Opinion No. 77-09

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OPINION OF: Toney Anaya, Attorney General

BY: Jill Z. Cooper, Assistant Attorney General

TO: Representative William E. Warren, House of Representatives, Room 310-A, State Capitol, Santa Fe, New Mexico 87503

EQUAL PROTECTION CLAUSE-NEW MEXICO MILITARY INSTITUTE-SEX DISCRIMINATION-SCHOOLS.-The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution would prohibit the exclusion of women from the New Mexico Military Institute.

QUESTIONS

Would Senate Joint Resolution 7, exempting the New Mexico Military Institute from the Equal Rights Amendment, be unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

CONCLUSIONS

Yes.

ANALYSIS

The Equal Protection Clause of the Fourteenth Amendment provides that a state may not "deny to any person within its jurisdiction the equal protection of the laws." Essentially, states are not permitted to enact laws affecting some groups of citizens differently than others when the classification "rests on grounds wholly irrelevant to the achievement of the state's objective." McGowan v. Maryland, 366 U.S. 420, 425, 6 L. Ed. 2d 393, 81 S. Ct. 1101 (1961).

OPINION

Discrimination by classification on the basis of such criteria as race or national origin, the so-called suspect classifications, is subject to strict scrutiny and may be upheld only upon a showing of a compelling state interest. Otherwise, unless a fundamental right has been abridged, a discriminatory classification is subject to a less rigorous standard requiring only a showing that there is some rational relationship between the classification and the objective to be achieved. McDonald v. Board of Election, 394 U.S. 802, 22 L. Ed. 2d 739, 89 S. Ct. 1404 (1969).

The proposed amendment clearly accords citizens of the state different treatment solely on the basis of sex and creates a classification subject to review under the Equal Protection Clause. In the area of sex discrimination, the Supreme Court has developed a standard of review somewhere between strict scrutiny and rational relationship. In the most recent case, Craig v. Boren, 45 L. Week, 4057, December 20, 1976, the Supreme Court held *{*100}* unconstitutional an Oklahoma law which provided a higher minimum drinking age for men than for women. The court stated that the Equal Protection Clause requires "that the gender-based difference be substantially related to the achievement of the statutory objective." See also Stanton v. Stanton, 421 U.S. 7, 43 L. Ed. 2d 688, 95 S. Ct. 1373 (1975); Kahn v. Shevin, 416 U.S. 351, 94 S. Ct. 1734, 40 L. Ed. 2d 189 (1974); Frontiero v. Richardson, 411 U.S. 677, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973); Reed v. Reed, 404 U.S. 71, 30 L. Ed. 2d 225, 92 S. Ct. 251 (1971).

Although the Supreme Court has not ruled directly on the particular question of single-sex schools, Craig v. Boren, supra, would require the state to show that any sex-based classification is substantially related to the objectives to be achieved. The state must, therefore, prove that the exclusion of women from the New Mexico Military Institute is "substantially related" to the objectives of that institution.

If the objective is to maintain an institution which prepares students for the military, that objective may no longer be used to justify the exclusion of women. Edwards v. Schlesinger, 337 F. Supp. 1091 (D.D.C. 1974), which held that women may be excluded from the United States service academies on the grounds that the exclusion of women was rationally related to the objective of training officers for combat, has been overruled. See Waddie v. Schlesinger, 509 F.2d 508 (D.C. Cir., 1974). Moreover, Congress has enacted P.L. 94-106 § 803(c), 89 Stat. 538, providing for the "orderly and expeditious admission of women to the academies," and the issue of women in military schools have become moot.

If the objective is to establish an optimum academic atmosphere, no court has held that the objective sufficiently justifies the exclusion of one sex, at least where there is no comparable institution for the other sex. In Kirstein v. Rector and Visitors of Virginia, 309 F. Supp. 184, 187 (E.D. Va. 1970), the court held that the "state may not deny on the basis of sex, educational opportunities at the Charlottesville campus that are not afforded in other institutions operated by the state." The court found that the exclusion of women from the University of Virginia at Charlottesville, the most prestigious of the state's universities and colleges, denied them "their constitutional right to an education equal with that offered men at Charlottesville and that such discrimination on the basis of sex violates the Equal Protection Clause." 309 F. Supp. at 187.

Like the University of Virginia at Charlottesville, the New Mexico Military Institute is undisputedly a unique educational institution. It offers its students programs and educational opportunities unavailable anywhere else in the state. See New Mexico Military Institute Catalogue, 1976-1978. There is no comparable program for women in New Mexico. Thus, whether or not the single-sex policy of the New Mexico Military Institute contributes to an optimum academic atmosphere for men, no educational

objective can overcome a classification which absolutely bars women from this unique educational opportunity. Such discrimination is in violation of the Equal Protection Clause.

*{*101}* Even where a state has maintained comparable educational facilities for men and women, sex-based admission practices may still be constitutionally deficient.

In Vorchheimer v. School Dist. of Philadelphia, 400 F. Supp. 326 (E.D. Pa. 1975) the court held that women could not be denied admission to an allboys academic high school even if there were a comparable all-girls high school. Although this decision was reversed in Vorchheimer v. School Dist. of Philadelphia, 532 F.2d 880, 886 (3rd Cir. 1976), cert. granted, U.S. , 95 S. Ct. 252 (1976), the Court of Appeals noted that:

The nature of the discrimination which the plaintiff alleges must be examined with care. She does not allege a deprivation of an education equal to that which the school board makes available to boys.

To the extent that this case holds that the Equal Protection Clause only requires that the state maintain separate but equal educational facilities, that requirement is not met at New Mexico Military Institute. And, the Supreme Court may, on hearing this case, determine that, as with race, separate but equal is not permissible under the Equal Protection Clause as it applies to sex-based classifications. See Brown v. Board of Educ., 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686 (1954).

In other cases relating to equal educational opportunities for women, the courts have found that the Equal Protection Clause is violated when a system maintains an academically elite boys high school which provides for twice as many students as the comparable academically elite girls high school, Bray v. Lee, 337 F. Supp. 934 (D. Mass. 1972); and when an academically elite coeducational high school sets higher admissions for girls than for boys in order to achieve a balanced enrollment, Berkelman v. San Francisco United School Dist., 501 F.2d 1264 (9th Cir. 1974).

In sum, irrespective of the New Mexico Equal Rights Amendment, the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, as applied in sex discrimination cases to require a substantial relationship between the sex-based classification and the objective to be obtained, would, in light of the current case law on single-sex schools, be violated by the continued exclusion of women from the New Mexico Military Institute. We conclude, therefore, in response to your question, that Senate Joint Resolution 7 is unconstitutional. Thus, regardless of any attempt by the legislature and voters to amend the New Mexico Constitution in manner provided for by Senate Joint Resolution 7, the Fourteenth Amendment to the United States Constitution, which is the Supreme Law of the land, prohibits the maintenance of New Mexico Military Institute as a single-sex institution.

ATTORNEY GENERAL

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