



U.S. DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
ADMINISTRATIVE COMPLAINT

January 16, 2014

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COMPLAINANTS¹

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The American Civil Liberties Union is a nationwide, non-profit, non-partisan organization of more than 500,000 members that is dedicated to preserving the Bill of Rights.

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The ACLU of Wisconsin is the ACLU's Wisconsin affiliate. With approximately 6,244 members, the ACLU of Wisconsin has worked consistently to protect the civil liberties guaranteed Wisconsin residents under state and federal law including the right of women and girls to equality.

¹ The ACLU and the ACLU of Wisconsin are herein collectively termed "the ACLU."

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PRELIMINARY STATEMENT

1. This Complaint is filed by the ACLU pursuant to Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* (“Title IX”), and the regulations and policies promulgated thereunder. *See* 34 C.F.R. § 106 *et seq.* Title IX prohibits discrimination on the basis of sex in federally funded education programs and activities.
2. As detailed in the Factual and Legal Allegations below, data obtained by the ACLU from the School District of Somerset (“The District” or “Somerset”) pursuant to an open records request² indicate that the District approved, and Somerset Middle School operated, single-sex classes that violated 34 C.F.R. § 106.34(b) in the following ways:
 - a) Classifying their students by sex without adequate justification; specifically:
 - i. Classifying their students by sex based upon impermissible stereotypes concerning the interests and abilities of boys and girls; and
 - ii. Failing to articulate an important objective of either improving educational achievement of its students through an overall established policy to provide diverse educational opportunities, or of meeting the particular, identified educational needs of its students; and
 - iii. Failing to ensure that offering single-sex classes was substantially related to the achievement of the program’s objectives;
 - b) Employing different teaching methods for boys and girls that promoted impermissible, overly broad stereotypes concerning the interests and abilities of boys and girls;
 - c) Failing to ensure that participation in the single-sex classes was truly voluntary;
 - d) Failing to provide a substantially equal coeducational alternative to the single sex classes; and
 - e) Failing to conduct evaluations to ensure that the program does not rely on overly broad generalizations about the different talents, capacities, and preferences of either sex, or that the separation of students by sex is substantially related to the achievement of the program’s objective.

² *See* Letter from Karyn Rotker, Senior Staff Attorney, ACLU-WI to Randy Rosburg, District Administrator, Somerset Sch. Dist. (April 15, 2013) [hereinafter “Letter from Karyn Rotker”] (Attached hereto as **Exhibit A**).

3. The ACLU requests that the Office for Civil Rights (“OCR”) investigate the School District of Somerset to determine whether the single-sex classrooms at Somerset Middle School are in compliance with Title IX, and remedy any unlawful conduct.

JURISDICTION

4. OCR is responsible for ensuring compliance with Title IX and receiving information about, investigating, and remedying violations of Title IX and its implementing regulations and guidelines in the region. 34 C.F.R. §§ 106.71, 100.7.
5. The ACLU has not filed this complaint with any other agency or institution.
6. The problems documented are ongoing, thus this complaint is timely.³
7. The School District of Somerset receives federal financial assistance, including funds directly from the United States Department of Education (“ED”) and ED funds passed through the Wisconsin Department of Education, and is therefore prohibited from discriminating on the basis of sex by Title IX and must comply with ED regulations.

OPERATIVE LAW

8. Title IX provides in relevant part that:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a).

9. ED’s Title IX regulations require with respect to single-sex class assignments in a coeducational school that:

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 [of which single-sex education cannot be the sole example], 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

³ See Somerset Middle School, *Gender Equity: Can Single-Gender Classes Help Your Child Achieve More?* (Flyer) (March 21, 2012) [hereinafter “2012 Grade 5 Single-Gender Flyer”] (Attached hereto as **Exhibit B**).

class or extracurricular activity is substantially related to achieving that objective.

34 C.F.R. § 106.34(b)(1)(i); *see also* 71 Fed. Reg. 62,530, 62,534-62,535 (Oct. 25, 2006).

10. Justifications for single-sex classes may not “rely on overly broad generalizations about the different talents, capacities, or preferences of either sex.” 34 C.F.R. § 106.34(b)(4)(i); 71 Fed. Reg. 62,530, 62,535.
11. Whichever of these objectives is selected, the program must be implemented evenhandedly, enrollment in single-sex classes must be “completely voluntary,” and the program must offer a substantially equal coeducational alternative. 34 C.F.R. § 106.34(b)(1). “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.” 71 Fed. Reg. at 62537. “[T]he Department of Education regulations require an affirmative assent by parents or guardians before placing children in single-sex classrooms. Such affirmative assent would preferably come in the form of a written, signed agreement by the parent explicitly opting into a single-sex program.” *Doe v. Wood County Bd. of Educ.*, 2012 WL 3731518 at *4 (S.D. W.Va. Aug. 29, 2012).
12. Additionally, any program involving single-sex classes must be evaluated by the recipient at least every two years “to ensure that single-sex classes or extracurricular activities are based upon genuine justifications and do not rely on overly broad generalizations about the different talents, capacities, or preferences of either sex and that any single-sex classes or extracurricular activities are substantially related to the achievement of the important objective for the classes or extracurricular activities.” 34 C.F.R. § 106.34(b)(4).

FACTUAL ALLEGATIONS

General Allegations

13. Somerset Middle School, located in Somerset, Wisconsin, covers fifth through eighth grades. It educates approximately 451 students.⁴
14. The program at Somerset Middle School was initiated in certain classrooms in the fifth grade in the 2006-2007 school year after the first quarter.⁵

⁴ See Wisconsin Information System for Education, *Enrollment Statistics for Somerset Middle School in the 2013-2014 School Year*, <http://wisedash.dpi.wi.gov/Dashboard/Page/Home/Topic%20Area/Enrollment/> (last visited Dec. 16, 2013).

⁵ See Somerset Middle School, Fifth Grade Team, Letter to Parents from Brenda Boucher *et al.* (September 2006) [hereinafter “September 2006 Parent Letter”] (Attached hereto as **Exhibit C**); *see also* Somerset Middle School, Fifth Grade Team, Letter to Fourth Grade Parents from Brenda Boucher *et al.* (May 2006) [hereinafter “May 2006 Parent Letter”] (Attached hereto as **Exhibit D**).

15. Initially Somerset Middle School offered one all-girls homeroom, one all-boys homeroom and two mixed-gender homerooms in the fifth grade.⁶ By the 2008-2009 school year, the program had expanded to two all-girls homerooms, two all-boys homerooms, and one mixed-gender homeroom.⁷ Based on the latest documents produced, it appears that the single-sex classroom program is ongoing, including in the 2013-14 school year.⁸
16. The students selected for single-sex classrooms appear to have been separated by sex in all core subjects, as well as extracurricular activities and non-academic periods like lunch and recess.⁹

Lack of Adequate Justification for Classification by Sex

17. The documents provided in response to the ACLU's April 15, 2013 Open Records Act request, which sought "policies governing any single-sex education program or activity" and "records relating to the decision or rationale for creating single-sex education programs or activities,"¹⁰ do not indicate an adequate justification for the sex separation program at Somerset Middle School.
18. No evidence was produced suggesting that Somerset Middle School conducted an individualized assessment of student needs, or that it had an overall established policy to improve educational achievement by offering a diversity of educational options.
19. The stated goal of the program at Somerset Middle School was to improve "academic rigor in classes, with a sub-goal of diminishing the gender gap on WKCE [Wisconsin Knowledge and Concepts Exam] and Terra Nova tests" and to improve "student behavior and attitudes through increased student competence, confidence and class participation."¹¹ However, the documents produced do not identify or quantify either any specific gender gap in any particular grade or subject or subjects, or any particular deficiencies in "student competence, confidence and class participation" in any particular grade or subject or subjects that were to be remedied. In fact, it appears that the District did not consider any district or school-specific data at all in advance of authorizing the separation of fifth graders at Somerset Middle School on the basis of sex.

⁶ See Student List for Fifth Grade Classes 2006-2007 (March 15, 2007) (Attached hereto as **Exhibit E**).

⁷ See Letter to Fourth-Grade Parents from Brenda Boucher, *et al.* (February 2009) [hereinafter "February 2009 Parent Letter"] (Attached hereto as **Exhibit F**).

⁸ See Exhibit B (2012 Grade 5 Single-Gender Flyer, *supra* note 3).

⁹ See Somerset Middle School Grade Five Curriculum Summary (Undated Flyer) (Attached hereto as **Exhibit G**); Master Schedule 2006-2007, Grade 5 (Undated) (Attached hereto as **Exhibit H**).

¹⁰ Exhibit A (Letter from Karyn Rotker, *supra* note 2).

¹¹ Brenda Boucher, *et al.*, Presentation, Gender Equity: Can Single-Gender Classes Help Your Child Achieve More? 2006-2007, at slide 2 (Undated) [hereinafter "Presentation on Gender Equity"] (Attached hereto as **Exhibit I**); see also Brenda Boucher *et al.*, *Somerset School District Action Research Analysis and Reflection Report 5* (April 23, 2007) [hereinafter "2006-07 Action Research Report"] (Attached hereto as **Exhibit J**).

20. The documents contain no explanation as to how this unspecified gender gap in “some subjects” justifies a single-gender program for (a) all core and elective subjects, or (b) for fifth-graders specifically, as students take WKCE in grades 3-8, and 10.¹²
21. The District planned to achieve this goal through the use of differentiated teaching methods that were “tailored to meet the needs of the learning styles of the genders(s) within the classroom.”¹³ In addition to this being impermissible (see below), Somerset also produced no valid evidence demonstrating any nexus between its articulated goals and the use of the strategy of sex separation or the employment of different teaching methods for boys and girls.
22. The District does not appear to have conducted or considered any systematic literature reviews or primary research demonstrating that imposition of single-sex classrooms using different teaching methods for boys and girls would achieve its stated goals. Instead, the District relied on site visits to other schools with single-sex classes, anecdotal reports, and the writings of proponents of single-sex education, including the controversial work of Dr. Leonard Sax and Michael Gurian, two popular authors who propound the theory that hardwired differences between boys and girls necessitate the use of single-sex classrooms and the employment of different teaching methods for boys and girls.¹⁴
23. For example, among the handful of articles cited by the school in its presentation on the single-gender program was Leonard Sax’s *Why Gender Matters*, in which the author argues that:
 - a) Teachers should smile at girls and look them in the eye. However, teachers must not look boys directly in the eye or smile at them.
 - b) Boys do well under stress, and girls do badly, so girls should not be given time limits on tests.
 - c) Girls should be allowed to take their shoes off in class because this helps them relax and think better.
 - d) Literature teachers should not ask boys about characters’ emotions, and should only focus on what the characters actually did. But teachers should focus on characters’ emotions in teaching literature to girls.

¹² See Wisconsin Knowledge and Concepts Exam, available at http://oea.dpi.wi.gov/oea_wkce; See also Wisconsin School Performance Report for Somerset Middle School (Fifth Grade), November 2005, available at <http://www2.dpi.state.wi.us/wsas/schoolWkce.asp>.

¹³ Exhibit F (February 2009 Parent Letter, *supra* note 7); See also Exhibit C (September 2006 Parent Letter, *supra* note 5); Exhibit D (May 2006 Parent Letter, *supra* note 5); Exhibit I (Presentation on Gender Equity, *supra* note 11, at slide 37 [“Summary”]); Exhibit J (2006-07 Action Research Report, *supra* note 11, at 4, 6-7);

¹⁴ Exhibit I (Presentation on Gender Equity, *supra* note 11, at slide 5); Exhibit J (2006-07 Action Research Report, *supra* note 11, at 5).

- e) Boys should receive strict discipline based on asserting power over them. Young boys can be spanked. Girls should never be spanked, but instead should be disciplined by appealing to their empathy.
 - f) A boy who likes to read, who does not enjoy contact sports, and who does not have a lot of close male friends has a problem, even if he thinks he is happy. He should be firmly disciplined, required to spend time with “normal males,” and made to play sports.¹⁵
24. In 2006, staff at Somerset Middle School also attended trainings presented by Dr. Sax.¹⁶
25. Noting that these recommendations are “[e]xtrapolat[ed] from research on adults’ cardiovascular regulation,” scholars have observed that “[i]n his books, Web site, and teacher-training programs, Sax rationalizes different educational experiences for boys and girls by using obscure and isolated findings about brain maturation, hearing, vision, and temperature sensitivity. Although scientists have debunked many such claims as ‘pseudoscience,’ and even Dr. Sax himself has retracted many of these claims, this message has yet to reach many educators who are implementing such recommendations in single-sex classes within coeducational schools.”¹⁷
26. The District also cited Michael Gurian’s *Boys and Girls Learn Differently: A Guide for Teachers and Parents*,¹⁸ in which the author has claimed that boys are better than girls in math because their bodies receive daily surges of testosterone, while girls have similar skills only “a few days per month” when they experience “increased estrogen during the menstrual cycle”; that boys are abstract thinkers and so are naturally good at things like philosophy and engineering, while girls are concrete thinkers and should be given objects that they can touch to learn about math and science; and that boys should be given Nerf baseball bats with which to hit things so they can release tensions during class.¹⁹
27. The District produced numerous documents articulating a justification for separating boys and girls in fifth grade at Somerset Middle School that was explicitly based on the notion that boys and girls are “hardwired” to learn and develop differently. For example, a September 2006 letter from fifth-grade teachers to fourth-grade parents announcing the formation of the single-sex pilot program noted:
- Brain-based research has proven that the brains of girls and boys are built very differently. These differences are genetically programmed and are present at birth. Because of these hard-wired differences in the brain, girls and boys have

¹⁵ See Leonard Sax, *Why Gender Matters: What Parents and Teachers Need to Know About the Emerging Science of Sex Differences* 86-92, 108-112, 179-83, 188, 218-228 (2005).

¹⁶ Exhibit I (Presentation on Gender Equity, *supra* note 11, at slide 6); Exhibit J (2006-07 Action Research Report, *supra* note 11, at 5).

¹⁷ Diane Halpern et al., *The Pseudoscience of Single-Sex Schooling*, 333 *Science* 1706, 1707 (2011).

¹⁸ See Exhibit I (Presentation on Gender Equity, *supra* note 11, at slide 5); Exhibit J (2006-07 Action Research Report, *supra* note 11, at 5).

¹⁹ See Michael Gurian, *Boys and Girls Learn Differently: A Guide for Teachers and Parents* (2001).

different learning styles; as a result, single-gender classrooms have unique advantages for boys and for girls.²⁰

A flyer announcing a parent informational session about the single-gender classes was even entitled “‘*It’s in the Genes*’ Parent Night.”²¹

28. Somerset Middle School presented materials outlining numerous purported differences between boys and girls, including the following claims:
- “Girls and guys notice different things (boys: motion; girls: bright colors and people)”;
 - “Girls are more easily distracted than boys and prefer quiet and focus”;
 - “Girls hear better”;
 - “Boys are messy”;
 - “Teams work for boys as boys value team affiliation above friendship”²²
 - “Adulthood in terms of brain development is age 22 for females and age 30 for males”;²³
 - “Girls draw nouns. Boys draw verbs.”²⁴
29. The District’s decision to reauthorize and expand the pilot program in the 2007-2008 and 2008-2009 school year was taken in spite of the school’s own data, which did not show a significant improvement in student outcomes between the single-sex and coeducational classes.²⁵ No further systematic evaluation of academic outcomes appears to have been conducted in subsequent years. Rather, the program appears to have been continued without further assessment of its effectiveness, up through the present.

Impermissible Sex Stereotypes in the Educational Environment

30. In addition to the sex separation being inadequately justified, records produced by the District suggest that the sex separation within Somerset Middle School was not only based on, but also promoted impermissible stereotypes about purported differences in the brain development, intellectual capabilities, and learning preferences of boys and girls.
31. In accordance with the teachings of these proponents of single-sex education, Somerset Middle School intended to address these purported sex differences by

²⁰ Exhibit C (September 2006 Parent Letter, *supra* note 5). See also Somerset Middle School, *Gender Equity: Can Single-Gender Classes Help Your Child Achieve More?* (December 2, 2011) (Flyer) [hereinafter “2011-12 Gender Equity Flyer”] (Attached hereto as **Exhibit K**); Exhibit I (Presentation on Gender Equity, *supra* note 11, at slides 9, 11).

²¹ Somerset Middle School, “*It’s In the Genes*” Parent Night (Flyer advertising information session on “single-gender classroom information” held on April 22, 2008) (undated) (Attached hereto as **Exhibit L**).

²² Exhibit I (Presentation on Gender Equity, *supra* note 11, at slides 10-11, 21, 62).

²³ *Id.* at slide 9.

²⁴ Exhibit K (2011-12 Gender Equity Flyer, *supra* note 20).

²⁵ Exhibit I (Presentation on Gender Equity, *supra* note 11, at slides 52-60, 63-64); Brenda Boucher *et al.*, *Somerset School District Action Research Analysis and Reflection Report* 3-4 (February 1, 2008) [hereinafter “2007-08 Action Research Report”] (Attached hereto as **Exhibit M**).

creating separate classes for boys and girls that would be “tailored to meet the needs of the learning styles of the gender(s) within the classroom.”²⁶ A letter sent home to parents announcing the pilot program in 2006 explained, “[f]or example, the male homeroom may focus on lessons that are taught using more hands-on and movement oriented activities whereas the female homeroom may focus on lessons that are taught using more writing and giving more opportunities for leadership.”²⁷ A follow up letter in September 2006, stated that the single-sex classrooms would be focused on the “learning styles that promote success specific for boys and girls.”²⁸ Somerset noted that “HOW single-gender classes are implemented is critical to success or failure. Single-gender settings are not, by themselves, going to help girls and boys. Teaching methods and classroom environments must be adapted differently for boys and girls.”²⁹

32. A flyer to the parents specifically explained how such “developmental differences” influenced classroom teaching. Somerset’s research on what “works” for girls included recommendations of using a quieter teacher voice, making opportunities for sharing feelings, and giving more time for processing and sharing; for boys, Somerset included the recommendations of avoiding down time, using a louder teacher voice, and having the teacher interrupt himself or herself every minute or two to ask a question or provide a summary.³⁰
33. Teachers were encouraged to use “best practices” in single-sex classrooms that differed for the boys’ and girls’ classes. For the girls, they were advised: “[s]elf-revelation is the most precious badge of friendship” and “[h]ierarchies destroy friendship”; for the boys, they were advised: “friendship is peripheral to relationship” and “[s]elf-revelation is to be avoided at all costs.”³¹ Similarly, teacher-student relationships differed in single-sex classrooms, with girls’ teachers being “friends” who address them by their first names and boys’ teachers being “tough” and addressing students as “gentlemen.”³²
34. A presentation given by Somerset teachers listed subject-specific recommendations for teaching boys and girls particular subjects based on these presumed sex differences in learning.³³ For instance, the materials suggested different approaches for boys and girls in reading:³⁴

Boys	Girls
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²⁶ Exhibit D (May 2006 Parent Letter, *supra* note 5).

²⁷ *Id.*

²⁸ Exhibit C (September 2006 Parent Letter, *supra* note 5).

²⁹ Exhibit I (Presentation on Gender Equity, *supra* note 11, at slide 37).

³⁰ *See* Exhibit K (2011-2012 Gender Equity Flyer, *supra* note 20). *See also* Exhibit J (2006-07 Action Research Report, *supra* note 11, at 7).

³¹ Exhibit I (Presentation on Gender Equity, *supra* note 11, at slides 16-17).

³² *Id.* at slides 18-19.

³³ *Id.* at slides 27-36.

³⁴ *Id.* at slides 33-34.

<ul style="list-style-type: none"> - More likely to choose nonfiction, descriptions of real events, adventures, action, and illustrated accounts of how things work. - Want stories with male protagonists that are exciting. - Like to use clues in a book to construct maps and use puzzle solving skills. - Fiction works if there are strong male characters doing unpredictable things or taking dramatic action to change their world. 	<ul style="list-style-type: none"> - Prefer fiction, short stories and novels. - Like to analyze and connect with characters, their motives, and behaviors. - Like stories about experiences that might happen over one summer and emotional agonies the character endures. - Like role playing experiences.
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35. The materials suggested different pedagogy for boys and girls in math:³⁵

Boys	Girls
<ul style="list-style-type: none"> - Use concrete numbers – start with and stay with numbers. - Do not use manipulatives unless you have tight guidelines for their use. 	<ul style="list-style-type: none"> - Manipulatives help girls more than boys. - Bring in examples to show math concepts. - Begin with real world applications before emphasizing computation.

36. Somerset released a chart of teacher expectations in single-gender classrooms, which specifically encouraged teachers to “address stereotypical weaknesses” of both boys and girls.³⁶ For girls, these weaknesses included “Time to share ~ meet emotional needs” and “CLIQUEES ~ avoiding them/work on constantly.” For boys, weaknesses were “Messiness: organize for the day” and “Direct gentlemanly behavior instruction (MANNERS).”³⁷

37. Assessments of the program conducted by the fifth grade teachers after the conclusion of the pilot program in 2006-2007 and again at the end of the 2007-2008 school year state directly that different teaching methods were used in the boys’ and girls’ classrooms. For example, the 2007-08 Assessment describes how:

[W]e found that what works with boys is to avoid down time, use louder teaching voice, whenever possible give specific written directions, encourage non-threatening fine motor skill activities, and every minute or two interrupt your teaching to ask a question or for a summary.

Additional strategies that work with girls included using a quieter teacher voice, giving more processing and sharing time ... giving more opportunities for sharing feelings, encouraging leadership and mutual support, and using persistence in

³⁵ *Id.* at slides 27-28.

³⁶ *Single-Gender Classrooms, 2007-2008, Teacher Expectations* (undated chart) (Attached hereto as **Exhibit N**).

³⁷ *Id.*

depth of questioning. [We were] able to focus on student interest to discuss specific topics in health, novel choices math problems, etc.³⁸

The second-year assessment elaborates that in addition to those strategies,

[W]e have discovered that we need to allow for more choices in the boys' physical movements during actual learning time. With boys we provide many opportunities for movement around the classroom and we allow the choice of standing or sitting during classroom instruction time.³⁹

38. Evaluations of the singles-sex classes submitted by students and parents demonstrate that teachers actually employed these techniques in the classroom by using different teaching methods for boys and for girls. For example, in responding to how the classroom is different with only boys, students in the all-boys' class commented: "We get taught differently and the teachers relate a lot of questions to sports" and "[d]ifferent homework assignments[.]"⁴⁰ One boy commented he chose the all-boys' class because "[w]e'd get to do different things."⁴¹ Another student recommended the all-boys' class to others, observing: "Yes, they will have a different learning experience."⁴² A student in the all-girls' class noted that the classroom is different with only girls because "[w]e get to do a lot of things the boys can't[.]"⁴³
39. Parents and teachers also elaborated on the differences in both curriculum and teaching methods between the boys' and girls' single-gender classes. One parent commented, "[my son] has enjoyed some of the unique things that are done because they are all boys."⁴⁴ Another parent noted he or she choose the single-gender class because he or she "[t]hought [my son] would do better in a class where topics were used that interest boys more than girls."⁴⁵ Other parents observed that "[b]ooks for boys were well selected" and "[b]ook choices in reading [are] geared more toward the gender and therefore more interesting[.]"⁴⁶ In a review of single-gender elective classes, the art teacher commented, "My delivery varied on the project/lesson for the week. I used a much louder voice for the boy class! The girl class I could use a much quieter voice. I did notice I hurried through directions with the boy class and took my time with the girl class."⁴⁷
40. Viewed together, the teacher training, the promotional materials sent to parents, the literature that influenced school administrators and formed the basis for the single-sex program at Somerset Middle School, assessments of the program produced by school

³⁸ Exhibit J (2006-07 Action Research Report, *supra* note 11, at 7); Exhibit M (2007-08 Action Research Report, *supra* note 25, at 3).

³⁹ Exhibit M (2007-08 Action Research Report, *supra* note 25, at 3).

⁴⁰ Exhibit J (2006-07 Action Research Report, *supra* note 11, at 21).

⁴¹ *Id.*

⁴² *Id.* at 22.

⁴³ *Id.* at 24.

⁴⁴ Exhibit M (2007-08 Action Research Report, *supra* note 25, at 9).

⁴⁵ Exhibit J (2006-07 Action Research Report, *supra* note 11, at 26).

⁴⁶ *Id.* at 27; Exhibit M (2007-08 Action Research Report, *supra* note 25, at 11).

⁴⁷ Exhibit J (2006-07 Action Research Report, *supra* note 11, at 20).

personnel, and the evaluation forms filled out by teachers and students demonstrate conclusively that teachers indeed used different teaching methods, and in some cases, different curricula, in the boys' and girls' classrooms that was based upon and promoted sex stereotypes, and that these methods continue to be employed at the school today

Voluntariness and Coeducational Option

41. The written information that was provided to parents with fourth or fifth grade students at Somerset Middle School was biased and misleading, containing unsupported and one-sided statements touting the benefits of single-sex education, and including pseudoscientific claims about purported differences in boys' and girls' learning and development.⁴⁸
42. This one-sided and inaccurate information appeared to influence whether students and parents decided to participate in single-gender programs. For example, students and parents commented as follows:
 - “We heard the research findings about how separate-gender classes improve learning.”⁴⁹
 - “We felt the single-gender classroom would be a good learning environment for our son after hearing the presentation and what we know about boys and girls differences.”⁵⁰
 - “I believe in the research and data! I have no doubt that boys and girls learn differently and at this very transitional age (10-14 years old). They can do without gender-based distractions.”⁵¹
 - “She [the child] was eager to try it and after hearing [the] statistics, I felt it was worth a try.”⁵²
43. While coeducational alternatives were offered for fifth graders at Somerset Middle School, the documents suggest that single-sex classes were not completely opt-in during some school years. In the program's first year in 2006, parents could check “I AM INTERESTED in my child participating in a single gender classroom” or “I DO NOT wish my child to participate in a single gender classroom.”⁵³ However, the February 2009 letter to fourth-grade parents suggests a shift from an opt-in to an opt-out structure. Whereas previous letters ask parents to check one of two boxes to affirmatively indicate interest, the letter contains the following language: “Please contact us if you have questions or are NOT interested in having your child be in a

⁴⁸ See Exhibit I (Presentation on Gender Equity, *supra* note 11); Exhibit K (2011-2012 Gender Equity Flyer, *supra* note 20); Exhibit F (February 2009 Parent Letter, *supra* note 7).

⁴⁹ Exhibit J (2006-07 Action Research Report, *supra* note 11, at 26).

⁵⁰ *Id.*

⁵¹ *Id.* at 28.

⁵² *Id.* at 29.

⁵³ Exhibit C (September 2006 Parent Letter, *supra* note 5).

single-gender classroom for the 2009-2010 school year.”⁵⁴ No evidence was produced that the school ever switched back to an opt-in structure, as the 2009-10 letter was the latest communication to parents that was produced in response to the ACLU’s FOIA.

44. The documents also suggest that the coeducational alternatives offered at Somerset Middle School were not substantially equal. For example, parent surveys reported complaints that “[t]he all girls’ class also has extra activities such as parties and our child feels additional isolation from her friends because of these differences in the classroom”⁵⁵ and that the school should “[p]rovide the activities done in the all girls’ class to all girls.”⁵⁶
45. Additionally, questions exist as to the nature of distribution of students with special needs between single-sex and coeducational classes. For example, surveys of parents from suggested that girls with special needs may have been excluded from single sex classes, while boys with special needs may have been tracked into those classes.⁵⁷
46. The documents also suggest that teachers of single-sex classes may have received additional opportunities for training and professional development as compared to teachers of mixed-gender classes (although that training may well have been focused on impermissible sex stereotypes).⁵⁸

Evaluations

47. Somerset conducted its own data collection and surveys of students and parents from 2006 to 2008 that compared academic and behavioral outcomes for the all-boys, all-girls, and mixed-gender classes. However, the evaluations failed to ensure the school did not perpetuate sex stereotypes, as required by the Title IX regulations, 34 C.F.R. § 106.34(b)(4)—nor could they have done so, as stereotypes were the driving force behind the program.
48. Somerset did not produce any documentation that evaluations were conducted after 2008, violating the regulation’s requirements that such evaluations be conducted every two years. 34 C.F.R. § 106.34(b)(4).

⁵⁴ Exhibit F (February 2009 Parent Letter, *supra* note 7).

⁵⁵ Exhibit J (2006-07 Action Research Report, *supra* note 11, at 33).

⁵⁶ *Id.* at 36.

⁵⁷ *See id.* at 37 (reporting: “my daughter was not put in a single-gender class because of her special needs. It would have been good for her”); Exhibit M (2007-08 Action Research Report, *supra* note 25, at 10) (reporting that the school should “[s]elect boys at random-do not pull all/most special needs students in a gender class”). *See also* Exhibit J (2006-07 Action Research Report, *supra* note 11, at 9) (explaining better results in STAR Reading Testing Summary in mixed-gender classes because “special education students have been removed from the mixed-gender classes, but are mainstreamed in the single-gender classes”).

⁵⁸ *See* Exhibit J (2006-07 Action Research Report, *supra* note 11, at 6) (“Grant monies were used to purchase research and gender-specific teaching materials, and also to pay for workshops, facility visits, and additional planning time.”).

49. Moreover, Somerset’s own analysis of student performance data did not show significant improvement across all subjects between the single-sex and coeducational classes.⁵⁹
50. A number of parents expressed significant dissatisfaction with the program in surveys, including comments focused on the perpetuation of sex stereotypes such as:
- “I believe that segregating the classroom is not only morally depriving our children, but is also protected by our constitution and could be detrimental to the mental welfare of our children.”⁶⁰
 - “Children need to experience life in the classroom and outside in life not separated or segregated as in the old days where blacks and whites or men and women were at one time separated. It teaches them about tolerance.”⁶¹
 - “School is supposed to prepare a child or young adult to be successful in the adult/work world. As the world gets to be ever more politically correct, a person needs to know how to handle those situations. A same-gender class completely ignores those issues.”⁶² Other parents echoed this sentiment.⁶³
 - “Abolish single-gender classrooms!”⁶⁴
 - “I really didn’t care which class he was in as I have mixed feelings about this.”⁶⁵
 - “I think public schools should be open and mixed.”⁶⁶
 - “Gender has no bearing on learning.”⁶⁷
 - “We teach our kids that they can do or be anything. Why would we separate and divide them because of their sex? Some kids need the mix.”⁶⁸
 - “I hope the school district does not plan to carry this to next year. Whether it is this class or next year’s class of 5th graders. If I wanted my child in a single-gender class, I would send them to private or parochial school.”⁶⁹
51. Moreover, while a full analysis of the evaluation methods used is beyond the scope of this Complaint, the evaluation contained obvious methodological flaws, including the failure to control for confounding variables, the likelihood that students were cherry-picked for inclusion in the single-sex classes, and the failure to account for selection bias or the “Hawthorne” effect.⁷⁰

⁵⁹ See Exhibit I (Presentation on Gender Equity, *supra* note 11, at slides 52-60, 63-64).

⁶⁰ Exhibit J (2006-07 Action Research Report, *supra* note 11, at 36).

⁶¹ *Id.* at 33.

⁶² *Id.*

⁶³ See *id.* at 33-36.

⁶⁴ *Id.* at 35.

⁶⁵ *Id.* at 34.

⁶⁶ *Id.* at 36.

⁶⁷ *Id.* at 37.

⁶⁸ *Id.* at 36.

⁶⁹ *Id.*

⁷⁰ See Halpern, *supra* note 17, at 1706 (describing “Hawthorne effect,” a phenomenon in which subjects of an experiment modify their behavior in response to their knowledge of the experiment, which may often distort results).

LEGAL ARGUMENT

52. As outlined in ¶¶ 17-20 of the Factual Allegations above, the School District of Somerset is not in compliance with 34 C.F.R. § 106.34(b)(1)(i) because its stated rationale to “improve academic rigor” is too vague a goal to qualify as a governmental interest sufficiently important to justify sex segregation across all subjects in an entire grade. The goal of increasing “academic rigor in classes, with a sub-goal of diminishing the gender gap” on various standardized tests is also too vague to be considered an important objective because the District did not specify any particular “gender gap” it sought to target, or even identify in which subjects girls or boys performed better.⁷¹
53. As outlined in ¶¶ 21-28 of the Factual Allegations above, the Somerset School District is not in compliance with 34 C.F.R. §§ 106.34(b)(1)(i) and 106.34(b)(4) because the primary articulated mission of the single-sex classes and activities at Somerset was, and on information and belief still is, to address the “hard-wired differences in the brain” by implementing “single-gender classrooms [that] have unique advantages for boys and for girls.”⁷² This is an invalid justification for sex-based classifications as a matter of law, for at least two reasons:
- a) As the Supreme Court has held, the provision of single-sex education cannot be itself used as a justification for a sex-based classification because this confuses the “means” with the “end.” Such a justification constitutes a “notably circular” argument that distorts the applicable test to determine the constitutionality of sex-based classifications (like the decision to institute single-sex classes). See *United States v. Virginia*, 518 U.S. 516, 545 (1996) (“*VMI*”).
 - b) The Supreme Court has similarly rejected the use of generalizations about the differences between males and females in learning and developmental needs – which are the basis of the program at Somerset Middle School – as a justification for single-sex education. See *VMI*, 518 U.S. at 549-50.
54. As outlined in ¶¶ 17-29 of the Factual Allegations above, the School District of Somerset is not in compliance with 34 C.F.R. § 106.34(b)(1)(i)(A) because the justification for the single-sex classes and activities within the District was, and on information and belief still is, not part of an overall established policy to provide diverse educational opportunities. The District had no established policy to provide diverse educational opportunities.
55. As outlined in ¶¶ 18 of the Factual Allegations above, the School District of Somerset is not in compliance with 34 C.F.R. § 106.34(b)(1)(i)(B) because the justification for its single-sex classes and activities at Somerset Middle School was, and on information and belief, still is, not aimed at meeting the particular, identified

⁷¹ See Exhibit C (September 2006 Parent Letter, *supra* note 5); Exhibit I (Presentation on Gender Equity, *supra* note 11; Exhibit J (2006-07 Action Research Report, *supra* note 11, at 16); Exhibit K (2011-12 Gender Equity Flyer, *supra* note 20).

⁷² Exhibit C (September 2006 Parent Letter, *supra* note 5).

educational needs of its students, or part of an overall established policy to provide diverse educational opportunities. The District provided no documentation that it had any such policy, or that any individual assessments of student needs had been conducted prior to implementation or at any time during the program's operation. Rather, students appear to have been assigned to the single-sex classrooms based on based on their sex in combination with parent preference and teachers' subjective beliefs about which students they believed would benefit from being assigned to such classrooms.

56. As outlined in ¶¶ 20-29 of the Factual Allegations above, the Somerset School District is not in compliance with 34 C.F.R. §§ 106.34(b)(1)(i) and 106.34(b)(4) because there was, and upon information and belief, is, no evidence that the institution of single-sex classes or the use of gender-based instruction at Somerset Middle School was substantially related to the general objectives of improving academic rigor in the classroom or addressing the unspecified "gender gap."⁷³
- a) The District cited no valid evidence demonstrating a nexus between single-sex education generally, or the use of gender-differentiated instruction specifically, and improving academic rigor or outcomes— either for boys or girls, or for any particular subject(s).
 - b) Correspondingly, the documents produced do not explain why this gender gap in the WKCE exam for "some subjects" justifies a single-gender program for (a) all core and elective subjects, including in lunch and recess, or (b) why the program was implemented for fifth graders specifically.⁷⁴
 - c) Furthermore, the District's own data did not support the continuation and expansion of the pilot program or its continued operation over the years, because it did not demonstrate any significant improvement in academic outcomes in most subjects in the single-sex classrooms as compared to the coeducational classrooms.⁷⁵
57. As outlined in ¶¶ 30-40 of the Factual Allegations above, the Somerset School District is not in compliance with Title IX or with 34 C.F.R. §§ 106.34(b)(1)(i) and 106.34(b)(4) because teachers at Somerset Middle School employed and, on information and belief, continue to employ, different teaching methods in the boys' and girls' classrooms based on overly broad generalizations about the different talents, capacities, or preferences of boys and girls. This violates the core prohibition of Title IX that students not be subject to discrimination – i.e. different treatment – on the basis of sex in federally funded programs and activities.

⁷³ *Id.* See also Exhibit K (2011-2012 Gender Equity Flyer, *supra* note 20).

⁷⁴ Students take the Wisconsin Knowledge and Concepts Exam in grades 3-8, and 10. See Wisconsin Knowledge and Concepts Exam, available at http://oea.dpi.wi.gov/oea_wkce; see also Wisconsin School Performance Report for Somerset Middle School (Fifth Grade), November 2005, available at <http://www2.dpi.state.wi.us/wsas/schoolWkce.asp>.

⁷⁵ Exhibit I (Presentation on Gender Equity, *supra* note 11, at slides 52-60, 63-64); Exhibit M (2007-08 Action Research Report, *supra* note 25, at 4).

58. As outlined in ¶¶ 41-46 of the Factual Allegations above, the Somerset Middle School is not in compliance with 34 C.F.R. § 106.34(b)(1)(iii) because parents were, and on information and belief continue to be, misled into participating in the single-sex classes and because the single-sex classes may also be opt out rather than opt in.
- a) The information provided to parents of Somerset students was biased and misleading, and included unsubstantiated claims based on overly broad generalizations about the purportedly different talents, capacities, or preferences of boys and girls.
 - b) Although participation in the single-sex classes at Somerset Middle School appears initially to have been structured on an opt-in basis, it appears to have shifted to an “opt-out” basis for the 2009 school year, and upon information and belief may continue to be using an opt-out model.⁷⁶
59. As outlined in ¶¶ 40-46 of the Factual Allegations above, the District was not in compliance with 34 C.F.R. § 106.34(b)(1)(iv) because the coeducational alternative offered was and is not substantially equal to the single-sex classes.
60. As outlined in ¶¶ 47-51 of the Factual Allegations above, the District is out of compliance with 34 C.F.R. § 106.34(b)(4) because it failed and continues to fail to conduct required biannual evaluations, because the evaluation methods that were used were methodologically flawed, and because there is no evidence that it conducted *any* assessment of whether the single-sex classes at Somerset relied on overly broad generalizations about the different talents, capacities, or preferences of either sex. On the contrary, the entire program rests on “overly broad generalizations about the different talents, capacities, or preferences of either sex,” making them impermissible justifications for single-sex classes. 34 C.F.R. § 106.34(b)(4)(i); 71 Fed. Reg. at 62, 535.

RELIEF REQUESTED

61. The ACLU requests that:

- a) The OCR investigate the School District of Somerset and Somerset Middle School to determine whether they are in compliance with Title IX and its implementing regulations.
- b) The OCR order Somerset School District to take all necessary steps to remedy any unlawful conduct identified in its investigation, as required by Title IX and its implementing regulations. 34 C.F.R §§106.34 and 34 C.F.R. Part 100, Appendix B.
- c) If any violations are found, the OCR secure assurances of compliance with Title IX from all schools administered by Somerset School District.
- d) The OCR monitor any resulting agreements with Somerset School District and/or individual schools to ensure that full compliance with Title IX is achieved.

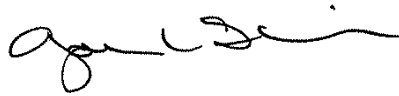
⁷⁶ See Exhibit F (February 2009 Parent Letter, *supra* note 7).

62. If your investigation substantiates that, as we have alleged, the program was indeed premised on unlawful sex stereotypes, and that different teaching methods and program structures were indeed employed in the boys' and girls' classrooms, then these defects cannot be cured. The district should not be permitted to invent new objectives for the program *post hoc* in order to justify its continuation, or attempt to merely restructure the program to remove overt evidence of sex discrimination. Nor can it undo the damage of having trained teachers on presumed sex differences and strategies for addressing them. The only sufficient remedy would be to cease the sex separation altogether and revert to a fully coeducational structure. In addition, the school district should be required to conduct remedial training for all administrative and teaching staff on gender equality in education that comports with the requirements of Title IX and the Constitution.

Respectfully submitted,



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Enclosures

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