

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WOMEN PRISONERS OF THE DISTRICT :
OF COLUMBIA DEPARTMENT OF
CORRECTIONS, et al., :

Plaintiffs : Civil Action No. 93-2052 (JLG)

v. :

DISTRICT OF COLUMBIA, et al., :

Defendants :

FILED

JUL - 5 1994

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

DEFENDANTS' TRIAL BRIEF

INTRODUCTION

Plaintiffs have invited this Court to replicate the holding in Klinger v. Nebraska Dep't. of Corrections, 824 F. Supp. 1374 (D. Neb. 1993). See Plaintiffs' Proposed Conclusions of Law and Pretrial Brief. The Court should decline the invitation.

Klinger's determination that the female and female prisoners in that case were similarly situated omitted consideration of the inherent differences between male and female prisoners, which is vital to the "similarly situated" inquiry. "Parity" scrutiny, as applied in Klinger, is dubious as a matter of equal protection jurisprudence and utterly contrary to common sense. It completely usurps the discretion which federal courts have traditionally reserved to prison administrators, so as to permit them to tailor programs and services which, they believe, meet the unique needs of their inmate populations. This Court must reject Klinger's

approach to equal protection and Title IX ¹/ claims.

ARGUMENT

I. THE WOMEN PRISONERS IN THIS CASE ARE NOT SIMILARLY SITUATED TO THE MALE PRISONERS TO WHOM THEY HAVE COMPARED THEMSELVES

The Court's consideration of the equal protection claims begins with a threshold inquiry. Before any equal protection scrutiny is appropriate, the Court must determine whether the women prisoners at the Correctional Treatment Facility ("CTF") are "similarly situated" to male prisoners at Medium Security Facility, Occoquan Facility and Central Facility ("the medium facilities") and whether the women prisoners at Minimum Security Annex ("Annex") are "similarly situated" to the male prisoners at Minimum Security Facility ("Minimum"). These are comparisons chosen by the plaintiffs. If the Court finds that the groups of male and female prisoners compared are not similarly situated, its equal protection and Title IX analysis is complete and judgment must be entered for defendants on these claims.

If the Court finds that one of the groups of male and female prisoners compared is similarly situated, it must then determine whether the needs of women prisoners are being met in a manner which is comparable to the way in which the needs of male prisoners are being met. If the Court finds that these needs are being met

¹ Title IX of the Educational Amendments of 1972, 42 U.S.C. § 2000d-7.

in such a manner, its equal protection analysis is at an end and judgment must be entered for defendants on these claims. If the Court finds otherwise, it must apply rational relationship scrutiny to determine whether the failure to provide programs and services in a comparable manner violates the equal protection guarantee of women prisoners. ^{2/}

Even if the Court were to look only at custody level, length of sentence and purpose of incarceration, which it should not do, the evidence clearly shows that the male and female prisoners are not similarly situated in this case. If the Court reaches a contrary conclusion, it is equally clear that there is no disparity in overall treatment between the male and women prisoners, since their treatment is generally equivalent. Defendants respond to the unique needs and characteristics of women prisoners in a manner which is equivalent to the way in which they respond to the unique needs and characteristics of male prisoners. They are able to do this despite the gender-segregation which exists in the prison system, a separation which plaintiffs do not challenge. ^{3/}

² See infra part IC.

³ Plaintiffs' Pretrial Brief, at 20, suggests that the gender-segregation is evidence of the District of Columbia's intent to discriminate against women. There is no facial gender discrimination as a matter of law in this case, because men are included in the set of persons denied access to certain programs at both the three medium facilities and at Minimum. See infra note 15 (discussing lack of facial gender discrimination as a matter of law where men included in group denied benefits) and Defendants' Trial Exhibit 130 which lists the programs females receive at CTF and males at Central, Occoquan and Medium Security Facilities and at Minimum and Minimum Annex. Additionally, Defendants' Trial Exhibit 131 indicates that female inmates have significantly greater
(continued...)

³(...continued)
participation in programs than males at all the facilities.

There is also no evidence of "invidious" discriminatory intent in this case. If there is any differential treatment afforded to male as compared to female prisoners, which defendants deny, it is based not on traditional notions of women's place in society, but on inherent differences between these populations. See infra part IB.

Further, plaintiffs have not challenged their gender-based segregation from male prisoners, but, rather, strongly assert their need for different and unique programming and services due to their own special characteristics. Much of this evidence comes from the plaintiffs themselves, in support of their Eighth Amendment claims. With this evidence in mind, plaintiffs can hardly contend they are treated differently solely on the basis of their gender and not for other reasons. Cf. Pitts, 866 F2d at 1458 (stating that because challenged differential treatment of inmates "responds directly" to segregation by gender "strongly suggests that the [challenged treatment] does not employ gender as an inaccurate proxy for other, more germane bases of classification") (quotation marks and citation omitted).

Although administrative convenience or cost alone cannot justify the differing treatment of men and women under equal protection principles, such factors are, obviously, proper considered in deciding whether the differing treatment amounts to invidious discrimination; the caselaw supports this conclusion. See, e.g., Pitts v. Thornburgh, 866 F.2d at 1461-63; Rostker, 453 U.S. at 81-82; Smith v. Bingham, 914 F.2d 740, 742-43 (5th Cir. 1990).

"Invidious," according to the Webster's New World Dictionary, (Modern Desk Ed. 1979), means "such as to excite ill will; giving offense, as by discriminating unfairly." In gender discrimination cases, the term "invidious" has been used to describe differences in treatment which reflect outmoded conceptions of the proper roles of women and men in contemporary society, usually suggesting an insult toward women. Id. at 72-74; Schlesinger, 419 U.S. at 506-10.

The sizes of the inmate populations at the facilities are different, and the characteristics and needs of the inmate populations at the facilities are different, and the average lengths of stay for inmates at CTF and the medium facilities are different, it is entirely appropriate (and not insulting or demeaning to women) to establish different priorities for programming and services at these institutions. It is entirely
(continued...)

Even if the Court finds that the male and female prisoners are both "similarly situated" and receive differential treatment, any disparity is rationally related to one or more legitimate interests of the District of Columbia, such a security or safety.

A. Whether two groups are "similarly situated" is a question of factual circumstances, not one of political or social preferences

Sometimes the grossest discrimination can lie in treating things that are different as though they were actually alike

Jenness v. Fortson, 403 U.S. 431, 442 (1971).

It is clear that equal protection principles prohibit the District of Columbia from making overbroad generalization based on sex which are entirely unrelated to any differences between men and women or which demean the abilities of or the social status of women. See Parham v. Hughes, 441 U.S. 347, 354 (1979). Where men and women are not similarly situated, however, and differences in their treatment are true differences, reflective of their situations, a challenged classification which responds to those differences is upheld, without receiving equal protection scrutiny. See id. at 354.

Thus in Parham, the Supreme Court upheld a Georgia statute barring fathers of illegitimate children from maintaining wrongful

³(...continued)
contrary to the evidence to suggest that there is anything invidious or discriminatory about the manner in which women prisoners are treated by the defendants.

death suits for the loss of their children, based on the reality that the identity of an illegitimate child's father is often unknown and may be difficult to determine after the child's death. The message of Parham is clear: if there are significant real differences between the sexes, those differences may make a comparison between the sexes inappropriate, even if some may find the result offensive.

The case which controls this Court's "similarly situated" analysis follows Parham precisely -- Pitts v. Thornburgh, 866 F.2d 1450 (D.C. Cir. 1989). In that case, plaintiffs, female prisoners of the District of Columbia sentenced to terms of more than one year, appealed from a district court grant of summary judgment to defendants. They alleged that by housing female prisoners convicted of non-federal crimes in a federal prison far from the District, in Alderson, West Virginia, while incarcerating those who, they contended, were similarly situated male offenders in local facilities, the United States and District of Columbia governments were violating their equal protection guarantees, solely on the basis of their sex. Id. at 1451-52. Like the plaintiffs in this case, they did not challenge the District's policy of segregating facilities by gender. Id. at 1458.

The Court of Appeals affirmed this Court's award of summary judgment to defendants, holding that the male and female prisoners which the plaintiffs compared were not "similarly situated." See

id. at 1458-59. ⁴/ The court stated that:

[t]he fact that District prison officials must make decisions within a larger context that includes gender-based separation bears upon and in part justifies the policy itself. In a variety of contexts, the existence of a classification which employs gender is justified when it is constructed with regard for some more pervasive institutional or social differentiation between the sexes. As the late Justice Stewart characterized the issue, members of different sexes, unlike members of different races, can under certain circumstances be situated differently for constitutional purposes. "[I]n certain narrow circumstances men and women are not similarly situated; in these circumstances a gender classification based on clear differences between the sexes is not invidious, and a legislative classification realistically based upon those differences is not unconstitutional."

Id. (some emphasis added, citations and quotation marks omitted).

The court concluded that

the classification at issue does not use gender "as an inaccurate proxy for other, more germane bases of classification," Craig v. Boren, 429 U.S. [190, 198 (1976)], but rather responds to and entirely correlates with the more pervasive gender classification existing in both federal and state prison systems. Cf. Dothard v. Rawlinson, 433 U.S. [321, 335 (1977)], ("A woman's relative ability to maintain order in a male, maximum security, unclassified penitentiary of the type Alabama now runs could be directly reduced by her womanhood.").

Id. at 1459.

Pitts cites two significant Supreme Court cases -- Rostker v.

⁴ It is clear that the court so held. The reasoning in the opinion, however, appears in an unusual sequence; the "similarly situated" analysis appears after the court states, in what is essentially dicta, that it disagrees with plaintiffs' equal protection contentions. Obviously, since the court found the men and women not to be similarly situated, it was unnecessary for it to reach the merits of the equal protection challenge. In any case, to the extent that Pitts's application of heightened scrutiny constitutes the holding of the case, it has been overruled. See infra part IC, (discussing Turner v. Safley, 482 U.S. 78, 89 (1987), and Washington v. Harper, 494 U.S. 210, 223-24 (1990)).

Goldberg, 453 U.S. 57 (1981), and Schlesinger v. Ballard, 419 U.S. 498 (1975). In Goldberg, 453 U.S. 57 (1981), the district court found that draft registration requirements which excluded women violated the equal protection component of the Fifth Amendment's Due Process Clause. In doing so, the court refused to consider the fact that women were not eligible for combat duty, id. at 79, which, like the gender segregation in this case, was not challenged by the plaintiffs, id. at 63. The Supreme Court reversed the district court's judgment, holding that male and female registrants were not similarly situated. It found that the differing treatment was not "the accidental by-product of a traditional way of thinking about females," id. at 74, but was merely a reflection of the fact that women were not eligible for combat duty, id. at 78. Whether the fact that women were not eligible for combat was objectionable or not was not an issue.

In Schlesinger v. Ballard, 419 U.S. 498 (1975), the Supreme Court held that male and female naval officers were not similarly situated for purposes of the Navy's so-called "up or out" promotions policy. The policy gave male officers less time than females to serve without promotion before being automatically discharged. The court opined that the differential treatment was based on the women officers' exclusion from combat and sea duty, which, like the gender segregation here, was not challenged. Id. at 508. Consequently, the Navy's differing treatment of males and females for promotional purposes was not based exclusively on gender or administrative convenience, id. at 501, 506-507, 510, nor

was it reflective of archaic and overbroad generalizations about women, id. at 508.

Parham, Rostker, Schlesinger and Pitts provide the methodology which controls the disposition of the equal protection claims in this case. The plaintiffs, however, would have this Court follow the equal protection analysis in Klinger v. Nebraska Dep't. of Corrections, 824 F. Supp. 1374 (D. Neb. 1993).

Klinger contains no "similarly situated" analysis. In lieu of the proper considerations, the court offered three superficial and conclusory observations: (1) that male and female prisoners are both incarcerated (which is a tautology), id. at 1389-90, (2) that the populations of the two chosen facilities were "roughly comparable," (which begs the question), id. at 1390, and (3) that the "purposes" of incarcerating male and female prisoners are the same (which may be said of any two prisons), id.

Most significantly, Klinger refused to consider whether there were "relevant differences between the [male prisoners and female prisoners]." Id. at 1390 (emphasis added). ^{5/} As explained, relevant differences between male and female prisoners are central to the "similarly situated" determination. See, e.g., Pitts, 866 F.2d at 1458-59; Rostker, 453 U.S. at 76-78; Parham, 441 U.S. at 354-57; Schlesinger, 419 U.S. at 506-508. The holding in Klinger

⁵ The trial judge made it clear why he wished to defer consideration of such differences to a later portion of his analysis: he believed that any such consideration would validate stereotypical notions about "appropriate" gender roles. 824 F. Supp. at 1390 & n. 20.

is entirely undercut by its omission of this vital consideration early in the opinion.

The other cases cited by plaintiffs ^{6/} do not use the Parham approach to the "similarly situated" determination. They either give scant weight to real differences between male and female prisoners, or they essentially ignore the "similarly situated" issue altogether. See, e.g., Glover v. Johnson, 478 F. Supp. 1075 (E.D. Mich. 1979); Canterino v. Wilson, 546 F. Supp. 174 (W.D. Ky. 1982); Wishon v. Gammon, 978 F.2d 446 (8th Cir. 1992); Divers v. Department of Corrections, 921 F.2d 191 (8th Cir. 1990); McKoy v. Nevada Dep't. of Prisons, 776 F. Supp. 521, 523-28 (D. Nev. 1991). The holdings in these cases are of little value in this case because of such deficiencies.

This Court must consider the effects of gender segregation on all the equal protection claims made by plaintiffs -- segregation which they do not challenge. The Court must also consider the real, non-stereotypical differences between male and female prisoners which are a reflection of their unique needs and characteristics. This is the heart of a "similarly situated" inquiry. It must focus on real and relevant differences, even if such differences are undesirable or objectionable. Whether two groups are "similarly situated" is not a political or social question -- it is a question of factual circumstances.

⁶ See Plaintiffs' Proposed Conclusions of Law.

B. The factual circumstances of the women prisoners in this case show that they are not "similarly situated" to the male prisoners

The evidence will show that women prisoners are inherently, apart from any action or inaction of defendant, different from male prisoners. These differences are a reflection of the unique needs and characteristics of these two groups. The differences require that defendants provide specific programs and services which are tailored to meet these needs. ^{7/}

Women prisoners have special security needs because they tend to be less violent, assaultive and predatory than men and thus demand greater visual supervision, with more officers supervising them both in their programs and in their industries. ^{8/} Women prisoners have special programming needs because they are more likely to be victims of past physical, emotional and sexual abuse and many of them suffer from low self-esteem and are more dependent than men. ^{9/} Women prisoners have special psychological needs because they tend to have more more acute problems regarding

⁷ The list which follows is not intended as exhaustive or fully developed. Indeed, plaintiffs put on substantial evidence of their special needs in their case and defendants anticipate offering additional evidence in theirs.

⁸ The security differential between men and women requires both single sex programming and the use of escorts in co-correctional facilities, such as CTF.

⁹ These inherent characteristics are addressed by programs in lifeskills, ETAP, violence reduction and conflict resolution, therapeutic community, as well as the provision of social workers and psychologists.

substance abuse than male prisoners and often have histories of substances abuse. ^{10/} Women prisoners have special parenting needs because many are single parents who must resume caring for their children immediately upon release and show a clear deficiency in their parenting skills. ^{11/} Women prisoners have special employment needs because, among other things, they lack support in the community and many have a history of low earnings, being on welfare and being under or unemployed prior to incarceration. ^{12/}

¹⁰ They are given a variety of substance abuse programs, ranging from short term intensive programming to intensive 18 month programs to address these needs.

¹¹ To address these needs, women inmates are provided with classes in the American Family Literacy Project where females read to their visiting children. Female inmates may also visit their sick children in the hospital which are arranged through the social workers. Females have three social workers who assist in child placement for pregnant inmates. Females have full contact visits with their children, learn coping and parenting skills in group and individual sessions with their psychologists and social workers and receive special prenatal and parenting classes on the pregnancy unit.

¹² The ETAP, lifeskills and use of social workers provided to the women responds to the problems created by their lack of support in the community. The jobs for which they are trained would allow flexible work hours which would accommodate their children's school day.

To address their specific employment needs, women receive job skills training in fields that they themselves prefer according to studies which will render them employable immediately upon release and which are resistant to economic recessions. Because female inmates tend to have shorter sentence structures, the training which they receive provides them with marketable skills during the shorter periods of their incarceration. Females receive programs such as computer literacy which can be completed quickly as opposed to apprenticeship programs which require six years to complete. Moreover, females receive programming which will render them employable in the District of Columbia market, which emphasizes office support, culinary and retail services and printing. The programs offered female inmates to render them employable in this
(continued...)

The unique needs of prisoners make them inherently different from male prisoners, a position which has not only been conceded by plaintiffs but advocated by them. The women prisoners are, therefore, not similarly situated to the male prisoners whom plaintiffs have chosen for comparison both as a matter of fact and as a matter of law.

C. The custody level, sentence structure and purposes of incarceration of the women prisoners shows that they are not "similarly situated" to the male prisoners

Plaintiffs ask the Court, in reaching its "similarly situated" finding, to look only at such broad factors as comparable custody level, sentence structure and purposes of incarceration. See Plaintiffs' Pretrial Brief at 9-13. Were the Court to follow this suggestion, the result would be an improvident departure from established principles of equal protection, which, at most, would permit the Court to consider these factors as several of many. Defendants would welcome a consideration of these factors, among the others already discussed, however, because, like the other factors, they show that the male and female prisoners are not similarly situated in this case. ^{13/}

¹²(...continued)
market include programs such as typing/word processing, computer literacy and docutech, graphic arts and printing. Boilerhouse repair, farming and other programs available to some men would not meet the special needs of female inmates.

¹³ Although the Court should also consider the factors already discussed, even if the Court were to focus solely on the broad factors discussed in this section, it is clear that the men and women prisoners are not similarly situated.

T

In the leading prisoner gender discrimination cases, the plaintiffs did not challenge gender-segregation. See, e.g., Glover v. Johnson, 478 F. Supp. 1075; Pitts v. Thornburgh, 866 F.2d 1450. The same is true here. Instead, the plaintiffs have demanded programs, services, or conditions which they contended were available solely, or in a more extensive manner, to prisoners of the other gender. Plaintiffs in these cases, however, have not been permitted to select as a comparison group the prisoners in one or more facilities who did not comprise the full spectrum of prisoners of the other gender having the same custody classifications or sentences as the plaintiff class. But see Klinger, 824 F. Supp. 1374. Rather, the courts in these cases required that the plaintiffs compare themselves to prisoners of the other gender in all facilities under the jurisdiction of the defendants which housed prisoners of comparable custody classification. See, e.g., Glover, 478 F. Supp. at 1076; Pitts, 866 F.2d at 1453; Canterino, 546 F. Supp. at 206; McKoy, 776 F. Supp. at 533. The major exception to this rule is Klinger.

T

The Klinger plaintiffs selected a population of men which excluded minimum-custody prisoners from comparison with the plaintiffs, who were women of all custody levels. 824 F. Supp. at 1381. Plaintiffs here have compared female prisoners of minimum- and medium-custody levels at CTF to male prisoners at Medium (low-medium), Central (medium-medium) and Occoquan (high-medium) (the "CTF/medium facilities comparison"), and female prisoners of minimum-custody level at Annex to male prisoners of minimum-custody

level at Minimum (the "Annex/Minimum comparison").

As to custody level, the evidence has shown that the CTF/medium facilities comparison is inappropriate. The CTF houses minimum, medium and maximum female inmates. The medium facilities do not include all or even any minimum- or maximum-custody men. What's more, the medium facilities do not even include all the medium-custody male prisoners. ¹⁴/ These men, like the women at CTF, are denied access to many of the programs and services available to the men at the three medium facilities. The evidence will also show that the Annex/Minimum comparison only appears to be appropriate because both male and female prisoners cohabit the same facility. The comparison, however, is difficient in the same way as the CTF/medium facilities comparison -- not all minimum security men are housed at Minimum. The missing men are housed at CTF, where they, like the women at Annex, are denied access to certain programs and services available to the men at Minimum.

More importantly, the evidence will show that the classifications of women at Annex are vastly different from those of men at Minimum. Classification is the most important aspect of determining the proper mix of programs and services for an inmate. The Court should consider classification, along with custody, length of sentence and purposes of incarceration, because it directly reflects the genuine needs of the population. Custody level, medical, psychological and social needs, vocational and educational requirements, and prerelease factors all contribute to

¹⁴ Some of these men are at the Modular Facility and CTF.

classification. As the evidence will show, the classification of women at Annex is vastly different from that of men at Minimum.

Finally, the Annex/Minimum comparison is inappropriate because the purposes for which men are incarcerated at Minimum are different from the purposes for which women are incarcerated at Annex. Accordingly, even if the Court follows plaintiffs' suggestion to base its "similarly situated" finding upon a few general criteria, it should still find that the male and female prisoners chosen by plaintiffs are not similarly situated.

D. The women prisoners in this case are not similarly situated to the male prisoners to whom they have compared themselves

Plaintiffs would like very much for this Court to follow most every facet of the Klinger decision. See Plaintiffs' Proposed Conclusions of Law and Pretrial Brief. They clearly believe that the facts of the two cases are similar. To be fair, the facts are, similar in one respect: the plaintiffs in both cases chose their male prisoner comparison groups very poorly. It is clear that the female prisoners in this case are not similarly situated to the male prisoners to whom they have compared themselves.

Accordingly, all of plaintiffs' equal protection and Title IX

claims must fail. ^{15/} The Court should hold (1) that the women

¹⁵ This would include plaintiffs' allegations of sexual harassment by Department of Corrections employees and male inmates is sex discrimination. Equal protection scrutiny always requires proof that the plaintiff is "similarly situated" to others to whom she desires comparison and who are, improperly, receiving better treatment. Plaintiffs do not allege, have never argued and have not offered any evidence to prove that, with regard to sexual harassment, women at CTF and Annex are similarly situated to men at the three medium facilities and Minimum. Rather, they have expressly limited their discussion of the Court's "similarly situated" determination to their claim regarding programs and services. See Plaintiffs' Pretrial Brief at 9-13.

The lack of evidence is not surprising; not one of the cases cited by plaintiffs even considered this issue. See Pontarelli v. Stone, 930 F.2d 104 (1st Cir. 1991); Starett v. Wadley, 876 F.2d 808 (10th Cir. 1989); Bohen v. City of East Chicago, 799 F.2d 1180 (7th Cir. 1986); Poulsen v. City of North Tonawanda, 811 F. Supp. 884 (W.D.N.Y. 1993). Those cases erroneously failed to require proof of the existence of and differential treatment of a "similarly situated" class. Rather, they simply missed the issue altogether or acknowledged its relevance but implicitly assumed that its proof was unnecessary. Thus, in Bohen, the court stated that "[f]orcing women and not men to work in an environment of sexual harassment is no different than forcing women to work in a dirtier or more hazardous environment than men simply because they are women." 799 F.2d at 1185 (emphasis added). Pontarelli said that "[h]ostile environment sex discrimination obtains when ... supervisors or co-workers create an atmosphere so infused with hostility towards members of one sex that they alter the conditions of employment." 930 F.2d at 112 n.14 (citation omitted).

There is no reason in law or common sense to assume that if women prisoners are victims of sexual harassment that either they are victims solely because they are women or that there are no male prisoners who are also victims of sexual harassment. Plaintiffs have not offered any justification, legal or factual, why they should be relieved of their burden of showing that the women prisoners are "similarly situated" to the male prisoners for sexual harassment purposes. Evidence of the circumstances of male prisoners is critical, since if some male prisoners also do not receive adequate protection from sexual harassment, then, as a matter of law, the failure to provide such protection could not be traced to invidious gender discrimination. Canterino v. Wilson, 869 F.2d 948; Geduldig v. Aiello, 417 U.S. 496; Jackson v. Thornburgh, 907 F.2d 194.

There is no evidence in this case to show that the male
(continued...)

at CTF are not similarly situated to the men at Medium, Central and Occoquan facilities and (2) that the women at the Annex are not similarly situated to the men at the Minimum Facility.

B. ALTERNATIVELY, THERE IS NO DISPARITY BETWEEN THE TREATMENT OF THE MALE AND FEMALE PRISONERS AS THESE GROUPS ARE TREATED IN A MANNER WHICH IS ROUGHLY COMPARABLE AND WHICH SHOWS EQUAL CONSIDERATION OF THEIR SPECIAL NEEDS AND UNIQUE CIRCUMSTANCES

Defendants are required by the equal protection component of the Due Process Clause of the Fifth Amendment to provide programs and services to women prisoners in a way which is comparable to the way in which they do this for male prisoners. If any comparison of the programs and services offered to male prisoners versus those offered to the female prisoners is warranted, the Court should review those programs and services generally. It should then determine whether the programs and services offered to the women at CTF meet their needs in a manner which is comparable to the manner in which the programs and services offered to the men at the three medium facilities meet their needs; a similar inquiry should be conducted for the women at Annex and the men at Minimum.

The judgment exercised by prison administrators in striking a

¹⁵(...continued)
prisoners are susceptible to and are victims of sexual harassment -- which might show that the male and female prisoners are similarly situated. There is no evidence to show that defendants give the male prisoners greater protection from such harassment by other inmates or by Department employees, as compared with the women prisoners -- which might show differential treatment based on gender. Accordingly, the sexual harassment claims must fail.

balance between the rights of prisoners and important and legitimate institutional concerns should be given substantial deference by the federal courts. Bell v. Wolfish, 441 U.S. 520, 547 (1978); Turner v. Safley, 482 U.S. 78. 84-85 (1987); Timm v. Gunter, 917 F.2d 1093, 1099 (8th Cir. 1990). The evidence will demonstrate that defendants provide women prisoners with programs and services that are comparable to the programs and services which defendants provide to male prisoners, taking into account the special and unique needs and characteristics of these groups and the fact that they are segregated by gender.

Defendants are not required to provide the exact same programs and services to both men and women, to the same extent, under all circumstances. Klinger essentially holds the opposite to be true. See also McKoy v. Nevada Dep't. of Prisons, 776 F. Supp. 521. Plaintiffs would have this Court use Klinger's "parity" scrutiny, comparing each and every program and service offered to male prisoners to each and every program and service offered to women prisoners to ensure precise and identical treatment of the groups.

Parity scrutiny requires the Court to ask "is the delivery of that program or service to the men group 'substantially equivalent' to the delivery of that program or service to the plaintiffs' group of women?" Id. at 1392. Greater expenditure of money due to "natural differences in the sexes or in the conditions of confinement," as well the fact that per capita expenditures for female prisoners tends to be significantly higher than for men, are unimportant. Id. If there is substantial equivalence between the

delivery of a particular program or service, there is parity; if not, then each such distinction in each and every program or service must be individually shown to "directly respond[] to and entirely correlate[] with the more pervasive gender classification existing in both federal and state prison systems." Id. at 1391.

Though Klinger paid lipservice to the notion that programs and services need to be only "roughly comparable," the holding in Klinger belies its relentless micro-scrutiny of the minutiae of prison operations. Under Klinger, if the men have a better computer system, that violates equal protection. If the men have longer hours at their law library, that violates equal protection. If the men's gymnasium is open more frequently, that violates equal protection.

Klinger totally eviscerates the deference which federal courts have traditionally given prison administrators. It substitutes the judgment of federal courts for the judgment of administrators. Parity scrutiny finds no support in the precedent binding on this Court. ^{16/} Klinger is a well-intentioned but misguided decision. Its methodology should be rejected by the Court.

Alternatively, if the Court finds that parity scrutiny is appropriate, then it should, for each program-to-program or service-to-service comparison which it chooses to make, first determine that the female group is similarly situated to the male

¹⁶ Plaintiffs suggest that parity scrutiny was applied in the Pitts case, in that portion of the court's analysis appearing in 666 F.2d at 1461-63. They are wrong. That portion of the Pitts decision was a straightforward application of heightened scrutiny.

group for purposes of each such comparison.

**C. THE ONLY SCRUTINY WHICH THE COURT
MAY APPLY IN THIS CASE IS RATIONAL
RELATIONSHIP JUDICIAL SCRUTINY**

The Supreme Court has recognized three levels of judicial review in equal protection analysis, which are, in increasing order of severity: rational relationship scrutiny, heightened scrutiny and strict scrutiny. Heightened scrutiny is frequently applied to cases of gender discrimination. See, e.g., J.E.B. v. Alabama, ___ U.S. ___, 114 S. Ct. 1419 (1994); Personnel Admin'r. of Mass. v. Feeney, 442 U.S. 256 (1979); Jackson v. Thornburgh, 907 F.2d 194 (1990). Klinger essentially embraces a fourth, even higher, parity scrutiny.

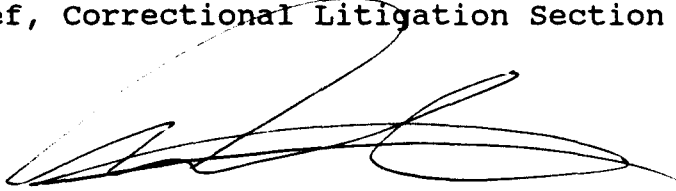
Plaintiffs urge that, assuming the Court finds that the women prisoners are similarly situated to the male prisoners and that gender-based disparities in programs and services are found, heightened scrutiny must be applied. They are wrong.

In cases dealing with prisoners, the only level of scrutiny available to the Court is rational relationship scrutiny.^{17/} The Supreme Court has made it absolutely clear that a violation of a prisoner's constitutional right never receives more than the protection of rational relationship scrutiny, even if that same violation in a non-prison setting would receive greater scrutiny. Turner v. Safley, 482 U.S. 78, 89 (1987); Washington v. Harper, 494

¹⁷ But see 42 U.S.C. § 2000bb (free exercise of religion).

Respectfully submitted,

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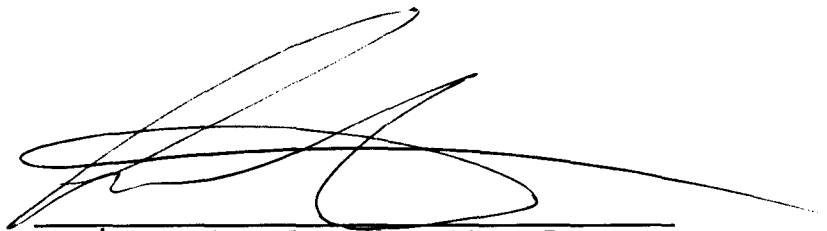
¹⁸ Defendants also note that District of Columbia Code § 24-425 does not impose a duty upon any defendant. D.C. Code § 24-425.

CERTIFICATE OF SERVICE

I certify that one copy of the attached Defendants' Trial Brief was hand-delivered on the 5th day of July, 1994, to:

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A large, stylized handwritten signature in dark ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

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