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William A. Smith, Superintendent
Cabell County Schools
2850 5th Avenue
Huntington, WV 25702

May 21, 2012

Re: Sex segregation in Cabell County Schools

Dear Superintendent Smith:

We appreciate your cooperation with our recent Freedom of Information Act (FOIA) request. We are writing to alert you that our analysis of the records produced strongly suggests that single-sex programs operated at both Barboursville Middle School and Enslow Middle School violated numerous provisions of federal law, including Title IX of the Education Amendments of 1972 and the United States Constitution.

The documents you produced in response to our request confirmed that Barboursville Middle School operated a single-sex program in core classes in the sixth grade during the 2010-2011 and 2011-2012 school year, and that Enslow Middle School operated a single-sex education program in core classes in the sixth grade during the 2009-2010 school year and in the sixth and seventh grades during the 2011-2012 school years.¹ In addition, we have been notified that Barboursville Middle School is currently segregating boys and girls during lunch. In your correspondence dated April 30, 2012, you indicated that the Enslow Middle School would no longer be operating single-sex classes during the 2012-2013 school year. However, it appears that the single-sex program at Barboursville Middle School is still in operation and plans to continue, or even expand, next year.

Our analysis demonstrates that both of these single-sex programs were unlawful because they lacked an adequate justification and instead were premised upon and likely promoted harmful stereotypes about the different learning styles and development of boys and girls. Such stereotypes limit educational opportunities for both boys and girls, and are legally impermissible in public schools. The two programs also failed to meet federal requirements that single-sex programs be completely voluntary and that students be offered a substantially equal coeducational alternative.

Because the information we have received regarding the operation of these programs in the past raises serious legal concerns, we request that Cabell County Schools enter into an agreement

¹ The records include data through April 30, 2012 and are thus current through the end of the 2010-2011 school year.

with the ACLU of West Virginia, a draft of which is enclosed, to cease all single-sex (and gender-specific) programs or activities District-wide,² effective at the start of the next school year, and to cease all gender-specific instruction, effective immediately.

- 1. The Barboursville Middle School and the Enslow Middle School programs appear to have violated the Constitution because they lacked sufficient justification and were based in large part on impermissible “overbroad generalizations about the different talents, capacities, [and] preferences” of boys and girls.**

The Equal Protection Clause of the U.S. Constitution prohibits sex segregation in education unless the government has an “exceedingly persuasive justification” for the sex segregation, and only permits it where the sex segregation is “substantially related to the achievement” of important educational needs. *United States v. Virginia*, 518 U.S. 515, 531, 533 (1996) (“*VMI*”).

Moreover, the Supreme Court has held that the Constitution does not permit single-sex education to be based on “overbroad generalizations about the different talents, capacities, or preferences of males and females.” *VMI*, 518 U.S. at 533. Despite claims that the form and structure of the sex-segregated program at VMI was “‘justified pedagogically,’ based on ‘important differences between men and women in learning and developmental needs,’ [and] ‘psychological and sociological differences,’” the Court held that generalizations about a “typical” woman (or man), are not constitutionally adequate to justify a sex-segregated program. *See id.* at 549-50. Unproven theories of learning style differences between boys and girls are, therefore, an impermissible basis to support sex segregation.

Documents produced in response to our FOIA request of November 23, 2011, which sought “documents relied upon by Cabell County or its officials in choosing to institute single-sex educational programs” and “documents presenting results or successes of single-sex instruction in a public school system used by Cabell County Schools either for public education or internal decision-making” do not clearly indicate *any* governmental interest, “substantial” or otherwise, that the Cabell County School District aimed to serve in implementing the sex segregation programs at either the Enslow or Barboursville Middle school. On the contrary, it appears that the decision to institute these programs was taken without any articulated mission, goal, or justification, and with little deliberation, public participation, or oversight by the County.

Documents suggest that the program at Enslow was initiated in 2009-2010 at the suggestion of the then-principal, Georgia Porter, modeled after a similar program in Kanawha County that the principal there had represented to her led to some “gains in test scores each year.”³ No documents were produced quantifying the extent of those purported gains in Kanawha County, and no further studies or educational data were produced showing any link between single-sex education and any

² We exempt from this request single-sex programs and activities permitted by Title IX, 20 U.S.C. § 1681(a)(6-9), and by 34 C.F.R. § 106.34(a).

³ Email from Georgia Porter, Former Principal, Enslow Middle School, to Ryan McKenzie, Principal, Enslow Middle School (April 16, 2008) (on file with the ACLU).

improved academic or behavioral outcomes elsewhere. The program was temporarily suspended due to scheduling issues in 2010-2011, but was reinstituted for the 2011-2012 school year in the sixth and seventh grades upon the staff's request. No documents were produced demonstrating the need to reinstitute single-sex education in core classes in the sixth or seventh grades. In fact, no documents were produced demonstrating that the school administration or the County considered *any further data or studies* in support of its decision, either in 2009 or in 2011, or that it put forward *any justification* for the program other than the unsubstantiated reports of improvements in Kanawha County and the unsupported views of the faculty that it had "worked very well" and that they had "missed it."⁴

The same appears to have been true of Barboursville. In that case, the County produced no records documenting the justification for instituting single-gender education in its sixth grade core classes, other than an explicitly non-exhaustive list of research abstracts that were considered in deciding whether to institute the program. No documents were produced demonstrating the need to institute single-sex education in the sixth grade class at Barboursville, or that it considered *any* school- or county-specific data in support of its decision. Since we must rely on the assurance from Cabell County Schools Superintendent William Smith that "there are no undisclosed or redacted records," we must conclude that the program was instituted with no articulated justification, with no examination of data on the particular need to institute such a program in the grades in question, and with no input or oversight from the County. Furthermore, it is impossible to conceive of an exceedingly persuasive justification for separating boys and girls during lunch, as the Barboursville school has reportedly done.

Moreover, the sources that administrators relied upon in implementing single-sex classes, according to your FOIA response, also suggest that single-sex classes in Cabell County Schools were premised on unproven and impermissible theories about the supposedly "different" brains and learning styles of boys and girls. For example, among the documents listed by Principal Jerry Lake as informing the decision to institute single-sex core classes in the sixth grade at Barboursville Middle School is Michael Gurian's *Teaching to the Minds of Boys*. Principal Ryan McKenzie stated that the faculty at Enslow was trained using Leonard Sax's *Why Gender Matters*. Both of these texts espouse the view that boys and girls learn and develop so differently that they should be educated using radically different teaching techniques. The Curriculum Supervisor of Cabell County Schools appears to have suggested that staff there should have received *more* professional development "for how to teach adolescent boys differently than adolescent girls."⁵

Publicly available documents also suggest that these gender stereotypes were incorporated into the curriculum in the single-sex classrooms at both schools. For example, members of the

⁴ See Email from Ryan McKenzie, Principal, Enslow Middle School, to Lenora Richardson, Curriculum Supervisor, Cabell County Schools (Sept. 30, 2011) (on file with ACLU).

⁵ Email from Ryan McKenzie, Principal, Enslow Middle School, to Lenora Richardson, Curriculum Supervisor, Cabell County Schools (Sept. 29, 2011) (noting that they had discussed in their curriculum evaluation the shortcoming that new staff had not had professional development "for how to teach adolescent boys differently than adolescent girls") (on file with ACLU).

faculty at Barboursville Middle School made comments to the media describing how “teachers try to use different angles for addressing the same subjects, those that might affect one sex more than the other. . . . [F]or boys they may use examples like tennis shoes or similar things in order to help them understand their lessons.” Clark Davis, *Cabell County Experiments with Single-Gender Classes*, WVPubcast.org, <http://www.wvpubcast.org/newsarticle.aspx?id=22716> (last visited May 18, 2012). Teachers at Enslow Middle School indicated that all female classes “get off on tangents and talk about girl things that [they] couldn't necessarily talk about in front of the boys,” whereas in all-male math classes, students “can talk about sports, tools and things that relate to the boys.” Carrie Cline, *Experimenting With Single-Sex Classrooms*, WSAZ, http://www.wsaz.com/home/headlines/Single_Sex_Classrooms_135058748.html (last visited May 18, 2012).

The scant remainder of the documents produced would not support the conclusion that single-sex education at either school was substantially related to *any* important or even legitimate educational interests, even had such an interest been articulated. For example, regardless of the merit of the underlying articles summarized, the list of abstracts produced by Barboursville hardly demonstrates the due diligence or rigorous research on the part of school administrators that would be required prior to initiation of a program instituting wholesale sex-segregation of students for all core academic subjects across an entire grade or grades.

In short, the records you produced do not support the conclusion that single-sex education at either Barboursville Middle School or Enslow Middle School was substantially related to any important or even legitimate educational interest. To the extent that the programs were justified at all, that justification appears to have relied in large part on unproven and impermissible theories about the supposedly “different” brains and learning styles of boys and girls. Public reports further suggest that the classroom curricula and activities were infused with impermissible sex stereotypes. While there are unquestionably biological and developmental differences between boys and girls, those differences cannot be translated into the need for different teaching methods in sex-segregated classrooms. See Diane Halpern, et al., *The Pseudoscience of Single-Sex Schooling*, 333 Science 1706 (2011). These flawed educational theories have been widely discredited by reputable scientific research, and have been definitively foreclosed in public schools by the Supreme Court in *VMI*.

2. The Barboursville Middle School and Enslow Middle School programs appear to have violated the statutory prohibition in Title IX on segregation on the basis of sex within coeducational institutions, as well as the implementing regulations of numerous regulatory agencies from which Cabell County Schools receives federal funds.

Under Title IX, “No person in the United States shall, on the basis of sex, be excluded from participation in . . . any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a). Separating students by sex within coeducational institutions, including separating students during academic classes, recess, or lunch, violates this prohibition on discrimination.

Accordingly, numerous federal agencies have promulgated regulations to implement this Title IX mandate. For example, regulations issued by the United States Department of Agriculture (USDA) flatly prohibit single-sex classes. 7 C.F.R. § 15a.34 (“A [USDA funding] 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”). USDA regulations apply to all West Virginia schools as a result of their participation in the USDA-funded school lunch program.

Moreover, while Title IX regulations promulgated by the United States Department of Education permit sex segregation under certain limited circumstances as a matter of federal enforcement, its regulations require at a minimum that any single-sex class within a coeducational school must be based on specific, identified objectives; must be completely voluntary; must ensure that a substantially equal coeducational option is available;⁶ and must be periodically evaluated “to ensure that single-sex classes or extracurricular activities are based upon genuine justifications and do not rely on overly broad generalizations about the different talents, capacities, or preferences of either sex and that any single-sex classes or extracurricular activities are substantially related to the achievement of the important objective for the classes or extracurricular activities.” 34 C.F.R. §106.34(b)(1),(4).

The absence of certain records from your FOIA response strongly suggests that the single-sex educational programs at both Enslow and Barboursville Middle schools failed to meet these requirements. For example, you provided no forms, whether “opt-in” or “opt-out,” that parents could fill out if they did not wish for their child to participate in single-sex classes. There was also no record of a “substantially equal coeducational” option available to students who chose not to participate in single-sex classes. When we followed up to confirm that this was the case, we were informed that the only alternative available is the option of going to a different school entirely. Thus, we must conclude that both middle schools engaged in the wholesale and effectively mandatory separation of students by sex within entire grades, which blatantly violates federal statute and regulations.

In addition, for the same reasons discussed in section 2, above, the records that you provided to us did not demonstrate a justification for the single-sex education programs at Cabell County Schools adequate to satisfy the Title IX regulations (either by demonstrating an assessment of individual student need, or by showing the existence of an established policy to improve educational outcomes by offering diverse educational options). Nor was there any evidence that the programs were evaluated to ensure they did not perpetuate sex stereotypes. To the extent that the County was

⁶“Factors the Department will consider, either individually or in the aggregate as appropriate, in determining whether classes or extracurricular activities are substantially equal include, but are not limited to, the following: the policies and criteria of admission, the educational benefits provided, including the quality, range, and content of curriculum and other services and the quality and availability of books, instructional materials, and technology, the qualifications of faculty and staff, geographic accessibility, the quality, accessibility, and availability of facilities and resources provided to the class, and intangible features, such as reputation of faculty.” 34 C.F.R. §106.34(b)(3).

involved at all in the oversight or supervision of these programs, the Curriculum Supervisor appears to have suggested that the program at Enslow called for *more* training on brain differences between boys and girls, rather than inquiring into whether such training had impermissibly furthered sex stereotypes.⁷ These significant shortcomings render both programs unlawful under the regulations of the Department of Education.

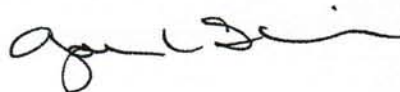
In light of these serious legal concerns, we respectfully request that Cabell County Schools agree to cease all single-sex programs and activities (including school lunches) with the exception of those permitted under Title IX by the start of the next school year. A proposed agreement is enclosed for your consideration. Should the Board fail to agree to take the steps outlined therein, the ACLU will consider pursuing legal action, including the filing of a lawsuit and/or an administrative complaint with the pertinent federal agency or agencies.

We expect your response no later than June 4, 2012.

Very truly yours,



Brenda Lee Green
Executive Director, ACLU of West Virginia
Foundation



Galen Sherwin,
Staff Attorney, ACLU Women's Rights Project

ENCLOSURE

⁷ See Email from Ryan McKenzie, Principal, Enslow Middle School, to Lenora Richardson, Curriculum Supervisor, Cabell County Schools (Sept. 29, 2011) (on file with the ACLU) (noting that they had discussed in their curriculum evaluation the shortcoming that new staff had not had professional development "for how to teach adolescent boys differently than adolescent girls").