



**NACUA
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Diversity in the Face of Adversity: Managing Legal Risks of Affirmative Diversity Efforts

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Roadmap

- The Law and the Regulations
 - Title VI
 - Title IX
- Practical Application to Programs
 - Employment (Staff and Faculty)
 - Student Scholarships and Fellowships
 - Mentoring Programs/Affinity Groups



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The Law and the Regulations

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Title VI

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Title VI

Title VI prohibits discrimination “on the grounds of race, color, or national origin . . . under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d; 28 C.F.R. § 42.104.

(This rule may be, and in many jurisdictions is, supplemented by state law.)



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Title VI

- Programs that use race, color, or national origin-based classifications or conditions for participation, or as part of financial aid or employment decisions, must be supported by
 - A **compelling interest** in the educational benefits of diversity and
 - Applied in a **narrowly tailored** fashion. 28 C.F.R. § 42.104.
 - This analysis applies to *both* public and private institutions.



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Title VI

- A **compelling interest** can arise from the educational benefits of diversity. See *e.g., Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198 (2016).



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Title VI

Narrowly tailoring hinges on whether the use of race:

- is flexible;
- is of limited extent and aligned with the university's diversity interest;
- is of limited duration, including whether the institution regularly reexamines such use;
- does not impose an undue burden on the educational opportunities of those students who are not direct beneficiaries of the use of race; and
- was adopted only *after the institution reviewed race-neutral means* and determined they were unworkable to achieve the educational benefits of diversity



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Title VI

- Institutions also may not discriminate “through contractual or other arrangements.” 34 C.F.R. § 100.3(1)
- Partnering with outside organizations that discriminate on the basis of race as a pass-through can also in some cases impose legal risks on institutions.



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Title VI

- The Department of Education has advised that **mentoring and support programs** targeted to benefit specific races or national origins should be *open to all* enrolled students.



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Title VI

Case Study:

- 2012 resolution agreement with City University of New York (“CUNY”),
- OCR discussed CUNY’s Black Male Initiative (“BMI”), which intended to increase, encourage, and support the inclusion and educational success of under-represented groups in higher education, particularly Black males.
- OCR: higher education institutions may take action to promote diversity so long as the action “does not exclude students on the basis of their race or sex and does not use race- or sex-exclusive recruiting.”



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Title IX



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Title IX

- Title IX prohibits recipients from excluding participation in or denying the benefits of any academic, extracurricular, research, occupational training, or other education program or activity based on sex. See 34 C.F.R. § 106.31(a).



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Title IX

- The Title IX regulations are somewhat less restrictive than the Title VI regulations, but generally, making programs or activities sex-exclusive will violate Title IX in the same way as those activities based on race or national origin violate Title VI.



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Title IX

- The regulations also prohibit higher education institutions from providing “significant assistance” to any *outside* organization that discriminates on the basis of sex in providing any benefit or service to the recipient’s students. 34 C.F.R. § 106.31(b)(6).
- The regulations do not define “significant assistance,” “turn[s] on the facts and circumstances of each specific situation.” Factors considered include whether the university provides:
 - financial support;
 - tangible resources, such as staff, use of facilities, or equipment; or
 - intangible benefits, such as recognition or approval; and whether the relationship is occasional or temporary, or permanent or long-term.



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Title IX

- Like in the Title VI context, OCR has opined that programs intended to increase, encourage, and support the inclusion of students of a specific sex do not violate Title IX so long as it is clear that such programs are open and available to all students regardless of sex.
- *See generally* Department of Education, Office for Civil Rights, Questions and Answers Regarding OCR’s Interpretation of Title IX and Single Sex Scholarships, Clubs, and other Programs, January 14, 2021.



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Title IX

- The January 2021 Q&A is (mostly) consistent with earlier OCR guidance that colleges and universities are not precluded from having “gender themed” mentoring and support programming (designed to support and mentor women) so long as such programming is not sex-exclusive and does not use sex-exclusive recruiting.
- Including statements on promotional materials that a program is open to all is not a *per se* legal requirement, but can be helpful in proactively clarifying that such a program is not discriminatory.



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Title IX

- During the time that Betsy DeVos led the Education Department, OCR opened a number of investigations targeting programs intended to increase the participation of women and girls in institutions' programs and activities, with publicly-available resolution agreements generally memorializing institutions' agreement to operate such programs on a non-gender-exclusive basis.



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Title IX

- In addition to prohibiting discrimination in programs, Title IX also prohibits institutions from providing different types or amounts of financial assistance, or limiting eligibility for financial assistance, on the basis of sex. 34 C.F.R. § 106.37(a)(1).



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Title IX

- As to aid, an exception exists for scholarships established through “wills, trusts, bequests, or other similar legal instruments that require that the award go to individuals of a particular sex.”
- Such awards are permissible if there is not an overall discriminatory effect and they are administered pursuant to procedures that comply with 34 C.F.R. § 106.37(b)(2), often referred to as “pool and match.”



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Title IX

- Additionally, 34 C.F.R. § 106.37(a)(2) provides that, in administering financial assistance to its students, a university may not, “through listing, approving, or soliciting, assist an external organization in a manner that discriminates on the basis of sex.”
- The 2021 Q&A clarifies that when a university does promote or advertise an external scholarship, OCR expects that they will take reasonable steps to verify that the scholarship does not discriminate on the basis of sex.



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Application to Specific Contexts

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Contexts to Consider

- General Principles
- Employment (Staff and Faculty)
- Student Scholarships and Fellowships
- Mentoring Programs/Affinity Groups



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General Principles

- Promoting diversity is a lawful objective, as long as the *means* used are lawful
 - “Lawful means” may vary by state
 - “Lawful means” may vary by institution type
 - “Lawful means” may vary by context! – *Grutter* (“context matters”)
- Legal risk increases as eligibility exclusivity increases



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Employment (Staff and Faculty)

- **Before the Search Begins**

- Train search committee/hiring manager on unconscious biases and equitable recruitment and hiring practices
- Set evaluation factors and priorities
 - CAN include commitment to diversity, equity, and inclusion (“DEI”)
 - CANNOT include specific applicant identities



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Employment (Staff and Faculty)

- **Job Posting Language**

- Identify as “Equal employment opportunity/affirmative action employer”
- Express institutional commitment to DEI
- Encourage applications from specific groups (but not ONLY those groups!)
- Encourage applicants who can demonstrate a commitment to DEI in previous roles



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Employment (Staff and Faculty)

- **Diversifying Applicant Pool**

- Post broadly, including in targeted publications/with targeted associations
- Reopen search if applicant pool does not reflect diversity of relevant labor market
 - NOT looking for exact reflection
 - Search committee/hiring manager should NOT know individual applicant identities



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Employment (Staff and Faculty)

- **Review of Applicants**

- Base on qualifications (including DEI commitment) from job posting
- CANNOT include consideration of individual applicant identities
 - This is true at EVERY STAGE of the hiring process
 - This is true EVEN IF there is a federally mandated affirmative action goal for the position



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Student Scholarships and Fellowships

• Institutional Scholarship Programs

- Tie program description/purpose to educational benefits of diversity
- CAN name programs to signal DEI commitment/purpose
 - More “exclusive” the name appears, more explicit must be re: non-exclusivity of eligibility
 - “Targeted but open”
- In selecting recipients, CAN consider factors such as the following:
 - Commitment to DEI
 - Socioeconomic-related factors
 - First-generation status
 - Prior attendance at MSIs, diverse high schools



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Student Scholarships and Fellowships

• Institutional Scholarship Programs (cont'd)

- Consideration of race/sex – permissible? IT DEPENDS.
 - What kind of institution/Where located?
 - Is program *donor-funded*?
 - *How* considered?
 - Exclusively?
 - As one of many factors?
 - What kind of program?
 - Straight scholarship?
 - Fellowship with employment component?

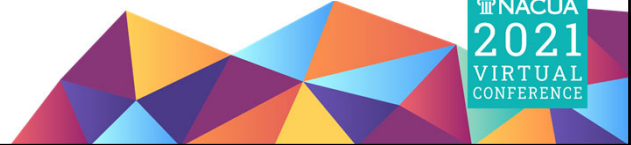


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Student Scholarships and Fellowships

- **External Race/Sex-Conscious Scholarship Programs**

- Would program be permissible if institution-run?
- If not, is institution “significantly assisting” outside organization with it?
 - Advertising to eligible students only?
 - Helping to select students?
 - Otherwise aiding in program administration?



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Mentoring Programs/ Affinity Groups

- Generally, programs should be “open but targeted”
 - Name/purpose/description of program
 - Program structure/contents
 - Program eligibility factors
- Race-/sex-exclusive programs more likely to face legal challenge
 - Greater the (real/perceived) benefit, greater the risk
 - Type/location of institution also a factor



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QUESTIONS?

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