

**DEPARTMENT OF EDUCATION****34 CFR Part 106**

RIN 1870-AA11

**Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance****AGENCY:** Office for Civil Rights, Department of Education.**ACTION:** Final regulations.

**SUMMARY:** The Secretary amends the regulations implementing Title IX of the Education Amendments of 1972 (Title IX), which prohibits sex discrimination in federally assisted education programs and activities. These amendments clarify and modify Title IX regulatory requirements pertaining to the provision of single-sex schools, classes,<sup>1</sup> and extracurricular activities in elementary and secondary schools. The amendments expand flexibility for recipients to provide single-sex education, and they explain how single-sex education may be provided consistent with the requirements of Title IX.

**DATES:** These regulations are effective November 24, 2006.**FOR FURTHER INFORMATION CONTACT:** Sandra G. Battle, U.S. Department of Education, 400 Maryland Avenue, SW., Room 6125, Potomac Center Plaza, Washington DC 20202-1100. Telephone: (202) 245-6767.

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**SUPPLEMENTARY INFORMATION:** Title IX prohibits discrimination on the basis of sex in education programs and activities that receive Federal financial assistance.<sup>2</sup> The Department's Title IX regulations implement Title IX's nondiscrimination requirements in

<sup>1</sup> The requirements for classes and extracurricular activities are the same. For the sake of simplicity, we generally use the term "class" in the preamble analysis of comments and changes. A noted exception is our discussion of comments from the public regarding extracurricular activities specifically.

<sup>2</sup> 20 U.S.C. 1681(a).

education programs and activities assisted by the Department.<sup>3</sup> These amendments to the regulations establish new standards that OCR will use in determining<sup>4</sup> whether recipients that choose to operate single-sex elementary and secondary classes, extracurricular activities, and schools<sup>5</sup> are doing so consistent with their Title IX obligations not to discriminate on the basis of sex for the purposes of receiving financial assistance from the Department.

On March 9, 2004, the Secretary published a notice of proposed rulemaking (NPRM) for this part in the **Federal Register** (69 FR 11276). We explained that these amendments to the regulations are intended to provide recipients with additional flexibility in providing single-sex classes, extracurricular activities, and schools in elementary and secondary education. At the same time, these amendments ensure for students that single-sex classes, extracurricular activities, and schools are provided in a nondiscriminatory manner. In the preamble to the proposed regulations, on pages 11276 through 11282, we discussed the major changes needed to accomplish these objectives.<sup>6</sup> These changes included the following:

<sup>3</sup> 34 CFR part 106.

<sup>4</sup> OCR would make these determinations in resolving any complaints or compliance reviews related to these issues. See 34 CFR 100.7, made applicable to the Title IX regulations by § 106.71.

<sup>5</sup> These regulations do not require single-sex classes, extracurricular activities, or schools.

<sup>6</sup> The NPRM also discussed minor and technical changes including:

- Amending § 106.34(a) to delete obsolete timeframes; to move the general prohibition against providing education programs or activities separately on the basis of sex or refusing or requiring participation in education programs or activities on the basis of sex from an undesignated part of the former § 106.34 published in 1980 to § 106.34(a); and, because the proposed amendments provided for an exception that would permit single-sex classes in nonvocational elementary and secondary schools of any type, except for vocational education classes or vocational extracurricular activities, to delete from § 106.34 the introductory listing of specific types of classes to which the general prohibition applies.

- Amending § 106.34(a) to move the exceptions to the general prohibition, relating to physical education, sex education, and chorus, to § 106.34(a)(1) and (2), (a)(3) and (a)(4), respectively, and to expand the exception for sex education, § 106.34(a)(3), to include classes in elementary and secondary education that deal "primarily" with human sexuality, rather than only those that deal "exclusively" with human sexuality.

- Amending § 106.35 to clarify that the prohibitions against sex discrimination in admissions to vocational education schools apply to all recipients, public and private, and to move the requirements, including the substantive amendments, related to nonvocational schools operated by local educational agencies (LEAs) to § 106.34(c).

- Adding a new § 106.43 and moving to it, from § 106.34(d) of the former regulations, the provision

- Amending § 106.34(b) to add a new exception to the general prohibition against single-sex classes and extracurricular activities. The exception applies to nonvocational classes and extracurricular activities in elementary and secondary coeducational schools that are not vocational schools.<sup>7</sup> Under this exception a recipient would be permitted to offer a single-sex class or extracurricular activity if (1) the purpose of the class or extracurricular activity is achievement of an important governmental or educational objective, and (2) the single-sex nature of the class or extracurricular activity is substantially related to achievement of that objective. (Proposed § 106.34(b)(1)(i)). The two important objectives described in the proposed regulations were to provide a diversity of educational options to parents and students and to meet the particular, identified educational needs of students. (Proposed § 106.34(b)(1)(i)). The proposed amendments also described, for those recipients that choose to provide single-sex classes or extracurricular activities under this new exception, requirements necessary to ensure nondiscrimination. Under these requirements, as described in the proposed regulations, the recipient must treat male and female students in an evenhanded manner in implementing its objective, and it must always provide a substantially equal coeducational class or extracurricular activity in the same subject or activity. (Proposed § 106.34(b)(1)(ii), (iii)). The proposed amendments provided that, in addition to the required substantially equal coeducational class or extracurricular activity in the same subject or activity, a substantially equal single-sex class or extracurricular activity for students of the other sex may be required to ensure nondiscriminatory implementation. (Proposed § 106.34(b)(2)). The proposed amendment provided a non-exhaustive list of factors that the Department will

regarding standards for measuring skill or progress in physical education.

<sup>7</sup> As explained in the preamble to the proposed regulations, the requirements for classes and extracurricular activities apply to recipients that operate public and private nonvocational coeducational schools. Private elementary and secondary schools are subject to the requirements pertaining to classes if they receive a grant or subgrant of Federal funds from the Department. Private schools with students who participate in programs conducted by LEAs that are funded under Federal programs such as Title I of the Elementary and Secondary Education Act of 1965, as amended, or the Individuals with Disabilities Education Act are not considered recipients of Federal funds unless they otherwise receive a grant or subgrant of Federal funds. These private schools are not subject to these amended regulations, but the LEA must ensure that its programs, including services to private school students, are consistent with Title IX.

consider in determining whether classes or extracurricular activities are substantially equal (Proposed § 106.34(b)(3)), and required the recipient to conduct periodic evaluations to ensure nondiscrimination (Proposed § 106.34(b)(4)). The proposed regulations defined “classes” to include all education activities provided for students by a school or sponsored by a school, and it was intended to include extracurricular activities.<sup>8</sup> (Proposed § 106.34(b)(5)).

- Amending § 106.34(c) to include from former § 106.35, with substantive changes, the nondiscrimination requirements applicable to the operation of nonvocational single-sex public schools.<sup>9</sup> The proposed amendment provided generally that a recipient that operates a public nonvocational elementary or secondary school may operate a single-sex school only if it provides substantially equal opportunities for students of the other sex in another school and that the other school may be either single-sex or coeducational. (Proposed § 106.34(c)(1)). As explained in the preamble to the proposed regulations, this represents a change in interpretation of Title IX. Under the prior interpretation, if a recipient operated a single-sex public school for students of one sex, we required it to offer a comparable single-sex school for students of the other sex.

The proposed amendments also exempted nonvocational public charter schools that are single-school LEAs from the requirement to provide a substantially equal school for students of the other sex. (Proposed § 106.34(c)(2)). In addition, the proposed amendments provided a non-exhaustive list of factors the Department would use in determining whether the schools are substantially equal and provided that the Department will use an aggregate approach in making this determination. (Proposed § 106.34(c)(3)).

### Significant Changes Between the Proposed Regulations and the Final Regulations

- *Clarification that § 106.34(b)(1) through (5) applies to extracurricular activities, as well as to classes:* We have added the term “extracurricular activities” throughout § 106.34(b)(1) through (5) to clarify that these provisions apply to both classes and extracurricular activities. As described

later in this section, we are also clarifying the scope of coverage of paragraph (b)(1) through (4) of § 106.34.

- *Clarification that a recipient’s objective must be “important”:* Section 106.34(b)(1) of the proposed regulations specified, in paragraph (i), that each single-sex class or extracurricular activity must be based on the “recipient’s objective.” Recipients that are public entities must have an important governmental objective and recipients that are private entities must have an important educational objective. We have clarified this provision in the final regulations by adding the word “important” to describe the recipient’s objective.

- *Revisions of “diversity of educational options” objective:* The proposed regulations stated that a “diversity of educational options to parents and students” was an important objective that may serve as a basis for providing single-sex classes. (Proposed § 106.34(b)(1)(i)(A)). We have revised the regulatory language to clarify that this objective is “to improve educational achievement of its students, through a recipient’s overall established policy, to provide diverse educational opportunities, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective.”

- *Clarification that participation in single-sex classes and extracurricular activities must be completely voluntary:* The proposed regulations in § 106.34(b)(1)(ii) referenced the requirements of § 106.34(a) to ensure together with the requirement to provide a coeducational class, that recipients did not assign students involuntarily to single-sex classes. New paragraph (iii) of § 106.34(b)(1) provides that student enrollment in single-sex classes and extracurricular activities must be completely voluntary.

To accommodate the addition of this new paragraph, we have renumbered the other paragraphs in this section. The requirement for evenhanded treatment of male and female students is now in § 106.34(b)(1)(ii), the requirement that participation in single-sex classes and extracurricular activities must be completely voluntary is in § 106.34(b)(1)(iii), and the requirement to provide a substantially equal coeducational class or extracurricular activity is in § 106.34(b)(1)(iv). We also have removed the reference to paragraph (a) in this paragraph because it is no longer needed.

- *Clarification of aggregate approach regarding the assessment of substantial equality of classes in § 106.34(b)(3) and schools in § 106.34(c)(3):* We have

clarified the description of the Department’s use of an aggregate approach for considering factors in assessments of substantial equality by deleting § 106.34(c)(ii) of the proposed regulations, which was misunderstood by commenters, and by adding the clarifying language, “either individually or in the aggregate as appropriate,” to § 106.34(b)(3), regarding factors the Department will consider in the assessment of substantial equality of classes, and to § 106.34(c)(3), regarding factors the Department will consider in the assessment of substantial equality of schools, in the final regulations.

- *Addition of “intangible features” to factors in § 106.34(b)(3) and (c)(3); addition of “geographic accessibility” factor in § 106.34(b)(3):* The proposed regulations provided non-exhaustive lists of factors in § 106.34(b)(3) and (c)(3) that the Department will consider in comparing classes or extracurricular activities and schools, respectively, for the purposes of determining compliance. We have added “intangible features” and “reputation of faculty” as an example of an intangible feature to both lists of factors in the final regulations. We also have added “geographic accessibility” as a factor in § 106.34(b)(3) because it may be relevant in certain circumstances in compliance determinations.

- *Modification of provisions on periodic evaluations:* The proposed regulations in § 106.34(b)(4) required that recipients conduct periodic evaluations of single-sex classes to ensure, among other things, that the classes and activities are based on genuine justifications and do not rely on overly broad generalizations about the different talents or capacities of either sex. Title IX also does not permit single-sex classes or extracurricular activities to rely on overly broad generalizations about the preferences of either sex. Therefore, we added the word “preferences” to § 106.34(b)(4). We also have added the term “important” to clarify that the evaluation must ensure that the single-sex class or extracurricular activity is substantially related to the recipient’s important objective.

- *Clarification addressing the frequency of the procedural requirement for periodic evaluations:* In the preamble to the proposed regulations, we requested comments regarding how often recipients should conduct the periodic evaluations required by § 106.34(b)(4). The proposed regulations were silent on this issue. The final regulations add a new paragraph (ii) to § 106.34(b)(4) that specifies that evaluations for the purposes of

<sup>8</sup> 69 FR 11276, footnote 1.

<sup>9</sup> As explained in the preamble to the proposed regulations, the requirements pertaining to the provision of single-sex schools do not apply to recipients that operate private, nonvocational elementary or secondary schools.

§ 106.34(b)(4)(i) must be conducted at least every two years.

- *Scope of coverage of § 106.34(b)(1) through (4):* The proposed regulations in § 106.34(b)(5) defined “class” for the purposes of § 106.34(b)(1) through (4), and that definition was intended to cover academic classes and extracurricular activities. We have determined that rather than define “class,” it is clearer and more useful to include a provision on the scope of coverage of paragraph (b)(1) through (4) of § 106.34. We have revised § 106.34(b)(5) to provide that paragraph (b)(1) through (4) applies to classes and extracurricular activities provided by a recipient directly or through another entity, and to clarify that paragraph (b)(1) through (4) does not apply to interscholastic, club, or intramural athletics, which are subject to the requirements of §§ 106.41 and 106.37(c).

- *Definition of “school” and “school within a school”:* The proposed regulations in § 106.34(c)(1) referred to a single-sex education unit. For the purposes of this paragraph, we consider an “education unit” to mean a “school within a school” and that term to mean a school that is housed within another school. We believe that the term “school within a school” and this explanation are clearer, more accurate, and more useful to recipients than the term “education unit.” For this reason we have added a new paragraph (4) to § 106.34(c) that defines the term “school” for the purposes of paragraph (c)(1) through (3) to include a “school within a school” and explains that the latter term means “an administratively separate school located within another school.” We have deleted the term “single-sex education unit” from § 106.34(c)(1) because it is no longer necessary in light of the new definition.

### Analysis of Comments and Changes

In response to the Secretary’s invitation in the preamble to the proposed regulations, we received approximately 5,860 comments on the proposed regulations. An analysis of the comments and of the changes in the regulations since publication of the proposed regulations follows.

We group major issues according to subject under the appropriate sections of the final regulations. Generally, we do not address technical or minor changes and suggested changes that the law does not authorize the Secretary to make.

### Section 106.34. Access to Classes and Schools

#### 1. Research

*Comments:* Some commenters recommended that the Department postpone amendment of the regulations. Among the comments were recommendations that we wait until pilot projects were conducted, until completion of a Department-commissioned study on single-sex schools, or until the completion of additional scientific research that concludes that single-sex education is beneficial to students.

*Discussion:* Title IX has always permitted single-sex schools under conditions that ensure nondiscrimination. Existing educational research suggests that single-sex education may provide benefits to some students under certain circumstances. For an overview of the literature assessing single-sex schools, see *Single Sex Versus Coeducational Schooling: A Systematic Review*, U.S. Department of Education, Office of Planning, Evaluation and Policy Development, 2005, available on the Department’s Web site. Although there is a debate among educators on the effectiveness of single-sex education, the final regulations permit each recipient to make an individualized decision about whether single-sex educational opportunities will achieve the recipient’s important objective and whether the single-sex nature of those opportunities is substantially related to achievement of that important objective consistent with the nondiscrimination requirements of these regulations.

*Changes:* None.

#### 2. Legal Standards for Single-Sex Classes (§ 106.34(b))

*Comments:* Some commenters objected to amending the regulations to permit additional flexibility to provide single-sex education because they were concerned that sex discrimination may result. Some commenters were particularly concerned about sex discrimination resulting from single-sex classes, given that the former regulations had restricted single-sex classes to very limited circumstances. Some commenters expressed the view that single-sex public education is generally illegal, analogizing it to race-segregated public education, which is unconstitutional. Some commenters expressed the view that the amendments were inconsistent with standards pertaining to sex discrimination under the Equal Protection Clause of the 14th Amendment to the U.S. Constitution

(Equal Protection Clause) and that recipients who implemented programs consistent with these regulations might be subject to litigation. Some commenters recommended that the final regulations provide notice about constitutional requirements.

*Discussion:* The Title IX statute requires equal educational opportunity regardless of sex, and both Title IX and the regulations<sup>10</sup> have always permitted single-sex nonvocational elementary and secondary schools.<sup>11</sup> With respect to schools, Congress both required that recipients that operate public schools conduct their education program or activity in a manner that does not discriminate on the basis of sex and permitted these recipients to operate single-sex schools within their school districts consistent with the nondiscrimination requirements. In issuing the original Title IX regulations, the former Department of Health, Education, and Welfare chose to require generally that classes be coeducational to ensure nondiscrimination. 45 CFR 86.34 (1975). Given that Congress intended for school districts to be operated in a manner that both prohibits sex discrimination and permits the operation of single-sex schools under conditions that ensure nondiscrimination, we believe that it is consistent with the intent of Congress to permit recipients additional flexibility to offer single-sex classes as long as they are offered under conditions that ensure nondiscrimination. These regulations permit recipients to continue to operate solely coeducational classes and provide the requirements that will ensure that, if recipients choose to provide single-sex classes, they will do so in a nondiscriminatory manner.

Although the Supreme Court has ruled race-segregated public education per se unconstitutional,<sup>12</sup> the Court has

<sup>10</sup> Comments pertaining solely to the legal standards applicable to schools are discussed in subsequent paragraphs in connection with § 106.34(c)(1) through (4), which provides requirements for single-sex schools.

<sup>11</sup> 20 U.S.C. 1681(a)(1); § 106.15(d) and former § 106.35 published in 1980. Title IX also includes exemptions for voluntary youth organizations (e.g., Boy Scouts and Girl Scouts), Boys’ and Girls’ Nation or State conferences, and father-son and mother-daughter activities. 20 U.S.C. 1681(a)(6)(B), (7), and (8). The Title IX regulations historically have permitted sex-separate athletic teams if selection is based on competitive skill or the activity involved is a contact sport (§ 106.41(b)) and sex-separate physical education activities involving a contact sport (former § 106.34(c) or § 106.34(a)(1) in these final regulations). The Title IX regulations also historically have permitted sex separation in classes on human sexuality (former § 106.34(e) or § 106.34(a)(3) in these final regulations) and for pregnant students, on a voluntary basis (§ 106.40(b)(1) and (3)).

<sup>12</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954).

not struck down the legality of single-sex public elementary or secondary education<sup>13</sup> under either Title IX or the Constitution.<sup>14</sup> In analyzing whether sex-separate admissions policies in public postsecondary undergraduate institutions were consistent with the standards of the Equal Protection Clause, the Supreme Court has indicated that to justify a sex-based classification the public entity must demonstrate that it is based on an important governmental objective and that exclusion of students of the other sex is substantially related to achievement of that objective.<sup>15</sup> The Supreme Court has ruled that the “justification must be genuine, not hypothesized or invented *post hoc* in response to litigation” and that “it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”<sup>16</sup> Subsequent paragraphs describe how the Title IX regulations also prohibit treatment based on overly broad sex-based generalizations.

With respect to the comments about consistency of these regulations with Equal Protection Clause standards, the Department enforces its Title IX regulations, which prohibit discrimination on the basis of sex in education programs and activities by public and private recipients of Federal assistance. The Equal Protection Clause prohibits sex discrimination by public actors, such as public school districts. If possible, the regulatory provisions of Title IX are informed by constitutional principles, but because the scope of the Title IX statute differs from the scope of

the Equal Protection Clause,<sup>17</sup> these regulations do not regulate or implement constitutional requirements or constitute advice about the U.S. Constitution. Rather, they implement Title IX by establishing the nondiscrimination requirements that the Department will enforce with respect to recipients that choose to provide single-sex education. These regulations do not require that recipients implement single-sex education. Recipients may wish to consult legal counsel regarding how the Equal Protection Clause or other applicable legal authorities prohibiting sex discrimination<sup>18</sup> may affect any particular single-sex school or class they propose to offer.

*Changes:* None.

### 3. Procedural Safeguards

*Comments:* Some commenters recommended additional requirements, such as pre-approval of single-sex classes or schools by the Department, specific data maintenance requirements in the regulations, reporting requirements to the Department, and routine review or monitoring by the Department to ensure nondiscrimination.

*Discussion:* We believe that these regulations and our current enforcement requirements and procedures are sufficient to ensure compliance. These regulations recognize that recipients that implement single-sex education will have differing objectives addressing differing student populations and that requiring a particular data set in the regulations could be both over-inclusive and under-inclusive. The Department has authority to access recipient records and other sources of information to determine compliance.<sup>19</sup> Recipients

have an ongoing responsibility to maintain compliance with Title IX and these regulations.<sup>20</sup> Additionally, the amended regulations require a recipient to periodically conduct self-evaluations. If students and their parents believe there has been a violation of these regulations, they may file a complaint alleging discrimination under the recipient’s grievance procedures.<sup>21</sup> Students, parents, and third parties may also file complaints with the Department’s Office for Civil Rights (OCR) if they believe discrimination in violation of these regulations has occurred. See, e.g., 34 CFR 100.7(b), (c), and (d), which are incorporated by reference in 34 CFR 106.71. In addition, OCR has authority to conduct periodic compliance reviews of recipients to ensure compliance.<sup>22</sup> If OCR finds that a recipient has failed to comply with the Title IX regulations, OCR will negotiate with the recipient to secure compliance by voluntary means, and will take action to enforce<sup>23</sup> if voluntary compliance cannot be achieved.

*Changes:* None.

### 4. Effect on Other Issues

*Comments:* Some commenters expressed concern that additional flexibility for single-sex education might result in a reversion to sex-based stereotypes or roles. Some commenters indicated concern that single-sex education may have negative effects on socialization of children. Another commenter was concerned that recipients might not be aware that the amendments do not affect Federal law that prohibits recipient employers from making job assignments on the basis of sex.

*Discussion:* With respect to commenters who expressed concern that increased flexibility to provide single-sex education might result in a reversion to sex-based stereotypes or roles, the regulations establish substantive and procedural requirements to ensure nondiscrimination. The regulations make it clear that a recipient’s failure to have a justification, i.e., an important objective and a substantial relationship between the important objective and the sex-based means to further that objective, that is genuine would be sex discrimination. Thus, the regulations also make it clear that a recipient’s use of overly broad sex-based

<sup>13</sup> There are no Supreme Court opinions on the issue of single-sex public elementary and secondary education. In 1977, the Court, by an evenly divided vote and without an opinion, let stand a decision allowing, under the Equal Protection Clause, a school district that also operated coeducational high schools to operate two comparable single-sex high schools, one for girls and one for boys.

*Vorchheimer v. School District of Philadelphia*, 532 F.2d 880 (3rd Cir. 1976), affirmed by an equally divided Court, 430 U.S. 703 (1977) (per curiam). More recently, the Court determined in a case involving the Virginia Military Institute that, by denying females the educational opportunities provided to males in a single all-male postsecondary school, the State had denied equal protection to females. *United States v. Virginia*, 518 U.S. 515 (1996).

<sup>14</sup> The Court uses different standards to evaluate classifications based on race, as compared to sex, to determine if they are consistent with the U.S. Constitution. Racial classifications are analyzed under the standard of strict scrutiny, whereas sex-based classifications are analyzed under the standard of intermediate scrutiny. *Grutter v. Bollinger*, 539 U.S. 306, 326–327 (2003); *Virginia*, 518 U.S. at 532–533.

<sup>15</sup> *Virginia*, 518 U.S. at 533, quoting *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982).

<sup>16</sup> *Virginia*, 518 U.S. at 533.

<sup>17</sup> For example, as explained in the Department’s “Guidelines on current title IX requirements related to single-sex classes and schools,” although recipients that operate public schools are subject to constitutional requirements pertaining to their justification for establishing single-sex schools, because the Title IX statute does not cover admissions to nonvocational elementary and secondary schools, the Department is generally precluded from examining the recipient’s justification. 67 FR 31101, 31103 (May 8, 2002).

<sup>18</sup> Recipients that are public entities, such as public school districts, are subject to the sex discrimination prohibitions of the Equal Protection Clause. Public elementary and secondary schools are also subject to the requirements of the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1701–1721 (EEOA), which, among other things, contains prohibitions against the involuntary assignment of students to sex-separate schools on the basis of sex. 20 U.S.C. 1703(c), 1705, and 1720(c). Recipients also are subject to private litigation under Title IX for intentional discrimination on the basis of sex. Public school and private school recipients also may be subject to State or local laws prohibiting single-sex classes or schools.

<sup>19</sup> Section 106.71, incorporating by reference 34 CFR 100.6(c).

<sup>20</sup> Section 106.4.

<sup>21</sup> Section 106.8(b).

<sup>22</sup> Section 106.71, incorporating 34 CFR 100.7.

<sup>23</sup> Enforcement options include commencement of proceedings to terminate Federal funds administratively or referral to the Department of Justice for judicial enforcement. 20 U.S.C. 1682.

generalizations in connection with offering single-sex education would be sex discrimination. With respect to commenters who were concerned about the effect of single-sex education on the socialization of students, we reiterate that these regulations do not require single-sex education. Rather, they permit a recipient that has determined that single-sex education may be beneficial for some portion of its student population to offer single-sex education consistent with the requirements in these regulations.

These regulations do not change the prohibitions on sex discrimination in employment, or any other area not specifically addressed in these amendments, in the Title IX regulations. Among other things, the Title IX regulations prohibit recipients from making job assignments on the basis of sex, § 106.51(b)(4), and from classifying jobs as being for males or females, § 106.55(a). Both of these provisions would prohibit schools from assigning teachers to single-sex classes based on their sex.

*Changes:* None.

#### 5. Important Objective (§ 106.34(b)(1)(i))

*Comments:* Some commenters objected to the description, in the preamble to the proposed regulations, of the recipient's objective for establishing a single-sex class as being an important "educational" objective because they perceived that the educational objective requirement imposed a lesser standard than the important "governmental" objective requirement.

*Discussion:* The same Title IX nondiscrimination standards apply to classes, whether public or private recipients operate them. We used two terms, "important educational objective" and "important governmental objective," in recognition of the fact that the regulatory provisions on single-sex classes apply to both private and public recipients. Recipients that are public actors, such as school districts, must have an important governmental objective to use any sex-based classification for the purposes of the Equal Protection Clause. Accordingly, for public recipients the same important governmental objective that would satisfy the requirements of the Equal Protection Clause will satisfy this portion of the regulations for the purposes of Title IX. Private recipients are not subject to the Equal Protection Clause because they are not governmental agencies. Thus, it is not appropriate to describe the objective for private recipients as an important "governmental" objective. However, with respect to single-sex classes, unlike

single-sex schools, the same demanding standards apply under Title IX for both public and private recipients. Thus, the regulations impose a Title IX requirement on private recipients that is analogous to the requirement for public recipients that they base any single-sex class on an "important governmental objective." The analogous requirement for private recipients is that they must base any single-sex class on an "important educational objective." In addition, because some commenters perceived that the reference to an important "educational" objective was a lesser standard than important "governmental" objective, we have added the term "important" to modify the term "objective" in the regulatory language in § 106.34(b)(1)(i).

*Changes:* The term "important" has been added to modify the term "objective" in § 106.34(b)(1)(i).

#### 6. Diversity Objective (§ 106.34(b)(1)(i)(A))

*Comments:* Some commenters objected to the diversity of educational options rationale for single-sex classes. Some of these commenters expressed the view that providing diverse educational options was not an important governmental interest for the purposes of the constitutional test for sex-based classifications. Some commenters stated that there is not an important governmental interest in a sex-based educational option as a diverse option without a requirement that the recipient demonstrate that the single-sex option advances educational goals, because otherwise the single-sex nature of the class would always be justified as substantially related to achievement of the objective, which is circular.

Some commenters argued that implementation of diversity of educational options was an impermissible justification for single-sex classes because it might permit classes to be based on sex-based stereotypes or overly broad generalizations about the different talents, capacities, or preferences of either sex.

*Discussion:* The Department continues to believe that, for the purposes of justifying a single-sex class under Title IX, a recipient can have an important governmental or educational objective evenhandedly to provide the opportunity to choose among diverse educational opportunities, provided that the single-sex nature of the class is substantially related to achieving that important objective. Although the Supreme Court has not decided the specific issue of whether this objective

is an important governmental or educational objective for the purposes of justifying a sex-based classification under either Title IX or the Equal Protection Clause, the Court has suggested it would uphold the evenhanded provision of single-sex public educational opportunities, among a diversity of educational opportunities.<sup>24</sup>

Given that Title IX encompasses broad nondiscrimination requirements, with narrow statutory exceptions,<sup>25</sup> our intent is to establish regulatory exceptions for single-sex classes consistent with the statutory approach. We have clarified that a recipient's evenhanded provision of single-sex classes for the purpose of improving educational achievement of its students, through a recipient's overall established policy to provide diverse educational opportunities consistent with the requirements of these regulations meets the nondiscrimination requirements of Title IX.

In this regard, subject to the requirements of these regulations, some recipients might determine that the diversity of educational opportunities they provide to students would appropriately include providing single-sex opportunities in addition to coeducational opportunities.<sup>26</sup> The regulations also require that the single-sex nature of any class offered pursuant to this objective must be substantially related to achievement of the objective.<sup>27</sup>

The purpose of providing diverse educational opportunities is to engage parents in the education of their children and students in their own education with the goal of improving student outcomes. This will provide parents the opportunity to choose single-sex classes as well as other diverse opportunities because they

<sup>24</sup> In considering admissions policies at the postsecondary level, the Court stated that "we do not question the State's prerogative evenhandedly to support diverse educational opportunities." *Virginia*, 518 U.S. at 534, n.7. Responding to the Virginia Military Institute's defense that its male-only admissions policy was established and maintained to further a State policy of diversity, the court recognized that the reality that "single-sex education affords pedagogical benefits to at least some students" was uncontested in the litigation and that "it is not disputed that diversity among public educational institutions can serve the public good." 518 U.S. at 535. See also *Virginia*, 518 U.S. at 564 (Chief Justice Rehnquist, concurring.)

<sup>25</sup> *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 175 (2005).

<sup>26</sup> For example, a recipient may seek to achieve an educational benefit for its students such as improvement in class work.

<sup>27</sup> For example, a recipient may have evidence that some boys and girls show educational improvement in single-sex classes during their adolescent years.

believe that these classes will help their children. In support of this objective and to further bolster the connection between the diversity justification and the legitimate interest in providing diverse educational opportunities, the final regulations clarify that the provision of single-sex classes must be pursuant to a recipient's established policy of offering diverse educational opportunities. This means that the range of choices offered to students and parents is not limited to single-sex schools and classes and coeducational schools and classes. A school or school district may not simply establish a single-sex class and declare that the class by definition promotes diversity and is therefore consistent with these regulations. This ensures that a single-sex class in fact must be related to the important objective of improving educational achievement of its students, through a recipient's overall established policy to provide diverse educational opportunities.

At the school district level examples of diverse educational opportunities that a recipient might offer as part of an overall established policy include charter schools, magnet schools, coeducational schools, single-sex schools, coeducational schools that offer both coeducational and single-sex classes, or other forms of public school opportunities. At the school level, this policy may include a range of elective classes or the opportunity to take classes at other schools.

A recipient's justification, i.e., an important objective and a substantial relationship between the important objective and the sex-based means to further the objective, must be genuine. Thus, recipients are prohibited from determining which classes to offer on a single-sex basis or providing single-sex classes on the basis of overly broad generalizations about the different talents, capacities, or preferences of either sex. However, to the extent that a recipient offers single-sex classes, consistent with the requirements of these regulations, among its diverse educational opportunities, these regulations recognize that a parent or guardian may make an individualized decision to select from those opportunities regarding enrollment of his or her child.

*Changes:* We have revised § 106.34(b)(1)(i)(A) to clarify that single-sex classes offered under this objective are offered to improve educational achievement of its students, through an overall established policy of providing diverse educational opportunities.

#### 7. Needs Objective (§ 106.34(b)(1)(i)(B))

*Comments:* Numerous commenters questioned, on a variety of grounds, whether the amendments permitting single-sex classes to address particular, identified educational needs met the requirements of Title IX or met the test for sex-based classifications under the Equal Protection Clause. Numerous commenters expressed concern that the regulations did not require a recipient to articulate the educational benefit that it would be trying to achieve pursuant to the particular, identified educational needs objective or to produce evidence that the class would achieve the benefit described in the objective. Numerous commenters indicated that the proposed regulations did not require a recipient to compile evidence that the single-sex nature of its class is substantially related to the particular, identified educational need or educational benefit the recipient seeks to provide. Several commenters were concerned that recipients would establish single-sex classes based on administrative convenience.

Commenters also objected to the implementation of the particular educational need objective for single-sex classes because it might permit classes to be based on sex-based stereotypes or overly broad generalizations about the different talents, capacities, or preferences of either sex.

*Discussion:* The Supreme Court has not decided the issue of whether the particular, identified educational needs objective is an important governmental or educational objective for the purposes of justifying a sex-based classification under either Title IX or the Equal Protection Clause. However, the Court has indicated in Equal Protection Clause decisions that an array of "important objectives" can support sex-based classifications, including "to advance full development of the talent and capacities of our Nation's people."<sup>28</sup> We believe that a recipient's evenhanded provision of single-sex classes to meet the particular, identified educational needs of its students in order to improve educational outcomes for its students is consistent with the objective found by the Court of "advance[ment of] full development of the talent and capacities of our Nation's people." Thus, we continue to believe that meeting the particular, identified educational need of students is an important governmental or educational objective for recipients for the purposes of Title

<sup>28</sup> *Virginia*, 518 U.S. at 533 (internal quotations omitted; citations omitted). See also *Hogan*, 458 U.S. at 728 (finding that in limited circumstances, sex-based classifications can be justified.)

IX, and that, if single-sex classes are evenhandedly implemented pursuant to this objective and consistent with the safeguards in these amended regulations, they will meet the nondiscrimination requirements of Title IX.<sup>29</sup>

The regulations require a recipient to evenhandedly identify the particular educational needs of students of both sexes. A student's particular, identified educational need is evidenced by limited or deficient educational achievement.<sup>30</sup> After the needs of its students have been evenhandedly identified, a recipient then evenhandedly determines how to meet those needs. This determination must be made on a nondiscriminatory basis and should include nondiscriminatory consideration of whether a single-sex class would meet the particular needs identified for its male and female students. Establishment of a single-sex class requires a determination, based on an analysis of evidence, that the single-sex nature of the class would be substantially related to the achievement of a recipient's important objective of meeting the particular, identified educational needs of its students. Administrative convenience cannot justify sex-based classifications under Title IX.<sup>31</sup> As discussed previously regarding single-sex classes, to provide the opportunity to choose among diverse educational opportunities, under Title IX, a recipient's justification, i.e., an important objective and a substantial relationship between the important objective and the sex-based means used to further that objective, must be genuine and cannot be based on overly broad generalizations about the different talents, capacities, or preferences of either sex.<sup>32</sup>

*Changes:* We have made a nonsubstantive revision to § 106.34(b)(1)(i)(B) to change the term "meeting those needs" to "achieving that objective" in order to reflect the language used by the Supreme Court in *Virginia*. Our previous language was intended to convey this concept.

<sup>29</sup> See *Virginia*, 518 U.S. at 534, n.7.

<sup>30</sup> For example, limited educational achievement may be shown when students are not taking higher level courses; deficient educational achievement may be shown when students have remedial needs.

<sup>31</sup> See *Wengler v. Druggists Mutual Insurance Company*, 446 U.S. 142, 151–52 (1980) (citing cases); *Frontiero v. Richardson*, 411 U.S. 677, 689–90 (1973).

<sup>32</sup> See *Virginia*, 518 U.S. at 533. See also *Hogan*, 458 U.S. at 726; *Craig v. Boren*, 429 U.S. 190, 198 (1976) (holding that sex cannot be used as a proxy for other more germane bases of classification.)

## 8. Social Needs (§ 106.34(b)(1)(i)(B))

*Comments:* Two commenters responded to OCR's invitation for comments on whether there were additional important governmental or educational objectives that could be the basis for single-sex classes that should be incorporated into the final regulations. They proposed to add as an important objective one that addresses social problems affecting students, i.e., social needs. The types of social needs they mentioned included pregnancy, discipline problems, drug or alcohol abuse, delinquency, and criminal activity.

*Discussion:* We recognize that a recipient's educational mission may legitimately extend beyond strictly academic objectives and outcomes, that their classes may provide social benefits, in addition to academic benefits, to students, and that positive social outcomes for students can have a positive effect on their educational outcomes. Thus, it may be consistent with a recipient's broad educational mission to provide classes and extracurricular activities to meet the types of social needs described by these commenters. We interpret the regulations pertaining to a recipient's important objective to meet particular, identified educational needs as already covering the types of social needs described by these commenters. For example, under the educational needs objective a school district that has high school students who are pregnant or are parents may determine that it is important to help students address a related particular, identified need, and may offer a single-sex class<sup>33</sup> to meet that need consistent with these regulations as long as the single-sex nature of the class is substantially related to the objective and the other requirements of § 106.34(b) are met. For this reason, it is unnecessary to change the regulations pertaining to a recipient's important objective to add a separate social needs objective.

*Changes:* None.

## 9. Evenhanded Implementation (§ 106.34(b)(1)(ii))

*Comments:* In the preamble to the proposed regulations, we invited specific comments on whether OCR needs more information on how to assess if a recipient is implementing its objective in an evenhanded manner. Commenters indicated that they found the evenhanded implementation standard vague and subjective and

found that it did not provide sufficient guidance.

*Discussion:* Under Title IX, subject to the other requirements of these regulations, evenhanded<sup>34</sup> implementation of the recipient's important objective means that a recipient that offers single-sex classes in connection with achieving its important objective must provide equal educational opportunity to students regardless of their sex, with the end result that it must provide substantially equal classes.<sup>35</sup>

A recipient's important objective may be providing diverse educational opportunities to students pursuant to § 106.34(b)(1)(i)(A). That choice of diverse educational opportunities, including the single-sex or coeducational class opportunity, must be provided evenhandedly to male and female students. In this regard, evenhanded implementation of single-sex opportunities requires an evenhanded assessment of what to offer. This means that the recipient must determine, in a manner that provides equal educational opportunity to male and female students, which classes in which subjects should be offered as a single-sex opportunity and to whom (i.e., does it have an obligation to offer a particular single-sex class to students of both sexes or is it permissible to offer it to students of one sex only; see the discussion in subsequent paragraphs), and then offer those classes evenhandedly to students. A recipient may collect pre-enrollment information from its student and parent populations in an evenhanded manner as part of its determination of the types of classes in which students would enroll. In a school in which male and female students sought to enroll in single-sex classes in the same subjects, the recipient would be required to accommodate them evenhandedly, absent a non-discriminatory reason, which would result in male and female students being provided single-sex classes in the same subjects.

<sup>34</sup> In *Virginia*, 518 U.S. at 534, n.7, the Court noted that briefs submitted by *amici* argued that "diversity in educational opportunities is an altogether appropriate governmental pursuit and that single-sex schools can contribute importantly to such diversity," and the Court stated: "We do not question the Commonwealth's prerogative evenhandedly to support diverse educational opportunities." The Court indicated that its decision addressed only the facts presented by the Virginia Military Institute's program, a unique educational opportunity available only at one public institution for students of one sex.

<sup>35</sup> *Virginia*, 518 U.S. at 554 (Virginia failed to show "substantial equality in the separate educational opportunities" offered in the two institutions).

If a recipient's important objective is meeting the particular, identified educational needs of students pursuant to § 106.34(b)(1)(i)(B), evenhanded implementation requires the recipient's unbiased assessment, based on evidence, of the educational needs of students of both sexes within a particular setting. After the needs of students have been identified, the recipient then determines how to meet those needs on an evenhanded basis. The regulations permit a recipient to consider in an evenhanded manner whether a single-sex class would meet the particular, identified educational needs for male or female students, or for students of both sexes, and whether the single-sex nature of such a class would be substantially related to the achievement of the objective of meeting the particular, identified need.

For example, if a recipient has evidence that providing a single-sex class in a particular subject would meet the particular, identified educational needs of students of one sex and that the single-sex nature of the class is substantially related to achievement of the objective, (i.e., meeting the needs of students of that sex), subject to the other requirements of these regulations, the recipient may offer that class on a single-sex basis to students of that sex. If the recipient also has evidence that providing a single-sex class in that same subject would meet the particular, identified educational needs of students of the other sex and that the single-sex nature of the class would be substantially related to meeting those needs, then the requirement that the recipient implement its objective evenhandedly would require that, absent a non-discriminatory reason, it provide a single-sex class in that subject to students of the other sex as well. On the other hand, if a recipient has evidence that providing a single-sex class in that subject would not meet the particular, identified needs of students of the other sex or that the single-sex nature of the class would not be substantially related to achievement of that objective, the recipient is not required to provide a single-sex class to students of the other sex, but would be required to offer a substantially equal coeducational class in that subject. However, although a single-sex class would not be required in that subject, evenhanded implementation of the recipient's objective does require the recipient to determine, based on its assessment of educational needs of students, whether a class in another subject should be offered on a single-sex

<sup>33</sup> Compare with § 106.40(b)(1) and (3), regarding pregnant students.

basis to meet the particular, identified needs of students of the excluded sex.

*Changes:* None.

#### 10. Voluntary Participation (§ 106.34(b)(1)(iii))

*Comments:* Commenters recommended that we clarify the regulations to require clearly that student participation in single-sex classes must be voluntary. Some commenters were concerned, unless the regulations were clear about this requirement, that in situations in which many students of one sex voluntarily chose a single-sex class that a recipient might, for administrative convenience, assign or attempt to “steer” students of the other sex to a single-sex class, even if they wanted to enroll in a coeducational class. A commenter recommended that the regulations be revised to require that recipients notify parents or guardians of all their options, including the option of enrolling their child in a single-sex class.

*Discussion:* The proposed regulations in § 106.34(b)(1)(ii) were intended to require recipients to offer single-sex classes only on a completely voluntary basis, by requiring a recipient to provide a coeducational class in the same subject, in conjunction with the requirement in § 106.34(a) that a recipient may not require participation in classes on the basis of sex. We agree with commenters that the proposed regulations may not have been as clear as we intended, and we have revised the regulations to require clearly that participation in single-sex classes must be completely voluntary.

Unless a recipient offers enrollment in a coeducational class in the same subject, enrollment in a single-sex class is not voluntary. In order to ensure that participation in any single-sex class is completely voluntary, if a single-sex class is offered, the recipient is strongly encouraged to notify parents, guardians, and students about their option to enroll in either a single-sex or coeducational class and receive authorization from parents or guardians to enroll their children in a single-sex class.

*Changes:* We have added new regulatory language in § 106.34(b)(1)(iii), clearly requiring that student participation in a single-sex class must be completely voluntary. For the sake of clarity, we have also deleted the reference in paragraph (b) of § 106.34 to the requirements of paragraph (a) of that section.

#### 11. Coeducational Class (§ 106.34(b)(1)(iv))

*Comments:* Some commenters expressed concern that if a recipient

provides a single-sex class for students of one sex, the regulations always require a coeducational class, but they do not always require a single-sex class for students of the other sex. Some commenters argued that it would be a denial of equal opportunity to provide a single-sex class or other benefit, service, or opportunity for students of one sex, but not for the other. Some commenters expressed the view that a recipient could legally provide a single-sex class for students of one sex, without a corresponding single-sex class for students of the other sex, only if the purpose was to remediate discrimination.

*Discussion:* The regulations always require a recipient that offers a single-sex class to offer a substantially equal coeducational class in the same subject to all students, including students excluded from the single-sex class. A recipient must provide single-sex classes in an evenhanded manner when seeking to fulfill its important objectives either to provide a diversity of educational opportunities or to address particular, identified educational needs.

Thus, if a recipient's procedure includes obtaining information from parents and students about interest in enrolling in potential single-sex classes in order to provide a diversity of educational opportunities, the recipient must include students of both sexes and their parents. Similarly, if a recipient is seeking to address educational needs of students, the recipient must treat male and female students in an evenhanded manner when identifying particular educational needs, determining if a single-sex class would meet those needs, and meeting the educational needs of both sexes. A recipient may not decide simply to offer single-sex classes only to students of one sex, but rather may do so only if it can show (1) students of the other sex are not interested in having the option to voluntarily enroll in a single-sex class if the recipient is seeking to further its important objective of providing diverse educational opportunities, or (2) students of the other sex do not have educational needs that can be addressed by a single-sex class if the recipient is seeking to meet the educational needs of its students. Thus, under these circumstances, the recipient would not be denying students of the other sex a substantially equal class by providing them only a substantially equal coeducational class in the same subject as the single-sex class.

Additionally, OCR will examine recipients that provide significantly more single-sex opportunities to students of one sex than to students of

the other sex to determine if this is the result of sex discrimination.

*Changes:* We have added to § 106.34(b)(1)(iv) the words “to all other students, including students of the excluded sex” to clarify the scope of this requirement.

#### 12. Private Schools (§ 106.34(b)(1)(iv))

*Comments:* Two commenters sought a revision to the regulations to provide an exemption, under certain circumstances, for coeducational recipient private schools from the requirement that they provide a substantially equal coeducational class if they provided a single-sex class to students of both sexes.

*Discussion:* Because all recipients are subject to Title IX and because a substantially equal coeducational class option for students is essential to prevent involuntary assignment to a single-sex class on the basis of sex, Title IX does not permit a categorical exception to this requirement. However, in some cases, parents of all students in a particular grade in a private school may provide their completely voluntary consent to the private school to offer a single-sex class with no coeducational class. If the parents of the affected students in a class in a private school enroll their children, or the students themselves enroll, in a single-sex class on a completely voluntary basis, and there are no students who would choose to enroll in a coeducational class in that subject, these regulations do not require the school to provide a coeducational class in that subject.

*Changes:* None.

#### 13. Substantially Equal Classes (§ 106.34(b)(1)(iv) and (b)(2))

*Comments:* Some commenters stated that the regulations needed to state specifically that recipients are required to provide students of both sexes equal educational opportunities. Some commenters objected to the term “substantially equal” in the proposed regulations because it might be interpreted as a lower standard than a requirement of equal educational opportunity. Some commenters stated that the term “substantially equal” was too vague and that recipients would not understand what was required for compliance.

*Discussion:* Section 106.34(b)(1)(ii) of the proposed regulations provided that a recipient that offered a single-sex class to students of one sex was required to offer a substantially equal coeducational class in the same subject, and § 106.34(b)(2) provided that a recipient that offered a single-sex class to students of one sex also may be required

to offer a substantially equal single-sex class for the excluded sex. Section 106.34(b)(3) of the proposed regulations described factors that the Department would consider in comparing classes.

We disagree with the comments that the substantially equal standard for comparing and measuring classes is a lower standard or is too vague. The substantially equal standard in these regulations is informed by, and consistent with, the nondiscrimination requirements of the Equal Protection Clause. The Supreme Court compared two single-sex postsecondary institutions and used the term “substantial equality” in measuring whether the standards of the Equal Protection Clause were met.<sup>36</sup> This standard ensures that students who are excluded from a single-sex class will be provided a class with tangible and intangible features substantially equal to the corresponding features in the single-sex class. We recognize, however, that in comparing classes, a recipient may provide students with a substantially equal class even if the classes are not identical in every respect.

*Changes:* None.

#### 14. Factors (§ 106.34(b)(3))

*Comments:* Some commenters suggested that the proposed list of factors to be used in determining whether a class meets the requirements of § 106.34(b)(1)(iv) or (b)(2) should include intangible factors because the Supreme Court considered intangible features, as well as tangible features, in comparing single-sex educational institutions to determine if Equal Protection standards had been met. Some commenters recommended that additional factors be added to the list including educational methods, single-sex opportunities, factors that would capture sex-stereotyping, and motive for creating single-sex classes.

*Discussion:* Section 106.34(b)(3) of the proposed regulations listed several factors that the Department proposed to consider in comparing classes and determining if a class provided to students of the excluded sex is substantially equal to the single-sex class. The list of factors, which was not intended to be exhaustive, included—the policies and criteria of admission; the educational benefits provided, including the quality, range, and content of curriculum and other services, and the quality and availability of books, instructional materials, and technology; the qualifications of faculty and staff; and the quality, accessibility,

and availability of facilities and resources. Under the substantially equal standard, classes are not required to be identical, and there may be differences in factors that may be justified for legitimate, nondiscriminatory reasons or because the differences are not significant enough, alone or aggregated together, to constitute sex discrimination under these regulations. Alternatively, a substantial difference (or differences) of an unjustified nature in the benefits, treatment, services, or opportunities that constitute one factor in the respective classes, if significant enough, in and of itself, to cause the classes not to be substantially equal, is sex discrimination under these regulations. Also, when factors for determining substantial equality of the respective classes are considered in the aggregate, if there is a pattern of differences of an unjustified nature that favors one class with regard to the benefits, treatment, services, or opportunities provided to students to the extent that the pattern of differences is significant enough to cause the classes not to be substantially equal, this pattern constitutes sex discrimination under these regulations. Because, as described in a subsequent section on schools, commenters who objected to a provision in the proposed regulations regarding the aggregate approach for assessing the substantial equality in schools misunderstood it, we have clarified the regulatory language for both classes and schools by adding the term “either individually or in the aggregate as appropriate.”

The Supreme Court considered intangible and tangible features in comparing postsecondary institutions for the purposes of the Equal Protection Clause.<sup>37</sup> The Department will consider all relevant factors in determining whether classes meet the requirements of § 106.34(b)(1)(iv) or (b)(2) and agrees that, for the purposes of assessing compliance with Title IX, intangible features should be considered whenever relevant.

Although we have not listed other factors suggested by commenters, the Department will consider all relevant factors in any case investigation. The list of factors is not exhaustive. We note that some aspects of single-sex education that commenters suggested be included in the list of factors will be considered in connection with compliance with other parts of these regulations.

Although we did not receive comments from the public, we are adding geographic accessibility as a

factor pertaining to substantial equality of classes. In most cases a recipient's substantially equal classes for a particular school will be in the same school building, and geographic accessibility will not be relevant to substantial equality. There are, however, situations in which geographic accessibility will be relevant for classes. For example, if a recipient operates a consortium of schools whereby students at three neighboring high schools take some classes at the school to which they are assigned on the basis of their residence and are permitted to take certain other classes, which are not offered at their assigned school, at one of the neighboring schools, location, *i.e.*, geographic accessibility, of the classes in the same subject, would be relevant to the issue of substantial equality. The list of factors described in the regulations is not exhaustive. However, because the proposed regulations listed geographic accessibility as a factor for schools, but not for classes, it is important to ensure that recipients have notice that geographic accessibility is also a factor for classes.

*Changes:* We have revised the regulatory language to clarify the aggregate approach in assessing substantial equality in classes by adding the clarifying term, “either individually or in the aggregate as appropriate.” Section 106.34(b)(3) of the final regulations provides in relevant part: “Factors the Department will consider, either individually or in the aggregate as appropriate, in determining whether classes or extracurricular activities are substantially equal include. \* \* \*”

We have revised the list of factors in § 106.34(b)(3) to be considered in comparing classes to include “intangible features” and “reputation of faculty” as an example of an intangible feature. We have also revised the list of factors to include “geographic accessibility.”

#### 15. Periodic Evaluations for Classes (§ 106.34(b)(4))

*Comments:* In the preamble to the proposed regulations we invited specific comments as to how often a recipient should be required to conduct periodic evaluations. Comments ranged from yearly, biennially, or variable depending on the single-sex classes offered. Of the four comments received on this issue, two commenters recommended biennial evaluation. In addition, commenters were concerned that the regulations did not require the evaluation to ensure against reliance on overly broad generalizations about the different preferences of either sex consistent with Equal Protection Clause requirements.

<sup>36</sup> *Virginia*, 518 U.S. at 554 (citing *Sweatt v. Painter*, 339 U.S. 629, 633 (1950)).

<sup>37</sup> *Virginia*, 518 U.S. at 554, 557.

*Discussion:* Recipients have an ongoing responsibility to comply with the nondiscrimination requirements of the Title IX regulations. These regulations require recipients to conduct periodic evaluations to ensure that their single-sex classes are based on justifications, *i.e.*, an important objective and a substantial relationship between the important objective and the sex-based means used to further that objective, that are genuine and that do not rely on overly broad generalizations about either sex. Part of the periodic evaluation requirement involves an assessment of the degree to which the recipient's important objective has been achieved and an assessment of whether the single-sex nature of the class is substantially related to achievement of the recipient's objective. This procedural provision requires a recipient to evaluate its own classes so that it can take appropriate corrective action if it identifies compliance problems. We have determined that recipients must conduct evaluations at least every two years in order to meet this procedural obligation. Recipients may evaluate single-sex classes more often because the substantive obligation to comply is ongoing or because its own findings have identified issues that may require a more frequent evaluation. In addition, if the Department investigates a recipient and identifies compliance problems, we may require the recipient to conduct more frequent evaluations. Because § 106.71 of the Title IX regulations, which incorporates the requirements of 34 CFR 100.6(b) and (c), requires generally that recipients keep records to show that they are in compliance with civil rights requirements and requires them to provide the Department access to information relevant to compliance determinations, recipients should have appropriate records to show compliance with the periodic evaluation requirement.

We agree that under Title IX, single-sex classes cannot be based on overly broad generalizations about the talents, capacities, or preferences of either sex. As discussed previously, recipients must make fact-specific determinations.

*Changes:* We have revised § 106.34(b)(4)(i) to add "or preferences" and to delete "male and female students" and substitute in its place "either sex." We have also added the term "important" to clarify that the evaluation must ensure that the single-sex class or extracurricular activity is substantially related to the recipient's important objective. In addition we have revised § 106.34(b)(4) to provide that a recipient must conduct evaluations of

its classes at least every two years (§ 106.34(b)(4)(ii)) in order to comply with the procedural requirement for periodic evaluations (§ 106.34(b)(4)(i)).

#### 16. Extracurricular Activities (§ 106.34(b)(1) Through (5))

*Comments:* None.

*Discussion:* Section 106.34(b)(1) through (5) applies to extracurricular activities, as well as classes.

*Changes:* We have added the term "extracurricular activities" throughout § 106.34(b)(1) through (5) of the regulations to clarify that these provisions apply both to classes and extracurricular activities.

#### 17. Athletics

*Comments:* Some commenters objected to the coverage of extracurricular activities in the proposed regulations because they perceived that the amendments would be applied to athletics, which would result in undermining the Department's longstanding Title IX regulations requiring equal athletic opportunity for students of both sexes and would permit sex discrimination in athletics.

*Discussion:* The proposed regulations defined "classes," for the purposes of proposed § 106.34(b), to include "all education activities provided for students by a school or in a school" (proposed § 106.34(b)(5)), and this definition was intended to cover extracurricular activities, as well as classes. It was not, however, intended to affect or change the longstanding Title IX requirements applicable to athletics, including interscholastic, club, or intramural athletics.<sup>38</sup>

*Changes:* Because some commenters interpreted the proposed definition as extending the requirements in § 106.34(b)(1) through (4) to athletics, we have revised § 106.34(b)(5) in the final regulations. We have determined that rather than define "class" and "extracurricular activity," it is clearer and more useful to include a provision on the scope of coverage of paragraph (b)(1) through (4) of § 106.34. We have revised § 106.34(b)(5) to provide that paragraph (b)(1) through (4) applies to classes and extracurricular activities provided by a recipient covered by § 106.34(b)(1) either directly or through another entity and to clarify that paragraph (b)(1) through (4) does not apply to interscholastic, club, or intramural athletics, which are subject to the provisions of §§ 106.41 and 106.37(c).

<sup>38</sup> Sections 106.41 and 106.37(c).

#### 18. Physical Education Classes

*Comments:* Commenters objected to these amendments because they perceived that they would weaken the current Title IX regulatory standards pertaining to physical education classes in a manner that would permit sex discrimination. Commenters indicated that separation in physical activity should be based on differences in skill, size, or strength, rather than on the sex of the student. Some female commenters described how playing sports with boys had enhanced their sports skills.

*Discussion:* The longstanding regulatory provision that permits recipients to separate students in physical education classes on the basis of ability is not affected by these amendments.<sup>39</sup> Similarly, the regulatory exception that permits recipients to separate students by sex within physical education classes or activities during participation in contact sports<sup>40</sup> is not affected by these amendments. The amended regulations provide a recipient the additional flexibility to offer single-sex classes, including physical education classes, if all the requirements of § 106.34(b)(1) through (5) are met. These requirements, which are discussed in previous paragraphs, require a recipient that provides a single-sex class, including a physical education class, to provide substantially equal classes to students of both sexes. These requirements prohibit discrimination on the basis of sex, including physical education classes, which means that single-sex classes must be based on a justification, *i.e.*, an important objective and a substantial relationship between the important objective and the sex-based means used to further the objective, that is genuine and not based on overly broad sex-based generalizations about either sex.

*Changes:* None.

#### 19. Legal Standards for Single-Sex Schools (§ 106.34(c)(1))

*Comments:* In addition to the general concerns about legal standards discussed in previous paragraphs, some commenters had specific concerns about the legal standards applicable to the proposed regulations regarding single-sex schools. Some commenters objected to permitting any "new" single-sex schools (*i.e.*, after the effective date of Title IX), citing the reasoning in a Federal district court decision, as contrary to congressional intent.

<sup>39</sup> Compare former § 106.34(b) with § 106.34(a)(2) of these final regulations.

<sup>40</sup> Compare former § 106.34(c) with § 106.34(a)(1) of these final regulations.

A commenter objected to the proposed regulations on schools on the basis that sex-segregated schools violate the Equal Educational Opportunity Act of 1974 (EEOA),<sup>41</sup> citing a Federal appellate court decision<sup>42</sup> holding that a sex-segregated assignment plan violated the EEOA.

Some commenters objected to the proposed provisions on schools because public recipients are subject to both Title IX and the Equal Protection Clause, but the regulatory requirements did not require constitutionally sufficient justifications for sex-based classifications.

*Discussion:* The Title IX regulations have permitted single-sex nonvocational schools since the regulations were issued in 1975. Thus, it is not a change that these regulations continue to permit single-sex schools. Both the plain language of the statute and legislative intent support this interpretation. Section 901 of Title IX covers admissions only to certain types of educational entities named in the statute.<sup>43</sup> Because nonvocational elementary and secondary schools are not among those listed, admission to these schools is not covered. The legislative history of Title IX shows that Congress was aware of the existence of public single-sex elementary and secondary schools and that Congress understood that, by exempting admissions to these schools from the general prohibitions, single-sex admissions policies could continue.<sup>44</sup> Our longstanding and current interpretation that the Department is precluded from examining a recipient's justifications for offering single-sex schools is based on the plain language of Title IX and its legislative history. As the commenter pointed out, involuntary assignment to single-sex public schools violates the EEOA.

*Changes:* We have made a nonsubstantive revision to § 106.34(c) to add "*General Standard*" to the title of this provision to make it consistent with § 106.34(b). We also revised the statement of the general standard for single-sex schools to align it more closely to the statute. Section 106.34(c)(1) requires, subject to an exception for certain charter schools, discussed in a later paragraph, a

recipient that operates a public, nonvocational single-sex elementary or secondary school to provide a substantially equal single-sex school or coeducational school to students of the excluded sex.

#### 20. Schools for Excluded Sex (§ 106.34(c)(1))

*Comments:* Some commenters objected to amending the regulations to permit a recipient to offer a single-sex school to students of one sex and to offer either a coeducational or a single-sex school to students of the excluded sex, rather than requiring that excluded students also be offered a single-sex school. Commenters objected to this change in our previous interpretation of the Title IX statute. They stated that to provide students of one sex the opportunity to attend a single-sex school, but not to provide students of the other sex an equal opportunity to attend a single-sex school, is discriminatory treatment on the basis of sex in violation of the requirements of Title IX and the Equal Protection Clause.

*Discussion:* The Title IX statute does not cover admissions to nonvocational elementary and secondary schools.<sup>45</sup> We have determined that, by excluding these schools from the admissions coverage, Congress was not only permitting recipients to operate public schools with single-sex admissions policies without sanction under Title IX,<sup>46</sup> but it also was permitting recipients to operate single-sex schools without requiring them also to provide a corresponding single-sex school for students of the excluded sex, again without sanction under Title IX. We no longer interpret Title IX to require that if a recipient offers a single-sex school for students of one sex, it must offer students of the other sex a corresponding single-sex school. The regulations now require, in § 106.34(c)(1), that the recipient must provide a substantially equal school to students of both sexes,<sup>47</sup> but the school may be a coeducational or single-sex school.

*Changes:* None.

#### 21. Substantially Equal Schools (§ 106.34(c)(1))

*Comments:* Many commenters had the same concerns regarding the regulatory language in § 106.34(c)(1) used to describe the standard for comparing and measuring schools as they had for classes. As discussed in previous paragraphs regarding requirements for classes, commenters were concerned that the term "substantially equal," as used in the proposed regulations for comparing benefits provided to students, described a lower standard than the equal educational opportunity standard required by Title IX and the Equal Protection Clause.

*Discussion:* Title IX does not cover admissions to nonvocational elementary and secondary schools. Title IX does require that a recipient that operates public schools must not provide a single-sex school to students of one sex and discriminate against students of the excluded sex with respect to the educational opportunities the recipient provides them in another school, regardless of whether the other school is coeducational or single-sex. Under the original Title IX regulations, if an LEA chose to provide a single-sex school, the standard for comparison of benefits and treatment provided to students in schools was described as "comparable." Under the final regulations the standard of comparison for schools is described as "substantially equal."

As discussed under the paragraphs on single-sex classes, we disagree with the comments that the substantially equal standard is a lower standard for comparing schools than is required under Title IX or the Equal Protection Clause. This standard ensures that students who are excluded from a single-sex school will be provided a school with tangible and intangible features substantially equal to the corresponding features in the single-sex school. We recognize, however, that in comparing two schools, a recipient may provide students with a substantially equal school even if the schools are not identical in every respect.

*Changes:* None.

#### 22. School Within a School (§ 106.34(c)(1) and (c)(4))

*Comments:* None.

*Discussion:* Section 106.34(c)(1) of the proposed regulations referred to a school or "education unit." We explained in the preamble to the proposed regulations that "education unit" meant a "school within a school," which was a school located within another school. We believe that it is important for recipients to have this information included in the regulations.

<sup>41</sup> 20 U.S.C. 1701 through 1721.

<sup>42</sup> *United States v. Hinds County Sch. Bd.*, 560 F.2d 619 (5th Cir. 1977).

<sup>43</sup> 20 U.S.C. 1681(a)(1). The nondiscrimination provisions of section 901 of Title IX apply to admissions to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education.

<sup>44</sup> 118 Cong. Rec. 5804, 5807, 5812–13 (1972).

<sup>45</sup> 20 U.S.C. 1681(a)(1) ("in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of higher education").

<sup>46</sup> 118 Cong. Rec. 5804, 5807, 5812–13 (1972).

<sup>47</sup> Subject to the exception for certain public charter schools in § 106.34(c)(2).

*Changes:* We have deleted the term “education unit” from § 106.34(c)(1) and added a new paragraph (4) that defines “school” to include “school within a school” and explains what we mean by a “school within a school.”

#### 23. Limited Charter Schools Exception (§ 106.34(c)(2))

*Comments:* Some commenters objected to the provision in the proposed regulations that would exempt nonvocational public single-sex charter schools that are single-school LEAs from the requirements that apply to other public schools. Many of these commenters stated that public charter schools, like other public schools that receive Federal funds, are subject to the requirements of Title IX and the U.S. Constitution. They believed that all single-sex public schools should be required to demonstrate an exceedingly persuasive justification for limiting admission to one sex. One commenter noted that recipients authorizing the operation of single-sex charter schools, as opposed to the individual schools themselves, are likewise subject to the constitutional and Title IX requirements. One commenter stated that the Department’s rationale that it would be unduly burdensome to require single-sex charter schools that are single-school LEAs to create a single-sex charter school for students of the excluded sex was not a valid reason to excuse those schools from the constitutional requirements of the Equal Protection Clause.

*Discussion:* The constitutional standard referenced in the comments is not a Title IX requirement. The Title IX statute does not cover admissions to nonvocational elementary and secondary schools.<sup>48</sup> Given Congress’ intent, OCR does not have the authority to require recipients to provide a justification for single-sex nonvocational elementary or secondary schools. Accordingly, the regulatory amendment regarding single-sex schools is consistent with Title IX. Of course, public schools are subject to constitutional requirements, including the Equal Protection Clause, which requires that a recipient demonstrate that its sex-based classification serves an important governmental objective and that the sex-based classification is substantially related to the achievement of that objective.

With regard to public charter schools, it would be impracticable to require either chartering authorities, which are merely approving applications for—but are not operating—single-sex charter

schools, or the groups of community leaders, developers, or parents who seek to establish a single-sex charter school that will be a single-school LEA under State law, to establish and operate an additional substantially equal school to meet the needs of the other sex. Because it would be unlikely that those groups would be able to create two substantially equal charter schools, absent the exception in § 106.34(c)(2) those groups would be unable to establish a single-sex charter school. Title IX does not require such a rigid approach. On the other hand, any LEA that operates multiple schools, including charter schools, must comply with § 106.34(c)(1). The notion of excepting certain types of schools from the Title IX requirements is not new. Pursuant to § 106.35 of the former regulations, private schools that received Federal assistance were permitted to operate single-sex schools without providing the excluded sex with a comparable school. The requirements of § 106.34(c)(1) of these regulations do not apply to recipients that operate private, nonvocational elementary or secondary schools.

*Changes:* We have made a nonsubstantive revision to describe more precisely the single-school LEAs that are entitled to this exception.

#### 24. Chartering Authorities

*Comments:* A commenter noted that a school board that serves as a chartering authority of public charter schools should not be found to have violated Title IX if it approves a charter school application for a single-sex charter school, but does not provide the resources to establish a single-sex school for students of the excluded sex. Additionally, the commenter suggested that the final regulations include a statement clarifying that Title IX does not obligate a chartering authority that is an LEA to approve an application for a single-sex charter school.

*Discussion:* Title IX would require all chartering authorities that receive Federal financial assistance to review, and approve or reject, applications in a nondiscriminatory manner. Nothing in Title IX or these regulations requires that applications for single-sex charter schools be approved. Title IX simply requires that the same standards be applied to a proposed single-sex charter school, regardless of which sex the charter school proposes to serve. An LEA will be considered to be “operating” a charter school that is part of the LEA. Thus, if a recipient LEA chartering authority approves an application for a single-sex charter school that will be part of the LEA, the

LEA must comply with the requirements of § 106.34(c)(1) and must provide students of the excluded sex with a substantially equal single-sex school or coeducational school. As stated in the discussion of § 106.34(c)(2), however, if a chartering authority’s role is merely approving an application for a single-sex charter school that is a single-school LEA, the chartering authority will not be required to provide the students of the excluded sex with a substantially equal school. State charter school laws govern whether a charter school will be a public school within the LEA or whether it will be a single-school LEA.

*Changes:* None.

#### 25. Factors (Proposed § 106.34(c)(3)(i))

*Comments:* Several commenters stated that the proposed list of factors used to compare schools must include intangible factors.

*Discussion:* Readers should refer to the prior discussion of this issue under the classes section of this analysis.

*Changes:* We have removed paragraph designation (i) from § 106.34(c)(3). With respect to the list of factors (in proposed § 106.34(c)(3)(i)), we have revised the regulations to include “intangible features” and to list “reputation of faculty” as an example of an intangible feature on the non-exhaustive list of factors. Further changes with respect to the consideration of these factors (proposed § 106.34(c)(3)(ii)) are discussed in the next section.

#### 26. Aggregate Approach (Proposed § 106.34(c)(3)(ii))

*Comments:* Some commenters objected to the proposed “aggregate” approach<sup>49</sup> for comparing the benefits and treatment provided to students in single-sex schools and the benefits and treatment provided to students excluded from those schools. Commenters were concerned that this approach would permit inequities between schools that would constitute discrimination on the basis of sex against the students in one of the schools in violation of Title IX and the U.S. Constitution. A commenter stated that the proposed aggregate approach would condone inequities between a single-sex and coeducational school as long as the inequities balanced in some unspecified way.

*Discussion:* Commenters misunderstood the aggregate approach

<sup>49</sup>The proposed amendments in § 106.34(c)(3)(i) provided a non-exhaustive list of factors that the Department would consider in determining whether schools were substantially equal, and in § 106.34(c)(3)(ii) provided that “this determination involves an assessment in the aggregate of the educational benefits provided by each school as a whole.”

<sup>48</sup>20 U.S.C. 1681(a)(1).

in the proposed regulations to permit inequities that would be prohibited by Title IX. This perception of the proposed provision was inconsistent with the intent of the proposed provision and of the substantial equality standard.

We have revised the regulations to provide more clarity on the aggregate approach. The same regulatory language added in these final regulations to clarify the aggregate approach for assessing substantial equality of classes, § 106.34(b)(3), has also been added to the regulatory language on assessing substantial equality of schools, and § 106.34(c)(ii) of the proposed regulations has been deleted in the final regulations. For more information about assessments of substantial equality, readers should refer to the prior discussion in this analysis of how compliance with the requirement of substantial equality will be assessed for classes.

*Changes:* Section 106.34(c)(3) has been revised to clarify the aggregate approach in assessing substantial equality of schools, by adding the term "either individually or in the aggregate as appropriate" so that the regulatory language now provides in relevant part: "Factors the Department will consider, either individually or in the aggregate as appropriate, in determining whether schools are substantially equal include \* \* \*." Section 106.34(c)(3)(ii) of the proposed regulations has been deleted and the section has been renumbered to reflect this change.

#### 27. Periodic Evaluations

*Comments:* Some commenters stated that the regulations should require recipients to periodically evaluate single-sex schools.

*Discussion:* As discussed in previous paragraphs, we interpret the Title IX admissions exception for nonvocational elementary and secondary schools to prevent the Department from regulating the justifications for single-sex schools. For that reason we have not included a requirement for periodic evaluations, similar to the requirement for single-sex classes. Regardless of the lack of this additional procedural requirement for schools, recipients continue to be subject to the substantive requirements of Title IX and our Title IX regulations, and they continue to be subject to investigation if there is a complaint or compliance review.<sup>50</sup> Recipients that voluntarily monitor their single-sex and

coeducational schools for compliance with these regulations are in the best position to achieve compliance.

*Changes:* None.

#### Executive Order 12250

Pursuant to Executive Order 12250, which provides for the Attorney General to review regulations implementing Title IX, the Attorney General has reviewed and approved these final regulations for publication.

#### Executive Order 12866

We have reviewed these final regulations in accordance with Executive Order 12866. Under the terms of the order we have assessed the potential costs and benefits of this regulatory action.

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

In assessing the potential costs and benefits of these final regulations, we have determined that the benefits of the regulations justify the costs.

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

#### Summary of Potential Costs and Benefits

The benefit of the final regulations is the expanded flexibility to provide single-sex schools, classes, or extracurricular activities, if they are desired. The final regulations do not require recipients to provide single-sex schools, classes, or extracurricular activities and thus do not require recipients to incur any additional costs. If recipients choose to continue to operate schools, classes, or extracurricular activities under their current policies or practices and choose not to provide single-sex education, no added costs will be incurred. Those recipients that choose to provide single-sex schools, classes, or extracurricular activities may incur additional expenses. The costs associated with providing single-sex education under the final regulations will range from minimal to substantial, depending on what options recipients choose to provide.

#### Paperwork Reduction Act of 1995

These regulations do not contain any information collection requirements.

#### Assessment of Educational Impact

In the NPRM we requested comments on whether the proposed regulations

would require transmission of information that any other agency or authority of the United States gathers or makes available.

Based on the response to the NPRM and on our review, we have determined that these final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

#### Electronic Access to This Document

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: <http://www.ed.gov/news/fedregister>.

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1-888-293-6498; or in the Washington, DC, area at (202) 512-1530.

These final regulations also will be available at OCR's Web site on the Internet at: <http://www.ed.gov/ocr>.

**Note:** The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: <http://www.gpoaccess.gov/nara/index.html>.

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

#### List of Subjects in 34 CFR Part 106

Education, Sex discrimination.

Dated: October 20, 2006.

#### Margaret Spellings,

Secretary of Education.

■ For the reasons discussed in the preamble, the Secretary amends part 106 of title 34 of the Code of Federal Regulations as follows:

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

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

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

■ 2. Section 106.34 is revised to read as follows:

#### § 106.34 Access to classes and schools.

(a) *General standard.* Except as provided for in this section or otherwise in this part, a recipient shall not provide or otherwise carry out any of its

<sup>50</sup> 34 CFR 100.6(c); 34 CFR 100.7(a)(b). As discussed in previous paragraphs, public schools and school districts are also subject to the Equal Protection Clause.

education programs or activities separately on the basis of sex, or require or refuse participation therein by any of its students on the basis of sex.

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

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

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

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

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

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

(A) To improve educational achievement of its students, through a recipient's overall established policy to provide diverse educational opportunities, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective; or

(B) To meet the particular, identified educational needs of its students, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective;

(ii) The recipient implements its objective in an evenhanded manner;

(iii) Student enrollment in a single-sex class or extracurricular activity is completely voluntary; and

(iv) The recipient provides to all other students, including students of the

excluded sex, a substantially equal coeducational class or extracurricular activity in the same subject or activity.

(2) *Single-sex class or extracurricular activity for the excluded sex.* A recipient that provides a single-sex class or extracurricular activity, in order to comply with paragraph (b)(1)(ii) of this section, may be required to provide a substantially equal single-sex class or extracurricular activity for students of the excluded sex.

(3) *Substantially equal factors.* 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.

(4) *Periodic evaluations.* (i) The recipient must conduct periodic evaluations 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.

(ii) Evaluations for the purposes of paragraph (b)(4)(i) of this section must be conducted at least every two years.

(5) *Scope of coverage.* The provisions of paragraph (b)(1) through (4) of this section apply to classes and extracurricular activities provided by a recipient directly or through another entity, but the provisions of paragraph (b)(1) through (4) of this section do not apply to interscholastic, club, or intramural athletics, which are subject to the provisions of §§ 106.41 and 106.37(c) of this part.

(c) *Schools.* (1) *General Standard.* Except as provided in paragraph (c)(2) of this section, a recipient that operates a public nonvocational elementary or secondary school that excludes from admission any students, on the basis of

sex, must provide students of the excluded sex a substantially equal single-sex school or coeducational school.

(2) *Exception.* A nonvocational public charter school that is a single-school local educational agency under State law may be operated as a single-sex charter school without regard to the requirements in paragraph (c)(1) of this section.

(3) *Substantially equal factors.* Factors the Department will consider, either individually or in the aggregate as appropriate, in determining whether schools 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 quality and range of extracurricular offerings, the qualifications of faculty and staff, geographic accessibility, the quality, accessibility, and availability of facilities and resources, and intangible features, such as reputation of faculty.

(4) *Definition.* For the purposes of paragraph (c)(1) through (3) of this section, the term "school" includes a "school within a school," which means an administratively separate school located within another school.

(Authority: 20 U.S.C. 1681, 1682)

■ 3. Section 106.35 is revised to read as follows:

**§ 106.35 Access to institutions of vocational education.**

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

(Authority: 20 U.S.C. 1681, 1682)

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

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

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

(Authority: 20 U.S.C. 1681, 1682)

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