IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
AT LAFAYETTE

JANE DOE, as next friend to her minor daughters, JOAN DOE and JILL DOE,

Civil Action No.
Section:

v.

VERMILION PARISH SCHOOL BOARD, RANDY SCHEXNAYDER, Superintendent, BILL SEARLE, District A, ANGELA FAULK, District B, DEXTER CALLAHAN, District C, RICKY LEBOUEF, District D, ANTHONY FONTANA, District E, CHARLES CAMPBELL, District F, CHRIS MAYARD, District G, RICKY BROUSSARD, District H, and DAVID DUPUIS, Principal, Rene A Rost Middle School.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiffs JOAN and JILL DOE are students at Rene A. Rost Middle School, and seek an order from this Court enjoining Defendants from perpetuating sex segregation in violation of Title IX and the Equal Protection Clause. The Does are entitled to such an order because (1) the proposed sex segregation clearly violates the prohibition on sex discrimination set out in Title IX and the Equal Protection Clause of the Constitution, (2) Joan and Jill Doe will suffer irreparable harm by being forced to involuntarily attend sex-segregated classes taught according to broad gender stereotypes about psychological differences between boys and girls should the order not issue, (3) enjoining the institution of sex segregation would not substantially harm Defendants or others, and (4) the public interest would be served by such an injunction.

STATEMENT OF FACTS

This action arises out of the unlawful sex discrimination of Defendants Vermilion Parish School Board, Superintendent Randy Schexnayder, Defendant School Board members, and Principal David Dupuis in seeking to craft separate spheres for girls and boys attending Rene A. Rost. Rene A. Rost is a public school comprised of grades five through eight, to which students are assigned based on their place of residence.

On August 4, 2009, Rene A. Rost hosted a meeting for parents of current and incoming students, which Jane Doe attended.[1] At that meeting, the principal of Rene A. Rost, Defendant David Dupuis, informed the parents in attendance that beginning in the fall, Rene A. Rost would segregate its students by sex in all core classes.[2] He stated that the decision had already been made; there was no opportunity for parental input or feedback.[3] Students assigned to Rene A. Rost do not have the option of attending another public school in the district.[4]

After Plaintiffs advised Defendants of the unlawfulness of this scheme, Defendants committed to offer a co-educational alternative to the sex-segregated classrooms that was equal in quality to the segregated classrooms. Defendants have failed to do so, however. Thus, Plaintiffs' participation in the sex-segregated classes is not truly voluntary.

Defendants plan to provide instruction in sex-segregated classes tailored to reflect overbroad stereotypes and generalizations about differences between the genders. For instance, Defendant Dupuis has indicated that the boys' sections will read books that boys are interested in, and the girls section will read books that the girls are interested in. In citing his support for

[1] Doe Decl., Rec Doc 1-1, ¶6
[2] *Id.*
[3] *Id.* ¶7.
[4] *Id.*¶5

sex-segregation, Defendant Dupuis references the NASSPE.[5] The NASSPE relies upon Dr. Leonard Sax's book *Why Gender Matters* as a resource. Dr. Sax is a medical doctor with a Ph.D. in psychology who has styled himself an expert on and advocate for single-sex education. In *Why Gender Matters*, Dr. Sax puts forward various theories of gender difference, based on research performed by others. (*Id.*) For instance, according to Dr. Sax:

- Girls have more sensitive hearing than boys. Thus, teachers should not raise their voices at girls and must maintain quiet classrooms, as girls are easily distracted by noises. Conversely, teachers should yell at boys, because of their lack of hearing sensitivity. (Sax, *Why Gender Matters*, at 87-89.)

- Because of biological differences in the brain, boys need to practice pursuing and killing prey, while girls need to practice taking care of babies. As a result, boys should be permitted to roughhouse during recess and to play contact sports, to learn the rules of aggression. Such play is more dangerous for girls, because girls don't know how to manage aggression. (*Id.* at 58-65.)

- Teachers should smile at girls and look them in the eye. However, teachers should not look boys directly in the eye and should not smile. (*Id.* at 86.)

- Boys should be taught in competitive, high-energy teams. In contrast, teachers should assure that girls are relaxed in class and should not give girls time limits to complete tasks. Stress makes boys perform better and girls perform worse. Having girls take off their shoes in class is a good way to keep stress from impairing girls' performance. (*Id.* at 88-92.)

- Girls need real world applications to understand math, while boys understand and enjoy math theory. Girls understand number theory better when they can count flower petals or segments of artichokes, for instance, to make the theory concrete. (*Id.* at 101-106.)

- Literature teachers should not ask boys about emotions in literature, but should simply focus on what actually happened in the story. In contrast, teacher should focus on emotions rather than action in teaching literature to girls. (*Id.* at 106-112.)

- Boys should receive strict, authoritarian discipline, and boys respond best to power assertion. Boys can be spanked. Girls must never be spanked. Girls should be disciplined by appeals to their empathy. (*Id.* at 181-83, 188.)

[5] See, http://www.abbevillenow.com/content/aclu-targets-kaplan-classes, last visited September 5, 2009.

- "Anomalous males"—boys who like to read, who do not enjoy competitive sports or rough-and-tumble play, and who do not have a lot of close male friends—should be firmly disciplined, should spend time with "normal males," and should be made to play competitive sports. (*Id.* at 223-28.)

Plaintiff Joan Doe just started the eighth grade at Rene A. Rost on August 17, 2009.[6] Her mother, Jane Doe, objects to involuntary sex-segregation and gender-stereotyped pedagogy as a violation of her right to enjoy equal educational opportunities without discrimination on the basis of sex.[7] She believes that her daughter should have the equal opportunity to participate in the school's academic offerings without regard to her gender and to receive instruction based on her individual strengths and needs, rather than on stereotypes about the sort of education the "average girl" wants or requires.[8] She is troubled that her daughter was approached by the principal and pressured to attend single-sex classes, directly contrary to her wishes, and that her daughter was told that she is "too smart" for co-educational classes.[9]

Jill Doe just started sixth grade at Rene A. Rost Middle School.[10] For the reasons articulated, Jill's mother Jane requested that Jill be placed in co-educational classes.[11] However, this request was not honored, and Jill was placed in segregated classes nonetheless.[12]

Plaintiffs question the stereotypes about boys and girls.[13] Additionally, Plaintiffs are concerned that separating boys and girls will make interaction later or in other spheres of life more challenging, and that the children will not be properly socialized.[14] The decision as to how to define gender roles is one best left to the family and to the individual child, not one for the government to make for parents. Yet that is exactly what Defendants are doing: allowing

[6] Doe Decl., Rec Doc 1-1, ¶3.
[7] *Id*. at ¶¶8-14.
[8] *Id.*
[9] *Id*.¶¶19-20.
[10] *Id*. ¶4.
[11] *Id*. ¶18.
[12] *Id*. ¶26.
[13] *Id*. ¶8-13.
[14] *Id*. ¶14.

Principal Dupuis to experiment upon and study the children at Rene A. Rost, in violation of anti-discrimination laws and without regard to the wishes of the individual parents, such as the Plaintiff.

ARGUMENT

Preliminary relief is appropriate when a movant demonstrates "(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." *Speaks v. Kruse*, 445 F.3d 396, 399- 400 (5th Cir. 2006). "When analyzing the degree of 'success on the merits' that a movant must demonstrate to justify injunctive relief, the Fifth Circuit employs a sliding scale involving the balancing the hardships associated with the issuance or denial of a preliminary injunction with the degree of likelihood of success on the merits." *McWaters v. Federal Emergency Mgmt. Agency*, 408 F. Supp. 2d 221, 228 (E.D. La. 2006). "Moreover, when the other factors weigh in favor of an injunction, a showing of *some* likelihood of success on the merits will justify temporary injunctive relief." *Id.* As set out below, Plaintiffs easily meet the relevant standard.

I. PLAINTIFFS ARE EXTREMELY LIKELY TO PREVAIL ON THE CLAIM THAT DEFENDANTS' SEX SEGREGATION CONSTITUTES UNLAWFUL SEX DISCRIMINATION.

A. Defendants' Sex Segregation Violates Title IX.

Defendants' decision to segregate classes at Rene A. Rost by sex is in blatant violation of Title IX of the Education Amendments of 1972. Title IX provides, "No person in the United States shall, on the basis of sex, be excluded from participation in . . . *any* education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (emphasis added). Rene A.

Rost Middle School receives federal financial assistance. Obviously, by mandating that children attend classes separately on the basis of sex, Defendants violate this provision of federal civil rights law.

The Supreme Court has held that Title IX's prohibition on excluding students from any educational program or activity based on their sex must be given "a sweep as broad as its language." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1983). Indeed, in introducing the legislation, Title IX's sponsor, Senator Birch Bayh, specifically criticized single-sex classrooms and explained that Title IX would prohibit such segregation.[15] "Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction." *North Haven*, 456 U.S. at 527.

Defendants will doubtless argue that the 2006 Department of Education regulations implementing Title IX validate the program at Rene A. Rost, because those regulations purport to allow sex-segregation where there is an equal co-educational alternative. Plaintiff has two answers. First, the program at Rene A. Rost is neither voluntary nor equal, and therefore fails even if one accepts the validity of the new regulations. Second, Plaintiff questions whether the new regulations are themselves valid. Each shall be addressed in turn.

1. The segregation at Rene A. Rost violates the Department of Education regulations implementing Title IX

While recently amended Title IX regulations purport to permit some sex-segregation in coeducational schools, they explicitly disallow the mandatory segregation being implemented by

[15] 118 Cong. Rec. 5806 (Feb. 28, 1972) ("Unfortunately, the Office of Education does not keep complete statistics on the number of programs or classes which are restricted in terms of sex; however, a survey of city boards of education indicated that sex separation is the rule rather than the exception."); 118 Cong. Rec. 5807 ("This 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."). *See also Sex Discrimination Regulations: Hearings before the Subcommittee on Postsecondary Education of the House Committee on Education and Labor*, 94th Congress, 1st Sess. 172 (1975) (statement of Sen. Bayh that Title IX was passed to rectify "discriminatory course offerings," among other purposes).

Rene A. Rost. The regulations state that single-sex classes or activities are permitted only when (among other criteria) "student enrollment in a single-sex class or extracurricular activity is completely voluntary." 34 C.F.R. § 106.34(b)(1)(iii). The program at Rene A. Rost is not "completely voluntary." The Defendant principal has personally pressured students and parents to participate. *See* 71 Fed. Reg. 62,537 (Oct. 25, 2006) (indicating that the regulation's requirement that participation in sex-segregated classes be completely voluntary in part stemmed from concerns that administrators might attempt to steer students to sex-segregated classes). More significantly, even once Ms. Doe selected co-educational courses for her daughter Jill Doe, the child was still placed in segregated classes.

Additionally, participation in the segregated classrooms is not "voluntary" if there is not equality between the single-sex and the co-educational classes. 34 C.F.R. § 106.34(b)(1)(iv). Defendant Dupuis advised Joan Doe that she was "too smart" to attend co-educational classes. The eighth graders were informed that students choosing the co-educational option would be placed in the "special needs" section, which was not being segregated. The pressure on Joan Doe was so significant that she defied her mother's wishes and changed her enrollment form to elect sex-segregated rather than co-educational classes. These facts make clear that the two tracks are not substantially equal, and therefore, participation in the segregated classes is not truly "voluntary." For these reasons, the segregation is overtly contrary to the existing Title IX Department of Education regulations, and patently unlawful.[16]

[16] The language and structure of Title IX, its legislative history, and its judicial construction demonstrate that the Department of Education regulations permitting sex-segregated classes in coeducational schools are contrary to congressional intent and thus invalid as an unreasonable interpretation of the statute. Plaintiffs believe the 2006 regulations therefore invalid. Plaintiffs have pled this in their Complaint, but, for the purposes of the instant Motion, do not advance that argument.

2. The segregation at Rene A. Rost violates the U.S.D.A. and H.H.S. regulations implementing Title IX

Because they receive federal funding from the USDA for lunch programs and from the Department of Health and Human Services for Head Start programs, the Defendants are bound by the regulations of those agencies as well.

The U.S. Department of Agriculture regulations explicitly prohibit U.S. Department of Agriculture funding recipients from instituting sex-segregated classes, stating, "A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis . . . ." 7 C.F.R. § 15a.34. The Defendants' program is clearly in direct contravention of this regulation.

Similarly, the Department of Health and Human Services regulations expressly prohibit the sex-segregation scheme being implemented by the Defendants. Those regulations state, "a recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis . . . ." 45 C.F.R. § 86.34. Defendants' sex-segregated classes are directly contrary to this regulation.

B. Defendants' Proposed Sex Segregation Violates the Equal Protection Clause.

The proposed sex segregation at Rene A. Rost also violates the U.S. Constitution. In *United States v. Virginia*, a case challenging the males-only admission policy at the Virginia Military Institute (VMI), the United States Supreme Court made clear that to comply with the Equal Protection Clause, a governmental actor must demonstrate an "exceedingly persuasive justification" for instituting single-sex education. *Virginia*, 518 U.S. 515, 540-42 (1996). In demonstrating this exceedingly persuasive justification, the school has the burden of showing "at

least that the challenged classification serves important governmental objectives and that the discriminatory means employed are closely related to the achievement of those objectives." *Id.* at 524 (internal quotation marks omitted). In other words, the school must prove that the discrimination is "substantially and directly related" to an important objective. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1982). Moreover, "if the . . . objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or be innately inferior, the objective itself is illegitimate." *Id.* at 725.

The Supreme Court has expressly held that a state actor instituting single-sex education cannot meet this heavy burden of justification by pointing to "gender-based developmental differences" or evidence of male and female "tendencies." *Virginia*, 518 U.S. at 516-17. In *United States v. Virginia*, VMI argued that its all-male policy was justified by the unsuitability of its highly confrontational and militaristic educational methods for the average woman. According to VMI, the "adversative" method it used was incompatible with coeducation, because, as expert witnesses had attested in unchallenged testimony, "males tend to need an atmosphere of adversativeness, while females tend to thrive in a cooperative atmosphere." *Id.* at 541 (internal quotation marks omitted). Thus, VMI asserted, the educational benefits offered by a VMI education were in a real sense simply unavailable to the average woman. *Id*. at 540. The Supreme Court concluded, however, that even assuming these statements of the average capacities and preferences of men and women were accurate, they were an impermissible basis for VMI's discriminatory policy. In response to VMI's argument about "important differences between men and women in learning and developmental needs," the Court pointedly explained that "generalizations about the 'way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them

outside the average description." *Id.* at 550; *see also, e.g, Adams v. Baker*, 919 F. Supp. 1496, 1504 (D. Kan. 1996) (rejecting school district's argument that preventing girls from wrestling was substantially related to student safety, because it was based on generalization about average differences between male and female physical strength and ignored the fact that some females are stronger than some males).

The promise of the Equal Protection Clause is that individual men and women, and individual boys and girls, will not be forced to conform to generalized understandings of what is essentially "male" or essentially "female," whether those generalizations are accurate on average or not. *See, e.g., Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151-52 (1980); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975); *Frontiero v. Richardson*, 411 U.S. 677, 688-89 (1973). In order to provide equal educational opportunities to all students, schools should, of course, ensure that options exist for students of different learning styles and that classroom experiences are structured to give both boys and girls ample opportunities to succeed. Indeed, the principles of gender equality enshrined in the Constitution and Title IX demand no less. What the Constitution forbids, however, is excluding all students of one sex from an educational opportunity, or requiring all students of one sex to participate in a particular educational program, based on conclusions about what is appropriate for the average male or female student. Even if these assumptions contain a kernel of accuracy, such a rationale, the Supreme Court has stated, "cannot rank as 'exceedingly persuasive' as we have explained and applied that standard." *Virginia*, 518 U.S. at 542.

Rene A. Rost's proposed sex segregation relies on the latest iteration of theories about "important differences between men and women in learning and developmental needs" that the Supreme Court has explicitly rejected as a permissible justification for sex segregation in public

education. *Id.* at 550. By assuming that all boys have the same learning and developmental needs as the "average" male, while all girls will have the same learning and developmental needs as the "average" female, Defendants have "relied upon the simplistic, outdated assumption that gender could be used as a 'proxy for other, more germane bases of classification,' to establish a link between [an important governmental] objective and [sex] classification." *Mississippi Univ. for Women*, 458 U.S. at 726 (quoting *Craig v. Boren*, 429 U.S. 190, 198 (1976)).

For these reasons, Plaintiffs are likely to succeed in the claim that the sex segregation violates the Equal Protection Clause of the Constitution.

3. SHOULD AN INJUNCTION NOT ISSUE, PLAINTIFFS FACE A SUBSTANTIAL THREAT OF IRREPARABLE HARM.

"It has been repeatedly recognized by the federal courts that violation of constitutional rights constitutes irreparable injury as a matter of law." *Springtree Apartments, ALPIC v. Livingston Parish Council*, 207 F. Supp. 2d 507, 515 (M.D. La. 2001). As the Supreme Court has held, the loss of a constitutional right "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *see also Deerfield Medical Ctr. v. City of Deerfield Beach*, 661 F.2d 328 (5th Cir. 1981) ("We have already determined that the constitutional right of privacy is either threatened or is in fact being impaired and this conclusion mandates a finding of irreparable injury."); *Killebrew v. City of Greenwood*, 988 F. Supp. 1014, 1016 (N.D. Miss. 1997) ("Plaintiffs' claims are primarily based upon violation of their constitutional rights under the Equal Protection Clause of the Fourteenth Amendment, and thus, the threat of irreparable injury is present as a matter of law."); *Murillo v. Musegades*, 809 F. Supp. 487, 497 (W.D. Tex. 1992) ("Irreparable injury is established upon movants showing constitutionally protected rights have been violated."); *Wiggins v. Stone*, 570 F. Supp. 1451, 1453 (M.D. La. 1983) ("[I]t is well established that deprivation of a

constitutionally protected right constitutes irreparable injury[.]"); 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1 (2d ed.1995) ("When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.").

The presumption of irreparable harm entitling a movant to injunctive relief also arises in these circumstances because monetary damages do not provide an adequate remedy here. Plaintiffs will only be in the eighth and sixth grades once. If the opportunity to attend middle school absent unlawful discrimination on the basis of sex is denied to them now, it is denied to them for all time. They will lose educational experiences and opportunities as a result of their involuntary participation in sex-segregated classes. In addition, the classroom diversity that the Supreme Court has recognized serves a compelling educational interest, given that interaction with diverse people, cultures, and viewpoints prepares students for participation in diverse workforces and society, will be greatly diminished. *See Grutter v. Bollinger*, 539 U.S. 306, 325-33 (2003). "'The two sexes are not fungible; a community made up entirely of one is different from a community composed of both.'" *Virginia*, 518 U.S. at 533 (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)). Monetary damages will not remedy the loss the Plaintiffs will experience as the result of being relegated to a single-sex community.

4. THIS THREATENED INJURY FAR OUTWEIGHS ANY HARM THAT WILL RESULT IF THE INJUNCTION IS GRANTED.

Rene A. Rost has long operated successfully as a fully coeducational middle school offering gender-integrated classrooms. The only harm to Defendants would be the minor administrative inconvenience of revising students' course schedules to assure integrated classes. Defendants modified class schedules as recently as September 4, 2009, and can easily co-mingle boys and girls into the currently segregated sections. The threatened harm to Plaintiff's right to

be free from sex discrimination and to their interests in the educational benefits that flow from a diverse classroom far outweighs such an inconvenience. *See Frontiero v. Richardson*, 411 U.S. 677, 690-91 (1973) (holding that discrimination on the basis of sex for the sake of administrative convenience is forbidden by the Constitution).

5. THE PUBLIC INTEREST WILL BE SERVED BY GRANTING THE REQUESTED RELIEF.

An injunction preventing Defendants from discriminating against Plaintiffs by enforcing sex segregation based on gender stereotypes will serve the public interest. Of course, the public interest is always served by ensuring compliance with the Constitution and civil rights law. *See, e.g.*, *Valley v. Rapides Parish School Board*, 118 F.3d 1047, 1056 (5th Cir. 1997) (finding that public interest would be undermined if unconstitutional actions of a school board were permitted 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 violation of constitutional rights). Further, the public has a substantial interest in promoting the well-being of youth in the community and eliminating the stigmatizing effects of gender discrimination and gender stereotyping. An injunction would eliminate Defendants' unmistakable and destructive message that girls and boys are irreconcilably different in their capacities, skills, and abilities and would advance the public interest in equal educational opportunity. As the Fifth Circuit has held, any public interest in allowing local officials discretion in developing and administering local policies "does not extend so far as to allow arbitrary and capricious actions that interfere with the exercise of" rights protected by the Constitution. *Deerfield Med. Ctr.*, 661 F.2d at 338-39.

CONCLUSION

For the reasons set out above, this Court should issue an order prohibiting Defendants from segregating Rene A. Rost Middle School by sex or implementing any single-sex class, course, or academic program during the 2009-2010 school year.

Dated: September 8, 2009

Respectfully submitted,

Ronald L. Wilson (#13575)
900 Poydras Street
Suite 2556
New Orleans, Louisiana 70112
(504) 525-4361
Cooperating Attorney for the American Civil Liberties Union Foundation of Louisiana

/s/ Katie Schwartzmann
Katie Schwartzmann (#30295)
P.O. Box 56157
New Orleans, Louisiana 70156

Legal Director for the American Civil Liberties Union Foundation of Louisiana

Emily J. Martin
Lenora M. Lapidus
American Civil Liberties Union Foundation
Women's Rights Project
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2615
(Motion for admission pro hac vice forthcoming)