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In the

Supreme Court of the United States

SUSAN LYNN VERCHHEIMER, BY HER
PARENTS BERT AND CAREL VORCHHEIMER,
ETC.,

PETITIONERS,

V.

SCHOOL DISTRICT OF PHILADELPHIA,
ET AL.,

RESPONDENTS.

NO. 76-37

Washington, D. C.
February 22, 1977

Pages 1 thru 41

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IN THE SUPREME COURT OF THE UNITED STATES

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SUSAN LYNN VORCHHEIMER, BY HER :
PARENTS BERT AND CAROL VORCHHEIMER, :
ETC., :
:
Petitioners, :
:
v. : No. 76-37
:
SCHOOL DISTRICT OF PHILADELPHIA, :
ET AL., :
:
Respondents. :
- - - - - X

Washington, D. C.

Tuesday, February 22, 1977

The above-entitled matter came on for argument at
2:17 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

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Petitioners.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-37, Vorchheimer against School District of Philadelphia.

Counsel, you may proceed whenever you are ready.

ORAL ARGUMENT OF SHARON K. WALLIS, ESQ.,

ON BEHALF OF THE PETITIONERS

MS. WALLIS: Mr. Chief Justice, and may it please the Court:

The question presented by this case is whether one particular public school, the Central High School of Philadelphia, may exclude academically qualified female students solely on the basis of their gender.

District Court below applied this Court's analysis in Reed and examined all the proper justifications for this policy, and after identifying the school district's goals and examining its justifications in terms of the particular facts of this case, determined that the policy had not been shown to be fairly and substantially related to any of the Respondents' legitimate objectives.

This case presents the clearest and most compelling case in which sex segregation in public education violates the Equal Protection clause.

Central High School is a unique institution for many reasons. It was the first high school in Philadelphia.

It happens also to be the second in the nation. Excuse me, that's public high school.

It is one of two schools, both of them being single-sex schools, which are characterized as academic high schools, in the public school system.

Academic high schools are defined in terms of their exclusively academic curriculum and also their high admission standards, which are only met by 7% of the students in the Philadelphia School system.

Because of these unique characteristics of Central High, it is particularly difficult to justify the exclusion of female students from that institution. It is an exclusion that dates back, originally, to a time when Central was the only school -- public school in Philadelphia. Public high school education was only offered to exceptionally gifted students and it was not offered to female students because it was not regarded as appropriate to their abilities and their needs.

That's what this Court has referred to as "old notions" about the role of women and men in society.

Subsequently, Philadelphia High School for Girls was developed as an all-female school which has the same admission standards, but it does not have the history or the character of Central High School.

QUESTION: It obviously hasn't been in existence as

long, but what do you mean by the history and the character?

MS. WALLIS: Central has a very unique history, not only because it was the first high school, but because it always held a certain position in the school system as the training ground for leaders.

If you are interested, you might want to look at Cornog's, School of the Republic, which goes in some great detail into the history of Central High School.

QUESTION: By history and all, are you referring to its reputation and standing?

MS. WALLIS: Its reputation, its standing in the community, and I think, above all, its mission, that is, that it was always held to be, and was created to be, a special school for training leaders within the public school system.

QUESTION: For training leaders or for training exceptional boys, young men?

MS. WALLIS: Well, the stated objective, which is repeated again and again as you will see in the Cornog book -- and some excerpts from that are quoted not only in our brief but also in the brief of the United States as amicus curiae.

The goal of the school, the concept of the school was to train leaders in industry and life. That's a quote. To train leaders in all fields of endeavor.

That was an education that was only open to male

students.

The definition of the school was one of preparing people for leadership.

We are relying, obviously, on Sweat v. Painter.

I am taking that a step further, in a sense. What I am saying is the school not only has all the characteristics that make for greatness in an educational institution, that is, outstanding alumnae, a great tradition of accomplishment, as well as particular, you know, high reputation, national reputation, but in addition to that this is the result of a conscious effort to maintain such an institution within the Philadelphia school system. And that institution has traditionally been exclusively open to male students.

The Trial Court here did find that the education available at Philadelphia High School for Girls was equivalent to that -- substantially equivalent to that available at Central. But if you look at that Finding 30 and the surrounding findings, it becomes very clear that the Trial Court defined education as level of classroom instruction.

And the Trial Court mentions, for example, Central is the only high school in Philadelphia with a substantial private endowment. That's the Barnwell Foundation. The Barnwell Foundation was responsible for bringing to the school such distinguished speakers -- and this is just recently -- as Robert Kennedy when he was Attorney General,

Hubert Humphrey when he was Vice President.

More recently -- it doesn't happen to be mentioned in the Court's opinion -- Elliot Richardson.

This is not something in the very distant past.

QUESTION: If the training at Central High and the training at Girls High was identical, would you still be here?

MS. WALLIS: I think that we have to define our terms.

I understand the Trial --

QUESTION: I said "identical."

MS. WALLIS: That's not the term I am concerned about. It's training.

QUESTION: Well, that's my question.

MS. WALLIS: Yes.

The question is: What do you mean by training or what do you mean by education?

What I mean by education and what I believe this Court --

QUESTION: Are you arguing that it is unequal? That's what I want to know. Are you arguing unequal or not?

MS. WALLIS: Well, what I am arguing is that there is an important opportunity that is lost by being deprived of access to Central High School.

That opportunity is the opportunity for a unique

preparation for a leadership role in society.

It is not a difference in classroom instruction, particularly, although there are some differences in the schools.

QUESTION: Let me extend Mr. Justice Marshall's hypothetical a little.

Suppose, as with some of the schools, they decided that four hours a day was enough class time for the students, and in the same building, under the same name, with the same faculty, you had the boys go to school from 8 until 12 and the girls go to school from 1 until 5. That would then -- I would think you would agree, or perhaps you wouldn't, that this is identical. Would you say -- What would be the problem then, in your view?

MS. WALLIS: Then I think you would have a fairly clear statutory problem.

QUESTION: A what?

MS. WALLIS: Well, there would be a stronger statutory argument, under Title 20, if you were talking about the same school with segregated classes.

I'd put that aside for the moment. That's not what you are asking me about, obviously.

QUESTION: Well, I thought I was.

MS. WALLIS: Well, let me put it this way --

QUESTION: Same building, same curriculum, curricula,

all the way through, same teachers, everything identical, except boys in the morning, girls in the afternoon.

MS. WALLIS: I think that that would be certainly a different case than this one. There are many qualities, many aspects of Central High School that we are concerned about here.

If the diploma were the same, then that would make it -- that would be one opportunity the girls were not denied. If, by graduating from this institution in a separate program, they were entitled to be full-fledged members of the Central High School Alumnae Society which the District Court recognized was an extremely influential and important organization within Philadelphia, that would be another opportunity that would not be denied to female students under your hypothesis which is now --

There is another aspect of this case, and that is the opportunity for young men and young women to enjoy a free exchange of ideas which the Court talks about in Sweat v. Painter and also in its companion case, McLaurin --

QUESTION: Is that what your case is all about? Are you arguing for a coeducational education?

MS. WALLIS: The case is all about all of those things.

QUESTION: I think it is of some importance to identify what this case is about.

The Chief Justice's question was directed to determining whether this is a separate but equal case and whether separate but equal violates the Constitution, or whether, on the other hand, it is a somewhat simpler case, and that is that the best high school in Philadelphia excludes girls because they are girls. This is quite a different case.

MS. WALLIS: Yes, it is the easier case.

QUESTION: Which one?

MS. WALLIS: What I am saying is that this is the easiest possible case.

QUESTION: Why?

MS. WALLIS: The reason it is the easiest possible case is because Central does have all of these unique features and also because when you are talking about young women who are academically gifted you are talking about the young women who are most qualified for leadership positions, both young women and young men --

QUESTION: That isn't the approach the District Court took, and it certainly isn't the approach that the Court of Appeals took.

MS. WALLIS: You are right. The District Court --

QUESTION: The District Court said separate but equal isn't bad and the Court of Appeals said it is okay. Neither court said there was inequality.

MS. WALLIS: No, the District Court --

QUESTION: And so you want us to find it.

MS. WALLIS: Oh, no.

The District Court -- There is a confusion in the District Court. In Footnote 1, you will see. The District Court, unfortunately, didn't quite understand Sweat v. Painter. But the District Court made all of the necessary findings. So I am not asking you --

QUESTION: So it would be proper for us to make the legal conclusion to the effect that you want?

MS. WALLIS: Yes. The District Court found that the level of classroom education was significantly similar, which this Court assumed in Sweat v. Painter.

The District Court went on to find very significant differences between the two schools.

QUESTION: Why should we, contrary to a District Court that knows more about the locality than we do, make a conclusion different from the District Court as to whether these were substantially equal, in its words?

MS. WALLIS: It is not a question of whether they are equal or not.

We will -- I mean for purposes of this record we have to go on the hypothesis that the level of classroom instruction is the same, but that --

QUESTION: In Finding 26, which says very specifically that the scientific facilities at Central are superior.

MS. WALLIS: I think the Court also found that the level was generally the same, is what I am saying.

There are differences.

QUESTION: I thought that your argument parced down to the claim that in this public school system Central High School is the best, and it excludes girls because they are girls.

MS. WALLIS: That is my argument. Now I am trying to tell Justice White why you can accept my argument and you don't have to overrule the District Court, and the reason is that the District Court found that there were very significant differences between the schools. Central was, in fact, superior in terms of the accomplishments of its alumnae.

QUESTION: What about the Court of Appeals?

MS. WALLIS: They didn't overturn any of those findings. The Court of Appeals merely --

QUESTION: They went on the basis that there was substantial equality.

MS. WALLIS: I don't know where they got that. I mean, seriously, --

QUESTION: You are asking us to differ with the Court of Appeals and then on that point --

MS. WALLIS: No, because they didn't change -- they didn't overrule any of the facts in the record. They just say in a conclusory sentence that --

QUESTION: Well, you wouldn't suggest that the Court of Appeals would have ruled against you if they had thought the training at these two schools was substantially unequal, would you?

MS. WALLIS: Your Honor, this is --

QUESTION: Would you, or not?

MS. WALLIS: Yes, I think they would have, because I think the question here is not the fact. The question here is the law. The problem in the District -- We won in the District Court. Let's get that straight first. The District Court's analysis which I think is a very good one was this is obviously a classification based on sex, gender.

QUESTION: You are coming around to my hypothetical. You are really answering by inference the question which you said you didn't want to answer in my hypothetical, that if it was the same building, the same books, the same teachers, everything the same, morning and afternoon, you would still be here.

MS. WALLIS: I didn't mean to say that I didn't want to answer.

What I was --

QUESTION: Well, do you want to answer?

MS. WALLIS: What I am trying to say is that this is the easiest case. All of those factors that you have excluded in your hypothesis makes this an easier case than

your hypothesis, but, even under --

QUESTION: On which hypothesis does the educational opportunity in the school -- not afterwards -- in the school -- was substantially the same? Is that the hypothesis you accept?

MS. WALLIS: The hypothesis that I would -- What I take from the record, is that the District Court found that the education offered, the classes were not significantly different, but that --

QUESTION: We are reviewing the Court of Appeals, now remember.

MS. WALLIS: Yes, but you are still reviewing it from the factual record which the Court of Appeals did not disturb. They did not find that any of the facts or findings went against the weight of the evidence. These are still the facts and --

QUESTION: Could we try once again? And I promise I won't ask you another question if you answer this one. Are you standing on separate but equal or not?

MS. WALLIS: We are saying the schools are not equal. In addition to that --

QUESTION: Are you standing on separate but equal? Is that your point, that the schools are unequal?

MS. WALLIS: Well, I don't think that I have to argue that separate but equal is the law in order to argue the

schools are not equal. I am saying the schools are not equal.

QUESTION: I respectfully say you have to take one position or the other.

QUESTION: Or at least alternatively.

MS. WALLIS: I think alternatively that the schools, number one, are not equal, and number two --

QUESTION: Even if they are, it is unconstitutional to segregate on the basis of sex.

MS. WALLIS: No.

(laughter)

MS. WALLIS: Even if they were equal, which I think, for purposes of legal analysis, was the District Court's position, that the school district failed to demonstrate why females should be excluded from Central High. That's not to say that sex segregation is inherently unequal and, therefore, unconstitutional. All I am saying is that this Court decided Reed, this Court decided Craig, you decided the intervening cases.

You decided in those cases that classification based on gender must be justified, and you indicated what type of justification must be met. Most recently, in Craig, you said it has to be substantially related to an important governmental purpose. You also said there that that was what you had said in Reed. The Trial Court here happened to apply the

language in Reed because he didn't have the benefit of Craig, but I don't think there is any substantial difference there.

The Trial Court said this is a sex classification case. School District justify. School District presented certain proffered justification. The Trial Court examined those and said that they failed to meet the standard the Supreme Court of the United States has told me in Reed I must apply, and therefore I find that the exclusion of female students from Central High School is unconstitutional.

Now, that is not nearly as broad as saying that the exclusion of female students from any school in the entire country --

QUESTION: I take it it is not your threshold argument, either.

MS. WALLIS: I believe --

QUESTION: You are saying that they are substantially unequal and only if it were found that they were substantially equal would you purport to defend the District Court's position. Is that it?

MS. WALLIS: Well, I think the Respondents have to meet both of those in order to prevail. They must convince you that the schools are equal under the standard set forth in Sweat v. Painter which applies --

QUESTION: Well, you are the Appellant. You are the one who has to convince us that the both courts below were

wrong on equality.

MS. WALLIS: You are right.

You have to be convinced --

QUESTION: By somebody --

MS. WALLIS: By somebody that the schools are, in fact, equal --

QUESTION: Contrary to the views of the District Court.

MS. WALLIS: No.

QUESTION: I mean consistent with the views of the District --

MS. WALLIS: The District Court found that the schools were equal only in one respect.

In Sweat v. Painter, the Court hypothesized that the Jim Crow Law School and the University of Texas would be equal in that particular way and found that all these other characteristics, these what they called intangibles, were terribly important in determining whether the Equal Protection standard was met.

We have all those findings. So I am not asking you to overrule the findings of the District Court. I am just asking you to apply Sweat to this case.

If you look at Footnote 1, the District Court confused Brown and Sweat and said in order to apply Sweat you had to show a feeling of inferiority.

That's just wrong, under the law. That's why the District Court didn't make use of the findings. But the findings are there.

We are not asking you to make any new findings that aren't in the record.

Now, in addition to that, the Court in both Sweat and McLaurin was concerned, I believe, with individuals who were destined for leadership positions in the community. And the Court in both of those cases said that the free exchange of ideas with members of the dominant society is a very important interest, in addition to the intangibles like prestige of the faculty and prestige of graduates, etcetera, etcetera, that just the opportunity for the free exchange of ideas is essentially important to those individuals who are going to take on leadership positions in the community.

And, to that extent, I am arguing that sex-segregated education is hardest to sustain when you are talking about the most talented young women in the public school community, because in that context you are talking about girls who are going to be lawyers and doctors and judges and all of those things. And it is most important for them -- just as important for them to graduate from a school where they will have an entre to alumnae who are in leadership positions in those fields of endeavor.

It is also important for them to go to school with the boys who are likewise going to be the leaders in all of those fields of endeavor, perhaps in greater numbers for some time to come, that cutting off those contacts does a great disservice to these particular women.

Now, with the Court's permission, I would like to reserve the rest of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Ms. Wallis.

Mr. Gilbert.

ORAL ARGUMENT OF ALAN H. GILBERT, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. GILBERT: Mr. Chief Justice, and may it please the Court:

This is not a case of an invidious sex-based discrimination.

I would point out to the Court the finding which was made by the District Court, Finding Number 18, on page 43A of the petition, that Girls High School, the school which is available to the Petitioners, quote, "has fulfilled the vision of many Nineteenth Century educators, both men and women, by becoming the equal of Central in preparing its students for college."

We are talking about a high school here, Your Honors, especially an all-academic senior high school, the function of which is to prepare students for college. Girls High School

and Central High School are equal in that regard.

The District Court, apparently, thought there was a constitutional right to a coeducational academic education, a right which I do not think this Court has ever found, and said that it did not have to take into account the existence of Girls High School and that Petitioner's desire to attend Central High School was sufficient basis for its decision, though it did find that under the rational relationship standard the school district's policy passed constitutional muster in the words of the District Court.

Your Honor, essentially, Girls High School is just as good as Central High School. The only finding in the record -- and it wasn't a finding that was a basis for the District Court's decision -- concerns the science facilities, Your Honors, and that finding, apparently, is based on a statement by a student who was a witness for the Petitioners, that Central has a student-built cyclotron and a classroom planetarium. There is nothing else in the record concerning the science facilities. And in the record is the very extensive science program available for the females at Girls High School. The course list which is in the record in Exhibit D2 is quite extensive, really more extensive than that available at Central High School.

Essentially, we are dealing with two institutions which are equal in preparing students for college. At one

point, the District Judge said they were comparable. Under either statement of the comparison between the two schools, we are satisfied that they are substantially equal.

QUESTION: The Court of Appeals didn't disturb that, I take it?

MR. GILBERT: No sir, it did not, Your Honor.

QUESTION: Did they affirmatively agree with it?

MR. GILBERT: Yes. In the statement of the case by the Court of Appeals, the Court of Appeals summarized the party's position that the schools for boys and girls are comparable in quality, academic standing and prestige. That's at 5(a) of the petition.

QUESTION: Comparable is quite a different word from identical. You can compare anything, or any two or more things.

MR. GILBERT: We are not arguing that the two institutions in question are identical. Obviously, they are two separate institutions.

QUESTION: One for women and one for men.

MR. GILBERT: That's correct, Your Honor.

That really is about the only difference, Your Honor, in the two schools.

QUESTION: Well, there is an additional science teacher at Central, isn't there?

MR. GILBERT: And there probably are --

QUESTION: The record does show that, doesn't it?

MR. GILBERT: I think that was in the interrogatories.

QUESTION: And there is no compensatory additional member of the faculty at Girls?

MR. GILBERT: I think the record does show that, Your Honor, but there are additional --

QUESTION: And there is a finding that, in scientific facilities, at least, Central is superior.

It still means they are comparable. One is superior and the other is inferior, and they are comparable.

MR. GILBERT: Your Honor, as I suggest, that finding is not of particular relevance in this case because --

QUESTION: Very relevant. First of all, we have to know what kind of a case we have here.

MR. GILBERT: You have a case of equal schools, Your Honor.

QUESTION: That's not what Finding 26 indicates, and Finding 26 was left undisturbed, as were all the other findings, by the Court of Appeals. Am I wrong about that?

MR. GILBERT: You are right, Your Honor, except for Finding 51, which I think was, while not specifically reversed by the Court of Appeals, that was the finding on the academic quality of the other high schools, the comprehensive high schools, we alleged to the Court of Appeals that the other high schools have within their programs, academic

programs, if you will, along with the general course of study for students who are not interested in going to college, but that these programs, these academic programs were the equal of Central and Girls High School in preparing students for college.

And the statement of the Court of Appeals was that the comprehensive schools "provide a wide range of courses, including those required for college admissions and offer advanced placement classes for students who are intellectually able to progress at a faster than average rate."

That's at 2(a) and 3(a) of the petition. And it is pointed out by the petitioner that any petitioner who, upon not desiring to go to Girls High School went to a comprehensive high school, George Washington High School, and was able, from that school, to go to the University of Pennsylvania and skipped her senior year in high school.

QUESTION: These terms.

MR. GILBERT: Yes, Your Honor.

QUESTION: Now, the term "comparable" is used throughout this record. Is it used in the sense of things which are subject to being compared, or does it mean -- Is the word used in the sense that the intelligence of women is comparable to the intelligence of men, that they are essentially the same, that there is no difference?

MR. GILBERT: I think they are essentially -- Used

in that sense, comparable in this case means essentially equal.

QUESTION: Is comparable better or less than separate but equal?

MR. GILBERT: For purposes of this case, Your Honor, I think it is the same.

QUESTION: It is the same as separate but equal.

MR. GILBERT: Comparable -- I think that perhaps the Court, having used equal in the one finding, Finding Number 18, the District Court, that is, Your Honor, probably should have used it throughout consistently. However, it did make the finding that the two schools are equal in preparing students for college, irrespective of whether Central or Girls may have one or more teachers in a particular department -- They are not the identical school.

QUESTION: But they did say, specifically, that the chemistry, physics, etcetera, was below.

MR. GILBERT: No, I don't think so, Your Honor.

QUESTION: They said science was below.

MR. GILBERT: It said scientific facilities. The scientific program, Your Honor, is quite a different story. As a matter of fact, the finding of the District Court was that the courses at the two schools are comparable and of equal quality, at that is --

QUESTION: Except, they also said the science

department was less.

MR. GILBERT: I don't mean to be argumentative, Your Honor, but --

QUESTION: Well, if you are going to take those findings, you have to take them all.

MR. GILBERT: That's not the finding, Your Honor. The finding is that --

QUESTION: Well, what about the library?

MR. GILBERT: -- scientific facilities, not science program or courses. Science program or courses at Girls High may be superior to that at Central High School.

QUESTION: I am not interested in that. I am interested in what they found to be inferior, and they did find it to be inferior.

MR. GILBERT: Scientific facilities, Your Honor, not science program.

QUESTION: Well, that's inferior.

MR. GILBERT: The finding was on scientific facilities.

QUESTION: Well, why is it separate but equal?

MR. GILBERT: Why are the schools equal, Your Honor?

QUESTION: Why are they separate?

MR. GILBERT: Your Honor, the school district here is pursuing a respected pedagogical method, something has been stipulated to by the petitioner. It is pursuing a

policy in its academic -- the high schools are providing an option for students. They can either take -- go into the comprehensive high school and take the academic program there and they are coeducational, or they can go to a single-sex school.

There is evidence in the case, not just stipulations, Your Honor, of recent studies that were done suggesting and supporting Dr. James Coleman's study that coeducation may be inimical to academic achievement and social adjustment.

With that kind of evidence in the case, Your Honor, I think it is perfectly reasonable for a school district to make this option available. It is, I think, highly relevant --

QUESTION: I don't understand the option. There are two schools that concentrate on high level of academic training, higher than any of the other schools in Philadelphia, right?

MR. GILBERT: I don't agree with Your Honor's assumption there. I think that --

QUESTION: Well, what is all this noise about Central High being so great?

MR. GILBERT: Well, Your Honor, I think that the record demonstrates that --

QUESTION: I thought Central High was one of the greatest high schools in the country. That's its reputation.

MR. GILBERT: Your Honor, I am not going to --

QUESTION: And I might also add I've never heard of Girls High.

MR. GILBERT: You may have heard of it under the name Philadelphia High School for Girls. Probably the name "Girls High" has become a pejorative term for the petitioners in their brief to this Court. I think it is a rather proud name. There is in the record that community leaders, including

QUESTION: Why deny it to the boys? If Girls High is so great, why not allow the boys to go there?

MR. GILBERT: Because, Your Honor, there are relevant, and I think highly relevant, pedagogical reasons for making the option available of single-sex education. It is something which this record demonstrates is relevant to the school district's basic purpose of providing educational opportunities and the best education available to parents and students and educators who may wish to avail themselves of that option.

QUESTION: The entry requirements for the two schools are quite a bit different from other schools, and doesn't Philadelphia frankly anticipate a higher grade of student in the two schools, or not?

MR. GILBERT: Your Honor, the pertinent comparison would be between Central and Girls High School and the academic students at the comprehensive high schools, and no

such study was done. A study was done and there was evidence comparing the comprehensive high schools, in toto, to Girls.

QUESTION: Let's put it this way. If the education at the boys' school and the girls' school in Philadelphia, these two schools we are talking about, if the education at those two schools is better, generally, than in the comprehensive high schools, the only way that a young man or young girl can get that brand of education is by going to a single-gender school.

MR. GILBERT: Your Honor's major premise is the one which I would not agree with.

QUESTION: I didn't put it as a premise. I said if.

MR. GILBERT: If that were the case, Your Honor, then I would agree that there would probably be the two schools to go to.

QUESTION: And so that on that, if you want to call it, a premise -- On that premise, the only way a person can get that level of education is by going to a school, either all boys school or all girls school.

MR. GILBERT: That would be correct, Your Honor.
The -- Excuse me, Your Honor.

QUESTION: I take it that part of the argument you describe is the freedom of states and their subdivisions to experiment in educational areas.

MR. GILBERT: Yes, Your Honor, the decisions of this Court in various cases, as recently as San Antonio Independent School District v. Rodriguez, stated that it is important for the local educational bodies to have the ability to be flexible in its pledge to educational methodology, as long as there is no inequality, no invidious discrimination between individuals. We contend --

QUESTION: How long has this experiment of separate races been going on in Philadelphia?

MR. GILBERT: Separate sexes, Your Honor?

QUESTION: Yes, sir.

MR. GILBERT: These two schools have been in existence for a number of years.

QUESTION: So it is not an experiment, is it?

MR. GILBERT: This particular mode of education, I think, is being reevaluated and reexamined.

As recently as last month, in a study which I cited in the brief, educators have come out with a conclusion that it may be better for students to be educated at single-sex schools. And just because the policy evolved in the Nineteenth Century, as we admit that it did, does not mean that educators cannot reexamine it and experiment again with it.

QUESTION: I suppose, for example, in the field of corrections in this country, we've been in the business, now, for nearly 200 years, the states are still experimenting and

there is a widespread view that we haven't discovered the right solutions yet. So there is nothing wrong with experiments that go along for 100 years or more, is there?

MR. GILBERT: I would agree, Your Honor, and that may be particularly true in education. Educators have an ability to reexamine their prior methodologies and say that they would like to try a different type of education, maybe this would be better.

QUESTION: Does the record tell us when the Philadelphia School Board last reexamined this question of whether there should be separate schools for the two?

MR. GILBERT: Your Honor, the record doesn't tell us that, but the School Board, every year, passes on the budget for the schools.

QUESTION: But does it tell us whether the issue has ever been presented to the Board as to whether or not one or both of these schools should be made coeducational?

MR. GILBERT: Well, Your Honor, the Board directed the defense of this case.

QUESTION: Other than the fact that they authorized the defense of the case?

MR. GILBERT: Not on the record, Your Honor, but --

QUESTION: So the record doesn't tell us why the Board has adopted this policy, does it? Other than somebody sued the Board.

MR. GILBERT: The then Superintendent of Schools, the Chief Executive Officer of the Board, stated in his deposition testimony that the advantage of the two schools -- and this is in the record in d(3) -- as an educator, he explained that the -- as for parents and students -- providing for parents and students an option, the parents and students that prefer that kind of atmosphere -- speaking of single-sex schools -- "I think we can do well to provide that for those who want the opportunity."

So it is something which the educational people in the school district have been examining throughout.

I am sure there is debate even in the school district of the merits of coeducation or single-sex. When you get educators together there is a lot of controversy.

QUESTION: I take it you are tacitly conceding that you must justify what you are doing here, to some extent.

Let's assume that we accept your position that the two schools are, for all intents and purposes, equal, and that there is no substantial difference between the two in terms of educational opportunity. Do you say the case is automatically over then? Even if that's true, then nevertheless there is a gender-based classification here and people are sent to one school or another based on their gender.

Do you think the state must justify -- Even if the schools are equal, must the state justify the

classification to any extent? Or do you say well, that's the end of it?

MR. GILBERT: I think the burden -- I think the school district is not particularly concerned with who had the burden of proof in this matter, nor was it going to stand on that.

QUESTION: Well, I am just asking: Must there be some justification for the use of it? The use of the gender classification.

MR. GILBERT: To show that it is not arbitrary or capricious, I think that is the extent of the burden that we have, and I think we showed that. This is not an invidious case. I don't think we had to go any higher than that. We did go higher than that. We showed that the classification is highly relevant.

QUESTION: How convincing does your submission have to be that there are solemn educational reasons for having separate education for boys and girls?

MR. GILBERT: I think that all we had to show was a rational basis. It was done in Williams v. McNair on stipulation.

QUESTION: Just the lowest level of equal protection.

MR. GILBERT: That's what we had to show because there is not invidious discrimination here. Perhaps, as this Court has recently stated in Craig v. Boren, that where there

is an invidious discrimination, perhaps there is a higher standard, but this is not that case, Your Honor.

vant precedent in this particular --

QUESTION: Do you say if there were five experts on each side of this issue, five saying there was a solid basis for differential education, and five of them saying there is no advantage whatsoever, and the evidence was equally balanced, you should win?

MR. GILBERT: Yes, Your Honor.

QUESTION: Well, let's suppose there were five one way and one the other. Is not the trier of facts totally free to accept the one and reject the five, if he wants to?

MR. GILBERT: I think what the trier of facts was to determine was whether there would be reasonable basis for this case, not whether there is a preponderance of the evidence in an equitable matter or beyond a reasonable doubt in a criminal matter. I was just trying to show that we are not acting arbitrarily or capriciously. I think we did that.

The District Court said we did that by virtue of the stipulations. We can add in there the testimony and exhibit of Dr. Jones who formulated the study which really proved Dr. James Coleman's hypothesis concerning single sex in coeducation. There is a controversy here, Your Honor.

QUESTION: Mr. Gilbert, 7% of the students who qualify for admission to one of these two schools -- Does the

record tell us what percent of the students actually go to these schools? How many of those who qualify elect to go to one of the single-sex schools and how many elect to go to a coed school?

MR. GILBERT: I don't think the record shows us that, Your Honor.

QUESTION: Doesn't the record show that both of these schools are somewhat underpopulated?

MR. GILBERT: At the time of this litigation, Your Honor, they were.

QUESTION: As contrasted to most of the other schools in the Philadelphia system.

MR. GILBERT: Yes. At the time of the litigation, these two schools had less than capacity enrollments. That's in the record, Your Honor, and I don't --

QUESTION: From that, we could neither conclude that some persons were passing up the opportunity, nor that Philadelphia lacks exceptional people, could we? We can't conclude anything about it.

MR. GILBERT: I wouldn't conclude anything from that, Your Honor.

I would respectfully submit the school district's position, as presented in its brief and in answers to the questions, and pray that this Court affirm the judgment of the Court of Appeals for the Third Circuit. Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Gilbert.

Ms. Wallis, do you have anything further?

MS. WALLIS: Yes, I do, Your Honor.

MR. CHIEF JUSTICE BURGER: Very well.

REBUTTAL ORAL ARGUMENT OF SHARON K. WALLIS, ESQ.,

ON BEHALF OF THE PETITIONERS

MS. WALLIS: For one thing, I would like to attract the Court's attention, at some point, to the Exhibit A in our Reply Brief which excerpts all the high school related information from one of the -- from P12.

I think you will find it gives you some overview and some information that will be helpful in considering this case.

Very briefly, the District Court reviewed every single one of the justifications that was proffered here, and found that they were without merit with respect to this particular case.

The testimony was presented of two sorts. One of Dr. Jones' studies indicated, at best, that some male students may to some slight extent benefit from single-sex education. That was based on a study --

QUESTION: May I ask you the same thing I asked your adversary. Suppose, contrary to your submission, we conclude that the two schools were identical, or equal or substantially equal, but nevertheless there is a gender-based classification

here and we have to get to the question of separate but equal. Do you think the city must justify the gender-based classification, at all, on the assumption that the two schools are equal?

MS. WALLIS: I think they must justify it.

QUESTION: At what level, if there is such a thing as different levels?

MS. WALLIS: Well, I think that what this Court has said, really, is that you must scrutinize the justification.

Let me give you an example. They purported to prove -- and there does seem to be some evidence to this extent -- that some female students benefit from single-sex education, because they are afraid to express themselves in the presence of boys, or whatever it may be.

Let's assume for present purposes that that evidence is valid. You cannot use that argument to sustain the continued existence of Central as an all-male institution, because what you are doing is excluding female students who may not belong in that category, like Susan Vorchheimer who, obviously, is able to excel in a coeducational atmosphere.

QUESTION: If the city submits, in good faith, and it is their fundamental belief that separate education gets better educational results, suppose they just submit that, and they say that's the reason for it and there are

some bases in the literature, among the experts, for that belief. How closely must we scrutinize that submission?

MS. WALLIS: You have to examine it. You have to examine it first to say is it really relevant to their goals, now. And that's what the District Court did.

If it is true that some female students benefit from single-sex education, that's a reason for having a school for female students. It is not a reason for refusing to admit female students to Central High School if they are, in fact, female students who would benefit from Central.

So, you have to examine that.

Number two. They say there are educational --

QUESTION: Let me just stop you there.

Could you validly say that those female students should be given the privilege of attending an all-female school and yet males might feel the same way and they should not be given the privilege of attending an all-male school?

How could you do -- In other words, you are suggesting you could have coeducational in female but you can't have male and female?

MS. WALLIS: Well, that's another point that I am getting to.

QUESTION: Well, it is directly responsive to your point that that evidence is not relevant.

MS. WALLIS: The question is: In what way would --

Suppose we are successful in this lawsuit and female students are admitted to Central High School. Why would a male student want to go to Girls High, since he already has a coed academic school that he can go to? That's Central High School.

Now, the next issue is, well, should he be able to go to a single-sex school? He can also go to a single-sex school because the school district still has Thomas Edison which is a single-sex comprehensive school. So he can go to an all-boys school, too, which is the reason of their preferred justification. And the District Court said they say it is freedom of choice.

It can't be freedom of choice. That can't be the real reason because they don't offer choice to students who are interested in academic education, and besides that --

QUESTION: How do you know that that isn't the real reason? Do you psychoanalyze people to find that out?

MS. WALLIS: No. I think you have to address your good judgment to it.

QUESTION: Would you allow some good judgment in the school board to say that this subject is in dispute. It has been in dispute for a couple of hundred years, or at least one hundred, and we are going to try the general run of schools coeducational, but we are going to try two special schools, one for boys, one for girls. Anything irrational about that?

MS. WALLIS: I am not suggesting in this argument that they couldn't do that. They have two comprehensive schools, Edison and Kensington. They may maintain those schools under what we are asking for here, as single-sex schools, as options for those students who would choose single-sex education.

What we are saying is that you can't take, number one, the best school in the system. And, number two, you can't take the only academic schools and make them entirely single-sex. That's the problem here, that students who choose academic schools are not given a choice. And that's why you can't say this is a freedom -- this is in order to provide freedom of choice -- that's what the District Court said -- because you are only providing freedom of choice for the people who choose a single-sex academic high school. You don't have any idea who would choose a coed academic high school because you don't offer that alternative.

QUESTION: That statement that you've just made clearly responds to Mr. Justice Marshall's question that separate but equal is unconstitutional. The statement you've just made.

MS. WALLIS: In this case, is what I am saying.

But I haven't said, and I don't think I have to say, in this case, that it would not be permissible for the school district to maintain single-sex schools, and they do have two

others, as well as a female school, if they could justify those. And the only way to justify them on the theory that they are based on freedom of choice is to show that a full range of choices is generally available, which is not the case here.

QUESTION: Ms. Wallis, I notice that you haven't made your statutory argument, nor, indeed, did Mr. Gilbert. You waived it, or we didn't give you an opportunity to, or the time limitations didn't?

MS. WALLIS: Do you want me to respond?

QUESTION: No. I just want you to -- Why didn't you?

MS. WALLIS: The reason I didn't was -- There are two reasons. One, I think that the constitutional argument is much narrower. If you decide the case on the statute, in the only way that would avoid the constitutional argument, then you must decide that all schools must be coeducational, because that's what the statute must say, and I don't believe that -- that's broader than what -- the relief that we are asking for in this case, and therefore I wouldn't urge it on this Court.

And I think there is a Section 5 problem which is raised by the United States which I think is much more difficult, again, than the constitutional problem here, so I think it only creates difficulties. It is better to decide it on the narrower constitutional ground.

MR. CHIEF JUSTICE BURGER: Very well.

The case is submitted.

Thank you, counsel.

(Whereupon, at 3:10 o'clock, p.m., the case in the above-entitled matter was submitted.)