United States Court of Appeals

for the

Fifth Circuit

Case No. 10-30378

JANE DOE, on behalf of Jill Doe, on behalf of Joan Doe,

Plaintiffs-Appellants,

– v. –

VERMILION PARISH SCHOOL BOARD; RANDY SCHEXNAYDER, Individually and in his official capacity as Superintendent of the Vermilion Parish School Board; BILL SEARLE, Individually and in his official capacity as member of the Vermilion Parish School Board; ANGELA FAULK, Individually and in her official capacity as member of the Vermilion Parish School Board; DEXTER CALLAHAN, Individually and in his official capacity as member of the Vermilion Parish School Board; RICKY LEBOUEF, Individually and in his official capacity as member of the Vermilion Parish School Board; ANTHONY FONTANA, Individually and in his official capacity as member of the Vermilion Parish School Board; CHARLES CAMPBELL, individually and in his official capacity as member of the Vermilion Parish School Board; CHRIS MAYARD, Individually and in his official capacity as member of the Vermilion Parish School Board; RICKY BROUSSARD, Individually and in his official capacity as member of the Vermilion Parish School Board; DAVID DUPUIS, Individually and in his official capacity as Principal of Rene A. Rost Middle School,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA, LAFAYETTE

BRIEF FOR PLAINTIFFS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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2. Joan Doe
3. Jill Doe

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9. Lenora Lapidus – Women's Rights Project, American Civil Liberties Union
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Defendants-Appellees

11. Vermilion Parish School Board
12. David Dupuis, Principal, Rene A. Rost Middle School
13. Randy Schexnayder, Superintendent, Vermilion Parish School Board

14. Bill Searle, Member, Vermilion Parish School Board

15. Angela Faulk, Member, Vermilion Parish School Board

16. Dexter Callahan, Member, Vermilion Parish School Board

17. Ricky Lebouef, Member, Vermilion Parish School Board

18. Anthony Fontana, Member, Vermilion Parish School Board

19. Charles Campbell, Member, Vermilion Parish School Board

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22. Calvin "Woody" Woodruff, Jr., Vermilion Parish School Board

23. Dawn L. Morris – Law Office of Dawn L. Morris, LLC

STATEMENT REGARDING ORAL ARGUMENT

Appellant Jane Doe, as next friend to her minor daughters Joan and Jill Doe (collectively, "Appellants" or "Plaintiffs"), respectfully request oral argument because they believe argument will assist the Court in its analysis of the disputed constitutional, statutory and regulatory issues presented on appeal, and will enable counsel to address any questions the Court may have.

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JURISDICTIONAL STATEMENT

This is an appeal from the District Court's April 19, 2010 order, denying Plaintiffs' motion for a preliminary injunction. Record on Appeal ("ROA") at USCA5 2872-80. The District Court had federal question jurisdiction over this case, which seeks to redress the deprivation of Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§ 1681-88 ("Title IX") and the Title IX implementing regulations of the United States Departments of Education ("DOE"), 34 C.F.R. § 106.34, Agriculture ("USDA"), 7 C.F.R. § 15a.34, Homeland Security ("DHS"), 6 C.F.R. § 17.415(a), and Health and Human Services ("HHS"), 45 C.F.R. § 86.34. 28 U.S.C. §§ 1331, 1343. Plaintiffs timely filed a notice of appeal on April 21, 2010. ROA at USCA5 2881-92. This Court has jurisdiction to review interlocutory orders of the District Court denying injunctions. 28 U.S.C. § 1292(a)(1).

ISSUES PRESENTED

1. Did the District Court commit reversible error by failing to apply the four-part test governing the issuance of a preliminary injunction?

2. Did the District Court commit reversible error by failing to conduct any legal analysis whatsoever of Plaintiffs' claims that the sex segregation program

at the public, coeducational Rene A. Rost Middle School ("RRMS") is a *per se* violation of Title IX and the Title IX implementing regulations of the USDA, DHS and HHS?

3. Did the District Court commit reversible error by holding that in order to succeed on its Equal Protection claim Plaintiffs were required to show that the Vermilion Parish School Board ("VPSB"), Principal David Dupuis and Superintendent Randy Schexnayder (collectively "Appellees" or "Defendants") acted with an intent to harm RRMS students based on their sex?

4. Did the District Court commit reversible error by failing to consider whether Defendants met their burden of demonstrating that the RRMS sex segregation program serves an important governmental objective and is substantially related to the achievement of that objective?

5. Did the District Court commit reversible error by concluding that the sex segregation program at RRMS did not violate either the Equal Protection Clause or the DOE regulations despite its factual conclusion that the sole justification offered by Defendants in defense of the program was "extremely flawed"?

STATEMENT OF THE CASE

On September 8, 2009, Plaintiffs filed a Complaint along with a motion for a temporary restraining order and preliminary injunction, seeking what, until recently, most parents would have thought of as a given: normal coeducational schooling at the only public school in their community. ROA at USCA5 20-67.

The Complaint, ROA at USCA5 20-49, alleges that the sex segregation program at RRMS violates four independent federal requirements that either bar sex segregation in public schools outright, or impose extremely high hurdles Defendants cannot meet: (1) Title IX, which prohibits Defendants from "exclud[ing]" any student "from participat[ing] in" or "den[ying]" any student "the benefits of" "any education program or activity," or "subject[ing]" any student to "discrimination" on the basis of sex, 20 U.S.C. § 1681(a); (2) the Title IX implementing regulations of the USDA, DHS and HHS, which also bar Defendants from "provid[ing] any course or otherwise carry[ing] out any . . . education program or activity separately on the basis of sex," 45 C.F.R. § 86.34 (HHS); 7 C.F.R. § 15a.34 (USDA); 6 C.F.R. § 17.415(a) (DHS); (3) the Equal Protection Clause, which permits the government to make sex-based classifications only where it can demonstrate an "exceedingly persuasive" justification, that "the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of

those objectives," *United States v. Virginia*, 518 U.S. 515, 524, 531 (1996); and (4) the DOE regulations, which purport to permit sex segregation only where the government can show "each single-sex class" is based on a specific "important objective," is "substantially related" to achieving that objective, is "completely voluntary," and has "a substantially equal coeducational class." 34 C.F.R. § 106.34(b)(1)(i)-(iv). The record demonstrates that the RRMS sex segregation program is unlawful under each of these federal legal requirements.

After denying Defendants' partial motion to dismiss, ROA at USCA5 1759-67, 1833, the District Court held an evidentiary preliminary injunction hearing on February 24 and 25, 2010. At the hearing, the District Court heard live testimony from Plaintiffs, another child who suffered as a result of the sex segregation and his parent, Defendant Principal David Dupuis, Defendant Superintendent Randy Schexnayder and several school and district administrators, as well as expert testimony on behalf of Plaintiffs. *See* ROA at USCA5 1844-2139, 2537-2855. In addition, the parties submitted extensive pre- and post-hearing briefs on the legal issues presented in the case, ROA at USCA5 1242-1313, 1680-1757, 2459-2520, as well as written testimony from parents and teachers and hundreds of pages of deposition testimony and exhibits.

Several undisputed facts emerge from this voluminous record that compel reversal of the District Court's ruling. It is undisputed that Defendant VPSB

receives federal funding from DOE, HHS, USDA and DHS, ROA at Pl. H. Exs.[1] 53, 61-63; ROA at USCA5 2422, 2872, and that Defendants (1) exclude certain students from participating in specific classes based on sex and (2) provide courses separately on the basis of sex by creating separate core curriculum classes for boys and girls at RRMS. ROA at USCA5 2424. These facts alone establish, and certainly demonstrate a likelihood of success on the merits, that Defendants violated the *per se* bars imposed by Title IX and its implementing regulations.

The record also is replete with uncontested evidence that the "wrongful" manner in which Defendants implemented the "flawed" sex segregation program at RRMS plainly violates both the Equal Protection Clause and the DOE regulations. *See* ROA at USCA5 2877. For example, the District Court found, based on uncontroverted record evidence, that: (1) the sole justification offered by Defendants to implement the sex segregation program was the results of a social experiment conducted during the 2008-2009 school year by Defendant Principal David Dupuis, which purported to show drastic improvements in grade point averages and disciplinary referrals, ROA at USCA5 2797-2803, 2877; ROA at Pl. H. Ex. 38; and (2) the results of that experiment were, as the District Court

[1] "Pl. H. Ex." and "Def. H. Ex." refer to exhibits contained in Plaintiffs' Bench Book of Exhibits and Defendants' Bench Book of Exhibits respectively, both of which were admitted into evidence at the preliminary injunction hearing, ROA at USCA5 1846-48, and are contained in the Record on Appeal.

charitably put it, "extremely flawed." ROA at USCA5 2877. In fact, as Plaintiffs' expert demonstrated, the official report cards from RRMS show that grades ***declined*** during sex-segregated classes. ROA at Pl. H. Ex. 60 (Supplemental Expert Report of Diane Halpern) at 15. The District Court's factual findings are both uncontested and entitled to deference. An "extremely flawed" experiment cannot, as a matter of law, constitute an "exceedingly persuasive" justification that furthers an "important" government objective as the Equal Protection Clause and the DOE regulations require.

Faced with these undisputed facts and the legal conclusions that inevitably flow from them, the District Court simply ignored three of Plaintiffs' claims outright –under Title IX and various Title IX regulations – and misstated the standard applicable to the Equal Protection claim.

With respect to the Equal Protection claim, the District Court made a reversible error of law by holding that a claim of intentional discrimination by means of segregation under the Equal Protection Clause requires proof that the Defendants intended to harm the segregated students. ROA at USCA5 2876. Under controlling Supreme Court precedent, state action that classifies by sex is subject to heightened judicial scrutiny, regardless of the intent of the state actors. Under this test, Defendants bear the "demanding" burden of showing that the RRMS sex segregation program is substantially related to an important

governmental interest and that the segregation "directly furthers that interest," *Virginia*, 518 U.S. at 532-33, a burden Defendants did not even attempt to meet.

Because it found no evidence of intent to harm, the District Court eschewed any analysis of the Defendants' justification for sex segregation (Dupuis' "extremely flawed" experiment) or whether sex segregation furthered any important government interests. Instead, without citation to or analysis of the standards governing the issuance of a preliminary injunction, the District Court issued an ultimate conclusion on the merits of Plaintiffs' claims – that sex segregation at RRMS is lawful "so long as [it] is completely voluntary **and** there is a substantially equal co-ed opportunity available to every student." ROA at USCA5 2877. Despite uncontested record evidence that the RRMS sex segregation program was neither completely voluntary nor offered a substantially equal coeducational alternative, *see infra* sections IV.B-C, the District Court applied its subjective and unsubstantiated belief that sex-segregated classes are good for education and in the "best interest of the children," ROA at USCA5 2877, and allowed Defendants to continue segregating students by sex.

The District Court's reversible errors of law have immediate, real world consequences. In a purported attempt to implement its erroneous decision, the District Court's order allows the Defendants to institute a modified but equally unlawful sex segregation program for the 2010-2011 school year, subject to

various conditions such as requiring Defendants to provide the Court with monthly updates on the program, and permitting "parents who object to the single-sex option as a matter of principle . . . to transfer their child(ren) to the middle school or elementary school nearest their residence which provides co-educational classes only." ROA at USCA5 2879. The District Court does not explain how these modifications bring the RRMS sex segregation program into compliance with federal law. They cannot: Title IX and its implementing regulations promulgated by USDA, DHS, and HHS outright bar the program, and Defendants undeniably lack the type of justification for segregation required by the Equal Protection Clause and the DOE regulations.

Plaintiffs timely filed a notice of appeal from the District Court's Ruling on April 21, 2010. ROA at USCA5 2881-92. On May 6, 2010, the Court granted Plaintiffs' motion for expedited consideration of the Appeal.

STATEMENT OF FACTS

Beginning in the 2009-2010 academic year, the VPSB authorized Principal David Dupuis to implement mandatory sex-segregated classes in all four grades at RRMS. ROA at Def. H. Ex. 1 (June 4, 2009 VPSB Minutes). RRMS had been a successful coeducational school, recognized by the State as a school of "Academic Growth" and "Exemplary Academic Growth," and not in any academic crisis. ROA at USCA5 2616-17; *see* ROA at Pl. H. Ex. 17 (Dupuis Dissertation) at 5;

ROA at Pl. H. Exs. 40 & 42; ROA at Schexnayder Dep. Tr.[2] 17-18. As the District Court properly concluded, the sole basis for implementing sex-segregated classes was an "extremely flawed" social experiment Principal Dupuis conducted on certain RRMS eighth-grade students, without parental consent, during the previous school year (the "Dupuis Experiment" or "Experiment"). ROA at USCA5 2877; *see also* ROA at USCA5 2797-2803; ROA at Pl. H. Ex. 38.

I. The "Extremely Flawed" Dupuis Experiment And Dissertation.

Principal Dupuis conducted the Experiment at RRMS in connection with a dissertation in the Doctor of Education program at Nova Southeastern University ("NSU"), ROA at USCA5 2544; ROA at Dupuis Dep. Tr. 16-17, and as the culmination of a long-held personal affinity for sex-segregated education, ROA at USCA5 2542-44. After a presentation by Principal Dupuis on the purported benefits of sex-segregated classes, the VPSB voted to authorize the Dupuis Experiment, over one board member's objection that more research was needed. ROA at USCA5 2768-70; ROA at Pl. H. Exs. 16 (January 4, 2008 VPSB Minutes) & 18 (Presentation by Dupuis to VPSB); ROA at Fontana Dep. Tr. 21-22.

In connection with the Experiment, Principal Dupuis drafted consent forms to authorize participation by students as human subjects and submitted these blank

[2] "Dep. Tr." refers to deposition transcripts admitted into evidence at the preliminary injunction hearing, ROA at USCA5 1848-54, and contained in the Record on Appeal.

forms to NSU, yet never distributed the forms to students or parents as NSU's Institutional Review Board requires. ROA at USCA5 2548-50; ROA at Dupuis Dep. Tr. 70-81, 90; *see* ROA at Pl. H. Exs. 21 & 22. In keeping with his personal beliefs concerning sex segregation, Dupuis had earlier segregated all RRMS students by sex during non-instructional periods, such as lunch, recess, before school, and in the after-school bus lines. ROA at USCA5 2543-44. As with the Experiment, Dupuis did so without the consent of any parents (or in this instance the VPSB). ROA at USCA5 2543-44; ROA at Dupuis Dep. Tr. 47-51. He had also imposed similar sex segregation as principal of another school. ROA at USCA5 2542; ROA at Dupuis Dep. Tr. 30-32, 50.

The Dupuis Experiment consisted of assigning all 2008-2009 eighth grade students to coeducational classes for the first two six-week periods of the school year (Blocks I and II), switching some of those students to sex-segregated classes for Math and English for the second two six-week periods (Blocks III and IV), and returning the students to coeducational classes for the final two six-week periods of the school year (Blocks V and VI). ROA at USCA5 2090-91; *see* ROA at Pl. Ex. 17 at 17-18. Dupuis provided the eighth grade Math and English teachers with materials authored by sex-segregation advocates such as Leonard Sax and Michael Gurian. ROA at Dupuis Dep. Tr. 104-05. The work of these advocates is replete

with gender stereotypes. *See* ROA at Pl. H. Ex. 34 (Expert Report of Diane Halpern) at 26-27; *see also* ROA at Pl. H. Exs. 51-52.

Dupuis purported to monitor the grades and disciplinary referrals of the students during Blocks I through V. ROA at USCA5 2563, 2590-91. Dupuis purportedly used class grades obtained from teachers to measure results, although he created his own GPA scale, different from the scale listed on RRMS report cards and then destroyed the underlying data a few months later. ROA at USCA5 2561, 2569-73; ROA at Dupuis Dep. Tr. 137-41, 158-59, 162-68, 174-76; *see also* ROA at Pl. H. Exs. 28 & 53.

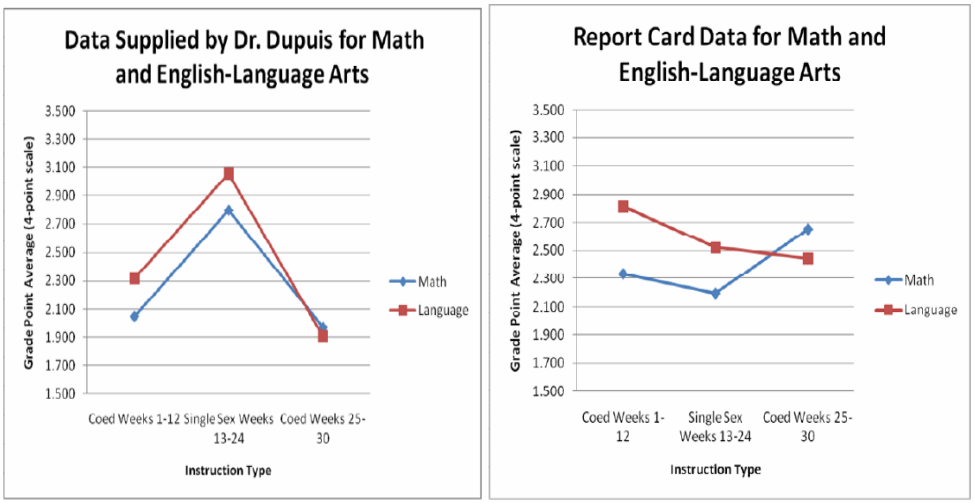
II. The Presentation Of "Extremely Flawed" Results To The VPSB And Parents.

Dupuis presented the purported results of the Experiment to the VPSB on June 4, 2009. ROA at USCA5 2557-58; ROA at Pl. H. Ex. 30 (Presentation to VPSB). He highlighted soaring GPAs and plummeting discipline referrals across gender and racial lines during the sex-segregated period, and drastic swings in opposite directions once the students returned to coeducational classes. ROA at USCA5 2558-59; *see, e.g.*, ROA at Pl. H. Ex. 17 at 25-29, 43-55; ROA at Pl. H. Exs. 5 & 30. Based on the purported results of the Experiment, he recommended implementation of sex-segregated classes with a "gender-specific curriculum" for all "core classes." ROA at Pl. H. Ex. 30 at VP20000508.

The District Court found that the Experiment was "extremely flawed," a very generous description given that the data Principal Dupuis presented to the VPSB and parents are totally inconsistent with the actual report card grades of the RRMS students who participated in the Experiment. ROA at USCA5 2877. There is ample evidence to support the District Court's finding. Among other methodological flaws, Dupuis admitted that an entire class of eighth grade students – approximately 20% of his Experiment population – did not even participate in the sex-segregated phase, but he included their grades (or what he purported to be their grades) in the reported results as though they had been segregated. ROA at USCA5 2588-90.

Furthermore, unrefuted testimony adduced at the hearing demonstrates the data reported in Dupuis' dissertation is demonstrably false. For example, he reported no failing grades in Math and English during the sex-segregated phase, even though the official RRMS report cards show 36 F's in Math and English over the same period. ROA at USCA5 2575-76, 2580-81; ROA at Pl. H. Ex. 60 at 16-17. More disturbingly, whereas Dupuis reported dramatic increases in GPAs during sex segregation, the actual school records and report cards show a statistically-significant ***decline*** in GPAs during sex segregation. ROA at USCA5 2034-38, 2042-46; ROA at Pl. H. Ex. 60 at 13-16. The following charts from the Supplemental Report of Plaintiffs' expert, Dr. Diane Halpern, were presented at

the hearing and graphically illustrate the discrepancy between the GPAs as reported by Dupuis and as reflected in the students' report cards:



ROA at Pl. H. Ex. 60 at 15. Dr. Halpern also identified many other defects in Dupuis' methods and results, ranging from errors in the simple mathematics required for computing means to the absence of any controls or independent evaluators to account for intended or unintended bias. ROA at Pl. H. Ex. 60 at 4-17. Although repeatedly given the opportunity, Dupuis provided no explanation for these discrepancies or the other, numerous, crippling flaws in his Experiment. *See* ROA at USCA5 2573-77, 2580-90.

Dupuis also reported to the VPSB and parents that the sex-segregated classes reduced disciplinary infractions by 52%. ROA at USCA5 2558-59, 2591; ROA at Pl. H. Ex. 29 at VP20000520; ROA at Pl. H. Ex. 30 at VP20000507. Although he stated that he calculated the disciplinary results by monitoring the infractions reported on the official school report cards, Dupuis offered no explanation for why

his results did not match the infractions reported on the report cards. To take one example, Dupuis' reported results included infractions occurring in Math and English classes on Saturdays when in fact no classes are conducted on Saturdays. ROA at USCA5 2595-2601. Dupuis admitted that, after correcting these and other errors in his work, his data showed sex segregation in fact had no positive effect on discipline incidents, once again contradicting his earlier reports to the VPSB and parents touting the purported benefits of sex-segregated classes. ROA at USCA5 2605-06 ("Q. It didn't decrease? Discipline incidents did not decrease at all during the first single-sex period, correct? [PRINCIPAL DUPUIS]: Correct . . . . Q. But it doesn't indicate that separating students by sex made discipline better, correct? [PRINCIPAL DUPUIS]: Yes sir."); ROA at Pl. H. Ex. 69.

These and other glaring errors led the District Court to offer to take judicial notice that the Experiment was "flawed with errors." ROA at USCA5 2613-14 ("THE COURT. Is your point that [Dupuis'] thesis as well as the presentation to the school board is flawed with errors that either he did on purpose o[r] omitted out of – I don't know why he omitted them. Is that the purpose of this? Because I can take judicial notice of that based on what you have done so far.").

III. **RRMS Institutes Sex Segregation For The 2009-2010 Academic Year.**

Despite the many and serious flaws in the Dupuis Experiment, VPSB authorized sex segregation in all parish middle schools for the 2009-2010 academic

year based solely on Dupuis' report of the Experiment's results. ROA at USCA5 2797-2803; *see* ROA at Schexnayder Dep. Tr. 56-57; ROA at Def. H. Ex. 1 (June 4, 2009 VPSB Minutes). In fact, at least one member of the VPSB was so enthralled with Dupuis' results that he suggested making sex segregation ***compulsory*** for all Vermilion Parish middle schools. *See* ROA at Schexnayder Dep. Tr. 63-64. Accordingly, RRMS developed a plan to segregate its students by sex and implemented that plan for the 2009-2010 school year. As the District Court properly concluded, the implementation of the plan was "wrongful" at its outset and the program itself "flawed." ROA at USCA5 2877.

Each grade at RRMS consists of approximately 100 students, divided into five classes. ROA at USCA5 2716. At the beginning of the 2009-2010 school year, accordingly, Dupuis and Guidance Counselor Ann Abshire created two "all boys" and two "all girls" classes in each of RRMS' five core curriculum subjects for each grade. ROA at USCA5 2618; ROA at Abshire Dep. Tr. 71.

Dupuis and Abshire also created a fifth "special needs" class in each grade, to which they assigned students with Individual Educational Plans ("IEPs"), students who were repeating a grade, all seventh and eighth grade students on track to take the GED exam, and all students whose previous eighth grade Louisiana Educational Assessment Program test scores necessitated remedial instruction at RRMS after attending certain ninth grade classes at Kaplan High School. ROA at

USCA5 2618-22; ROA at Dupuis Dep. Tr. 191-92, 197-98. The table below, derived from information provided to the District Court by Defendants, demonstrates that 95% of RRMS students with learning impairment exceptionalities (the more serious IEP disabilities) were concentrated in the six coeducational classes. In contrast, only two students with learning impairment exceptionalities were included in the sixteen sex-segregated classes.

	Learning Impairment Exceptionalities[3]		**Other Exceptionalities**	
Grade	**Coed**	**Single-Sex**	**Coed**	**Single Sex**
5th	7	0	0	13
6th	9	0	1	4
7th	14	1	1	5
8th	9	1	1	3
Total	39	2	3	25
Ratio	**95%**	**5%**	**11%**	**89%**

ROA at Def. H. Ex. 7.

Each of these "coeducational" classes was almost exclusively male, but included a few girls who fell into the various special needs categories. *See, e.g.*, ROA at Trahan Dep. Tr. 33-37; ROA at Faulk Dep. Tr. 20-21; ROA at Hebert Dep. Tr. 36-37; ROA at Touchet Dep. Tr. 22-24; ROA at LeBlanc Dep. Tr. 22-24; ROA at Pl. H. Exs. 13 & 67. Dupuis admitted that no other students were placed

[3] Learning impairment exceptionalities include Specific Learning Disabilities (SLD), Other Health Impaired (OHI), Emotional Disturbance (ED) and Individual Accommodation Plan (504). Other exceptionalities include Limited English Proficiency (LEP), Speech Only (SPH), Talented (TALENT) and Gifted (GIFT). ROA at Def. H. Ex. 7.

in these classes prior to the start of the school year, because they were conceived as special needs classes rather than as general coeducational classes. *See* ROA at USCA5 2621-22, 2747; ROA at Abshire Dep. Tr. 71-72, 91-92; *see also* ROA at USCA5 2693-94 ("THE COURT: So the intent from the beginning was children that needed special services would be included in the coed classes? [PRINCIPAL DUPUIS]: At the beginning until we had the selection. Then – THE COURT: The selection came because they got involved and decided to file suit and called you on the fact that you didn't make it voluntary, right? [PRINCIPAL DUPUIS]: Yes, sir . . . . THE COURT: . . . . I want to know why in the world six of the seven or six of the eight kids who are IEPs were put in the coed classes if you were going to make a true comparison of children who are in single-sex education as opposed to coeducation? I mean, that skews the numbers don't you think? [PRINCIPAL DUPUIS]: Yes, sir.").

At the parent orientation held on August 4, 2009, which not all parents attended, Dupuis orally informed parents for the first time that their children would be placed in sex-segregated classes for their five core curriculum subjects. ROA at USCA5 1862; ROA at Dupuis Dep. Tr. 78-79; ROA at Jane Doe Dep. Tr. 9. Dupuis enthusiastically endorsed sex segregation, referencing the academic benefits he falsely claimed the Experiment had yielded, and omitting any reference to potential disadvantages. ROA at USCA5 1862-64; ROA at Jane Doe Dep. Tr.

10; ROA at Dupuis Dep. Tr. 90. Parents were not given a choice of whether their children would be in sex-segregated classes; children were assigned to either one of the sex-segregated classes or the special needs coeducational class according to the classroom arrangements earlier determined by Principal Dupuis and Abshire. ROA at USCA5 2618-23.

On August 12, 2009, the ACLU of Louisiana, in response to a request for legal assistance from Plaintiffs, contacted Dupuis and Superintendent Schexnayder to advise them of the program's illegality under constitutional, statutory and regulatory laws. ROA at USCA5 43-44. The next day, Defendants, through their counsel, conceded that assignment to sex-segregated classes had not been voluntary at all, as required at a minimum by the 2006 DOE regulations, but represented that consent letters would be sent to parents on the first day of school to remedy this defect. ROA at USCA5 45-46. The 2009-2010 school year commenced on August 17, with four out of five classes in each grade segregated by sex for all five core curriculum subjects, and all students segregated by sex during non-instructional periods. ROA at USCA5 2543-44, 2721; ROA at Dupuis Dep. Tr. 119-20, 192.

The consent forms were not provided until August 21. ROA at USCA5 2622-23. They were distributed to students to bring home to parents, and contained no additional information to assist parents in their selections. *See id.*;

ROA at Pl. H. Ex. 31; ROA at Dupuis Dep. Tr. 193. On September 1, before many of the consent forms had been returned, Dupuis once again touted the purported results of his "extremely flawed" Experiment to RRMS parents at an Open House. ROA at USCA5 2559-60, 2877; ROA at Pl. H. Ex. 29; ROA at Dupuis Dep. Tr. 169, 195.

Once the consent forms were returned, however, not all parental elections for the coeducational classes were honored. Despite the false information Dupuis had provided, and the fact that most students began the year in sex-segregated classes, nearly one-third of the parents elected coeducational classes. ROA at USCA5 2627-28. This presented a scheduling crisis for Dupuis given other scheduling parameters, including state-mandated maximum class sizes. ROA at USCA5 2615, 2627-32. Put simply, more students chose coeducational classes than could be accommodated in the classroom structure devised by Dupuis and Abshire. ROA USCA5 2630-32. Accordingly, Dupuis admitted to approaching at least 30 parents and students who had chosen coeducational classes to dissuade them from transferring from the sex-segregated classes. ROA at Declaration of Kay Music; ROA at USCA5 2632-40, 2711 ("THE COURT: Well, in this case we now know that the principal got on the phone and called parents and basically said, you know, I want to make sure that you understand this is coed and there is a single-sex class. And although he said he didn't coerce, at least some say they felt

coerced . . . .”). He further admitted that he did not approach a single parent or student who elected sex-segregated classes regarding switching. ROA at USCA5 2632-41.

Moreover, some children whose parents chose coeducational classes remained in single-sex classes against the wishes of their parents based on Dupuis’ false reports that the parents had changed their choices. ROA at USCA5 1874-76, 1879-80, 2641-43; ROA at Declaration of Curt Deshotels. In addition, at least one parent of an IEP student was told that in order to honor her request for single-sex classes, she would need to petition to modify her child’s IEP and abandon the inclusion teaching that the school had found necessary to provide her child with an appropriate education. *See* ROA at USCA5 2723-24, 2726-27.

Even after Defendants provided parents with a so-called “choice”, the only real “choice” parents were given was for their children either to be in sex-segregated classes or to be in special needs classes, as VPSB Superintendent Randy Schexnayder candidly admitted. ROA at USCA5 2838-39 (“THE COURT: But he didn’t give anyone a choice at the beginning, but they have a choice now, that’s your understanding? [SUPERINTENDENT SCHEXNAYDER]: Yes, sir. We made sure of that. THE COURT: And the choice was to go into coed with the IEP kids and special needs kids? [SUPERINTENDENT SCHEXNAYDER]: Yes, sir.”). As a result, parents were not given the choice for their children to be in a

truly coeducational class of the type that RRMS traditionally offered to parents and students in previous years. *See* ROA at USCA5 2735.

As a result of Dupuis' coercive tactics and the nature of the so-called coeducational class, the coeducational classes remained overwhelmingly male and the concentration of IEP students with learning impairment exceptionalities in the classes remained almost exactly the same before and after the purported "choice" was offered to parents as the table below, derived from information Defendants provided at the hearing upon request by the District Court, demonstrates. *See* ROA at USCA5 2694-97. The sole exception was one sixth grade student whose IEP was changed in February 2010 for reasons unrelated to parental election. *Id*.

	Learning Impairment Exceptionalities Before Parent Election		**Current Learning Impairment Exceptionalities**	
Grade	**Coed**	**Single-Sex**	**Coed**	**Single-Sex**
5th	7	0	7	0
6th	**10**	0	**9**	0
7th	14	1	14	1
8th	9	1	9	1
Total	40	2	39	2
Ratio	**95%**	**5%**	**95%**	**5%**

ROA at Def. H. Exs. 7 & 7A.

IV. **Jill And Joan Doe's RRMS Classes.**

As a result of the manner in which RRMS implemented sex segregation, Jill Doe was placed, and remained, in a class during the 2009-2010 school year that was conceived as the sixth grade special needs class, is overwhelmingly male, and

includes all IEP students except those who are talented and gifted. ROA at USCA5 1878, 2619-22, 2653, 2747; *see* ROA at Pl. H. Ex. 9. By contrast, Joan Doe, who did not want to be in a "special needs" class that would isolate her from virtually all other eighth grade girls, remained in the sex-segregated class to which she had been assigned. ROA at USCA5 1874-76, 1879-80. Her classes are taught using different strategies than are used in the all-boys' classes, and she has been assigned different books to read based on stereotyped notions about what books girls like and what books boys like. ROA at USCA5 1885-87; *see also* ROA at Riebel Dep. Tr. 61, 63–64, 67-69; ROA at Cormier Dep. Tr. 32-36.

Evidence adduced at the hearing powerfully demonstrated the stark difference between RRMS' sex-segregated classes and the coeducational alternatives. In live testimony, an exceptionally articulate straight-A student, John Roe, who opted for coeducational classes, described in detail the difficulties he experienced as a result of RRMS' sex segregation program. ROA at USCA5 1982, 1989, 1992-2005. The class composition was hardly coeducational; it consisted of approximately 18 students, but only four girls, two of whom joined the class the week prior to the hearing. ROA at USCA5 1991-92. Moreover, as with the other so-called coeducational classes, it contained all of the students with learning impairment exceptionalities IEPs as well as all of the 8.5 (students returning from high school for remedial work) and self-contained special needs students (those

with severe impairments) in the eighth grade. ROA at USCA5 1991-96, 2619-20, 2653. John Roe testified to, among other incidents, the way the students in the class frequently misbehave and how his friends tease him for being in the "retard class." ROA at USCA5 1992-93, 2003-04.

John Roe also described how he was approached by a teacher and asked to take a test the sex-segregated students took, rather than the test the teacher would give the students in the coeducational class, in order to not "cripple" his progress. ROA at USCA5 1999-2001; *see also* ROA at USCA5 2656-57 ("Q. Okay. So isn't it true that the average GPAs of the kids in the coed classes are lower than the average GPAs of the kids in the single-sex classes this year? THE COURT: Well, of course. They are full of IEPs and the other kids that are – of course it's going to be lower.").

V. **Plaintiffs Continue To Suffer Irreparable Harm.**

In addition to the *per se* irreparable injury stemming from the continuing violation of their constitutional and statutory rights, Joan and Jill Doe suffered, and continue to suffer, additional irreparable injury from RRMS' sex segregation program.

As Plaintiffs' expert Dr. Diane Halpern, a former president of the American Psychological Association and a leading expert on the effects of sex-segregated education, testified, harms from the type of sex segregation at RRMS are concrete

and irremediable. *See* ROA at Pl. H. Ex. 34 at 32-34 (substantial evidence of increased sex role sterotyping, resulting in "anxiety [that] can impair executive functioning on . . . standardized aptitude tests" and "lead young adolescent girls and women to . . . devalue mathematics as a career choice"). Her unrefuted testimony summarized the significant scientific literature showing that sex segregation leads to increased sex role stereotyping and increased bullying for children who do not fit typical gender stereotypes. ROA at USCA5 2057-58; *see also* ROA at Pl. H. Ex. 34 at 32-34. She further testified that, while many students have been successful in sex-segregated schools, the schools these students attend are often private or parochial schools and the students come from a background that will lead them to succeed no matter what kind of school they attend. ROA at USCA5 2056-57.

Rather than weigh Dr. Halpern's expert testimony objectively, the District Court substituted its own personal preferences concerning sex-segregated classes derived not from any evidence presented by Defendants (as they presented none), but rather from the Court's own personal and anecdotal experiences. *See*, *e.g.*, ROA at USCA5 2846 ("My biggest problem is I like same-gender education. I like it . . . as I said a thousand times and I'm being ridiculous here, but I think there is some merit in it."), 2693 ("I'm a product of [same-gender education]. I think it

is a good concept."), 2787 ("I disagree with [Plaintiffs' expert] who . . . doesn't think it's good for education. I disagree. I have seen the fruits of it.").

Notwithstanding the District Court's personal views, the injuries suffered by Plaintiffs are real and irreparable. As a result of Defendants' unlawful segregation program, both Jill and Joan Doe, as well as all of the other students at RRMS in Kaplan, Louisiana, are denied the educational benefits they would have had if sex segregation had not been implemented. Joan Doe and Jill Doe will not have another opportunity to replicate their eighth grade and sixth grade years, respectively, after the 2009-2010 school year. Class composition at RRMS for the 2010-2011 school year will continue to violate the Constitution and civil rights laws as a result of the sex segregation required by the District Court's order. Monetary damages cannot remedy this loss.

SUMMARY OF ARGUMENT

The District Court committed reversible error by denying Plaintiffs' request for a preliminary injunction. As conceived and implemented, RRMS' sex segregation program violates legal requirements that fall into two categories: those that establish a *per se* prohibition on sex segregation (Title IX and the Title IX regulations promulgated by USDA, HHS and DHS), and those that impose very high obstacles to sex segregation (the Equal Protection Clause and the DOE regulations). Perhaps because of its oft-professed affinity for same-sex education,

see, e.g., ROA at USCA5 2693, 2787, 2846, and willingness to "tweak" the law in what it believes is "the best interest of the children," ROA at USCA5 2793, the District Court failed entirely to even address the claims under Title IX and the Title IX implementing regulations, applied an incorrect analysis with respect to Plaintiffs' Constitutional claims, and entirely ignored the governing standard for issuing preliminary injunctions. Instead, it applied its own subjective judgment to arrive at the conclusion that sex segregation at RRMS is lawful so long as it is voluntary and RRMS offers a substantially equal coeducational alternative. ROA at USCA5 2877.

In reaching this conclusion, the District Court erred in four ways, each of which requires reversal.

First, the Court committed reversible error by failing properly to apply the four-part preliminary injunction test required in the Fifth Circuit.

Second, the Court committed reversible error by completely failing to address Plaintiffs' arguments that sex segregation within a coeducational school is *per se* prohibited by Title IX and the regulations of USDA, HHS, and DHS despite being presented with undisputed and incontrovertible facts establishing a violation of these legal requirements. The language of Title IX and the regulations could not be more clear: Title IX prohibits the VPSB from "exclud[ing]" any student "from participat[ing] in . . . any education program or activity" or "subject[ing]" any

student to "discrimination" on the basis of sex. 20 U.S.C. § 1681(a). The USDA, HHS and DHS regulations prohibit the VPSB from "provid[ing] any course or otherwise carry[ing] out any of its education program or activity separately on the basis of sex." 45 C.F.R. § 86.34 (HHS); 7 C.F.R. § 15a.34 (USDA); 6 C.F.R. § 17.415(a) (DHS). Defendants do not and cannot dispute that: (1) they receive federal funding; and (2) they provide courses and carry out education programs or activities separately on the basis of sex. On that basis alone, the District Court erred as a matter of law by denying relief.

Third, the District Court committed an additional reversible error of law by denying Plaintiffs' claim that RRMS' sex segregation program violates the Equal Protection Clause. Under settled law, Defendants have the "demanding" burden of demonstrating an "exceedingly persuasive" justification for RRMS' sex segregation program, meaning they must show the program serves important governmental objectives and is substantially related to the achievement of those objectives. *Virginia*, 518 U.S. at 533. The District Court erred first by failing to consider whether Defendants met this burden, particularly given that the District Court's own factual finding that the only justification offered by Defendants – the results of Principal Dupuis' Experiment – was "extremely flawed" means that Defendants failed to meet that burden. ROA at USCA5 2876-77. "Extremely

flawed" data simply cannot provide the "exceedingly persuasive" justification the Equal Protection Clause requires.

The District Court also erred by requiring Plaintiffs to demonstrate that Defendants had "intended to cause an adverse effect on males or females attending [RRMS]" when they authorized and implemented sex segregation. ROA at USCA5 2876. This "intent to cause an adverse effect" requirement applies only to a governmental action that is sex-neutral on its face and has no relevance where, as here, the State expressly and intentionally classifies on the basis of sex. The District Court's application of an incorrect standard, its failure to scrutinize Defendants' purported justification, and its failure to apply the uncontested facts to the law each require reversal.

Fourth, the District Court committed reversible error by ignoring the strict requirements embodied in the DOE regulations, which tolerate sex segregation only where "each single-sex class" satisfies four nondiscrimination requirements. 34 C.F.R. § 106.34(a), (b). In its Ruling, the District Court ignored voluminous, undisputed evidence demonstrating that Defendants were unable to satisfy even one of these requirements, much less all of them. Moreover, the District Court again failed properly to apply its own factual finding that the results of the Dupuis Experiment were "extremely flawed" to conclude that Defendants failed to establish the first nondiscrimination requirement – that RRMS' sex segregation

was "substantially related" to achieving the kind of "important" objectives specified in the DOE regulations. 34 C.F.R. § 106.34(b)(1)(i). Each of these four errors of law compels reversal by this Court.

STANDARD OF REVIEW

"Although the ultimate decision whether to grant or deny a preliminary injunction is reviewed only for abuse of discretion, a decision grounded in erroneous legal principles is reviewed *de novo*." *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009); *Speaks v. Kruse*, 445 F.3d 396, 399 (5th Cir. 2006). "[W]hen a preliminary injunction turns on a mixed question of law and fact, it, too, is reviewed *de novo*." *Byrum*, 566 F.3d at 445 (citing *Speaks*, 445 F.3d at 399).

ARGUMENT

I. The District Court Committed Reversible Error By Failing To Apply The Correct Preliminary Injunction Standard.

A preliminary injunction should issue if the movant establishes:

> (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.

Byrum, 566 F.3d at 445 (citing *Speaks*, 445 F.3d at 399-400).

The District Court failed to apply this four part test, not mentioning once in its Ruling any of the four required factors. Furthermore, the District Court applied legal standards directly contrary to the "likelihood of success on the merits" and

"irreparable injury" prongs of the preliminary injunction analysis. For example, rather than determining whether Plaintiffs had a substantial likelihood of success on the merits, the District Court made an ultimate ruling on the merits that sex segregation at RRMS is lawful. ROA at USCA5 2877. Moreover, rather than looking to whether "irreparable injury" would result in the absence of an injunction, balancing the harms, or analyzing the public interest, the District Court simply issued the ruling it subjectively believed was in the "best interest of the children." ROA at USCA5 2877. Where, as here, the District Court fails to apply the correct legal standard, the District Court's decision must be reversed. *See, e.g.*, *H & W Indus., Inc. v. Formosa Plastics Corp., USA*, 860 F.2d 172, 179 (5th Cir. 1988) ("A grant or denial of a preliminary injunction must be the product of a reasoned application of the four factors held to be necessary prerequisites.") (internal citations omitted)*; Landmark Land Co., Inc. v. Office of Thrift Supervision*, 990 F.2d 807, 811 (5th Cir. 1993) ("[T]he district court abused its discretion by failing to apply the four criteria for preliminary injunctions when it granted the suspension.").

Under the proper, governing legal standard, the uncontroverted facts in the record compel the conclusion that Plaintiffs are entitled to the relief they seek – *i.e.*, a return to the status quo, coeducational classes.

II. The District Court Committed Reversible Error By Ignoring Title IX And The HHS, USDA And DHS Regulations.

A. The RRMS Sex Segregation Program Violates Title IX.

Title IX, which applies to VPSB as a recipient of federal funding, ROA at Pl. H. Exs. 53, 61-63; ROA at USCA5 2422, 2872, provides in pertinent part that:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits or, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. 20 U.S.C. § 1681(a).

The Supreme Court has explained that Title IX is to be construed broadly. *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) ("There is no doubt that if we are to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language." (internal citations omitted)). By its plain terms, therefore, Title IX prohibits three distinct types of activity: (1) "exclud[ing students] from participation in" an education program or activity on the basis of sex, (2) "den[ying students] the benefits" of an education program or activity on the basis of sex, and (3) "subject[ing students] to discrimination" on the basis of sex. 20 U.S.C. § 1681(a). Establishing any one prohibited activity is enough to establish a violation of Title IX. *Id*. Here, all three are violated.

By definition, the sex segregation program at RRMS violates the "excluded from participation" and "denied the benefits" prongs of Title IX: By creating separate classrooms for boys and girls at RRMS, Defendants (1) exclude boys from

participation in the girls' class and vice versa and (2) deny boys the benefits of participating in the girls' class and vice-versa. On this basis alone, the sex segregation program at RRMS violates the plain language of Title IX, warranting reversal of the District Court's decision and remand for the entry of appropriate relief.

Segregating students by sex in core curriculum classes also constitutes illegal discrimination under the third prong of Title IX, as the plain language of the statute as well as its legislative history make clear. When Congress enacted Title IX, it specifically exempted certain discrete activities – such as admission to some single-sex education institutions, fraternities and sororities, and mother-daughter and father-son activities – from Title IX coverage. *See, e.g.*, 20 U.S.C. §§ 1681(a), 1686.[4] Congress, however, provided no exemption for schools to create separate classes for boys and girls within coeducational schools. Under the settled principle of statutory construction that "when a statute limits a thing to be done in a

[4] The activities exempted under Title IX are nonetheless subject to Equal Protection scrutiny. *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (nursing school that excluded males is unconstitutional despite Title IX exemption); *Virginia*, 518 U.S. 515 (military school that excluded females is unconstitutional despite Title IX exemption). Accordingly, lower courts have repeatedly ordered schools to allow girls to participate on male football and wrestling teams even when Congress intended to exempt such activities from the reach of Title IX. *See, e.g.*, *Adams v. Baker*, 919 F. Supp. 1496, 1503, 1505 (D. Kan. 1996); *Saint v. Neb. Sch. Activities Ass'n*, 684 F. Supp. 626 (D. Neb. 1988); *Lantz v. Ambach*, 620 F. Supp. 663 (S.D.N.Y. 1985).

particular mode, it includes a negative of any other mode," *Christensen v. Harris County*, 529 U.S. 576, 583 (2000) (internal citations omitted), the absence of any exception in Title IX for sex-segregated classes means they are prohibited as a matter of law. *See, e.g.*, *Carrieri v. Jobs.com Inc.*, 393 F.3d 508, 518 (5th Cir. 2004) ("It is well established that, 'when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.'") (quoting *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004)).

Title IX's legislative history further demonstrates clear congressional intent that sex-segregated classes within a school constitute illegal discrimination. As Senator Bayh explained when Congress considered Title IX, "[t]his portion of the amendment covers discrimination in all areas where abuse has been mentioned . . . [including] ***access to programs within the institution*** such as vocational education classes, and so forth." 118 CONG. REC. 5807 (1972) (emphasis added) (available at ROA at USCA5 1304). While acknowledging Title IX's express statutory exemption for ***admissions*** to single-sex elementary and secondary schools, Senator Bayh made clear that once a student is admitted to a school, no further sex discrimination or segregation is permissible:

> At the elementary and secondary levels, admissions policies are not covered . . . . We are dealing with . . . ***discrimination of available services or studies within an institution once***

> ***students are admitted***, and discrimination in employment within an institution, as a member of a faculty or whatever.
>
> In the area of employment, we permit no exceptions. ***In the area of services, once a student is accepted within an institution, we permit no exceptions***.

118 CONG. REC. 5812 (1972) (emphasis added) (available at ROA at USCA5 1305). "Senator Bayh's remarks, as those of the sponsor of the [Title IX] language ultimately enacted, are an authoritative guide to the statute's construction." *N. Haven Bd. of Educ.*, 456 U.S. at 526-27.

Parallel provisions in other federal non-discrimination laws confirm that RRMS' sex-segregated classes subject students to discrimination in violation of Title IX. In drafting Title IX, Congress copied the language from Title VI of the Civil Rights Act of 1964,[5] which is universally understood to prohibit racially segregating students, including in public school classrooms. *See, e.g., Adams v. Rankin County Bd. of Educ.*, 485 F.2d 324, 327 (5th Cir. 1973) ("[A] school board may not direct or permit the segregation of students within the classrooms."); *Johnson v. Jackson Parish Sch. Bd.*, 423 F.2d 1055, 1056 (5th Cir. 1970) ("[T]he decisions of the Supreme Court and this Court required the elimination of not only segregated schools, but also segregated classes within the schools."); *Henry v.*

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[5] Title VI provides, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

Clarksdale Mun. Separate Sch. Dist., 409 F.2d 682, 589 (5th Cir. 1969); *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 852 (5th Cir. 1966) ("We read Title VI as a congressional mandate for change – change in pace and method of enforcing desegregation.")

Because Title IX was modeled after Title VI, "[t]he drafters of Title IX explicitly assumed that [the language of Title IX] would be interpreted and applied as Title VI had been during the preceding eight years." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696 (1979); *see also Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998); *Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788, 797 (2009) ("In the absence of any contrary evidence, it follows that Congress intended Title IX to be interpreted similarly to [Title VI]."). The language Congress used in both these laws is clear: Segregation by sex constitutes discrimination prohibited by these statutes.

B. **The RRMS Sex Segregation Program Violates The HHS, USDA And DHS Regulations.**

Like Title IX, the implementing regulations of HHS, USDA and DHS – agencies from which it is undisputed that VPSB receives funds, ROA at Pl. H. Exs. 53, 61-63; ROA at USCA5 2819, 2872 – expressly prohibit VPSB from:

> provid[ing] any course or otherwise carry[ing] out any of its education program or activity separately on the basis of sex, or requir[ing] or refus[ing] participation therein by any of its students on such basis.

45 C.F.R. § 86.34 (HHS); 7 C.F.R. § 15a.34 (USDA); 6 C.F.R. § 17.415(a) (DHS).[6] VPSB has specifically agreed to comply with these regulations. For example, VPSB has signed an agreement with the Louisiana Department of Education that provides: "[VPSB] agrees to comply with the requirements of the [USDA's] regulations regarding nondiscrimination as stated in 7 C.F.R. Part 15, 15 (a) and 15 (b)." ROA at Pl. H. Ex. 63 at 3. Plaintiffs have standing to enforce these regulations, with which VPSB has agreed to comply, by virtue of an implied private right of action or as a third-party beneficiary of VPSB's agreements with federal agencies. *See Alexander v. Sandoval*, 532 U.S. 275, 284 (2001) ("We do not doubt that regulations applying [Title VI]'s ban . . . are covered by the cause of action to enforce [Title VI] . . . . A Congress that intends [a] statute to be enforced through a private cause of action [also] intends the authoritative interpretation of the statute [*i.e.*, the regulations,] to be so enforced as well."); *Bossier Parish Sch. Bd. v. Lemon*, 370 F.2d 847, 850-51 (5th Cir. 1967) (private suit by students as beneficiaries of school board's assurances to the Department of Health, Education and Welfare).

[6] Title IX directs all federal agencies "empowered to extend Federal financial assistance to any education program or activity" to "effectuate the provisions of [Title IX] . . . by issuing rules, regulations, or orders of general applicability." 20 U.S.C. § 1682.

The regulations of these federal agencies, by their own terms, and consistent with the definition of "program" in Title IX adopted by Congress in the Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687(2)(B) ("CRRA"), apply to "***all*** of the operations of a [school system], any part of which is extended Federal financial assistance." 6 C.F.R. § 17.235(c) (DHS) (emphasis added); *see also* 45 C.F.R. §§ 86.11, 86.2(h) (HHS); 7 C.F.R. §§ 15a.11, 15a.2(q) (USDA). Consequently, VPSB, is obligated to comply with DHS, HHS and USDA Title IX regulations at RRMS even if no DHS, HHS and USDA funds are expended specifically in connection with sex segregation of academic classes at RRMS.

It is undisputed that Defendants provide courses and carry out education programs or activities separately on the basis of sex by creating separate classes for boys and girls. When asked if it was true that RRMS provides courses separately on the basis of sex, VPSB Superintendent Randy Schexnayder could not deny it, admitting "I guess you can say that." ROA at USCA5 2424. As a matter of law, by operating sex-segregated classes at RRMS – regardless of whether such classes are intended to benefit students – Defendants have violated the Title IX implementing regulations of these three federal agencies. The District Court's failure to so hold requires reversal and remand for the entry of appropriate relief.

III. The District Court Erred As A Matter of Law In Denying Plaintiffs' Claim That RRMS' Sex Segregation Violates The Equal Protection Clause.

A. Sex Segregation At RRMS Is Not Supported By An "Exceedingly Persuasive" Justification And Does Not Serve An "Important Governmental Objective".

Under the Equal Protection Clause, any sex-based classification by a state actor is subject to heightened scrutiny and is unlawful absent a sufficient justification. As the Supreme Court explained in *Virginia*, 518 U.S. 515, and *Hogan*, 458 U.S. 718, once a state actor classifies by sex, for example, by separating students by sex, the law imposes a "***demanding***" burden that rests "entirely on the State" to show an "exceedingly persuasive justification" for the classification, which means "at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *See Virginia*, 518 U.S. at 524, 533 (citing *Hogan*, 458 U.S. at 724) (emphasis added).

In both *Virginia* and *Hogan*, the Supreme Court addressed sex segregation in public educational institutions. In *Virginia*, the Court considered a challenge to the male-only admissions policy at the Virginia Military Institute; Virginia also operated coeducational colleges and funded the Virginia Women's Institute for Leadership intended to share VMI's mission of producing "citizen soldiers." 518 U.S. at 522, 547. *Hogan* involved a challenge to Mississippi's all-female

admissions policy at one of its schools of nursing; Mississippi also operated two coeducational nursing programs. 458 U.S. at 723 n.8, 735. In both cases, the Court struck down the single-sex admissions policies under the Equal Protection Clause.[7]

Garrett v. Bd. of Educ. of the Sch. Dist. of Detroit, 775 F. Supp. 1004 (E.D. Mich. 1991), is an instructive decision that applied the constitutional standard set forth in *Hogan*. The *Garrett* Court issued a preliminary injunction preventing the opening of three all-male academies in Detroit, which the School District had conceived in response to a severe educational crisis in its schools and violence in the city as a whole. The school district also operated some all-female schools. Nevertheless, the court found:

> Although co-educational programs have failed, there is no showing that it is the co-educational factor that results in failure. . . . None of these findings meet the defendant's burden of showing how the exclusion of females from the Academies is necessary to combat unemployment, dropout and homicide rates among urban males. There is no evidence that the educational system is failing urban males because females attend schools with males. In fact, the educational system is also failing females. Thus, the Court concludes the application of the second prong of the *Hogan* test to the facts at hand, makes it likely that the plaintiffs will succeed on a constitutional argument.

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[7] The admissions policies of both of these historically single-sex schools were statutorily exempt from coverage under Title IX, so Title IX's strict prohibition of operating programs separately on the basis of sex did not apply.

Id. at 1007-08.

Had the District Court, like the *Garrett* court, properly subjected the sex segregation at RRMS to the heightened scrutiny applied to sex-based classifications, it would have been compelled to find that the segregation was unjustified. As the District Court correctly determined in one of its few factual findings, the Dupuis Experiment's "extremely flawed" results were the sole justification for RRMS' sex segregation program. ROA at USCA5 2877. This finding is entitled to deference and is supported by ample evidence in the record, including Defendants' responses to document requests, ROA at Pl. H. Ex. 38, and the deposition and hearing testimony of Defendant Superintendent Schexnayder. ROA at USCA5 2800-2803; ROA at Schexnayder Dep. Tr. at 54-57. Data that are at best meaningless and undisputedly inaccurate cannot provide any justification for sex segregation, much less a justification that is exceedingly persuasive.

Nor have Defendants articulated any important governmental objective to which their sex-segregated program is substantially related. *See Virginia*, 518 U.S. at 533; *Hogan*, 458 U.S. at 724. Defendants cannot meet that burden because RRMS' sex segregation was not substantially related to any objective, and unlike the failing inner-city schools in *Garrett*, RRMS has been a successful coeducational school. ROA at USCA5 2616-17; *see* ROA at Pl. H. Ex. 17 at 5; ROA at Pl. H. Exs. 40 & 42; ROA at Schexnayder Dep. Tr. 17-18. Nor is there

any evidence that sex segregation at RRMS produced good results justifying implementation of sex segregation. As Principal Dupuis admitted, there are many ways to provide quality education that in no manner require sex segregation, such as use of puzzles and learning games, small group settings, peer tutors, or visual aids and diagrams. ROA at USCA5 2659-62. To the contrary, the key is ascertaining what works for any individual student, ROA at USCA5 2659-60, not making overbroad generalizations based on "hypothetical average" differences between the sexes. ROA at USCA5 2075-76.

Moreover, to the extent the objective in instituting sex-segregated classes was implementing gender-based teaching strategies, the objective itself was constitutionally impermissible. As Dr. Halpern's testimony and the substantial literature on sex-segregated education demonstrate, ROA at Pl. H. Ex. 34 at 14-15, 23-25, 32-35, RRMS' sex segregation is based on, and will perpetuate, stereotypes about "gender-based developmental differences" or male and female "tendencies" that the Supreme Court repeatedly has declared to be insufficient to justify sex-based classifications. *Virginia*, 518 U.S. at 541, 550 (concluding that even if assumptions regarding the average capacities and preferences of men and women were accurate, they were an impermissible basis for a sex-based classification); *Hogan*, 458 U.S. at 724-25 ("a gender-based classification . . . must be applied free of fixed notions concerning the roles and abilities of males and females. Care must

be taken in ascertaining whether the statutory objective itself reflects archaic and stereotyped notions."). The sex-segregated classes at RRMS experienced this improper result earlier this year, when the all-boys' classes were assigned *Where the Red Fern Grows* and the all-girls' classes were assigned *The Witch of Blackbird Pond*, because boys like "hunting" and "dogs," but girls prefer "love stories." ROA at Riebel Dep. Tr. 63; ROA at USCA5 1987-88.

Evidence adduced at the hearing made clear that RRMS teachers continue to experiment with "gender-based strategies," and at times employ different classroom activities for the all-girls' and all-boys' classes. ROA at USCA5 2759-63; ROA at Pl. H. Ex. 47 at 15, 18 (showing all-girls' class was given bracelet quiz and all-boys' class was given bike quiz). When teachers make subjective determinations about what coursework will be relevant to students based on stereotypes or assumptions about the needs or interests of the ***average*** boy or girl, it sends the entire school down a slippery slope of both creating and reinforcing gender stereotypes and inequality.

Based on its finding that the sole purported justification for the sex segregation at RRMS was the Dupuis Experiment, and that the results of that experiment were "extremely flawed," the District Court should have concluded that, as a matter of law, the Plaintiffs were likely to succeed on the merits of their Equal Protection claim. Its failure to do so was reversible error.

B. **The District Court Committed Reversible Error When Ruling That Plaintiffs Must Show Intent To Harm To Establish An Equal Protection Claim Based On Intentional Segregation.**

The District Court misstated the law by holding that an essential element of Plaintiffs' Equal Protection Claim is a showing that Defendants intended to adversely affect the students based on their sex. ROA at USCA5 2876. These legal conclusions are reviewed *de novo* and accordingly enjoy no deference from this Court. *Byrum*, 566 F.3d at 445; *Speaks*, 445 F.3d at 399.

By holding that a claim of intentional sex segregation also requires a demonstration of intent to cause an adverse effect before the challenged state action is subjected to any scrutiny, the District Court confused the legal standard applicable to intentional discrimination with that applicable to claims that a facially neutral law or classification has a disproportionate effect on a protected class. It is not disputed that the Defendants intentionally segregated the students at RRMS by sex for 80 academic classes. ROA at USCA5 2424. As state actors, they admittedly intended to classify the students by sex and segregate them into separate classes. That action alone was sufficient to trigger the heightened scrutiny that the Constitution requires of this type of state action. *Virginia*, 518 U.S. at 555.

The two decisions the District Court relied on, *United States v. Crew*, 916 F.2d 980, 984 (5th Cir. 1990), and *Lavernia v. Lynaugh*, 845 F.2d 493, 496 (5th Cir. 1988), ROA at USCA5 2876, as well as the cases cited within those decisions,

Washington v Davis, 426 U.S. 229 (1976), *Vill. of Arlington Heights v Metro. Housing Dev. Corp.*, 429 U.S. 252 (1977), *Personnel Adm'r of Mass. v. Feeny*, 442 U.S. 256 (1988), involved challenged governmental action that was race- or gender-neutral on its face, but that allegedly had a disparate impact on a constitutionally protected class. In *Crew*, Equal Protection was only discussed by this Court "in summary fashion" because the defendant did not challenge the constitutionality of the criminal statute in question, which authorized enhanced penalties for distributing cocaine within 1,000 feet of elementary schools. 916 F.2d at 983. The *Crew* defendant observed that the statute's neutral language had been challenged in other cases as disproportionately impacting members of racial minorities who were more likely than nonminorities to live in densely populated urban areas in closer proximity to elementary schools. *Id*. at 984. This Court observed that even if the disparate impact claim were substantiated, "more than disparate impact must be shown" and the defendant had failed to carry his burden of demonstrating that the statute was enacted with an intent to discriminate. *Id.* at 984; *see also Lavernia*, 845 F.2d at 495-96 (*habeas* decision denying equal protection challenge based on trial court's failure to enter an order transferring jurisdiction to a particular district court because petitioner failed to establish that the judiciary had classified based on sex or race, or intended to discriminate against him).

The Supreme Court's decision in *Feeny*, relied on by this Court in *Lavernia*, provides guidance regarding the relevance of motivation in Equal Protection analysis with regard to both race and sex classifications:

> Certain classifications . . . in themselves supply a reason to infer antipathy. Race is the paradigm. A racial classification, ***regardless of purported motivation***, is presumptively invalid and can be upheld only upon an extraordinary justification. *Brown v. Board of Education*, 347 U.S. 483 (1954) . . . . But, . . . even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.
>
> Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination . . . . This Court's recent cases teach that such classifications must bear a close and substantial relationship to important governmental objectives . . . and are in many settings unconstitutional.

442 U.S. at 272-73 (emphasis added); *see also Wayte v. United States*, 470 U.S. 598, 608 n.10 (1985) ("A showing of discriminatory intent is not necessary when the equal protection claim is based on an overtly discriminatory classification." (internal citation omitted)).

The Supreme Court has thus clearly distinguished between cases of express classification, in which motivation is irrelevant, and cases of disparate impact, in which motivation may be considered in assessing constitutionality. Like racial segregation, the mere fact of state-sponsored sex segregation compels judicial scrutiny. *Cf. Brown*, 347 U.S. at 495; *McLaurin v. Okla. State Regents*, 339 U.S. 637, 641-42 (1950) (prohibiting state-operated University from segregating black

and white students within a classroom, within the cafeteria and within the library even though all students had the same access to teachers, food and books). The only difference between the analysis of expressly race-based classifications and sex-based classifications is that the former require an "extraordinary justification" while the latter require "an exceedingly persuasive justification." *Feeny*, 442 U.S. at 273. The Defendants here expressly established sex-segregated classes, which are presumptively invalid. *Virginia*, 581 U.S. at 532. Whether they intended to harm either sex by doing so is, as a matter of law, irrelevant. *Feeny*, 442 U.S. at 272. In other words, regardless of whether Defendants ***intended*** an "adverse effect" or otherwise sought to provide the same curriculum and resources, the classification of students by sex triggered their burden of justification, a burden they manifestly did not meet.

Rather than looking to guidance from two inapposite disparate impact cases, the District Court should have based its Equal Protection analysis on the Supreme Court's decisions in *Virginia* and *Hogan*, two cases directly addressing single-sex public education that were not even cited in the District Court's opinion. Because the District Court ignored the governing legal standard for Equal Protection claims and added an element that the Supreme Court in *Feeny* has said is irrelevant, it should be reversed.

IV. The District Court Committed Reversible Error By Failing To Address Plaintiffs' Argument That RRMS' Sex Segregation Violated The DOE Regulations.

The DOE regulations presume that a coeducational institution receiving federal funding will not implement sex segregation, and tolerate it only where "each single-sex class" satisfies four nondiscrimination requirements. *See* 34 C.F.R. §§ 106.34(a), (b). Moreover, the DOE regulations not only reaffirm a presumption against sex segregation, *see* 34 C.F.R. § 106.34(a) ("[A] recipient ***shall not*** provide or otherwise carry out any of its 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") (emphasis added), but also make clear that any sex-segregated programs implemented pursuant to the DOE regulations also have to comply with the regulations of other agencies, and that any more restrictive agency regulations take precedence:

> The obligations imposed by [DOE's Title IX regulations] are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by . . . any other . . . Federal regulation.

34 C.F.R. § 106.6(a). Therefore, Defendant VPSB, as a recipient of federal funding from the USDA, HHS and DHS, is required to comply with the more restrictive regulations of these agencies, which outright bar sex segregation in classes, irrespective of what the DOE regulations permit.

As the factual record as well as the District Court's findings make clear, Defendants' sex segregation program violates even the more lenient DOE regulations, which demand:

- That sex segregation be based on a specific "important objective," and be "substantially related" to achieving that objective;
- That sex segregation be implemented in "an evenhanded manner;"
- That enrollment in the classes be "completely voluntary;" and
- That schools offer "all other students, including students of the excluded sex, a substantially equal coeducational class."

34 C.F.R. § 106.34(b)(1)(i)-(iv). These requirements are drafted conjunctively and each must be satisfied. If Defendants fail to meet even one, then RRMS' sex segregation violates the DOE regulations.

A. **Sex Segregation At RRMS Is Not Based On A Legally Sufficient "Important Objective."**

To survive under the DOE regulations, any sex segregation at RRMS would have to be aimed at achieving specific objectives – either (1) as part of an overall established policy to provide diverse educational opportunities, or (2) to address particular, identified educational needs of its students. 34 C.F.R. § 106.34(b)(1)(i). In other words, sex segregation had to be part of a larger policy offering a wide range of choices for parents, or be targeted and remedial – such as a large New Orleans high school offering an all-girls' physics course where girls had previously not enrolled in physics classes, or an all-boys' poetry class where boys traditionally

avoided the poetry elective. *See* 71 Fed. Reg. 62,530, 62,535 (Oct. 25, 2006) ("At the school level, [a] policy may include a range of elective classes or the opportunity to take classes at other schools"). RRMS' sex segregation meets neither requirement.

RRMS' sex-segregated classes are not part of an established overall policy to provide diverse educational opportunities. As Superintendent Schexnayder admitted, VPSB has no such policy. ROA at USCA5 2825-26; ROA at Pl. H. Exs. 53 & 55. Nor can Defendants create such a policy by "simply establish[ing] a single-sex class and declar[ing] that the class by definition promotes diversity." 71 Fed. Reg. at 62,535.

Likewise, RRMS' sex segregation does not address "particular, identified educational needs" of RRMS students. To the contrary, it is being applied generally to most RRMS students as their regular education in core subjects. At the same time, it excludes students who actually have particularized, educational needs expressed in special needs IEPs. In fact, 95% of RRMS students with learning impairment exceptionalities (the more serious IEP disabilities) were concentrated in the coeducational class, as were all of the "pre-employ" students (older students attempting to reach sufficient academic proficiency to enter Kaplan High School's GED program) and the "8.5" students, who return from Kaplan High School for remediation in Math and English. ROA at Def. H. Ex. 7.

Even if the VPSB had an established policy to provide diverse opportunities or had identified particular educational needs, RRMS' sex segregation is not "substantially related" to achieving those objectives. The DOE regulations require more than just a hypothesized link between sex segregation and educational benefits. 71 Fed. Reg. at 62,535-36. The only link Defendants have proffered – the "extremely flawed" Dupuis Experiment – cannot be a legitimate justification that shows that ***each*** sex-segregated course at RRMS is substantially related to achieving an important educational objective. ROA at USCA5 2877.

Once it found that the Experiment that formed the basis for the sex segregation at RRMS was "extremely flawed," the District Court was compelled to hold that as a matter of law the Defendants had violated the DOE regulations. By choosing to instead order a "Plan for the 2010-2011 School Year" that compels sex segregation at RRMS, the Court committed a reversible error of law. Absent a prior showing that sex segregation was substantially related to an important governmental objective, no plan of segregation at RRMS could comply with the DOE regulations.

B. **Sex Segregation At RRMS Is Not Completely Voluntary.**

RRMS' sex segregation also is not completely voluntary, as the DOE regulations require. 34 C.F.R. § 106.34(b)(1)(iii). The DOE stressed that such classes be "***completely*** voluntary" in response to concerns that schools might

"assign or attempt to 'steer' students" into single-sex classes for the sake of administrative convenience. 71 Fed. Reg. at 62,537 (emphasis a dded). This exact scenario played out at RRMS this year. Indeed, the District Court implicitly found that there was a lack of voluntariness by noting "the wrongful implementation of this flawed program" and by purporting to order changes to the program regarding parental consent for the 2010-2011 school year. ROA at USCA5 2877-79. The lack of voluntariness is supported by ample evidence in the record.

Even before the start of the 2009-2010 school year, Defendants tilted the playing field in favor of sex segregation. On the first day of school, RRMS students were already divided by sex on a mandatory basis and without the consent of parents or students. ROA at USCA5 2617-23. As a result, students and teachers began to bond in sex-segregated classes. Only after students had acclimated to their classes, and the ACLU had threatened suit, did the VPSB send election forms home to parents. ROA at USCA5 2693.

Further, the evidence at the hearing concerning parent elections and class assignments demonstrated the lack of a true voluntary choice. After election forms were distributed, Principal Dupuis continued his "sales effort" by again promoting sex segregation at an open house for parents, describing only its benefits, *see* ROA at Pl. H. Ex. 29 at VP2000520 (touting "[s]ignificant improvement in Academic Performance" and a "[d]ecrease in the number of discipline referrals"), and

presenting his false data. For many parents, this was likely the only information they had on which to make a choice.

In at least some cases, parent choices were overridden. Because the number of parents who had selected coeducational classes for their children could not be accommodated for scheduling purposes – there were too many for just one coeducational (mostly IEP) class – Principal Dupuis pressured parents and students to remain in single-sex courses, specifically placing calls to only those parents who elected the coeducational alternative. ROA at USCA5 2632-36; ROA at Declaration of Kay Music. In addition, at least one parent of an IEP student was told that in order to honor her request for single-sex classes, she would need to petition to modify her child's IEP and abandon inclusion teaching that the school had previously found necessary to provide her child with an appropriate education. *See* ROA at USCA5 2723-24, 2726-27.

Some parent choices were simply not honored. For example, Jane Doe chose coeducational classes for both her daughters. Principal Dupuis, however, did not move Joan Doe to a coeducational class or contact Jane Doe directly, about which the District Court voiced significant concern. ROA at USCA5 1893-94 ("THE COURT: She is the parent. They should have listened to what she said in that letter and moved that child immediately . . . . [I]t is the parent's choice, not the child's, not the principal's, not the school board's."), 1911 ("THE COURT: . . . .

[T]he principal didn't call again and say I still have this thing saying my child goes to coed and I need to follow the wishes of the parent and not the wishes of the child."). When Jane Doe learned of this later, it had become socially and academically very difficult to switch Joan Doe to a coeducational class. As a result, Joan Doe remained in single-sex classes for the remainder of the school year. ROA at USCA5 1874-76, 1879-80.

In another instance, a parent who had elected coeducational classes for his son discovered that his child remained in single-sex classes despite his choice. ROA at Declaration of Curt Deshotels. Although this parent's election form has a handwritten note by Dupuis indicating that the student was switched to a single-sex class at the parent's request, Mr. Deshotels made no such request. *Id.* Principal Dupuis later claimed he disregarded Mr. Deshotels' election and left the student in single-sex classes pursuant to his mother's request, but has no documentation of such a request and could not justify preferring one parent's election over another's. ROA at USCA5 2641-43. And despite another parent's choice of single-sex for her son, an IEP student, RRMS officials simply ignored the request and kept the child in the nominally coeducational class to which he was originally assigned. ROA at Declaration of Celeste Lambert. Principal Dupuis' only explanation for this disregard of parent choice was that it "slipped through the cracks." ROA at USCA5 2127. Yet even one of Defendants' own affiants who had elected single-

sex classes for her son, also an IEP student, ultimately found her child in the coed class despite her initial election. *Compare* ROA at Affidavit of Bridget Touchet *with* ROA at Pl. H. Ex. 32 at VP20000381 (election form signed by Bridget Touchet).

The question under the DOE regulations is whether, given these circumstances, the RRMS program was completely voluntary. The answer is that even if it was voluntary in some respects despite the "extremely flawed" and biased information Dupuis provided, it was not ***completely*** voluntary. Students with IEPs remained in the coeducational class in order to retain their learning accommodations, and students without IEPs were prodded into sex-segregated classes to maintain the class structure Principal Dupuis had conceived. A "regular" coeducational class had not been part of the plan and was never created even after parents of students without special needs requested coeducation. Perhaps the strongest evidence of this is that, after nominally offering choice, the resulting classes had virtually the same composition as that mandatorily imposed at the start of the school year. *See* Def. H. Exs. 7 & 7a; ROA at USCA5 2695-96. This lack of voluntariness cannot be cured, and the District Court should have enjoined any further segregation at RRMS.

C. **Coeducational Classes At RRMS Are Not Substantially Equal.**

The DOE regulations require Defendants to provide a substantially equal coeducational alternative. 34 C.F.R. § 106.34 (b)(1)(iv). Notwithstanding their repeated pre-hearing denials, Defendants were finally compelled to admit that the nominally coeducational classes were originally conceived as the special needs classes with an overwhelming concentration of students who required special academic support. ROA at USCA5 2618-22.

Although these nominally coeducational classes may in theory cover the same curriculum with the same primary teachers as the sex-segregated classes, they are fundamentally different. While there is some evidence that these classes sometimes lag behind their sex-segregated counterparts, ROA at USCA5 2015-16, the real difference is between the experiences in the coeducational classes on the one hand, and in the sex-segregated classes on the other. The coeducational classes have no "talented" or "gifted" students. Instead they have a group of "8.5" high school students that shuffle in for one of the five core classes and then depart, a group of self-contained special education students with the most serious disabilities who join one class and then return to their self-contained classes, and a group of "pre-employ" students aiming for GEDs not diplomas who appear for another two classes. ROA at USCA5 1993-95, 2620-21.

The coeducational class thus resembles a game of musical chairs where students rotate in and out of the group; by contrast, students in the single-sex classes enjoy the benefit of a stable, cohesive class setting. In coeducational classes, tests are sometimes read aloud and a resource teacher attends certain classes, walking around and talking during the primary teacher's classroom instruction, unlike the single-sex classes that experience a more conventional classroom dynamic. ROA at USCA5 1995-96, 2001. As a result, a smart, principled, and courageous 13 year old boy like John Roe, one of Plaintiffs' hearing witnesses, is subjected to taunts about his "retard" class, ROA at USCA5 2002-03, and some students who transferred into the coeducational class immediately transferred back to single-sex after seeing what the class was like. ROA at USCA5 1991.

These differences illustrate that the coeducational classrooms RRMS created simply cannot provide the same experience as provided by the single-sex classes. The District Court expressed its concern with this inequality at the preliminary injunction hearing. *See* ROA at USCA5 2735 ("THE COURT: . . . . My concern is sticking the children who have no deficit, who have no learning disability, and placing them in a classroom where, because they chose to be in a coeducational class, they are placed – in the minds of 5th, 6th, 7th, and 8th graders – in classes with kids who are not as smart as everybody else in the school."). These unequal

experiences constitute the types of "intangible benefits" listed as a factor in determining whether classes are "substantially equal," 34 C.F.R. § 106.34(b)(3), yet another aspect of governing law ignored by the District Court.

For all these reasons, the sex-segregated program at RRMS violates yet another of the hurdles Defendants were required, but failed, to clear. The District Court's failure to enjoin sex segregation therefore was reversible error.

V. The Court Should Remand For Entry Of A Preliminary Injunction Because No Further Fact Finding Is Needed.

The undisputed facts and the District Court's own factual findings entitle Plaintiffs to a preliminary injunction. The record facts establish not only Plaintiffs' likelihood of success on the merits, *see supra* sections II-IV, but all of the elements for a preliminary injunction.

Absent an injunction, Plaintiffs face a substantial threat of irreparable harm from being denied coeducational classes in violation of their constitutional and statutory rights. *See Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981) (concluding that a substantial threat to the constitutional right of privacy "mandates a finding of irreparable injury"); *Springtree Apartments, ALPIC v. Livingston Parish Council*, 207 F. Supp. 2d 507, 515 (M.D. La. 2001) ("It has been repeatedly recognized by the federal courts that violation of constitutional rights constitutes irreparable injury as a matter of law."). Moreover, these injuries are irreparable because RRMS students will not have another

opportunity to repeat their grade school years – years critical to their academic and social development. The threatened injury to Plaintiffs outweighs any harm to Defendants from an injunction, as RRMS has a history of operating successfully as a fully coeducational middle school offering gender-integrated classrooms, ROA at Pl. H. Exs. 40 & 42; ROA at USCA5 2616, 2751. Furthermore, enjoining Defendants from violating the Constitution and civil rights law clearly serves the public interest. *See, e.g.*, *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1056 (5th Cir. 1997) (finding public interest undermined if "unconstitutional actions of [a school board] were allowed to stand"); *G&V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) (holding that "it is always in the public interest to prevent the violation of a party's constitutional rights").

The District Court already heard numerous live witnesses and the voluminous record makes clear both the nature of the violations and the harm suffered by Plaintiffs. No further fact finding is necessary. As a result, this Court should not only reverse the April 19, 2010 order but should also remand with instructions to enter a preliminary injunction, enjoining the continuation of the illegal sex segregation program at RRMS. *See Roberts v. Austin*, 632 F.2d 1202, 1213-14 (5th Cir. 1980) (reversing district court's ruling and remanding for entry of a preliminary injunction where an evidentiary hearing had been held below and

factual record was before court on appeal); *see also Shamloo v. Miss. State Bd. of Tr. of Insts. of Higher Learning*, 620 F.2d 516, 525 (5th Cir. 1980) (same).

CONCLUSION

For the foregoing reasons, the Court should reverse the Ruling below and remand for entry of a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FIFTH CIRCUIT RULES 25 AND 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 13,710 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface and type style requirements of Fed. R. App. 32(a)(5)-(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Work 2003 word processing software in Times New Roman typeface, 14-point.

3. The PDF versions of this brief and the Record Excerpts that are being filed electronically with the Clerk of Court through the CM/ECF system, have been scanned for viruses and to my knowledge contain no viruses.

4. Pursuant to Fifth Circuit Rule 25.2.13, all required privacy redactions have been made.

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CERTIFICATE OF FILING AND SERVICE

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