October 2, 2013

Commissioner Stephan Pryor
Dept. of Education State Office Building
165 Capitol Avenue
Hartford, CT 06106

Sent via facsimile and USPS Certified Mail

Re: SERC Technical Report Single-Sex Education: The Connecticut Context

Dear Commissioner Pryor:

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We are writing on behalf of the American Civil Liberties Union of Connecticut and the American Civil Liberties Union Women's Rights Project to express concerns about a technical report recently issued by the State Education Resource Center (SERC), a copy of which is attached.[1] Relying on this report as a basis for setting educational policy in Connecticut would be both educationally and legally misguided. We therefore request that the Department of Education reject the report and issue a clarification to school districts regarding the governing law.

We will first address the legal issues raised by the report and then briefly address some of the educational policy concerns.

I. Legal Issues

We understand that this report was drafted by education researchers and aimed at policy-makers and educators, and was not intended to provide legal advice or even a comprehensive discussion of the law. Indeed, it is clear that the authors at SERC did not set out to conduct legal research. The brief discussion of the law contained in the report contains significant errors and omissions, however, and could mislead school administrators who rely on it to take steps that would put their school districts at legal risk.

A. Connecticut Law Prohibits Sex Segregation

The most critical omission is that sex segregation of students is expressly prohibited under the Equal Rights Amendment of the Connecticut Constitution, which guarantees that "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin or sex."

In addition, state education law dictates that free public education be offered to all students "without discrimination on account of race, color [or] sex."[2] The courts have recognized that the "history of this mass of legislation evidences a firm commitment not

[1] State Education Research Center, *Single-Sex Education: The Connecticut Context*, http://ctserc.org/docs/Single-Sex%20Education%20report%20SERC%202013.pdf (2013).
[2] Connecticut General Statutes, Section 10-15c

only to end discrimination against women, but also to do away with sex discrimination altogether." *The Evening Sentinel v National Organization of Women*, 168 Conn. 26 (1975).

Thus, the report, despite being intended as guidance for Connecticut public schools, fails to take into account the strict standards of the Connecticut Constitution and state law. Quite simply, single-sex public education is a non-starter under Connecticut state law, and the report is dangerously inaccurate in suggesting otherwise by concluding that it is an option that should be made available to Connecticut residents.

B. Federal Law Sharply Limits the Circumstances Under Which Schools May Separate Students on the Basis of Sex

Even if sex segregation were not foreclosed by state law, the circumstances under which public schools can separate students on the basis of sex are sharply limited by federal laws, including the Constitution and Title IX of the Education Amendments of 1972. The report seriously misstates the law in this area.

Under Title IX, "No person in the United States shall, on the basis of sex, be excluded from participation in . . . any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). As reflected in the regulations of numerous federal agencies implementing this law, separation of students by sex within coeducational institutions generally violates this prohibition on discrimination.[3]

Moreover, while Title IX regulations issued by the federal Department of Education tolerate sex segregation under certain limited circumstances as a matter of federal enforcement, its regulations require at a minimum that any single-sex class within a coeducational school must be based on specific, identified important objectives; that there must be a demonstrated substantial relationship between the objective and the single-sex nature of the class; that it must be completely voluntary; and that a substantially equal coeducational option must be available.[4] In addition, the regulations require 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." 20 C.F.R. §106.34(b)(1), (4). The report discusses only a few of these requirements, and thus runs the risk of misleading school districts into believing they can institute single-sex classrooms without complying with all these regulatory requirements.

Furthermore, the report fails to address the protections afforded by the U.S.

[3] *See, e.g.,* 7 C.F.R. § 15a.34 ("A [USDA funding] recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis … ."). USDA regulations apply to all Connecticut schools as a result of their participation in the USDA-funded school lunch program.

[4] "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." 20 C.F.R. §106.34(b)(3).

Constitution. In *United States v. Virginia*, a case challenging the all-male admission policy at the Virginia Military Institute, the U.S. Supreme Court made clear that to comply with the Equal Protection Clause, a governmental actor instituting a single-sex education program must demonstrate an "exceedingly persuasive justification," and the single-sex nature of the program must be substantially related to the achievement of that justification. *Virginia*, 518 U.S. 515, 540-42 (1996). The United States Court of Appeals for the Fifth Circuit has held that this standard applies to sex separation within coed public schools. *Doe v. Vermilion Parish School Board*, No. 10–30378, 2011 WL 1290793, at *5 (Apr. 6, 2011). Moreover, the *Virginia* opinion makes clear that the Constitution does not permit coed schools to separate students based on "overbroad generalizations about the different talents, capacities, or preferences of males and females." *Virginia*, 518 U.S. at 533.

Despite these Constitutional protections, a recent report by the ACLU documented that such impermissible stereotypes are in fact the basis of many single-sex education programs currently operating across the country.[5] Several of such programs have faced legal challenges. *See Doe v. Vermilion Parish*, 2011 WL 1290793; *Doe v. Wood County Bd. of Educ.*, 888 F. Supp. 2d 771 (S.D. W. Va. 2012). Many others have abandoned their programs under threat of litigation. The Connecticut Department of Education should not appear to be giving a green light for school districts to engage in such legally risky experimentation by permitting this report to stand uncorrected.

II. Educational Policy Concerns

The report's discussion of the research on single-sex education notes that "[r]esults have been inconclusive" and that there is "no definitive argument to compel the justification of their existence." And it concludes that "Ultimately, teacher effects have the most impact on students." Nonetheless, the report extensively echoes assertions that single-sex classes and schools may be a "choice" or "option." Of course, as discussed above, that "choice" is not a lawful one in Connecticut; nor is it a desirable one.

A. The Research on Single-Sex Education Is Inconclusive at Best

The report is unsurprisingly thin on citations of empirical research or surveys in support of single-sex education—in large part, because there are none. In an attempt to provide some support for the argument that single-sex education is effective, the report relies heavily on a "study" described in an opinion piece written by Senators Mikulski and Hutchison. This study has never been published, which is why the SERC researchers could not provide a citation (and neither did Senators Mikulski and Hutchison). The SERC citation of this non-existent study, as well as the citation of news articles and websites such as goodschools.com, demonstrates that there is no legitimate research that substantiates the claimed benefits of single-sex education. Indeed, the authors recognize that there is a dearth of high-quality studies showing advantages for single-sex education. Nonetheless, the inclusion of these references in the SERC report gives fodder to those who contend that single-sex education is a successful educational intervention.

Despite this lack of evidence, the report includes a list of "pros" and "cons" that suggest the items listed are demonstrably true even though they are mostly unsupported assertions; in some cases the "pros" are affirmatively harmful and even unlawful. For example, the "pros" include "Increases staff sensitivity and awareness of gender differences." But expectations that boys and girls have different interests and learn

[5] *See* ACLU, *Preliminary Findings of Teach Kids, Not Stereotypes Campaign,* https://www.aclu.org/files/assets/doe_ocr_report2_0.pdf (August, 2012).

differently may lead teachers to instruct them in a gender stereotyped manner. Moreover, the concept that gender is binary may be harmful to children who do not conform to traditional gender norms, and may violate Connecticut law. Indeed, the "pro" that single-sex education is "Less distracting than co-ed environments," in addition to being unsubstantiated, ignores the experiences of LGBT children.

Another asserted "pro" is that single-sex education "provides positive same-gender role models." Besides the obvious fact that all children need to interact with responsible adults of both sexes and that good teachers of both sexes have served as models and mentors for their students, this statement might lead school administrators to think it is lawful to hire only male teachers for boys classes and vice versa, whereas a hiring policy of that nature would violate both state and federal law.

In sum, the people of Connecticut and the Connecticut legislature have wisely chosen to teach children in an environment that does not make sex or gender a student's single most important attribute. This report risks misleading educators and policy makers on both the operative law and the state of the research. The report should be withdrawn, and the Department of Education should issue a clarification to school districts informing them that single-sex education is not a lawful "choice" in Connecticut.

We would appreciate an opportunity to meet with you to discuss these important issues with you at your convenience.

Sincerely,

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Enclosure
DJM/jjs