IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

PARKERSBURG DIVISION

JANE DOE, et al.,

Plaintiffs,

v. CIVIL ACTION NO. 6:12-cv-04355

WOOD COUNTY BOARD OF
EDUCATION, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

Pending before the court is the plaintiffs' motion for preliminary injunction [Docket 4]. A hearing was held on August 27, 2012. The court today holds that the option to opt out of a single-sex education program does not satisfy the requirement under the 2006 United States Department of Education regulations that single-sex programs be completely voluntary. 34 C.F.R. § 106.34(b)(1)(iii). However, the court also finds that the preliminary relief requested by the plaintiffs is overly broad. Accordingly, for the reasons set forth below, the court GRANTS in part and DENIES in part the plaintiffs' motion for preliminary injunction.

I. Background and Procedural History

This case arises from a single-sex program adopted by Van Devender Middle School ("VDMS") in a commendable attempt to improve the education of its students. The plaintiffs are a mother, Jane Doe, and her three daughters, Anne Doe, Beth Doe, and Carol Doe.[1] The daughters all attended the sixth grade at VDMS for the 2011-12 school year, and are currently attending the seventh grade for the 2012-13 school year. Defendant W

preliminary relief. *Id.* Third, the plaintiffs must show that the balance of equities tips in their favor. *Id.* Finally, the plaintiffs must show that an injunction is in the public interest. *Id.* All four requirements must be satisfied. *Id.*

A. Likelihood of Success on the Merits

generalizations about the diffalents, capacities, or preferences of either sex. 34 C.F.R. § 106.34(b)(4). The Department of Education regulations thus establish some authority permitting a narrow exception to the general rule of coeducation, to allow schools to experiment with single-sex programs to improve educational achievement. *See Doe ex rel. Doe v. Vermilion Parish Sch. Bd.*, 421 F. App x 366, 369 (5th Cir. 2011) (The Department of Education and the Department of Justice have filed an amicus brief . . . describing these reh.(ParisrtcVdrib

Id. (emphasis added). The court should hold that the Department of Education regulations require an affirmative assent by parents or guardians before placing children in single-sex classrooms. Such affirmative assent would preferably come in the form of a written, signed agreement by the parent explicitly opting *in* to a single-sex program. An opt-out provision is insufficient to meet the requirement that single-sex classes be completely voluntary for several reasons. First, the above discussion leading to the addition of the completely voluntary language st suggests that this outcome is proper. The regulations closely track the language of *United States v. Virginia*, yet the commentators and drafters ultimately felt the need to add an add element of voluntariness, clearly requiring that student participation in a single-sex class must be completely voluntary. 71 Fed. Reg. at 62537.

Moreover, because single-sex classes are, by their very nature, a gender classification, it makes perfect sense to require the parent or guardian's *clear and affirmative* assent. While a failure to opt out may be a legal substitute for agreement in some other areas of the la membership in class actions,[3] presuming that parents or guardians have enrolled their child i single-sex class completely voluntarily because they failed to opt out would undermine the purpose of Title IX to prevent discrimination based on gender.

Finally, this reading of the Department of Education regulations is supported by the meaning of the word voluntary. Black's Law Dictionary defines voluntary as [d]one by design or intention. BLACK'S LAW DICTIONARY 1569 (7th ed. 1999). The first word in the definition, done, indicates that the actor must do something in other words, an affirmative act. The phrase by design or intent indicates that the actor must have decided upon the act

[3] *See, e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (We reject petitioner's contention that the Due Process Clause of the Fourteenth Amendment requires that absent plaintiffs affirmatively opt in to the class, rather than be deemed members of the class if they do not opt out.).

that was taken. In other words, the definition of the word voluntary suggests that one cannot be said to have agreed to something voluntarily if they have not taken an affirmative act to agree to it.

The evidence, even as presented by the defendants, shows that the single-sex program at VDMS was presented solely in an opt-out manner to parents and guardians of the children attending VDMS. Counsel for the defendants referenced the opt-out form sent to the parents via mail this year and the opt-out script sent to the parents via telephone this year. Cross-

the cheerleading team before any option to opt out was presented to the parents. The close proximity of the notices to the beginning of the school year, after students have already enrolled, suggest that their choice was not fully voluntary. As the record reflects, students opting out of single-sex classes would be sent to a different school if not enough students at VDMS opted to take a coeducational class.

The court does not decide the question of whether single-sex classes violate the Equal Protection Clause. Rather, the court finds, as discussed, that the defendants have not met their burden to ensure that single-sex classes at VDMS are completely voluntary under the Department of Education regulations. Thus, the court finds that the plaintiffs are likely to succeed on the merits of their Title IX claim.

B. The Plaintiffs are Likely to Suffer Irreparable Harm Absent Preliminary Relief

The court finds that the plaintiffs' continued participation in single-sex classes without having completely voluntarily chosen that option constitutes irreparable harm. Other co found that a violation of Title IX may constitute irreparable harm, and this court agrees.

emphasizes that the irreparable harm in this case is not the way the children at VDMS are

The rationale behind a grant of a preliminary injunction has been explained as preserving the *status quo* so that the court can render a meaningful decision after a trial on the merits. *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991); *Feller v. Brock*, 802 F.2d 722, 727 (4th Cir. 1986). The status quo, however, does not consist of a photog

replication of the circumstances existing at the

a narrow exception to the general rule of coedu

The court DIRECTS the Clerk to send a copy of this Order to counsel of record and any unrepresented party. The court further DIRECTS the Clerk to post a copy of this published opinion on the court s website, www.wvsd.uscourts.gov.

ENTER: August 29, 2012