigations and compliance reviews" of educational programs and to "develop regulations, plans, and procedures necessary to

tion of Girls High and Western High, the fact that boys are not prohibited from applying was one of the defenses used by these two all-girls schools. Girls High and Western High School never stated that their outright mission is to educate girls.<sup>187</sup> Boys are free to apply, though none have ever decided to attend.<sup>188</sup> In 1992, a United States Department of Education Office of Civil Rights investigation found these schools to be constitutional because they are open to boys and girls, and therefore did not deny admission on the basis of sex.<sup>189</sup> These schools have also been upheld by the Office of Civil Rights as remedies for what researchers have found to be a decline in achievement by teenage girls, especially in math and science, in coeducational settings.<sup>190</sup>

The all-girls schools have had more success in legal actions than the all-boys schools. This is partially because the boys schools were also racially segregated, which is not an issue in the Leadership School, there were no equivalent programs for girls, and because there is no evidence that boys perform better in a single-sex classroom.<sup>191</sup> There are, however, multiple studies discussing the benefits of single-sex education for girls.<sup>192</sup>

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carry out the Department's civil rights programs." *Id.* § 2.89(a)(13), (14). For an exhaustive list of the Office of Civil Rights' powers, see *id.* § 2.89(1)-(29).

<sup>187</sup> See Tabor, *supra* note 179, at B1 (stating that this open admissions policy has allowed the schools to avoid major court battles).

<sup>188</sup> See *id.*

<sup>189</sup> See Somini Sengupta, *East Harlem District in Considering an All-Boys Public School*, N.Y. TIMES, Dec. 12, 1996, at B9 (discussing the legality of the proposed all-male equivalent of the Young Women's Leadership School and that, although all-girls schools have been held to be legal, this may not apply to an all-boys school).

<sup>190</sup> See *id.*

<sup>191</sup> See Sengupta, *supra* note 189, at B9.

<sup>192</sup> One report leading to the new popularity of single-sex schools was the American Association of University Women's (AAUW) 1992 study entitled "How Schools Short-Change Girls" discussing gender bias in the public schools. See Gale Holland, *All-Girl Classrooms Don't Help, Women's Group Says*, USA TODAY, Mar. 12, 1998, at 1A, available in 1998 WL 5718488. But recently, the AAUW reported that single-sex education will not solve all problems and that girls can achieve in coeducational classes when they are treated equally, but they support the experimentation of single-sex schools. See *id.* (discussing AAUW's new report, "Separated by Sex: A Critical Look at Single-Sex Education for Girls," stating that although girls perceive the classrooms as being better and have greater confidence, this does not necessarily result in academic improvements); see also Leslie, *supra* note 54, at 55. The researchers concluded that there was not enough data to conclude as to whether there are academic benefits in single-sex education. See Estrich, *Ideologues Decry Single-Sex Education*, *supra* note 13, at B11. Some critics are skeptical about the manner in which the media has handled this report. One critic said that the report was inconclusive about the academic benefits of single-sex schools, but praise many aspects of an all-female education. See *Schools for Girls*, WALL ST. J., Mar. 13, 1998, at A16. The report did state that all-girls schools are very successful if the primary concern is to reduce the female drop-out rate and reduce teen pregnancy, see *id.*, which happens to be one of the main goals of the Leadership School. One critic of this report suggests that the release of this report was political and as a way to stymie school choice. See *id.*

For the 1997-1998 academic year, California began the largest program for single-sex education by encouraging separate but equal single-sex academies to be opened by the school districts as an educational option.<sup>193</sup> Legislation passed last year provided \$500,000 to districts that submitted proposals for single-sex schools with equal facilities for both sexes.<sup>194</sup> These schools also had to arrange for outside evaluations to ensure compliance with Title IX.<sup>195</sup> Six districts made proposals,<sup>196</sup> including the 49ers Academy in East Palo Alto, which is a middle school for at-risk boys, opened in 1995, which features visits from the 49ers football team, one of the school's sponsors.<sup>197</sup> In 1997, an academy for girls was also founded in the same district.<sup>198</sup> In addition, many California schools have segregated classes, especially in math and the sciences.<sup>199</sup> The California schools were initiated as a method of expanding school choice so that parents would have more options of where to send their children to school.<sup>200</sup> These schools have not been challenged under Title IX, but will probably face the same challenges as the Leadership School. And though it appears that these California schools are legal under Title IX because boys and girls will have the same opportunities, they could also face a constitutional challenge under the Equal Protection Clause.<sup>201</sup>

Although New York did not attempt to open an all-girls school until the Leadership School, there have been other specialty programs in New York that have provoked controversy because they promoted the segregation of students. Founded in April 1985 in Greenwich Village, the Harvey Milk School was a publicly-funded school for gay and lesbian teens.<sup>202</sup> It was the first public school in

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<sup>193</sup> See Tamar Lewin, *A Class of Their Own; An Old Idea — Single-Sex Education — Is in the Midst of a Renaissance*, CHI. TRIB., Dec. 14, 1997, at 6, available in 1997 WL 16802838.

<sup>194</sup> See *id.*

<sup>195</sup> See *id.*

<sup>196</sup> See *id.*

<sup>197</sup> See *id.*

<sup>198</sup> See *id.*

<sup>199</sup> See *id.*

<sup>200</sup> See *id.*

<sup>201</sup> See *id.* (“[T]he Office of Civil Rights has said that single-sex schools are an acceptable way to diversify educational choices as long as a district offers boys and girls the same classes and the same resources, as California is doing.”).

<sup>202</sup> See *The Forbidden School*, *supra* note 1, at A14 (“Friends of the Leadership School note with special rage that it appears the city’s civil rights establishment is imposing its brand of justice with an uneven hand . . . [since they] seem[ed] unruffled about stereotyping or worse things that might occur at [a school for homosexual teens].”); see also Leo, *supra* note 34, at 7 (noting that since its founding, the school subsequently turned private); Larry Rohter, *New York Offering Public School Geared to Homosexual Students*, N.Y. TIMES, June 7, 1985, at A1 [hereinafter Rohter, *New York Offering Public School Geared to Homosexual Students*] (introducing the creation of the Harvey Milk School, the need for a school where homosexual students can learn in a safe and secure environment, the organizations re-

the country to be aimed at the needs and problems of homosexual adolescents.<sup>203</sup> The original twenty students were homosexuals, including cross-dressers and transsexuals<sup>204</sup> who had difficulty fitting into traditional public schools because of their sexual identity.<sup>205</sup> Due to their sexual identity, these students were verbally abused, harassed, and assaulted at their previous schools.<sup>206</sup> Ultimately, each of these students had dropped out of school because of their poor treatment in their original educational environment.<sup>207</sup>

School officials, Mayor Edward Koch, and school advocates supported the school on the grounds that these adolescents needed to receive an education to survive in today's world,<sup>208</sup> and that it was better to segregate them than to allow them to roam the streets, possibly harming themselves or others, or to completely deny them an education.<sup>209</sup> Officials admitted that the school was not appropriate for everyone, including the many homosexual students who were comfortable attending traditional high schools.<sup>210</sup>

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sponsible for its founding, the financial supporters, the academic and counseling programs, and future plans for the school); Dorothy Gilliam, *Gay School of Thought*, WASH. POST, June 24, 1985, at C3 (covering the publicity frenzy and controversy that arose after the school's opening and the different points of view in support of and in opposition to a homosexual school).

<sup>203</sup> See Rohter, *New York Offering Public School Geared to Homosexual Students*, *supra* note 202, at A1; see also Gilliam, *supra* note 202, at C3.

<sup>204</sup> See Kathleen Brady, *New York City: A Place to be Somebody; At Harvey Milk School, Gays and Lesbians are the Norm*, TIME, Nov. 13, 1989, at 21 (discussing the backgrounds of the Harvey Milk students and the need for a separate and different program from the traditional public school).

<sup>205</sup> See Rohter, *supra* note 202, at A1.

<sup>206</sup> See *id.*; see also Gilliam, *supra* note 202, at C3 (reporting that many suicides and drug problems in teenagers are linked to homosexuality since society is so hostile to them); Brady, *supra* note 204, at 133 (stating that homosexual students were verbally harassed by students and teachers, and physically attacked by their classmates).

<sup>207</sup> See Rohter, *New York Offering Public School Geared to Homosexual Students*, *supra* note 202, at A1 (discussing that the students of the Harvey Milk School had difficulty fitting into their prior high schools, and therefore, they had dropped out).

<sup>208</sup> See Gilliam, *supra* note 202, at C3 (stating that people should not be deprived of an education because of their sexual preferences).

<sup>209</sup> See Larry Rohter, *Quinones Cites Duty of the City to Teach Homosexual Pupils*, N.Y. TIMES, June 7, 1985, at A1 [hereinafter Rohter, *Quinones Cites Duty of the City to Teach Homosexual Pupils*] (discussing the approval and the views of Schools Chancellor Nathan Quinones and Mayor Koch that the Harvey Milk school is needed to educate homosexual students); see also Gilliam, *supra* note 202, at C3 (stating that the school "is an important move in ensuring that people who are a little different are not penalized for those differences and are guaranteed the education that law — and decency — require."); Brady, *supra* note 204, at 21 (stating that 30% of the student in the Harvey Milk School attempted suicide).

<sup>210</sup> See Denise A. Williams with Susan Agrest, *A School for Homosexuals*, NEWSWEEK, June 17, 1985, at 93. "Harvey Milk is clearly not for everyone — and that includes most gay students. Whether they are openly gay or not, 'The overwhelming majority of gay kids function very well in a traditional high school.'" *Id.* (quoting Steve Ashkinazy, director of clinical programs for the Institute for the Protection of Lesbian and Gay Youth, Inc. who proposed the formation of the Harvey Milk School).

There were heated discussions concerning this controversial school.<sup>211</sup> Conservatives felt that public money should not be spent to support the school because homosexuality was a sin,<sup>212</sup> it could lead to an increase in students embracing homosexual lifestyles,<sup>213</sup> and because it could lead to social fragmentation.<sup>214</sup> Civil rights groups opposed the formation of the school because they believed that "separate schools are inherently unequal."<sup>215</sup> In addition, other critics, including psychiatrists and educators, felt such teens should not be segregated, but should instead learn to adjust to the larger society comprised of a variety of people.<sup>216</sup>

But unlike the Young Women's Leadership School and other public single-sex schools, Harvey Milk opened in April 1985<sup>217</sup> with "hardly a ripple of protest."<sup>218</sup> Although members of the press, conservatives, and civil rights groups engaged in debates over whether the school should exist,<sup>219</sup> it was never formally challenged either by a federal or state complaint, or by a lawsuit filed by the NYCLU or any other organization.<sup>220</sup> It is likely that the school was not challenged because the program admitted not only gay and lesbian students, but was available to any student who wanted to attend.<sup>221</sup> By not barring heterosexual applicants, the

<sup>211</sup> See Rohter, *Quinones Cites Duty of the City to Teach Homosexual Pupils*, *supra* note 209, at A1 (admitting that there was some initial nervousness due to the controversial nature of a homosexual public school); see also Gilliam, *supra* note 202, at C3 (stating that the school has created discussions on the morality and legality of the school between journalists, conservatives, and civil libertarians).

<sup>212</sup> See Gilliam, *supra* note 202, at C3.

<sup>213</sup> See Brady, *supra* note 204, at 21 ("Critics charged that the school was using city funds to subsidize homosexuality.")

<sup>214</sup> See Gilliam, *supra* note 202, at C3. In the scenario of social fragmentation, it was feared that segregation could occur on other bases which would not be appropriate, such as separate schools being established for brown-eyed and blue-eyed people. See *id.*

<sup>215</sup> *Id.* ("Some liberals feel the school shouldn't exist simply because separate schools are inherently unequal. 'I don't think it's sound to encourage segregation of anything.'" (quoting Eugene Reville, the Buffalo School Superintendent)).

<sup>216</sup> See Brady, *supra* note 204, at 21 ("Harvey Milk might be a good intermediate approach, but I'm not sure these students learn to cope in a school that is exclusively homosexual." (quoting Susan Forman, professor of psychology at the University of South Carolina); see also *Gay High; Furor Over a New York School*, NATION, June 17, 1985, at 36 (presenting the opposition of psychiatrists and educators who disagree with singling out homosexual students in order to solve the problems experienced at other public schools and are in favor of mainstreaming them, arguing that these young students are not old enough to know whether or not they are really homosexuals).

<sup>217</sup> See *Gay High; Furor Over a New York School*, *supra* note 216, at 36.

<sup>218</sup> Leo, *supra* note 34, at 7.

<sup>219</sup> See Gilliam, *supra* note 202, at C3; see also *supra* notes 211-16 and accompanying text (discussing the various arguments against the formation of the Harvey Milk School).

<sup>220</sup> See *The Forbidden School*, *supra* note 1, at A14.

<sup>221</sup> See Rohter, *New York Offering Public School Geared to Homosexual Students*, *supra* note 202, at A1.

school was not discriminatory, and therefore avoided legal challenges.<sup>222</sup>

C. *The Federal Complaint Filed Against the Leadership School with the Department of Education's Office of Civil Rights*

Despite the benefits that can be derived from single-sex education, the Leadership School has sparked controversy and opposition from civil rights groups.<sup>223</sup> Opponents argue that the school is discriminatory because it is a publicly-funded school separating students on the basis of sex.<sup>224</sup> They see great dangers in segregating students on the basis of their perceived special learning needs, because they argue every group with special needs will then want a separate school.<sup>225</sup> The argument that women have special educational needs and different biological processes of learning has been criticized as replicating the justifications that led to slavery and racial segregation.<sup>226</sup>

In addition, these opponents view all-girls schools as being inherently unequal because some all-girls schools were originally created as finishing schools during a time when girls were excluded from most selective institutions.<sup>227</sup> They argue that single-sex schools uphold pernicious stereotypes about both sexes; for example, that girls are the weaker sex and that boys are naturally obstreperous and poorly behaved.<sup>228</sup> Yet another objection is that this benevolent segregation of women discriminates against the neighborhood boys who are not allowed to attend the Leadership School, which may be located closer to their home than a coeducational school, and that they are being confined to the "dung heap of public schools" which do not have the programs and curriculum of the Leadership School.<sup>229</sup>

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<sup>222</sup> See *The Forbidden School*, *supra* note 1, at A14 (reporting the comments of an ACLU spokesperson who said there was no problem with the school because it not bar straight students even though stereotyping and "worse things" could occur with this experiment).

<sup>223</sup> The civil rights groups that have filed a formal complaint are the New York Civil Liberties Union, the New York Civil Rights Coalition, and the New York Chapter of the National Organization of Women. See generally *Administrative Complaint*, *supra* note 28.

<sup>224</sup> See Conners, Symposium, *supra* note 29.

<sup>225</sup> See *id.*

<sup>226</sup> See Meyers, Symposium, *supra* note 29.

<sup>227</sup> See Conners, Symposium, *supra* note 29.

<sup>228</sup> See Letter from Michael Meyers, Executive Director, New York Civil Rights Coalition, to William C. Thompson, Jr., President, New York City Board of Education, and Rudolph F. Crew, Chancellor, New York City Board of Education 2 (July 15, 1996), in *Administrative Complaint*, *supra* note 28, at Exhibit C (expressing concern that the Leadership School had been formed without the opportunity for public comment and stating that an all-girls school would violate Title IX); see also Meyers, Symposium, *supra* note 29.

<sup>229</sup> Meyers, Symposium, *supra* note 29.

The NYCLU,<sup>230</sup> the NYCRC,<sup>231</sup> and the New York Chapter of the National Organization of Women (NOW) have challenged the constitutionality of the Leadership School based on the above concerns.<sup>232</sup> On July 15, 1996, Norman Siegel, Executive Director of the NYCLU, wrote a letter to Education Chancellor Rudy Crew advocating that the school not be opened because admitting, or denying admission to, students solely on the basis of gender is unconstitutional and against federal and state law.<sup>233</sup> Siegel's letter acknowledges that the all-girls school is well-intentioned, but it specifically cites the Equal Protection Clause and Title IX as grounds for rendering such a program illegal.<sup>234</sup>

That same day, Michael Meyers, Executive Director of the NYCRC, also sent an additional letter to the Chancellor.<sup>235</sup> Meyers pointed out his concern with the Leadership School being created for high-achieving girls from disadvantaged backgrounds.<sup>236</sup> By associating disadvantaged students with minorities, Meyers stated in his letter that there is a possibility that the Leadership School

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<sup>230</sup> The New York Civil Liberties Union, the New York affiliate of the American Civil Liberties Union, "is devoted to protecting and enhancing those fundamental rights and constitutional values embodied in the Bill of Rights of the United States Constitution." Administrative Complaint, *supra* note 28, at 2.

<sup>231</sup> The New York Civil Rights Coalition is a "civil-rights organization that is committed to a society where people are regarded as equals and treated as individuals without regard to their race, color, national origin, ethnicity, or sex." Administrative Complaint, *supra* note 28, at 2-3. The organization was founded in 1986 after the Howard Beach murder in order to "advance integration and oppose segregation." Belluck, *supra* note 173, at B4.

<sup>232</sup> The National Organization for Women—New York City Chapter "is dedicated to achieving full political, social, and economic equality for women." Administrative Complaint, *supra* note 28, at 2. NOW contests the Leadership School because it is against any publicly funded program that segregates people on the basis of sex. See Conners, Symposium, *supra* note 29. Anne Conners believes that if girls are allowed to have separate schools on the basis of their learning needs, every group with special learning needs, culture, or belief will want their own school. See *id.* She is against single-sex schools because when they were started to provide education to women because they were excluded and were replicating society. See *id.*

<sup>233</sup> See Letter from Norman Siegel, Executive Director, New York Civil Liberties Union, and Christopher Dunn, Acting Legal Director, New York Civil Liberties Union, to Rudolph F. Crew, Chancellor, New York City Board of Education 1 (July 15, 1996), in Administrative Complaint, *supra* note 28, at Exhibit B (requesting an investigation of news reports of the formation of the Leadership School on the basis that an exclusionary admissions policy based on gender would violate federal statutory and constitutional provisions such as Title IX and Equal Protection); see also *The Forbidden School*, *supra* note 1, at A14 (stating that "regardless of good intentions, school boards may not, as a general rule, segregate by race or sex without violating the Constitution and federal and local law." (quoting Norman Siegel, executive director of the New York Civil Liberties Union)); Salamone, *supra* note 7, at 1 (stating that the legal challenges debated are based on the VMI decision concerning Equal Protection and Title IX which prohibits sex discrimination in federally funded programs).

<sup>234</sup> See Letter from Norman Siegel and Christopher Dunn, *supra* note 233, at 1-2. Title IX will be discussed in detail *infra* Part III and Equal Protection will be discussed in detail *infra* Part IV.

<sup>235</sup> See Letter from Michael Meyers, *supra* note 228, at 1.

<sup>236</sup> See *id.*

could become a school for minorities organized to separate them from the regular school population.<sup>237</sup> Under this interpretation, the school may violate Title VI of the 1964 Civil Rights Act.<sup>238</sup> Meyers also claimed that Title IX would be "functionally repeal[ed]" if the school was allowed and expressed his concern that the school will promote negative gender-related stereotypes.<sup>239</sup> His letter concluded by informing the Board of Education that the NYCRC would not contact the Department of Education until it received a response concerning the investigation by the Board of Education.<sup>240</sup> Meyers did receive a response on July 29, 1996 from the Board of Education stating that the matter was still under review.<sup>241</sup> The NYCRC, NYCLU, and NOW did not file the administrative complaint until the Board of Education made a public decision.

After the Board of Education approved the Leadership School, the NYCLU, NYCRC, and NOW filed a complaint with the United States Department of Education's Office of Civil Rights, alleging that the school discriminates against boys solely on the basis of their gender, and therefore the Leadership School violates Title IX of the Education Amendments of 1972.<sup>242</sup> The complaint calls for the Office of Civil Rights<sup>243</sup> to declare the Leadership School as violative of Title IX and its accompanying regulations, and de-

<sup>237</sup> See *id.* The letter from Michael Meyers states:

The use of the term "disadvantaged" may be an euphemism for minority, akin to educators' past and continuing use of the term "at risk." . . . Therefore, there is the *possibility* that a special public school for minorities-only is being organized — under the guise of fostering self-esteem and encouraging academic excellence for the youths so separated out from the regular school population.

*Id.*

<sup>238</sup> See *id.* at 2. Title VI prohibits the segregation of persons on the bases of sex in federally funded programs: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C.A. § 2000d (West 1994).

<sup>239</sup> *Id.*

<sup>240</sup> See *id.* at 3.

<sup>241</sup> See Letter from Mary C. Tucker, Counsel, New York City Board of Education, to Michael Meyers, Executive Director, New York Civil Rights Coalition 1 (July 29, 1996), in Administrative Complaint, *supra* note 28, at Exhibit F.

<sup>242</sup> See Administrative Complaint, *supra* note 28, at 1; see also Liz Willen, *No Schoolin' Rights Group Seeks to Block All-Girls Program from Opening*, NEWSDAY, Aug. 23, 1996, at 87 [hereinafter Willen, *No Schoolin' Rights Group Seeks to Block All-Girls Program from Opening*] (discussing the attempt to block the Leadership School by civil rights activists by filing a complaint with the U.S. Department of Education). Willen reports that the District anticipated such an action and is not concerned, and that there are no court actions pending since no males have inquired about attending the school. See *id.*; see also Bazzi & Chambers, *supra* note 139, at 27.

<sup>243</sup> For a discussion on the duties and powers of the Office of Civil Rights, see *supra* note 186.

mands that the Department of Education take appropriate steps to remedy all Title IX violations.<sup>244</sup>

The Leadership School has taken precautions to ward off potential lawsuits and to ensure that an equivalent education is also available to boys.<sup>245</sup> The Leadership School does not refer to gender on its application<sup>246</sup> and has stated that boys can apply, but no boy has yet to either request an application or apply for admissions.<sup>247</sup> Additionally, the Leadership School and District 4 have worked with the Isaac Newton Junior High School, the neighborhood's coeducational middle school, to ensure that boys can receive an equivalent education at the Isaac Newton School which offers the same math, science, and technology curriculum as the Leadership School.<sup>248</sup> Furthermore, the Isaac Newton School is adding a leadership training course to further equalize the two schools' educational programs.<sup>249</sup> The NYCLU argues that the district instituted these measures benefitting boys solely to discourage any legal challenges to its all-girls school.<sup>250</sup> The supporters of the Leadership School argue that they are protecting an educational necessity.<sup>251</sup>

The Department of Education's Office of Civil Rights has released a preliminary finding that the Leadership School was not using discriminatory hiring practices,<sup>252</sup> but it stated that the

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<sup>244</sup> See Administrative Complaint, *supra* note 28, at 12. For an explanation of Title IX, see *infra* notes 267-73 and accompanying text.

<sup>245</sup> See Lawrence Goodman, *All-Girls School Working to Skirt Legal Issue*, N.Y. DAILY NEWS, Aug. 19, 1996, at 7 [hereinafter Goodman, *All-Girls School Working to Skirt Legal Issue*] (analyzing the actions of District 4 to avoid a legal fight such as offering an equivalent curriculum to students in a nearby coeducational school, giving gender-sensitivity training to staff members, and removed references to gender on its application).

<sup>246</sup> See Goodman, *All-Girls Schools Win Approval*, *supra* note 245, at 7.

<sup>247</sup> See Willen, *No Schoolin' Rights Group Seeks to Block All-Girls Program from Opening*, *supra* note 242, at 87. This is identical to the defense used by Girls High, Western High, and the Harvey Milk School. See *supra* text accompanying notes 186-89, 218-22.

<sup>248</sup> See Goodman, *All-Girls Schools Win Approval*, *supra* note 245, at 7.

<sup>249</sup> See *id.*

<sup>250</sup> See *id.*

<sup>251</sup> See Cohen, Symposium, *supra* note 29.

<sup>252</sup> See *Harassed*, *supra* note 162, at A22 (stating that the Department of Education decided the school was not discriminating against male teachers). The teachers at the Leadership School were all female, until its second year in existence when one male joined the faculty. See Annette Fuentes, *We Don't Need No Coeducation*, 21 IN THESE TIMES 5 (Oct. 20, 1997), available in LEXIS, News Library, Curnews File. There were some questions as to whether a suit could be brought against the Leadership School for unlawful employment practices because the majority of faculty were women, but these were unfounded. Under Title VII of the Civil Rights Act of 1964: "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex. . . ." 42 U.S.C.A. § 2000e-2(a)(1).

school might be discriminating against boys under Title IX.<sup>253</sup> The Office of Civil Rights suggested that the district could open up the school to boys or create a similar school for boys.<sup>254</sup> This finding appears to be "a 'ringing endorsement of single-sex education in the United States'" since it specifically acknowledges that single-sex schools would be legal under Title IX and expressly allows the creation of an all-boys school.<sup>255</sup>

The Board of Education, after considering an all-boys school,<sup>256</sup> has rejected both options presented in the preliminary finding at this time deciding that "[t]here is no similar research to support an all-boys school . . . [and that a]dmitting boys . . . would defeat the purpose."<sup>257</sup> The opponents of the Leadership School will only settle for the school going coeducational.<sup>258</sup> The Department of Education has not made a formal final ruling that the Leadership School is discriminatory, nor has it taken any action to enforce its suggestion.<sup>259</sup> If the Board of Education and the Office of Civil Rights cannot reach a compromise, the Office of Civil Rights, after further investigation, will issue a written finding that

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<sup>253</sup> See *Harassed*, *supra* note 162, at A22; see also Sarah Kershaw & Rose Kim, *Feds See Bias at Girls School*, NEWSDAY, Sept. 18, 1997, at A5; Jacques Steinberg, *All-Girls School May Violate Rights of Boys, Officials Say*, N.Y. TIMES, Sept. 18, 1997, at B1 [hereinafter Steinberg, *All-Girls School May Violate Rights of Boys*]. A statement by Chancellor of Schools Rudy Crew said that this was a preliminary finding and that he was confident that the final ruling would be in the school's favor. See Joanne Wasserman, *Girls' School Illegal But Feds May Offer a Remedy*, N.Y. DAILY NEWS, Sept. 18, 1997, at 2.

<sup>254</sup> See Wasserman, *supra* note 253, at 2; see also Fuentes, *supra* note 252, at 5.

<sup>255</sup> Wasserman, *supra* note 253, at 2 (quoting Ann Tisch, the founder of the Leadership School). The creation of an all-boys school is opposed by the opponents of the Leadership School. See *id.* (revealing the sentiments of Norman Siegel, the Executive Director of the New York Civil Liberties Union, who stated that "[w]e didn't challenge an all-girls school to wind up with all-boys and all-girls schools.").

<sup>256</sup> For a discussion concerning the possible creation of an all-boys school in District 4, see *supra* notes 151-59 and accompanying text.

<sup>257</sup> Wasserman, *supra* note 253, at 2 (quoting J.D. LaRock, a spokesman for the Board of Education).

<sup>258</sup> See Kershaw & Kim, *supra* note 253, at A5 (reporting the sentiments of Michael Meyers, the Executive Director of the New York Civil Rights Coalition); see also Susan Estrich, *Sometimes, Single-Sex Schools Educate Best*, DENV. POST, Sept. 24, 1997, at B7, available in 1997 WL 13878111 (stating that the New York Civil Rights Coalition and the National Organization of Women will "settle only for [the] recruitment of boys" for the school).

<sup>259</sup> See *Harassed*, *supra* note 162, at A22. Schools Chancellor Rudy Crew argues that boys can get a comparable education at the coeducational public schools since the curricula and instruction are similar, and therefore an all-boys school is unnecessary. See Kershaw & Kim, *supra* note 253, at A5. Crew refuses to concede and has implied that he is willing to take this to court if it is necessary. See Steinberg, *All-Girls School May Violate Rights of Boys*, *supra* note 253, at B1. Some people who support the school feel that Crew has made a mistake in dismissing the suggestion of the Office of Civil Rights and should create the all-boys school. See *Fairness and Single-Sex Schools*, N.Y. TIMES, Sept. 27, 1997, at A14 (stating that it is wrong to confine such an opportunity to only a small group of girls).

the Leadership School either is or is not in violation of the law.<sup>260</sup> This will not necessarily conclude the process since the final decision of the Office of Civil Rights can be appealed to a federal judge.<sup>261</sup>

### III. TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

The federal administrative complaint filed by the NYCLU, NYCRC, and NOW is based on Title IX of the Education Amendments of 1972.<sup>262</sup> Although the United States Department of Education Office of Civil Rights<sup>263</sup> has looked favorably upon other all-girls schools in the past,<sup>264</sup> it is necessary to analyze Title IX's provisions and regulations, which, upon close scrutiny, clearly allow for single-sex secondary schools. The United States Department of Education Office of Civil Rights is the agency responsible for enforcing Title IX.<sup>265</sup> The Office of Civil Rights has jurisdiction only over Title IX claims, which is why the complaint does not mention any other possible challenges to the Leadership School, such as the Equal Protection clause.<sup>266</sup>

#### A. *The Statute*

Title IX mandates that public school students cannot be treated unequally on the basis of gender.<sup>267</sup> "No 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>268</sup> This is the language upon which the administrative complaint relies,<sup>269</sup> but the NYCLU, NYCRC, and NOW have not examined the statute's exclusive language, which expressly states to which programs the clause pertains. The second

<sup>260</sup> See Steinberg, *All-Girls School May Violate Rights of Boys*, *supra* note 253, at B1. If the school was found to be in violation of Title IX, the Office of Civil Rights would provide the Board of Education with a period of time to comply with their finding and the law. *See id.*

<sup>261</sup> *See id.*

<sup>262</sup> See Administrative Complaint, *supra* note 28, at 1, 10-12 ("The school's gender-based exclusionary admissions policy and practices . . . violate Title IX of the Education Amendments of 1972.")

<sup>263</sup> For a discussion of the powers of the Office of Civil Rights, see *supra* note 207.

<sup>264</sup> See discussion *supra* notes 186-92 and accompanying text (discussing the Office of Civil Rights' Title IX inquiry into Philadelphia's Girls High and Baltimore's Western High School).

<sup>265</sup> See 34 C.F.R. § 100.7(b) (1998) (stating that the Office of Civil Rights has jurisdiction over Title VI); 34 C.F.R. § 106.71 (stating that the procedural provisions of Title VI "adopted and incorporate by reference" into Title IX).

<sup>266</sup> See Cohen, Symposium, *supra* note 29.

<sup>267</sup> See 20 U.S.C.A. § 1681 (West 1990).

<sup>268</sup> *Id.* § 1681(a).

<sup>269</sup> See Administrative Complaint, *supra* note 28, at 10.

part of the clause clearly asserts that the mandate does *not* apply to public secondary schools: "[I]n regard to admissions to educational institutions, this section shall *only* apply to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education."<sup>270</sup>

This specific language omitting secondary schools, is supported by legislative history. The legislative history indicates that Congress did not intend for these provisions to apply to secondary schools.<sup>271</sup> The original bill passed by the House included secondary and primary schools; however, the Senate eliminated these provisions<sup>272</sup> because hearings would be needed to determine how many single-sex schools were in existence and whether the qualities they possessed and the education they provided were sufficient arguments for allowing single-sex schools.<sup>273</sup>

The NYCLU, NYCRC, and NOW cite a prior federal district court decision, *Garrett v. Board of Education of the School District of Detroit*,<sup>274</sup> to argue that single-sex schools are uniformly prohibited.<sup>275</sup> *Garrett* granted a preliminary injunction against the establishment of public male academies in Detroit.<sup>276</sup> This case is not precedent, however, because it was decided in the Eastern District of Michigan, and is therefore not binding in New York. In addition, this case was decided on plaintiff's motion for preliminary injunction, and therefore was never heard on the merits.<sup>277</sup>

The *Garrett* court found that the exemption for sex-based admissions policies created by limiting Title IX's applicability to public undergraduate, graduate, and vocational schools applies only to

<sup>270</sup> 20 U.S.C.A. § 1681(a)(2) (emphasis added).

<sup>271</sup> See *Vorchheimer v. School Dist. of Philadelphia*, 532 F.2d 880, 883 (3d Cir. 1976), *aff'd mem. by an equally divided Court*, 430 U.S. 703 (1977).

<sup>272</sup> See *id.*

<sup>273</sup> See *id.* at 883 (citing 118 Cong. Rec. 5804, 5807 (Feb. 28, 1972)).

<sup>274</sup> 775 F. Supp. 1004 (E.D. Mich. 1991).

<sup>275</sup> See Meyers, Symposium, *supra* note 29.

<sup>276</sup> See 775 F. Supp. at 1006, 1015. *Garrett v. Board of Education* was brought by females enrolled in the Detroit public school system who were denied admission to the three male-only academies which would serve 250 boys in pre-school through fifth grade. The schools would eventually expand through the eighth grade and would offer special programs in African culture and history, preparation for 21st century careers, male responsibility, and provide extra counseling and mentoring. The plaintiffs alleged that the schools violated the Fourteenth Amendment, Title IX, the Equal Educational Opportunities Act, and several Michigan state statutes, because this special curriculum does not need an all-male environment to succeed and these courses are also applicable to the problems experienced by minority females in Detroit. The plaintiffs also claim that these schools, which are meant to address the high unemployment rates, drop-out rates, and homicides of "at-risk" males, actually provide education for boys from all socio-economic levels. See *Garrett*, 775 F. Supp. at 1005-06.

<sup>277</sup> See Cohen, Symposium, *supra* note 29.

pre-existing single-sex schools and should not be "viewed as authorization to establish new single[-]sex schools."<sup>278</sup> The court's interpretation is problematic in that the language of Title IX is clear and unambiguous on its face, and therefore it is necessary to adhere to the words of the statute.<sup>279</sup> There is no language in Title IX that even so much as implies that single-sex schools can no longer be established. If this is what Congress intended, then they would have added a category for new single-sex schools in the second clause to limit the institutions to which Title IX applies.

Ultimately, the *Garrett* court decided that the plaintiffs had met their burden in proving that the suit was likely to be successful on the Title IX claim,<sup>280</sup> because the Office of Civil Rights had stated that all-male public elementary and secondary school programs were in violation of Title IX on other occasions.<sup>281</sup> The programs forbidden by the Office of Civil Rights, and relied upon by the court in *Garrett*, were formed in Dade County, Florida in 1988 and Wisconsin in 1990.<sup>282</sup> In Dade County, there was a proposed experiment to establish a kindergarten and first grade class composed exclusively of African-American boys who lacked male role models at home.<sup>283</sup> The school in Wisconsin was created for black males in order to address their particular needs.<sup>284</sup> Both schools were held by the Office of Civil Rights as violative of both Title VI and Title IX's regulations.<sup>285</sup> These schools differed from the Leadership School because they were all-boys schools separating students according to their race and there was no proposal for an equivalent program for similarly situated girls in a coeducational or all-girls school.

Title VI, which has been a factor in other Title IX challenges, is not a concern for the Leadership School because the school does not separate students according to race.<sup>286</sup> Although most of the

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<sup>278</sup> *Garrett*, 775 F. Supp. at 1009.

<sup>279</sup> See Cohen, Symposium, *supra* note 29.

<sup>280</sup> See *id.* at 1010.

<sup>281</sup> See *id.* at 1009.

<sup>282</sup> See *id.* at 1009 n.9.

<sup>283</sup> See *id.*; see also Letter from Jesse L. High, *supra* note 177, at 1.

<sup>284</sup> See *id.*; see also Letter from Cathy H. Lewis, *supra* note 177, at 2.

<sup>285</sup> See Letter from Cathy H. Lewis, *supra* note 177, at 2; see also Letter from Jesse L. High, *supra* note 177, at 2.

<sup>286</sup> The contrary is proposed by Michael Meyers and the New York Civil Rights Coalition who suggest that the schools' proposed purpose for "disadvantaged" and "at-risk" girls could be an indicia that "there is the possibility that a special public school for minorities-only is being organized — under the guise of fostering self-esteem and encouraging academic excellence for the youths so separated out from the regular school population." Letter from Michael Meyers, *supra* note 228, at 1. For a brief description of Title VI, see *supra* note 238.

students are African-American and Hispanic, this is merely a result of fact that the majority of the students come from within the District 4, which is primarily African-American and Hispanic. There are other races and ethnic groups represented in the student population of the Leadership School, but most of these girls reside outside the district.<sup>287</sup>

### B. Title IX Regulations

The regulations effectuating Title IX also have to be analyzed when considering the legality of Leadership School.<sup>288</sup> Two regulations are directly cited in the administrative complaint: 30 C.F.R. §§ 106.34 and 106.35.<sup>289</sup> The complaint asserts that the Leadership School is prohibited under the language of § 106.34: "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>290</sup> The language of this section pertains only to how students are assigned to classes within a school<sup>291</sup>; there is no prohibitory language pertaining to single-sex schools per se. The section specifies which classes within an educational program may be segregated and under what circumstances; for example physical education classes,<sup>292</sup> sexual education,<sup>293</sup> and choruses or glee clubs.<sup>294</sup>

The more applicable regulation to single-sex schools is § 106.35, which addresses the admission of students to public schools:<sup>295</sup>

A recipient which is a local educational agency shall not, on the basis of sex, exclude any person from admission to:

<sup>287</sup> See Steinberg, *Where the Boys Aren't*, *supra* note 54, at B1.

<sup>288</sup> See 34 C.F.R. § 106.1 (1998). "The purpose of this part is to effectuate title IX . . . designed to eliminate . . . discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution. . . ." *Id.*

<sup>289</sup> See Administrative Complaint, *supra* note 28, at 10-11.

<sup>290</sup> 34 C.F.R. § 106.34.

<sup>291</sup> The title of § 106.34 is "Access to course offerings." *Id.*

<sup>292</sup> See 34 C.F.R. § 106.34(c) ("This section does not prohibit separation of students by sex within physical education classes or activities during participation in . . . sports the purpose or major activity of which involves bodily contact.").

<sup>293</sup> See *id.* § 106.34(e) ("Portions of classes in elementary and secondary schools which deal exclusively with human sexuality may be conducted in separate sessions for boys and girls.").

<sup>294</sup> See *id.* § 106.34(f) ("Recipients may make requirements based on vocal range or quality which may result in a chorus or choruses of one or predominantly one sex.").

<sup>295</sup> See *id.* § 106.35.

(b) Any other school or educational unit operated by such recipient, *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>296</sup>

This regulation can be interpreted to explicitly allow single-sex schools. The New York Board of Education, as the "local educational agency," is not allowed to use sex to determine admission to a school, unless it offers the same policies, courses, services, facilities, and admissions criteria to the sex denied admission. The Leadership School and the Isaac Newton School, with a new academic program modified to duplicate the Leadership School's curriculum,<sup>297</sup> satisfy the language of this exception. If the Board of Education and District 4 decide to open an all-boys school, as originally planned,<sup>298</sup> with equal criteria of admission, facilities, courses, and teachers, it would also serve as an a comparable program for boys in the community under Title IX.

If an all-boys school is reintroduced and opened within District 4, it could help to protect the Leadership School against legal challenges.<sup>299</sup> The Department of Education Office of Civil Rights has agreed with the interpretation that Title IX "regulations require that a school or school district operating a single-sex school provide comparable courses, services, and facilities to students of both genders," and must be justified by compelling educational arguments,<sup>300</sup> such as those advanced by the Leadership School.<sup>301</sup> Critics of the Leadership School have admitted that if the all-boys school opened, their argument would lose force, "because federal regulations . . . sanction single-sex schools if there is a comparable

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<sup>296</sup> *Id.* § 106.35(b) (emphasis added). Section 106.35(a) prohibits the exclusion of persons to vocational schools on the basis of sex. *See id.* § 106.35(a). This section is not applicable to the Leadership School because it does not offer any type of vocational program.

<sup>297</sup> For a discussion of the revamped curriculum at the Isaac Newton School, see *supra* notes 248-49 and accompanying text.

<sup>298</sup> For a discussion of the creation of a similar all-boys school, see *supra* notes 151-59 and accompanying text.

<sup>299</sup> *See Sengupta, supra* note 189, at B9. Although the formation of an all-male school in District 4, could fend off the pending legal problems. The Chancellor of Schools Rudy Crew will not endorse the school just to fend off challenges because "you create a school for educational purposes[.] . . . They can not be pegged to litigation that is not educationally constructive." *Id.* (quoting Chiara Coletti, a spokeswoman for the Chancellor).

<sup>300</sup> *Id.* at B9 (quoting Rodger Murphey, a spokesman for the U.S. Department of Education).

<sup>301</sup> *See* discussion *supra* Part I (discussing the academic justifications of the Leadership School); *see also* discussion *supra* notes 119-22 and accompanying text (discussing the goals and purpose of the Leadership School).

facility for the opposite gender."<sup>302</sup> Although establishing a boys' school merely to render the girls' school legal would not be laudable, a boys' school would be a beneficial option for those boys who may desire to attend a school without the distractions of the other sex, and where they would enjoy the same education provided to girls attending the Leadership School.<sup>303</sup>

The Title IX regulations also set guidelines for admitting students: "No person shall, on the basis of sex, be denied admission, or be subject to discrimination in admission, by any recipient. . . ." <sup>304</sup> This section was not raised in the federal complaint, since no male has applied to the school, and therefore, there is no evidence as to how the school would treat a male applicant. The Leadership School has stated though that males are welcome to apply, and such a policy was sufficient to prevail against Title IX challenges in the investigations of Girls High and Western High.

The regulations actually provide defenses for the formation of the Leadership School. They state that a school board may allow segregation of the sexes when a local school board feels that a group has suffered from discrimination.<sup>305</sup> There are two instances which would allow the formation of single-sex schools under this provision. First, the Leadership School may be considered a remedial action rectifying past discrimination: "If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of such discrimination."<sup>306</sup> The discrimination that women have historically faced in the classroom, such as teachers who are biased towards boys, doing assignments that uphold traditional female stereotypes, and being subjected to harassment along with the problems arising from

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<sup>302</sup> Rose Kim, *supra* note 158, at A20. The opponents in this article accuse the Board of Education of delaying the Office of Civil Rights inquiry through not submitting twenty documents that had been requested. *See id.* Anne Connors of NOW implied that "school officials were deliberately postponing the investigation until an all-boys school is established." *Id.* (quoting Anne Connors).

<sup>303</sup> *See* Sheryl McCarthy, *If Kids Thrive at Same-Sex School, So Be It*, NEWSDAY, Dec. 12, 1996, at A58 (discussing the positive ramifications of the Leadership School, the proposal of a similar all-male school, and the support of School's Chancellor Rudy Crew for the Leadership School and his consideration of the all-male school).

<sup>304</sup> 34 C.F.R. § 106.21(a) (1998).

<sup>305</sup> *See id.* § 106.3. This section allows programs if they correct past discrimination or if a group of people have participated in a limited fashion in educational programs or activities. *See id.* §§ 106.3(a), (b).

<sup>306</sup> *Id.* § 106.3(a).

teenage pregnancy and single parentage,<sup>307</sup> could clearly fall within to the language allowing remedial action.

Secondly, the Leadership School may be upheld if there has been limited participation of a particular sex.<sup>308</sup> The regulations allow for affirmative action remedies in order to rectify conditions which could hinder women: "In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex."<sup>309</sup> This section allows for actions to be taken without an initial finding of discrimination.<sup>310</sup> The Leadership School may be construed as a remedial action taken to provide women with a suitable education, due to the unfair treatment they receive in coeducational schools. It is also simple to prove that there are conditions, above and beyond the current and past discrimination, that result in the limited participation of women in education. The social ills that result from poverty in large urban centers, such as teenage pregnancy, single parenthood, and resulting high drop-out rates, have limited the educational participation of women.<sup>311</sup>

#### IV. THE EQUAL PROTECTION CLAUSE

After the conclusion of the Title IX inquiry, the Leadership School could still face a legal challenge since it is possible for a male applicant who is denied admission to bring a discrimination suit under the Equal Protection clause of the Fourteenth Amendment.<sup>312</sup> Though no lawsuits have been filed as of yet,<sup>313</sup> if this did occur, the Leadership School would be required to comply with the conditions specified in the recently decided Equal Protection case, *U.S. v. Virginia*.<sup>314</sup> In deciding the constitutionality of the Vir-

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<sup>307</sup> See discussion *supra* notes 5-9 and Part I (discussing the difficulties caused by teenage pregnancy inherent discrimination faced by girls in coeducational schools).

<sup>308</sup> See 34 C.F.R. § 106.3(b).

<sup>309</sup> *Id.*

<sup>310</sup> See *id.*

<sup>311</sup> See Salamone, *supra* note 7, at 1; see also *supra* notes 5-9 and accompanying text (discussing the effect of single parenthood on the educational opportunities of women).

<sup>312</sup> See U.S. CONST. amend. XIV, § 1: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

<sup>313</sup> No lawsuits were reported as of August, 1998.

<sup>314</sup> 116 S. Ct. 2264 (1996). The scrutiny standard pertaining to gender discrimination in education has evolved over time from a rational relationship test, to intermediate scrutiny, and now to the recently coined skeptical scrutiny test. In *Williams v. McNair*, 316 F. Supp. 134 (D.S.C. 1970), *aff'd*, 401 U.S. 951 (1971), and *Vorchheimer v. School Dist. of Philadelphia*, 532 F.2d 880 (3d. Cir. 1976), *aff'd mem. by an equally divided Court*, 430 U.S. 703 (1977), the court applied a rational relationship test. In *Williams*, the Court found gender segregation

ginia Military Institute (VMI), the public single-sex military university in Virginia, the Supreme Court adopted a skeptical scrutiny standard under which they found that VMI was unconstitutional and would have to accept women.<sup>315</sup>

First, the Court stated that in order to uphold a government action based on sex, an "exceedingly persuasive justification for the classification" must be established.<sup>316</sup> The state would satisfy this test by showing "that the [challenged] classification serves 'important government objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'"<sup>317</sup> Virginia failed this requirement because it showed no "exceedingly persuasive justification" for excluding all women from the military training provided at VMI.<sup>318</sup> The Court mandated that any justification be genuine and not devised after the fact in response to a legal challenge.<sup>319</sup> The Court also instructed that the single-sex program may not rely on overbroad generalizations about the different talents, capabilities, or preferences of males and females.<sup>320</sup> Sexual classifications are justifiable as a compensatory device for economic disabilities women may have suffered in the past,<sup>321</sup> to promote equal employment opportunities,<sup>322</sup> and to advance the full talent and capacities of women.<sup>323</sup> But the classifications may not be used "to create or perpetuate the legal, social, or economic inferiority of women."<sup>324</sup>

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constitutional because there was a rational relationship to the goal of educational diversity. See *Williams*, 316 F. Supp. at 138. A similar analysis was used in *Vorchheimer* where the constitutionality of single-sex schools was not directly discussed, but the decision allowed a state to maintain single-sex schools as an educational option for parents and students. See *Vorchheimer*, 532 F.2d at 888.

In 1976, the Supreme Court pronounced a heightened scrutiny standard for gender discrimination in *Craig v. Boren*. 429 U.S. 190 (1976). Intermediate scrutiny required that gender classifications "must serve important governmental objectives and must be substantially related to [the] achievement of these objectives." *Id.* at 197. See also *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1992) (implementing the same standard as used in *Craig*).

<sup>315</sup> See *Virginia*, 116 S. Ct. at 2274-76.

<sup>316</sup> *Id.* at 2274 (quoting *Mississippi Univ. for Women*, 458 U.S. at 724).

<sup>317</sup> *Id.* at 2275 (quoting *Mississippi Univ. for Women*, 458 U.S. at 724).

<sup>318</sup> *Id.* at 2276.

<sup>319</sup> See *id.* at 2275 ("The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation.").

<sup>320</sup> See *id.* ("[The justification] must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." (citing Weinberger v. Wiesenfeld, 420 U.S. 636,643, 648 (1975))).

<sup>321</sup> See *id.* at 2276.

<sup>322</sup> See *id.* (citing *Califano v. Webster* 430 U.S. 313, 320 (1977)).

<sup>323</sup> See *id.*

<sup>324</sup> *Id.* ("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.").

VMI did not comply with these specifications. It defended the all-male military school by suggesting that there should be diversity in school choice and that the all-male quality of VMI ensured this diversity.<sup>325</sup> The Court agreed that diversity and single-sex education in the public school system can be beneficial.<sup>326</sup> Nevertheless, the Court did not agree that this defense was applicable to VMI, because Virginia had coeducationalized all of its single-sex schools except VMI, and therefore, there was no evidence of any existing state policy promoting school diversity through maintaining single-sex institutions.<sup>327</sup> Further evidence that this was not a state policy lay in the fact that Virginia only offered this choice of diversity to the men within the state, and not to the women.<sup>328</sup>

Virginia also argued that the adversative method,<sup>329</sup> which is the backbone of a VMI education, along with the physical training and the absence of privacy, would have to be modified drastically if women were admitted.<sup>330</sup> The defense that women would not de-

<sup>325</sup> See *id.* at 2277.

<sup>326</sup> See *id.* at 2276-77.

<sup>327</sup> See *id.* at 2279.

<sup>328</sup> See *id.* (“[T]his plan serves the state’s sons, it makes no provision whatever for her daughters. That is not *equal* protection.”).

<sup>329</sup> The adversative method consists of five main elements — the rat line, the class system, the dyke system, barrack life, and the honor code. See *United States v. Virginia*, 766 F. Supp. 1407, 1408 (W.D. Va. 1991).

The rat line is a rugged physical training program, series of rituals, punishments, and a method of regulating the behavior of the rats, which is the nickname for first year cadets at VMI. See *id.* at 1422. This system is meant to modify the behavior and values of the cadets to reinforce the VMI way of life through peer pressure. See *id.* “Behavior that contributes to VMI objectives is rewarded, behavior that detracts is swiftly punished. Both punishment and reward are collective as well as individual. Being punished or rewarded for the sins or accomplishments of brother rats . . . builds a sense of class solidarity in addition to individual responsibility.” *Id.*

The class system, like the rat system, reinforces the appropriate values and behavior through peer pressure. See *id.* at 1423. Each class at VMI has specific tasks which aid in the development of leadership skills. See *id.* at 1422-23. These tasks include older students teaching the values and traditions of VMI to the rats after their old values and behaviors have been broken down by the rat line. See *id.* at 1423.

The dyke system is meant to foster loyalty and trust between classes at VMI. See *id.* at 1422-23. Each rat is assigned a first classman, or senior, who guides the rat through the vigors of the VMI system. See *id.*

The barracks are stark and are meant to induce a stressful environment. See *id.* at 1424. In addition, the barracks allow the rats no privacy. See *id.* The dorms have no locks on the doors, no window shades, and possess gang bathrooms. See *id.* This barrack system is meant “to reduce all cadets to the lowest common denominator, from which the new cadet training system, class system, honor code, military system and academic system year-by-year builds the value, attitudes and behaviors expected from VMI graduates.” *Id.* at 1423.

The final component is the honor code, which is not adversative, but a vital part of the VMI experience. The strictly enforced honor code states that a cadet “does not lie, cheat, steal nor tolerate those who do.” *Id.* at 1423. Any violations of the honor code result in expulsion. See *id.*

<sup>330</sup> See *U.S. v. Virginia*, 116 S. Ct. 2264, 2279 (1996). Virginia argued, on behalf of VMI, that:

sire to be part of, or thrive in, an adversative system was rejected by the Court, which stated that this is a generalization based on archaic and stereotypical ideas of the roles and abilities of women.<sup>331</sup> There may be some women who wish to be educated by the adversative method at VMI and, therefore, no exceedingly persuasive justification for the all-male military academy exists.<sup>332</sup> Thus, Virginia failed to meet the requirement that the classification serve "important governmental objectives and that the discriminatory means employed [be] substantially related to the achievement of those objectives."<sup>333</sup>

It would have been possible for Virginia to survive equal protection scrutiny if the state established a program for women which was "sufficiently comparable" to VMI.<sup>334</sup> Such a school must place the "persons unconstitutionally denied an opportunity or advantage in 'the position they would have occupied in the absence of discrimination.'"<sup>335</sup> The purpose of this requirement is to prohibit the exclusion of women from the superior educational opportunities and programs available to men.<sup>336</sup> Virginia's alternative for females did not meet these requirements.<sup>337</sup>

Virginia established the Virginia Women's Institute of Leadership (VWIL), located at Mary Baldwin College, as a parallel program to VMI.<sup>338</sup> The VWIL students did not live in barracks like the men and had no experience in rigorous military training besides their participation in an ROTC program; instead, their role

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Alterations to accommodate women would necessarily be "radical," so "drastic," . . . as to transform, indeed "destroy," VMI's program. . . . Neither sex would be favored by the transformation, Virginia maintains: Men would be deprived of the unique opportunity currently available to them; women would not gain that opportunity because their participation would "eliminat[e] the very aspects of [the] program that distinguish [VMI] from . . . other institutions of higher education in Virginia.

*Id.* (quoting Brief for Cross-Petitioners 34-36).

<sup>331</sup> *See id.* at 2280.

<sup>332</sup> *See id.* at 2279. The district court found that "[i]t is . . . undisputed . . . that the VMI methodology could be used to educate women[.]" *United States v. Virginia*, 852 F. Supp. 471, 481 (W.D. Va. 1994), and that "some women would want to attend VMI," *United States v. Virginia*, 766 F. Supp. 1407, 1414 (W.D. Va. 1991), and "are capable of all the . . . activities required of VMI cadets." *Id.* at 1412. Furthermore, the parties agreed that women could meet the physical standards. *See United States v. Virginia*, 976 F.2d 890, 896 (4th Cir. 1992).

<sup>333</sup> *Id.* at 2275.

<sup>334</sup> *Id.* at 2282.

<sup>335</sup> *Id.* (citing *Milliken v. Bradley*, 433 U.S. 267, 280 (1977)).

<sup>336</sup> *See id.* (stating that the constitutional violation in VMI's case was "the categorical exclusion of women from an extraordinary education opportunity afforded men.").

<sup>337</sup> *See id.* ("For women . . . , Virginia proposed a separate program, different in kind from VMI and unequal in tangible and intangible facilities.").

<sup>338</sup> *See id.* at 2283.

was mostly ceremonial.<sup>339</sup> Their leadership training was gained through seminars, externships, and a speaker series.<sup>340</sup> Academically, VWIL was far inferior to VMI.<sup>341</sup> The SAT scores of VWIL's students were 100 points lower than those of VMI, there was no math or science focus, the faculty of Mary Baldwin College holds significantly fewer PhDs, and the prestige of the diploma and alumnae contacts paled in comparison.<sup>342</sup> Virginia, therefore, had failed to provide a comparable alternative for women.<sup>343</sup>

Looking at the facts in this case, it is possible to see how the prestigious military institute differed from the Leadership School. The decision in *U.S. v. Virginia* should be read narrowly as applying to all-male military institutions only. There is evidence for this interpretation within the opinion: "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 Court of Appeals as 'unique,' an opportunity available only at *Virginia's premier military institute.*"<sup>344</sup> Not only does the court enable this case to be easily distinguished, it recognizes that a state has the right to support diverse educational opportunities, including single-sex education.

In an earlier decision, *Mississippi University for Women v. Hogan*,<sup>345</sup> the Supreme Court held that a nursing school that excluded males violated the Fourteenth Amendment.<sup>346</sup> As in *U.S. v. Virginia*, the Court's decision was narrowly tailored to the situation at a professional nursing school, and therefore is also distinguishable from any possible suit brought against the Leadership School.<sup>347</sup>

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<sup>339</sup> See *id.* VWIL's program was not focused on military education and used a "cooperative method" of education" reinforcing self-esteem. *Id.* In addition, VWIL students do not have to live together in military-style residences, and they are not required to eat together or where uniforms like their supposed male counterparts. See *id.*

<sup>340</sup> See *id.* (stating that VWIL students are "[k]ept away from the pressures, hazards, and psychological bonding characteristic of VMI's adversative training.>").

<sup>341</sup> See *id.* at 2284 ("In myriad respects other than military training, VWIL does not qualify as VMI's equal. VWIL's student body, faculty, course offerings, and facilities hardly match VMI's. Nor can the VWIL graduate anticipate the benefits associated with VMI's 157-year history, the school's prestige, and its influential alumni network.>").

<sup>342</sup> See *id.* at 2284-85.

<sup>343</sup> See *id.* at 2285 ("[T]he Commonwealth has created a VWIL program fairly appraised as a 'pale shadow' of VMI. . . .").

<sup>344</sup> *Id.* at 2276 n.7 (emphasis added).

<sup>345</sup> 102 S. Ct. 3331 (1982).

<sup>346</sup> See *id.* at 3341.

<sup>347</sup> See *id.* at 3333. The case expressly states: "This case presents the narrow issue of whether a state statute that excludes males from enrolling in a state-supported professional nursing school violates the Equal Protection Clause of the Fourteenth Amendment." *Id.*

Similar to the scrutiny test applied in *U.S. v. Virginia*, Mississippi had to demonstrate that it had "an exceedingly persuasive justification for the classification" which is met by demonstrating that "the classification serves important governmental objectives and that the discriminatory means are substantially related to the achievement of those objectives."<sup>348</sup> If the objective is deemed legitimate, then a "substantial relationship between objective and means [needs to be] present."<sup>349</sup> The state's justification for the single-sex admissions policy was to compensate women for past discrimination.<sup>350</sup> This would have been a justifiable reason for a single-sex institution, so long as Mississippi could have proven that a history of past discrimination existed.<sup>351</sup> Mississippi failed to prove that there was past discrimination in the field of nursing, and the Court noted that, in reality, the field is dominated by women.<sup>352</sup> The Court added that excluding males from nursing schools perpetuates the stereotype that nursing is exclusively a woman's job.<sup>353</sup> The state also did not prove its objective because men were allowed to audit the nursing school's classes and there has been no evidence of any adverse affect upon the female students.<sup>354</sup> Since Mississippi was unable to produce evidence to sustain its gender-based classification, the state had failed to establish an "exceedingly persuasive justification" for its discrimination.<sup>355</sup>

In utilizing the "exceedingly persuasive justification" set forth in *U.S. v. Virginia* and *Mississippi University for Women v. Hogan*, it is possible to constitutionally defend the existence of the Leadership School. This criterion may be met by examining the reasons for the school's formation. Studies showing that girls have not excelled in math and the sciences, the plight of underprivileged women, discrimination and harassment in the classroom, and the crisis of teenage pregnancy, welfare, and its effect on the economy all provide legitimate justifications for the opening of the school.<sup>356</sup> These justifications are genuine in that they have been

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<sup>348</sup> *Id.* at 3336 (internal citations omitted).

<sup>349</sup> *Id.* at 3337.

<sup>350</sup> *See id.* at 3336.

<sup>351</sup> *See id.* at 3338.

<sup>352</sup> *See id.* The court cites that over 90% of nursing degrees are granted to women and that the labor force reflects this domination. *See id.* at 3338-39.

<sup>353</sup> *See id.* at 3339.

<sup>354</sup> *See id.*

<sup>355</sup> *Id.* at 3340.

<sup>356</sup> *See discussion supra* Part I (discussing the educational discrimination women have faced in coeducational public schools).

espoused since the school's conception.<sup>357</sup> The past discrimination against women in education clearly distinguishes the Leadership School from the nursing school in *Mississippi University for Women v. Hogan*. In addition, the Leadership School would survive application of the "generalizations test," because overbroad generalizations are not being utilized by the school to justify its creation. Instead, scientific studies and legitimate economic situations are the reasons for the formation of the school. VMI, on the other hand, used stereotypical views of women by claiming that women would not succeed in the school's military environment, and stated that diversity in education is a goal of the state which was not true.<sup>358</sup> The latter defense was characterized by the Court as a "benign justification proffered in defense of categorical exclusions,"<sup>359</sup> and the former was based on an unconstitutional generalization.<sup>360</sup>

In addition, the Leadership School benefits from the Court's language in *U.S. v. Virginia* which allows sex classifications to be used as a device to remedy the economic disabilities women have suffered in the past in order to advance the full talent of the people.<sup>361</sup> The disadvantages women have endured by being denied a classroom environment tailored to their learning style have made it difficult for them to achieve in the most lucrative fields.<sup>362</sup> Also, teenage pregnancy and drop-out rates have caused great disadvantages for both these women and for the community economically.<sup>363</sup> Since single-sex education encourages girls to remain in school, continue on to higher education, and become more productive citizens,<sup>364</sup> the Leadership School also fulfills the "economic disabilities" language used by the Court in *United States v. Virginia*.<sup>365</sup> The mission of the Leadership School serves an "important governmental objective [in] that the discriminatory means [it employs] are substantially related to the achievement of [its] objectives."<sup>366</sup>

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<sup>357</sup> See *supra* notes 119-22 and accompanying text (stating the justifications of the Leadership School).

<sup>358</sup> See *Virginia*, 116 S. Ct. at 2276, 2279; see also discussion *supra* notes 326-28 (discussing that diversity in education was not a goal held by the state of Virginia as demonstrated by the existence of only one all-male school in the state and no all-female equivalent).

<sup>359</sup> *Virginia*, 116 S. Ct. at 2277.

<sup>360</sup> See *id.* at 2280.

<sup>361</sup> See *id.* at 2276.

<sup>362</sup> See discussion *supra* Part I.A.

<sup>363</sup> See discussion *supra* notes 5-9 and accompanying text.

<sup>364</sup> See discussion *supra* notes 113-16 and accompanying text.

<sup>365</sup> *Virginia*, 116 S. Ct. at 2276 ("Sex classifications may be used to compensate women 'for particular economic disabilities [they have] suffered.'" (quoting *Califano v. Webster*, 430 U.S. 313, 320 (1997) (per curiam))).

<sup>366</sup> *Virginia*, 116 S. Ct. at 2271.

The New York Board of Education has the option of creating an all-male school with an equivalent educational curriculum.<sup>367</sup> This school would provide boys within the district the opportunity to attend a school without the distractions of the other sex where they would receive the same education as provided by the Leadership School.<sup>368</sup> It will be a much easier task for the School Board to establish a comparable all-male school than it was for VMI to establish an all-female academy. It is easy to conceive of a boys school equivalent to the Leadership School with the same curriculum in math, the sciences, and leadership training, with teachers of equal caliber, and with the same reputation. There already exists an equivalent program at the coeducational junior high school, Isaac Newton School, where boys can receive an equivalent education,<sup>369</sup> and, if an all-male school is ever opened, there will continue to be an equivalent coeducational school for those who want the leadership training without attending a single-sex institution.<sup>370</sup> Under this analysis, there is no reason why the Leadership School should not survive the skeptical scrutiny test under the Fourteenth Amendment.

## V. OTHER FEDERAL STATUTES APPLICABLE TO THE LEADERSHIP SCHOOL

### A. *Equal Educational Opportunities Act*

The Equal Educational Opportunities Act (EEOA)<sup>371</sup> applies directly to secondary schools, and was enacted to stop busing "as a means of securing racial balance in schools":<sup>372</sup> "[A]ll children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin."<sup>373</sup> The purpose is achieved by assigning children to the public school closest to their residence and neighborhood.<sup>374</sup> Assignment, as a focal point, is confirmed by the following language: "The maintenance of dual school systems in which students are assigned to schools solely on the basis of race, color, sex, or national origin denies to

<sup>367</sup> See, e.g., Sengupta, *supra* note 189, at B9; Goodman with Kornblut, *supra* note 151, at 2; Willen, *Boys-Only School*, *supra* note 152, at A4. For a discussion concerning the history of a possible all-boys school, see *supra* notes 152-60, 256.

<sup>368</sup> See McCarthy, *supra* note 303, at A58.

<sup>369</sup> See text accompanying *supra* note 248-49 (discussing the modified curriculum at the Isaac Newton School).

<sup>370</sup> See Goodman, *All-Girls School Working to Skirt Legal Issue*, *supra* note 245, at 7.

<sup>371</sup> 20 U.S.C.A. §§ 1701-58 (West 1990).

<sup>372</sup> *Vorchheimer v. School Dist. of Philadelphia*, 532 F.2d 880, 883 (3d Cir. 1976), *aff'd mem. by an equally divided Court*, 430 U.S. 703 (1977).

<sup>373</sup> 20 U.S.C.A. § 1701(a)(1) (West 1990).

<sup>374</sup> See *id.* § 1701(a)(2).

those students the equal protection of the laws guaranteed by the [F]ourteenth [A]mendment."<sup>375</sup>

The controversial section dealing with the segregation of students does not mention sex or gender: "No state shall deny equal educational opportunity . . . by the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools."<sup>376</sup> This deliberate exclusion of "sex" in this section appears to allow single-sex schools to operate,<sup>377</sup> but prohibits children from being assigned to them.<sup>378</sup> Children would have to choose to attend a single-sex school, as is the case with the Leadership School.

The legislative history of the EEOA is peculiar. The original bill contained no references to discrimination based on sex or gender, and gender discrimination was never considered during congressional hearings, but such references were added later for unknown reasons.<sup>379</sup> The Supreme Court opined that the EEOA prohibits assignments by gender, but does not prohibit voluntary attendance at a single-sex school.<sup>380</sup> In addition, the decision stated that there is no indication that Congress intended to make all schools coeducational and to prohibit educators from being able to establish alternative forms of education.<sup>381</sup> The Court believed that such a drastic interpretation outlawing single-sex schools "should require clear and unequivocal expression" by Congress.<sup>382</sup> For these reasons, the Court interpreted the statute to mean that Congress deliberately left open the question of single-sex schools.<sup>383</sup>

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<sup>375</sup> *Id.* § 1702(a)(1).

<sup>376</sup> *Id.* § 1703(a).

<sup>377</sup> *See Vorchheimer*, 532 F.2d at 884.

<sup>378</sup> *See* 20 U.S.C.A. § 170(c) (stating that educational agencies can only assign students to schools closest to their residences).

<sup>379</sup> *See Vorchheimer*, 532 F.2d at 883.

<sup>380</sup> *See id.* at 885 ("[T]he thrust [of the EEOC] 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>381</sup> *See id.*

<sup>382</sup> *Id.*

<sup>383</sup> *See id.* The Supreme Court stated:

Congress spoke clearly enough on single-sex schools in 1972 [in the legislative history of Title IX] when it chose to defer action in order to secure the data needed for an intelligent judgment. We do not believe that the ambiguous wording of the Equal Educational Opportunity Act of 1974 represented an abandonment of the clearly expressed desire to wait for more information before making a decision.

In *Vorchheimer v. School District of Philadelphia*,<sup>384</sup> a girl wanted to attend all-male Central High School instead of all-female Girls High in Philadelphia,<sup>385</sup> but, after finding that the EEOA did not prohibit single-sex schools, the Court decided that because her attendance was voluntary, and because the schools maintained equal curricula, there was no discrimination.<sup>386</sup>

A similar analysis would clearly allow the operation of the Leadership School. Students can attend the Leadership School on a voluntary basis, provided they meet the school's admissions criteria. In the case of Central High and Girls High, only 7% of Philadelphia's public school children met the academic criteria,<sup>387</sup> and these students had the option of attending school elsewhere.<sup>388</sup> The fact that Philadelphia did not have an educationally equivalent coeducational school was not considered in the Court's decision.<sup>389</sup> The Leadership School and the coeducational Isaac Newton School offer similar curricula, and if an all-male school were formed, it would possess the same quality of education as is provided by the Leadership School and the Isaac Newton School. Therefore, there is no reason why the Leadership School should be forbidden on the basis of this statute.

### B. *Women's Educational Equity Act*

The Women's Educational Equity Act<sup>390</sup> is a clear indication of Congress' intent to ensure "educational equity for women."<sup>391</sup> In stating the purpose of the Act, Congress expressly recognized that women have been discriminated against in educational settings:

The Congress finds and declares that educational programs in the United States, as presently conducted, are frequently inequitable as such programs relate to women and frequently limit the full participation of all individuals in American Society. The Congress finds and declares that excellence in education cannot be achieved without equity for women and girls.<sup>392</sup>

The Act is meant to "provide educational equity for women and girls who suffer multiple discrimination, bias, or stereotyping based

<sup>384</sup> 532 F.2d 880 (3rd Cir. 1976), *aff'd mem. by an equally divided Court*, 430 U.S. 703 (1977).

<sup>385</sup> *See id.*; *see also* discussion *supra* notes 179-85 (discussing Philadelphia's Girls High).

<sup>386</sup> *See Vorchheimer*, 532 F.2d at 881.

<sup>387</sup> *See id.*

<sup>388</sup> *See id.*

<sup>389</sup> *See id.* at 881-82.

<sup>390</sup> 20 U.S.C.A. § 3041-47 (West 1990).

<sup>391</sup> *See id.* § 3041(b)(2).

<sup>392</sup> *Id.* § 3041(b)(1).

on sex and on race, ethnic origin, disability, or age."<sup>393</sup> The Act provides financial assistance and grants to institutions "to meet the requirements of Title IX."<sup>394</sup> These grants can be given to agencies, organizations, and institutions, including secondary schools,<sup>395</sup> for the development of textbooks and curricula designed to enhance equity,<sup>396</sup> for training programs for educators to teach them educational equity,<sup>397</sup> for research and development activities to aid in gaining equity for females in education,<sup>398</sup> for guidance and counseling activities,<sup>399</sup> and for other reasons.<sup>400</sup>

It is notable that nowhere in this Act, the articulated intent of which is to improve and increase the educational opportunities for women, is single-sex education mentioned. If Congress had considered single-sex education to be discriminatory, it would have expressly forbidden it. In addition, the only reference to men or boys is found in the provisions concerning grants for activities to increase educational equity for women.<sup>401</sup> These provisions state that "nothing . . . shall be construed as prohibiting men and boys from participating in any programs or activities assisted under this part."<sup>402</sup> This language is especially interesting because it implies that boys may participate in these programs for women, but are not required to participate. There is no language in the Act which states that boys have to be privy to these programs, because a failure to allow them to participate would prove discriminatory. The Act merely specifies that these programs will not lose funding if they include boys.<sup>403</sup>

## VI. APPLICABLE LOCAL LAWS

### A. *New York State Laws*

New York State has discrimination laws which could be evoked against the Leadership School in the future, but, at this stage, they have not been cited by the NYCLU, NYCRC, or NOW. The statute states that "students, otherwise qualified, [must] be admitted to educational institutions and be given access to all the educational

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<sup>393</sup> *Id.* § 3041(b)(2).

<sup>394</sup> *Id.*

<sup>395</sup> *See id.* § 3042(a).

<sup>396</sup> *See id.* § 3042(a)(1)(A).

<sup>397</sup> *See id.* § 3042(a)(1)(B).

<sup>398</sup> *See id.* § 3042(a)(1)(C).

<sup>399</sup> *See id.* § 3042(a)(1)(D).

<sup>400</sup> *See id.* § 3042(a)(1). This list is inclusive. Other programs may fall within the auspices of this act. *See id.*

<sup>401</sup> *See* 20 U.S.C.A. § 3043(c) (West 1990).

<sup>402</sup> *Id.*

<sup>403</sup> *See id.*

programs and courses operated or provided by such institutions without regard to . . . sex. . . ."<sup>404</sup>

This language would appear to forbid the Leadership School, except the language defining "educational institutions" limits its application to post-secondary schools.<sup>405</sup> The statute states that "[e]ducational institution means any educational institution of *post-secondary* grade subject to the visitation, examination or inspection by the state board of regents or the state commissioner of education and any business or trade school in the state."<sup>406</sup> Since the statute specifies that it applies to post-secondary schools, it appears to govern over state colleges and universities, and not to public junior high or high schools which are considered to be secondary schools. Therefore, this statute does not apply to the Leadership School.

### B. *New York City Laws*

Opponents argue that the Leadership School is illegal because it violates New York City human rights laws.<sup>407</sup> For the Leadership School to be affected by these laws, it would be necessary to define secondary schools as public accommodations which are not allowed to refuse services on the basis of sex.<sup>408</sup> Although this statute has been cited by the NYCLU, no formal action has been taken. Critics most likely have not evoked this statute due to the possible political ramifications.

These human rights laws established the Commission on Human Rights,<sup>409</sup> which consists of fifteen mayoral appointees.<sup>410</sup> One of the Commission's functions is to perform investigations "in the field of human relations as in the judgment of the commission will aid in effectuating its general purpose."<sup>411</sup> To fulfill this function, the Commission is empowered to "receive, investigate and pass upon complaints"<sup>412</sup> and to hold hearings on any possible discrimination against persons in violation of the act.<sup>413</sup>

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<sup>404</sup> N.Y. EDUC. LAW § 313(1) (McKinney 1988).

<sup>405</sup> *See id.* at § 313(2) (a).

<sup>406</sup> *Id.* (emphasis added).

<sup>407</sup> *See* Meyers, Symposium, *supra* note 29; *see also* Connors, Symposium, *supra* note 29.

<sup>408</sup> *See, e.g.,* David Firestone, *Girls School May Violate Little-Known City Law*, N.Y. TIMES, July 17, 1996, at B7 (asserting that a New York City Law which had not been considered by the press or by the opponents could cause the greatest threat to the Leadership School, since it allegedly forbids single-sex schools).

<sup>409</sup> *See* NEW YORK, N.Y., ADMIN. CODE § 8-101 (Williams Press 1986).

<sup>410</sup> *See id.* § 8-103.

<sup>411</sup> *Id.* § 8-104(4).

<sup>412</sup> *Id.* § 8-105(4).

<sup>413</sup> *See id.* § 8-105(5).

Although the NYCLU believes it has a valid complaint under this statute, it has not filed a complaint with, or requested an investigation by, the Commission on Human Rights, because they feel to do so is futile since the Commission would favor the Leadership School. An examination of the structure of local politics reveals the reason for such inaction. The statute grants the Commission great discretion as to which complaints it will hear.<sup>414</sup> The Commission members' appointment by the mayor, in tandem with their advisory capacity to the mayor on human rights issues,<sup>415</sup> suggests that their loyalty to the mayor may run deep.<sup>416</sup> Mayor Rudolph Giuliani publicly supports the Leadership School and critics feel that a decision against the NYCLU could have negative repercussions in any federal administrative hearing or in a lawsuit brought by the NYCLU.<sup>417</sup> Even if their reservations about this process are true, the statutory language does not forbid single-sex schools.

The relevant human rights laws direct the Commission on Human Rights to "eliminate and prevent discrimination . . . in places of public accommodation . . . because of race, creed, color, age, national origin or physical handicap, and to take other actions against discrimination because of race, creed, color, age or national origin."<sup>418</sup> Although other provisions in the statute mention sex or gender, there are no mentions of sex or gender in the provisions that would affect public schools.<sup>419</sup>

There is additional statutory language stating that a person cannot be discriminated against in a place of public accommodation because of gender:<sup>420</sup>

It shall be an unlawful discriminatory practice for an person being the owner, . . . proprietor, manager, superintendent . . . of any place of public accommodation, . . . because of the . . . sex of any person directly or indirectly, to refuse, withhold from or

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<sup>414</sup> See *id.* § 8-105(4).

<sup>415</sup> See *id.* § 8-108.

<sup>416</sup> The appointment process and length of tenure for the commissioners creates a system where the commissioners will have to be loyal to the mayor if they want to remain on the Commission. The chairperson serves "as such at the pleasure of the mayor" and of the other members originally appointed, "five shall be appointed for one year, five for two years and five for three years; thereafter all appointments to the commission shall be for a term of three years." *Id.* § 8-103.

<sup>417</sup> See Meyers, Symposium, *supra* note 29.

<sup>418</sup> NEW YORK, N.Y., ADMIN. CODE § 8-101 (Williams Press 1986).

<sup>419</sup> Provisions that prohibit discrimination according to sex include employer, labor organizations, employment agencies, see *id.* § 8-107(1)(a)-(d), and housing accommodations, see *id.* § 8-107(5)(a)(1).

<sup>420</sup> See *id.* § 8-107(2).

deny to such person any of the accommodations, advantages, facilities or privileges thereof. . . .<sup>421</sup>

This is the language upon which the NYCLU relies; but when the definition of public accommodations is examined, this statute does not apply to secondary schools because a secondary school is not considered a public accommodation.<sup>422</sup>

Even if this provision were applicable to secondary schools, exceptions to this law can be granted by the Commission if it finds there are countervailing public policy considerations.<sup>423</sup> This provides the Leadership School even greater room to maneuver within the language of the statute. It may use a public policy argument that the school is a benefit to the community and economy, because it will lower the teenage pregnancy and drop-out rates, thus leading to a more productive population and the reduction of welfare. The Leadership School could also argue that women in the past have not had the same educational advantages as men because the environment of coeducational classrooms are more favorable to boys.<sup>424</sup>

## VII. CONCLUSION

The early successes of the Leadership School and the studies highlighting the unfavorable treatment of women in coeducational schools illustrate the importance and benefits of single-sex education. It may not provide the best means of education for all students and the Leadership School may not be the ideal school for all girls, but parents and students should have the opportunity to choose amongst different educational opportunities.<sup>425</sup> School choice has been a significant part of education in District 4 and has been very successful.<sup>426</sup> There is no reason to forbid a valuable educational tool, especially for girls who are not reaching their full

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<sup>421</sup> *Id.*

<sup>422</sup> *See id.* § 8-102(9).

The term "place of public accommodation" . . . shall *not* include public libraries, kindergartens, *primary and secondary schools*, academies, colleges and universities, . . . and all educational institutions under the supervision of the regents of the state of New York . . . [or which is] supported in whole or in part by public funds or by contributions solicited from the general public.

*Id.* (emphasis added).

<sup>423</sup> *See id.* ("The provisions of this subdivision shall not apply, with respect to sex, to places of public accommodation . . . where the commission grants an exemption based on bona fide considerations of public policy."); *see also* Salamone, *supra* note 7, at 1.

<sup>424</sup> *See* discussion *supra* Part I.A.

<sup>425</sup> *See* Genn, Symposium, *supra* note 29. Coleman Genn and the Center of Educational Innovation states that freedom of choice for parents is paramount. *See id.*

<sup>426</sup> *See* Macchiarola, Symposium, *supra* note 29.

potential in traditional coeducational schools in New York and other urban areas.

The Leadership School does not violate the Constitution or federal statutory law. The federal complaint, filed by the NYCLU, NYCRC, and NOW, alleges that the school violates Title IX. This complaint, however, cannot succeed when relevant statutory and regulatory language is examined. The Leadership School does not violate Title IX because the statute does not expressly forbid single-sex education, and does not apply to secondary schools. In addition, the Title IX regulations do not contain express language forbidding single-sex schools, but allow for measures to be taken if there has been past discrimination or limited educational participation by a group, such as girls or women. The formation of an equivalent educational opportunity for boys would help satisfy Title IX. This has been done by conforming the curriculum at the Isaac Newton School to be the same as the Leadership School. In addition, an all-male school could be formed with an equivalent curriculum to the Leadership School which would also provide additional protection against a Title IX challenge.

The possible lawsuit that could be brought if a male decides to apply and is refused admission to the school is also unlikely to succeed. Supreme Court examinations of the Equal Protection Clause of the Fourteenth Amendment do not conclude that single-sex schools are forbidden. In its latest Equal Protection case, *U.S. v. Virginia*, the Court's decision to force VMI to become coeducational was narrowly tailored toward military institutions. Justice Ginsburg realized that legislative history indicated that Congress did not want to outlaw single-sex education because it did not have any evidence supporting the benefits of single-sex education.

The Equal Educational Opportunities Act and the Women's Educational Equity Act further enhance the argument that Congress did not intend to preclude single-sex education. The Equal Educational Opportunities Act excludes sex from the provisions concerning the segregation of students in schools. This statute also does not apply because the gravamen of the law is the assignment of students to particular schools. The Leadership School is an alternative program and no one is assigned to attend; rather, enrollment at the school is voluntary. The Women's Educational Equity Act demonstrates Congress' realization that women are not being treated equally and that they are not reaching their full potential in today's educational system. In addition, this Act, which directly evaluates the educational opportunities for women, does not mention any prohibition of single-sex schools.

None of the federal statutes concerning education explicitly rule out single-sex education. If Congress meant to forbid all-girls education, it would have expressly stated so in at least one, if not all, of the discrimination laws: Title IX, the Title IX regulations, Equal Educational Opportunities Act, or the Women's Educational Equity Act. If such a prohibition had existed in these statutes, this language and the accompanying legislative history would have swayed the Supreme Court's Equal Protection jurisprudence.

Furthermore, the Leadership School is defensible in any lawsuit brought under local laws. New York's laws, similar to the applicable federal laws, do not prohibit single-sex education. These laws pose less of a threat to the Leadership School because New York's education laws and the New York City human rights laws do not apply to secondary schools. In conclusion, no laws clearly forbid single-sex education; therefore, the Leadership School is constitutional and should be allowed to fulfill its articulated mission of providing girls with the appropriate educational curriculum and environment so that they can reach their full potential and become leaders in the professional world and within their communities.

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