

## **Opinion No. 75-74**

December 24, 1975

**BY:** OPINION OF TONEY ANAYA, Attorney General

**TO:** Commission on the Status of Women

### **QUESTIONS**

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Does the exclusion of women from New Mexico Military Institute's cadet program violate either the Equal Rights Amendment to the New Mexico Constitution or the United States Constitution?

#### **CONCLUSION**

See analysis.

### **OPINION**

#### **{\*194} ANALYSIS**

The New Mexico Military Institute is an academic Institution operating within the framework of a military environment. It is one of the state educational institutions enumerated in Article XII, Section 11 of the Constitution of New Mexico. The cadet corp distinguishes this institution as a military academy. Only students in full residence may be members of the corp. Full residence entails living in barracks on campus, and enforced nightly study hall and free tutoring by faculty members. College level cadets may receive scholarships from N.M.M.I. Academic offerings of the Institute extend through six years -- from the high school freshman class through the college sophomore class. The high school division is limited to cadets, although the college division is open to enrollment by cadets and non-cadets. Cadets must be male.

The issue presented is whether the New Mexico Military Institute, by maintaining an all-male cadet corp is operating in contravention of the requirements of the Equal Rights Amendment to the Constitution of New Mexico or of the Equal Protection Clause of the Fourteenth Amendment. Article II, Section 18 of the Constitution of New Mexico provides:

No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person.

There are two possible standards of constitutional review which passage of the Equal Rights Amendment requires courts to use in judging sex-based classifications by the state: (1) absolute prohibition of distinctions based on sex or (2) the "strict scrutiny" standard of review under which racial classifications are judged. Under the latter, if the state can demonstrate a sufficiently "compelling" state interest to justify race or sex-based classifications, they will be allowed to remain. Under the former, the absolute prohibition interpretation of the Amendment, the state would not be allowed to offer any justifications to support sex-based discrimination.

The New Mexico Supreme Court has not yet decided which of these standards will be applied under the New Mexico Equal Rights Amendment, nor do we here, since state operation of N.M.M.I. under the conditions described above violates either standard.

As to the first, there is strong support for the view that the federal Equal Rights Amendment, if ratified, will be interpreted as an absolute prohibition of state discrimination based explicitly on sex. This interpretation is relevant because the New Mexico Equal Rights Amendment tracks the language of the federal Amendment.

The legislative history clearly indicates that the Amendment was intended to absolutely prohibit sex-based classifications. The United States Senate Committee on the Judiciary studied the proposed federal Equal Rights Amendment and issued Senate Report No. 92-689 which recommended {*\*195*} the Amendment for ratification by the states. The Committee noted the need for the Amendment as follows:

. . . the Court [Supreme] had consistently refused to apply the Fourteenth Amendment to discrimination based on sex with the same vigor it applies the Amendment to distinctions based on race . . . Passage of the Equal Rights Amendment will make it clear that the burden is **not** on each woman plaintiff to show sex discrimination is "unreasonable"; "the Amendment will, instead, assure all men and women the right to be free from discrimination based on sex."

The committee further noted that:

With respect to education, the Equal Rights Amendment will require that state-supported schools at all levels eliminate laws or regulations or official practices which exclude women or limit their numbers. The Amendment would not require quotas for men and women, nor would it require that schools accurately reflect the sex distribution in the population; rather admission would turn on the basis of ability or other relevant characteristics, and not on the basis of sex. A similar result may be expected with respect to the distribution of scholarships funds. State schools and colleges currently limited to one sex would have to allow both sexes to attend.

Significantly, the Committee rejected a motion to amend the proposal which might have sanctioned sex-segregated schools. That rejected amendment is as follows:

No federal law shall prohibit an institution of higher education from enrolling only male or female students or students of both sexes. If any such institution of higher education enrolls both male and female students, such institution shall not be allowed to accept only a certain percentage of individuals of either sex.

The leading commentary upon the subject of the federal Equal Rights Amendment is Brown, Emerson, Falk and Freedman, **Equal Rights for Women**, 80 Yale Law Journal 871 (1971).

The basic principle of the Equal Rights Amendment is that sex is not a permissible factor in determining the legal rights of women, or of men. This means that the treatment of any person by the law may not be based upon the circumstance that such person is of one sex or the other. The law does, of course, impose different benefits or different burdens upon different members of the society. That differentiation in treatment may rest upon particular characteristics or traits of the persons affected, such as strength, intelligence, and the like. But under the Equal Rights Amendment the existence of such a characteristic or trait to a greater degree in one sex does not justify classification by sex rather than by the particular characteristic or trait. Likewise the law may make different rules for some people than for others on the basis of the activity they are engaged in or the function they perform. But the fact that in our present society members of one sex are more likely to be found in a particular activity or to perform a particular action does not allow the law to fix legal rights by virtue of membership in that sex. In short, sex is a prohibited classification.

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From this analysis it follows that the constitutional mandate must be absolute. The issue under the Equal Rights Amendment cannot be different but equal, reasonable or unreasonable classification, suspect classification, fundamental interest, or the demands of administrative expediency. Equality of rights means that sex is not a factor.

Several state courts which have considered questions arising under their own state Equal Rights Amendments have also adopted the view that the Amendment absolutely prohibits the state from using sex as a criterion for determining legal rights. See, for example, **Wiegand v. Wiegand**, 310 A.2d 426 (Pa. Super. 1973) (striking down a statute awarding alimony to a divorced wife but not husband); **Hopkins v. Blanco**, 302 A.2d 855 (Pa. Super. 1973), **aff'd** 320 A.2d 139 (extending the right to recover for loss of consortium to women where previously only men had such right); **Kaper v. Kaper**, 227 Pa. Super. 337 323 A.2d 222 (1974) (recognizing that the Equal Rights Amendment requires consideration of the wife's income in support awards).

Expressing the view of the Yale authors, the court in **Wiegand, supra** stated:

The basic principal of the Pennsylvania Equal Rights Amendment is that sex is not a permissible factor in determining the legal rights of women, or of men. This means that

the treatment of any person by the law may not be based upon the circumstance that such person is of one sex or the other . . . **Id** at 430.

The same view was expressed in **Henderson v. Henderson**, 458 Pa. 97, 327 A.2d 60 (1974).

In **Commonwealth, Packel v. Pennsylvania Intersch. A.A.**, 334 A.2d 839 (Pa. Commonwealth 1975), the court struck down as violative of the Pennsylvania Equal Rights Amendment, a bylaw of the Pennsylvania Interscholastic Athletic Association which prohibited girls from competing against boys in any athletic contest. The court rejected all asserted justifications such as the greater athletic ability of men and that women are generally weaker. Asserting the view of the Yale authors the court stated:

The existence of certain characteristics to a greater degree in one sex does not justify classification by sex rather than by the particular characteristic. **Id.** at 843.

In **Texas Women's University v. Chaykintaste**, 521 S.W.2d 949 (Tex. Civ. App. 1975), the court held the university to be in violation of the Texas Equal Rights Amendment by not providing dormitory housing for its male students and, as a necessary corollary, by not permitting its female students to live off campus. The economic burden to the school to provide male housing was not justification for its discriminatory housing policies.

Thus, if the New Mexico Equal Rights Amendment is interpreted to absolutely prohibit sex-based classifications, N.M.M.I.'s utilization of sex as a criterion for admission as a cadet clearly is banned by this Amendment. However, even if the "strict scrutiny" standard of review is adopted, as did the United States Supreme Court in **Frontiero v. Richardson**, 411 U.S. 677, 93 S. Ct. 1764, 36 {\*197} L. Ed. 2d 583 (1973), an equal protection case, we can perceive no compelling interest of N.M.M.I. to justify the exclusion.

The case law in the area of sex-segregated schools has arisen in the context of an equal protection challenge. In **Heaton v. Bristol**, 317 S.W.2d 86 (Tex. Civ. App. 1958), **cert. den.** 359 U.S. 230, 3 L. Ed. 2d 765, 79 S. Ct. 802, the court found that the women plaintiffs were not denied equal protection alleged as resulting from the exclusion of women from the Agricultural and Mechanical College of Texas. Noting that the school was unique in that it was one of seven state-supported military colleges in the United States and was operated on a corp basis in which men were under military discipline, the court, nevertheless, found that the system of education in Texas, as a whole, did not discriminate against women, stating:

The Texas system of higher education, as it exists today, is comprised of eighteen institutions fully supported by state funds. Each of these institutions, with the exception of A. & M. and Texas Women's University is open to both sexes and has remained open to qualified members of each sex since the date of founding. A. & M. is only one part of the whole system, just at Texas Women's University is just a single part of the same

system, along with the University of Texas and the other state colleges. . . This record shows that the system does not discriminate but makes ample and substantially equal provisions for the education of both sexes. **Id.** at 98, 99.

Following the view of Bristol was **Allred v. Heaton**, 336 S.W.2d 251 (Tex. Civ. App. 1960, writ ref., n.r.e.), **cert. den.** 364 U.S. 517, 81 S. Ct. 293, 5 L. Ed. 2d 375, another case in which the women plaintiffs challenged the constitutionality of A & M.'s refusal to admit women. The court upheld the exclusion relying on **Bristol**. It should be noted that the court wrote on motion for rehearing that should the plaintiff apply for admission to A. & M. she should not be denied solely because she is a member of the female sex. This rehearing opinion was stricken because it was dictum. However, subsequent to this decision, Texas A. & M. and Texas Woman's University became integrated.

Finding an equal protection violation by the University of Virginia in its exclusion of women, the court in **Kirstein v. Rector and Visitors of University of Virginia**, 309 F. Supp. 184 (D.C.E.D. Va. 1970), stated:

The pattern of separation by sex of educational institutions is a long established one in America and a system widely and generally accepted until the last decade. Despite its history, it seems clear to us that the Commonwealth of Virginia may not now deny to women, on the basis of sex, educational opportunities at the Charlottesville Campus that are not afforded in other institutions operated by the state. Unquestionably the facilities at Charlottesville do offer courses of instruction that are not available elsewhere. Furthermore, as we have noted, there exists at Charlottesville a "prestige" factor that is not available at other Virginia educational institutions. These particular individual plaintiffs are not in a position, without regard to the type of instruction sought, to go elsewhere without harm to themselves and disruption of their lives. Two of the plaintiffs {\*198} are married to graduate students who must remain at the University of Virginia at Charlottesville. A pattern of continued sex restriction would present these plaintiffs with the dilemma of choosing between the marriage relationship and further education. We think the State may not constitutionally impose upon a qualified young woman applicant the necessity of making such a choice. **Id.** at 187.

A reverse situation occurred in **Williams v. McNair**, 316 F. Supp. 134 (D.C. S.C. 1970), **aff'd** 401 U.S. 951, 28 L. Ed. 2d 235, 91 S. Ct. 976, in which male plaintiffs sought admission into an all women college. Finding a rational basis for the maintenance of sex-segregated schools in the form of pedagogical opinion that such separation advanced the quality and effectiveness of instruction by concentrating upon areas of primary interest to only one sex, the court found no violation of equal protection. As in the cases cited previously, the entire system of education in the state was viewed:

. . . but, as we have already remarked, these plaintiffs have a complete range of state institutions they may attend. They are free to attend either an all male or, if they wish, a number of co-educational institutions at various locations over the State. There is no suggestion that there is any special feature connected with Winthrop that will make it

more advantageous educationally to them than any number of other state supported institutions. . . **Id.** at 137, 138.

Relying upon a rational basis to support the exclusion of women, the court, in **Edwards v. Schlesinger**, 337 F. Supp. 1091 (D.C.D.C. 1974), held that the refusal to admit women to the United States Air Force and Naval Academies did not deny equal protection. The court elaborated upon the rational basis as follows:

As a matter of law and policy, women in the United States Armed Forces are not assigned to active combat roles. Since it is the purpose of the Air Force Academy to train officers for combat, limiting admissions to men at that institution is rationally related to fulfillment of that goal. **Id.** at 1098.

The same was found with respect to the Naval Academy.

A recent case in this area is **Vorcheimer v. School District of Philadelphia**, 400 F. Supp. 326 (D.C.E.D. Pa. 1975). In that case, the court scrutinized the sex restricted admission policy of Central, an all-boys academic high school. Although an all-girls academic high school of equal caliber existed in the same locality, the court upheld the plaintiff's contention that the male restriction violated her right to equal protection. The court could find no justification for excluding women from Central for the reason that the school district did not demonstrate an adverse effect upon academic achievement of Central students if the school became coeducational.

The rational bases for separation asserted in **Allred**, **Bristol** and **Williams** are not applicable here. First, there is no state-supported all-girl's school. Secondly, we cannot perceive as did the court in **Vorcheimer** that academic impairment will result if women are admitted as cadets since they are already allowed to take courses at the college level. Thirdly, the purpose of N.M.M.I. is not to train for combat as in **Edwards**. Most {\*199} importantly, however, the school is unique and prestigious as in **Kirstein**, having several special features. It is unique in that it offers both a high school diploma and a college degree. Class study is strict and the environment is highly disciplined such that academic achievement is enhanced and encouraged. Cadets live on campus and have free tutoring. Cadets may receive school scholarships. The total atmosphere along with academic offerings are of substantial benefit.

Based on the foregoing discussion we can perceive no compelling justification to deny entrance as cadets to women.

Thus, although we are without guidance from New Mexico courts upon this question, based upon the authority mentioned herein, we conclude that the exclusion of women from N.M.M.I.'s cadet program violates the New Mexico Equal Rights Amendment.

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