



NACUA NOTES

National Association of College and University Attorneys June 2, 2022 | Vol. 20 No.8

TOPIC:

Sex-Targeted Programs and Aid in Higher Education: A Primer and Practical Guide

AUTHORS:

Nichole R. Davis, Christopher A. Lott, Joshua W. B. Richards, and Carolyn M. Toll^[1]

INTRODUCTION:

Starting in 2018, institutions of higher education began to see a significant increase in complaints to the United States Department of Education (“Education Department”) Office for Civil Rights (“OCR”) alleging that institutions were operating programs restricted unlawfully on the basis of sex. Complaints and OCR investigations have continued in the first years of the Biden administration. Originating from a number of different sources (although a few individuals have filed dozens, or even hundreds, on their own), these complaints generally target two types of sex-restricted programs: (1) scholarship or other financial assistance programs; and (2) co-curricular programs offered by the school, student groups, or third parties affiliated with the school or using school facilities. In many cases, descriptions of these programs are available publicly on institutions’ websites.

A number of institutions have addressed these complaints by voluntary resolution agreements with OCR. Those resolutions have ranged from short, straightforward agreements by the institution to comply with Title IX moving forward to more complex agreements involving reporting and monitoring periods accompanying specific changes to challenged programs and how they are promoted.

The purpose of this NACUANOTE is to provide a primer on the relevant legal principles, a focused description of how the law applies to student aid and co-curricular programs, and practical steps to mitigate pre-enforcement risk and respond to enforcement when it arises.

DISCUSSION:

I. Title IX General Principles

Certain foundational Title IX principles apply when colleges and universities evaluate whether and how they can implement gender-exclusive, gender-preferred, and/or gender-themed programs.

First, schools must start with Title IX's general command that "no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance."^[2] The Education Department's regulations tease out this general rule with a number of specific prohibitions. Relevant here, the regulations state that schools may not, on the basis of sex:

- "Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of [an] aid, benefit, or service;"
- "Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;"
- "Deny any person any . . . aid, benefit, or service;"
- "Subject any person to separate or different rules of behavior, sanctions, or other treatment."^[3]

As such, programs that limit participation by gender directly implicate the facial mandate of Title IX.^[4] Institutions may likewise not "provide or otherwise carry out any of its education programs or activities *separately* on the basis of sex, or require or refuse participation therein by any of the students on the basis of sex."

Second, while Title IX's general prohibitions are broad, the regulations and case law set out exceptions that, under certain circumstances, permit schools to make distinctions on the basis of sex without running afoul of Title IX.^[5] These explicit carve-outs apply in a limited variety of contexts, including fraternities and sororities, athletics, and, as discussed below, financial assistance under certain defined circumstances. Outside of these explicit safe harbors, it will generally be difficult to establish that a gender-exclusive program is compliant.

Third, under the Title IX regulations, there is an "affirmative action" provision that carves out a limited exception to the general prohibition on sex-specific programs. Pursuant to 34 C.F.R. § 106.3, "a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex." This is the entirety of the pertinent text in the regulation, and there are no subsections or explanatory notes. OCR does not further describe or provide guidance on how a recipient may avail itself of this defense.^[6] We are not aware of any publicly available resolution agreements or letters resolving OCR Title IX complaints where the affirmative action exception was successfully applied in defending a program or in which OCR found the affirmative action regulation a viable

defense to a Title IX enforcement action.^[7] While there is accordingly no set roadmap to making an affirmative action argument, institutions that wish to assert an “affirmative action” defense should expect OCR’s inquiry on this point to be searching, data-driven, and focused on the subject institution specifically, not on burdens faced by the excluded gender in society at large.^[8] In a now-withdrawn 2021 Q&A on Title IX in aid and programs (and as discussed further below), OCR explained:

May a college or university offer forms of financial assistance or programs to only one sex as a remedial or affirmative action to overcome the effects or conditions which resulted in limited participation in an education program or activity by persons of that sex?

In limited circumstances. While a school generally may not administer forms of financial assistance or programs that impose a preference or restriction on the basis of sex, there may be limited circumstances in which a school may take affirmative action with respect to forms of financial assistance or programs to overcome the effects of conditions which resulted in limited participation in its education program or activity by persons of a particular sex.

In cases where a school chooses to discriminate on the basis of sex in scholarship allocation or other programs as a form of affirmative action, it must still avoid any resort to sex-based quotas. Nor may it rely on national statistics as evidence of limited participation, but must instead clearly articulate why the particular sex-based scholarship or program was necessary to overcome the conditions in its own education program or activity which resulted in limited participation therein. As part of this analysis, OCR evaluates whether the classification based on sex was supported by an “exceedingly persuasive justification,” based on a substantial relationship between the classification and an important governmental or educational objective.

If OCR receives a complaint about a sex-restricted scholarship or program, and in response, the school seeks to invoke its ability to engage in affirmative action, OCR will require the school to support its justification with a specific assessment of the facts and circumstances surrounding the scholarship or other program. Additionally, OCR will analyze evidence of the conditions which led to limited participation by members of a particular sex in that school’s education program or activity, as well as whether the school’s purported remedial discrimination on the basis of sex is in fact directed at overcoming the effects of those conditions. The school’s justification for administering sex-restricted scholarships as an affirmative action may never rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.^[9]

Because the 2021 Q&A has been archived (as discussed below), it is unclear whether OCR continues to look at affirmative action through the same framework today.

Fourth, there is a meaningful legal distinction between the purpose of a program and how it operates in practice. As the regulatory language makes clear, Title IX’s focus is on “exclusion,” “denial of benefits,” and “discrimination.”^[10] These terms focus on how a program itself operates, not its ultimate end goal or even how it is described to program participants. Thus, standing alone, there is a strong argument that it is not a violation of Title IX for a school to operate a scholarship or program which has *as its purpose* eradicating gender disparities,

even if that purpose is expressly stated and explicitly references only one gender or set of gender identities, as long as participants of all genders can join and participate in that purpose.

Fifth, in addition to prohibiting recipients from engaging in many forms of sex-restrictive discrimination, Title IX's implementing regulations also prohibit schools 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.^[11] The regulations do not define "significant assistance"; OCR has stated that such a determination "will turn on the facts and circumstances of each specific situation."^[12] Yet more restrictively, with respect to the administration of student financial aid, the regulations state that a recipient may not, "through listing, approving, or soliciting," do so much as "assist" (versus "provide substantial assistance to") an external organization in a manner that discriminates on the basis of sex.^[13]

Finally, it is worth noting that as described briefly above, on January 14, 2021 – seven days after Secretary Betsy DeVos resigned her post and six days before President Biden was inaugurated – the Education Department published a detailed guidance document entitled "Questions and Answers Regarding OCR's Interpretation of Title IX and Single Sex Scholarships, Clubs, and other Programs" (the "Archived 2021 Q&A").^[14] The Archived 2021 Q&A poses and answers thirteen questions ranging from sex restrictions and preferences on scholarships to sex-targeted programs and activities, with a particular emphasis not just on how such programs operate, but also on how they are named and publicized.

Shortly after the Biden Administration took office, however, this guidance document was designated as "ARCHIVED AND NOT FOR RELIANCE" by the Department and removed from most Education Department guidance indexes. Nevertheless, in many respects, the Archived 2021 Q&A remains a useful, digestible practice aid for those new to this area of the law. The principles articulated in the Archived 2021 Q&A are (with a few odd exceptions, some of which are noted below) consistent with longstanding OCR regulatory interpretation and hew closely to the regulations. While recipients rely on the specific points of guidance in the Archived 2021 Q&A at their own risk (and are unlikely to get much traction with the current OCR by referring to it), the Archived 2021 Q&A provides a helpful starting point for interpreting the Title IX regulations as they pertain to single-sex programs and aid.

II. Student Aid

While the general rules discussed above provide the framework for analyzing sex-restricted programs generally, this section focuses on the unique issues and exceptions that apply to sex-restricted scholarships. As set forth above, colleges and universities generally may not administer scholarships or other forms of financial assistance that rely on sex-restrictive selection criteria.^[15] Both the regulations and the Archived 2021 Q&A clarify this prohibition with limited exceptions, including the regulatory provision permitting affirmative action to address specific conditions in the education program or activity that had resulted in limited participation of a particular sex^[16] and the administration of gender-restricted financial assistance where there is no overall discriminatory effect.^[17]

a. The Safe Harbor for Sex-Restricted Aid with No Overall Discriminatory Effect

OCR regulations specifically permit some sex-restricted scholarships, subject to a number of explicit limitations and requirements. Namely, such awards are permissible under Title IX if there is no "overall discriminatory effect," and they are administered pursuant to procedures that comply with 34 C.F.R. § 106.37(b)(2), often colloquially referred to as "pool and

match.” Notably, this exception explicitly applies **only** to financial assistance established through wills, trusts, bequests, or “other similar legal instruments”^[18] that require^[19] that the award go to individuals of a particular sex. The regulation does not expressly authorize this approach for funding sources other than wills, trusts, bequests, and other similar instruments, such as unrestricted institutional funds.^[20]

As a practical matter, to comply with § 106.37(b)(2) a recipient would administer funding as follows:

- *First* determine the overall financial package for each student based on neutral factors, such as merit or need.
- *Second*, after making that fixed determination, the recipient must “pool” the total funding from all sources (including both any sex-restricted donor gifts and other non-sex-restricted aid funds) for the pool of students to be awarded aid.
- *Third*, having already determined precisely how much aid each student will receive, the recipient then “matches” specific scholarships to students based on donors’ expressed desires so that all scholarship recipients receive the monetary amount they were designated to receive without any consideration of the source of funding.

By way of illustration, when § 106.37 was first promulgated in roughly its current form, the then-Department of Health, Education, and Welfare responded to public comments to its Notice of Proposed Rulemaking by describing the purpose, effect, and implementation of the no discriminatory “overall effect” safe harbor as follows:

Thus, the regulation now requires institutions to award financial aid on the basis of criteria other than sex. Once those students eligible for financial aid have been identified, the financial aid office may award aid from both sex-restrictive and non-sex-restrictive sources. If there are insufficient sources of financial aid designated for members of a particular sex, the institution would be required to obtain the funds from other sources or to award less assistance from the sex-restrictive sources.

For example, if fifty students are selected by a university to receive financial assistance, the students should be ranked in the order in which they are to receive awards. If the award is based on need, those most in need are placed at the top of the list; if award is based on academic excellence, those with the higher academic averages are placed at the top of the list. The list should then be given to the financial aid office which may match the students to the scholarships and other aid available, whether sex-restrictive or not. However, if after the first twenty students have been matched with funds, the financial aid office runs out of non-restrictive funds and is left with only funds designated for men, these funds must be awarded without regard to sex and not solely to men unless only men are left on the list. If both men and women remain on the list, the university must locate additional funding for the women or cease to give awards at that point.^[21]

The pool and match approach is accordingly permissible (and presumably would pass muster under intermediate scrutiny if challenged) because administering aid in this way has no discriminatory effect on aid recipients. Because the pool and match approach depends for its success on a relatively large pool of both restricted and unrestricted funding sources and a varied applicant pool where significant neutrally determined aid is also being awarded, it typically is best suited for undergraduate and professional schools; it is generally more

challenging to administer in smaller graduate programs or for individual school- or department-administered scholarships.

b. Providing Assistance to Outside Aid Sources

The Department's regulations also restrict institutions' flexibility to promote or even advertise external scholarships and aid where the outside entity (*not* the recipient) limits eligibility on the basis of sex.

Specifically, the regulations state that it is unlawful for a recipient, "in providing financial assistance to any of its students," and "[t]hrough solicitation, listing, approval, provision of facilities or other services," to "assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex."^[22] This issue arises most frequently when institutions publicize outside organizations' sex-restricted scholarships on their websites or promotional materials. From OCR's perspective, irrespective of the fact that the outside, sex-restricting organization is not itself a recipient of federal funding, the school's "assistance" in facilitating that sex restriction is potentially unlawful. As a baseline, OCR expects that institutions will take reasonable steps to verify that any outside aid it administers or promotes does not discriminate on the basis of sex.

An institution responding to an OCR complaint on this subject may wish to consider whether it can take the position that:

- The list of prohibited acts is exclusive, and that as long as the "assistance" the institution is allegedly providing is not "solicitation, listing, approval, provision of facilities or other services," it is permissible to "assist" the outside organization in providing funding to students; or
- "[L]isting" outside scholarships is not per se providing "assistance" to an outside organization that provides sex-exclusive aid, and such a conclusion only may be drawn by a consideration of all circumstances, including the connection between the outside organization and the institution, whether the listing actually meaningfully promotes or endorses the outside organization, and other case-specific factors; or
- All words of the regulation have to be given meaning, so although it may be a violation to "assist the *outside organization* by listing," if the institution is seeking to assist *its students* with pursuing their educational goals by sharing information about external programs with students (particularly about programs with which the institution does not interact directly), there is no violation.

These potential arguments are highly dependent on the facts of the case, and we are not aware of any specific precedent supporting them. In the authors' recent experience, OCR seems to consistently take the position that "listing" any sex-exclusive funding source is a *per se* violation.

c. Name or Purpose

Finally, if the name or description of a scholarship may reasonably be perceived as only open to one sex, Title IX may be implicated. In such cases, OCR has often required recipients to clearly communicate that such a scholarship is open to all students regardless of sex (presuming it is not eligible for pool and match).^[23] Aid intended to increase, encourage, and support the inclusion of students of a specific sex does not violate Title IX as long as it is clear that such aid is open and available to students regardless of sex. These principles are similar to

those that apply to programs, as discussed more fully in Section III below. For example, OCR might find a scholarship called “Women in Stem” that is limited to women pursuing engineering to be noncompliant, while concluding that a scholarship called “Scholarship for the Advancement of Women in Stem” – open to a student of any gender who has demonstrated a commitment to advancing women in engineering – should not violate Title IX.

III. Programs

a. General Principles

Under Title IX, a recipient of federal financial assistance may not provide or otherwise carry out any of its education programs or activities separately on the basis of sex.^[24] Title IX also prohibits recipients of federal funding from denying student participation in their programs or activities on the basis of sex.^[25] As such, activities or programs that are sex-exclusive and occur at the institution (whether operated by the recipient or not) can implicate the prohibitions under Title IX.

The regulations provide for limited express exceptions to this general rule. Institutions may provide separate programs and activities to students on the basis of sex in limited circumstances, namely: 1) contact sports in physical education classes;^[26] 2) ability grouping in physical education classes; and 3) choruses, if recipients need to divide students based on vocal range or quality.^[27] Thus, single sex music and acapella groups, as well as single sex sports teams at the club, intramural, or collegiate level do not violate Title IX. Title IX also does not apply to the membership practices of fraternities and sororities.^[28]

And while the regulations on their face do not permit single-sex programs outside these limited circumstances, a 2018 resolution agreement with the University of Central Missouri supports the conclusion that a “separate but equal” program for men and women may be permissible outside of sports and choruses in some contexts.” So while not sanctioned by the regulations themselves, it appears – at least in the Central Missouri case^[29] – that OCR might find the adoption of a comparable, parallel male program sufficient to pass muster under Title IX in some cases.

As noted above, Title IX also prohibits schools from providing “significant assistance” to any outside organization which discriminates on the basis of sex in providing any benefit or service to the recipient’s students.^[30] The standard for providing “significant assistance” to programs differs from the standard discussed above for providing assistance to outside agencies who award scholarships. While “significant assistance” is not defined, OCR has opined that the factors considered include provision by the University of the following: financial support; tangible resources such as staff, use of facilities and equipment; intangible benefits such as recognition or approval; and whether the relationship is occasional, temporary, permanent, or long-term.^[31]

b. Case Examples^[32]

Under Secretary DeVos, OCR received a number of complaints concerning university programs that focused on increasing participation of women and girls in activities and academic areas where they historically had less representation. Because the regulations with respect to this issue are sparse, this section explores OCR agreements resolving such complaints. It is important to remember that, as OCR has explained repeatedly, no individual complaint resolution letter has precedential value, so the case examples here are illustrative only of OCR’s

approach to the facts of a particular case, at that particular time. It is also important to remember that as presidential administrations change, so do enforcement priorities of the administration.

In 2020, Pace University's program entitled "Women's Leadership Initiative" was challenged as discriminating against males, on the basis of sex, because it was open only to "female and female-identified students."[\[33\]](#) The University explained that the program was open to all first-year students regardless of sex, gender, or gender identity, and the only requirements included 1) being enrolled in the College, 2) submitting an application, 3) attending weekly meetings during the fall and spring semesters, and 4) attending a one-on-one session with the program directors. The University also pointed out that the application did not ask applicants to disclose their sex. However, as OCR explained in its resolution of the matter, historically the University had only mailed the application to first-year female and female-identified students, the program's webpage only depicted female or female-identified participants, and no male or male-identified student had ever participated in the program. Taking this evidence into consideration, OCR was concerned that the University had not sufficiently conveyed that the program was open to students regardless of sex. In a resolution agreement, Pace agreed to modify the program to ensure it is open to all students regardless of sex in the future. Pace chose to keep the name of the program, "Women's Leadership Initiative," while communicating effectively that it is open to all students.[\[34\]](#)

OCR resolved a different, but related, complaint in a Grand Valley State University case involving a Science Technology & Engineering Preview Summit (STEPS) Camp for girls between the sixth and seventh grades. After receiving an initial complaint in 2019 that the sponsored program discriminated against boys, the University contacted OCR and explained that beginning the summer of 2020, the camp would be open to all interested applicants regardless of sex.[\[35\]](#) The University also circulated, and provided to OCR, an internal memo stating "there will be no restriction on gender as a prerequisite for participation," and committed to adjust the marketing materials to make clear that the program had no sex restriction.[\[36\]](#) Despite the University changing its application to provide boxes for male and female applicants, OCR's 2020 review still concluded that the promotional materials did not effectively communicate that the program was open to all students regardless of sex. OCR explained, for example, that the brochures continued to only depict female campers. As a result, the 2020 Voluntary Resolution Agreement included a commitment by the University to take additional steps in modifying its promotional material and website design to make clear that the camp is open to all students regardless of sex.[\[37\]](#)

Conversely, in 2012, OCR considered Title IX's application in the context of an internship's alleged restriction on the basis of gender. A male student claimed that he was told during Pacific College of Oriental Medicine's orientation that males were not permitted to enroll in a certain clinic.[\[38\]](#) The College explained to OCR that the clinic was open to "students" and that the clinic serves "underserved women and victims of abuse" which "works to provide affordable, compassionate and collaborative gynecological and mental health care to women and trans people in the Chicago area," but denied that male students were prohibited from participating in the clinic.[\[39\]](#) In its analysis, OCR recognized that in the previous two years no male students sought enrollment in the clinic, but OCR concluded the combination of the clinic's website, clinic materials, and other literature did not suggest to men that they were prohibited from applying for the clinic or any other clinic. OCR accordingly found there was insufficient evidence to conclude that the male student was discriminated against on the basis of sex.[\[40\]](#)

On the topic of “significant assistance,” OCR investigated allegations that Seattle University discriminated against males on the basis of sex by sponsoring a program called “Seattle Expanding Your Horizons” (SEYH), which provided support for girls interested in STEM fields in sixth through eighth grade. OCR’s investigation turned on whether the institution provided “significant assistance” to SEYH. Seattle University held a conference for the SEYH program on its campus, indicated on its website that the University’s College of Science & Engineering is the “official sponsor of SEYH,” provided use of campus facilities, and served as a fiscal agent for processing the registration fees and conference gifts. The University did not provide direct financial support. OCR made it clear that it was nonetheless troubled by the SEYH program and the level of assistance being provided by the institution. Seattle University signed a voluntary resolution agreement affirming that the University would adopt written guidelines stating that it would “not provide significant assistance to any program, agency, or organization that unlawfully discriminated against students or participants on the basis of sex.” The University also agreed to issue a notice of the written guidance and include it in all future contracts and memoranda of understanding. The University further agreed to take any steps necessary to ensure the SEYH program was in compliance with the written guidance by ensuring that the materials did not impermissibly exclude or discourage participation on the basis of sex.[\[41\]](#)

IV. Practical Pointers

From the general principles noted earlier and these selected resolution agreements, we can glean several practice pointers worth considering in how to both promote Title IX compliance in the first instance and respond to an OCR investigation in the second.

First, programs that are limited on the basis of gender likely violate Title IX. Complainants, who do not need to be affiliated with your institution to file a complaint, will often seek out publicly available information to support their OCR complaints. Can you shift the focus of the program, and satisfy your client’s goals, by adjusting the program participation criteria to those who have a demonstrated interest in the target program or in assisting the targeted population, rather than limit participation in the program by gender? That change would convert the program to a gender-themed one, which is more likely to pass muster (contingent upon the points below).

Second, if your institution has programs that are gender-exclusive or -focused, you should view them through a risk-based lens and take steps that account for that risk. For example, you may want to start your review by taking a close look at your public-facing websites to determine what programs and scholarships are listed there, as that may be fodder for a third-party complaint.

Third, in resolving a complaint, OCR will assess whether a program is available to all students, regardless of sex. The simplest way to demonstrate this is to ensure that your program materials are clear and direct that any student can participate. For example, a statement on the program’s website and in all marketing materials that the program is “open to all who support the mission, regardless of gender” is helpful to make the gender-inclusivity clear. If, by contrast, you have weighed the risk and determined that your institution will offer, or provide assistance to, a gender-exclusive program, you should be prepared to be able to defend the program using one of the exceptions described above. Be warned, though, that this tactic is likely to be met with resistance from OCR, and would require a heavy burden of proof.

Fourth, words matter, but so do the pictures on your website, social media, the marketing materials, and any program emails. OCR will look beyond mere recitals on the website and review everything in context. Questions you might consider asking: Do the pictures on your program website appear to depict individuals of only one sex? Does the messaging on your promotional materials align with the images in your marketing? Do marketing materials use gendered terms when more neutral terms could be used instead (e.g., “participant” or “student” instead of “girl” or “woman”). To which groups on campus do you advertise the group, and by what means (direct/indirect, passive/active)?[\[42\]](#)

Fifth, the importance of the program’s goals will not, alone, save the program from a finding of noncompliance. Having a worthy goal like improving female enrollment in STEM courses likely will not overcome a complaint of discrimination should OCR conclude that males are excluded from participating in the challenged program.[\[43\]](#) Exceptions discussed above are important, whether aid- or program-based, but absent such an exception, the surest way to come into compliance is to open programs to all. Likewise, events on campus but organized by third-party programs should also be open to all speakers, panelists, instructors, audience-members, and others, regardless of sex, to avoid undue risk.

Sixth, complaints may be easier to resolve through revision to program materials where the complainant is not affiliated with the institution and does not assert that they were discriminated against or restricted from access to the recipient’s programs or activities – this is a good question to raise with OCR early in the process if it is not clear from the materials provided by OCR in its notice, which may help narrow the focus of your response to OCR’s data request.

Seventh, and finally, if your institution receives an OCR complaint, recognize that OCR generally offers one of the following three options if it determines that there may be a potential violation of Title IX:

- Cease offering of the program entirely;
- Modify the program to ensure it operates, advertises, and recruits in a manner that reflects that it is coeducational and open to all students regardless of sex; or
- Modify the program to ensure promotional materials, websites, social media, and operations effectively communicate that the program is coeducational and open to all regardless of sex, regardless of the program’s name.

CONCLUSION:

At many institutions, promoting the advancement of women in higher education, especially in fields where women have been traditionally underrepresented, is a core mission-driven objective. Offering programs and scholarships that support women (and other underrepresented gender minorities) is frequently a part of this effort and highly valued by institutions’ communities, alumni, and donors. We hope this NACUANOTE is helpful to NACUA members in understanding and assessing risk in this area as they respond to their client communities’ desire for diversity, equity, and inclusion.

RESOURCES:

Kim Hewitt, Maya Kobersy, & Josh Richards, [“Diversity in the Face of Adversity”](#) (NACUA Annual Conference 2021).

Sankar Suryanarayan & Rosina Mummolo, [“Diversity Initiatives: Where Are We, and How Far Can We Go”](#) (NACUA Discrimination Law Workshop 2021).

Youndy Cook & Janet Judge, [“Title IX and Challenges to Sex-Based Scholarships”](#) (NACUA Briefing, Aug. 13, 2019).

Donna J. Snyder & Maya Kobersy, [“Scholarship Restrictions”](#) (NACUANOTE, April 20, 2017).

END NOTES:

[1] Nichole Davis is an Assistant University Counsel at the University of North Carolina at Chapel Hill. Prior to joining UNC-Chapel Hill, she was a Senior Legal Fellow in Duke University’s Office of Counsel, where she advised campus clients on Title IX compliance. She has also worked as an associate at a law firm in New York.

Chris Lott is Deputy General Counsel at Duke University. One of his responsibilities at Duke is to advise campus clients on all aspects of Title IX and other civil rights compliance obligations. Prior to joining Duke, Chris worked in the education practice group at Hogan Lovells LLP.

Josh Richards is a partner at Saul Ewing Arnstein & Lehr. He frequently advises client institutions on Title IX and other civil rights compliance issues and defends them in related civil and administrative claims.

Carolyn Toll is an associate at Saul Ewing Arnstein & Lehr. She regularly assists client institutions with Title IX compliance and works on matters related to civil and administrative Title IX claims.

[2] 20 U.S.C. §1681(a).

[3] 34 C.F.R. § 106.31(b).

[4] 34 C.F.R. § 106.37(a)(1).

[5] The regulations include only three exceptions to this prohibition that apply to postsecondary institutions: (1) contact sports in physical education classes; (2) ability grouping in physical education classes; and (3) choruses. 34 C.F.R. § 106.34(a)(1-3). Contrast this regulation with recent OCR resolution agreements, e.g., University of Central Missouri, 07-17-2293, at *infra* n. 28 and accompanying text, which appear to permit exactly this “separate but equal” approach in some circumstances.

[6] OCR has acknowledged that “[s]chools might, under certain circumstances, provide scholarships to women in programs that are traditionally dominated by men (such as certain STEM fields).” U.S. Dep’t of Educ., Office for Civil Rights, [Title IX and Access to Courses and Programs in Science, Technology, Engineering, and Math \(STEM\)](#), at 20 (October 2012) (emphasis in original). The Title IX regulations also require recipients to take any remedial actions that the Assistant Secretary for Civil Rights may deem necessary to remedy a violation of Title IX. 34 C.F.R. § 106.3(a).

[7] In fact, we are aware of only one Title IX resolution letter that even mentions this defense, though only in passing. In its 2018 resolution with the University of Maryland (OCR Docket No. 03182383 (2018)), OCR accepted the University of Maryland’s STEM program’s fairly broad definition of “open to all.” Importantly, OCR did not appear to take issue with the practice of directing its emails to female students, because it sent the email to all students and directed them to the program’s webpage, where its programming information and applications are available. OCR also did not appear to find any issues with the program’s Kindergarten through 12th grade outreach activities that were “advertised as serving underrepresented minorities and women . . . [and] primarily aimed towards girls.” OCR simply concluded that because the centerpiece of the program, its Living and Learning Communities (LLCs), operated both a female program

and a parallel male program, the program as a whole did not exclude men and was therefore compliant with Title IX.

[8] While we are unaware of a case or federal guidance applying this principle in the gender arena, in race-related cases federal courts have required that recipients responding to scrutiny demonstrate an institution-specific barrier to participation. *Accord Podberesky v. Kirwan*, 38 F.3d 147, 155 (4th Cir. 1992) (“[t]here is no doubt that racial tensions still exist in American society, including the campuses of our institutions of higher learning. However, these tensions and attitudes are not a sufficient ground for employing a race-conscious remedy at the University of Maryland.”)

[9] See U.S. 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](#), at 3-4 (January 14, 2021).

[10] 34 C.F.R. § 106.31(a).

[11] 34 C.F.R. § 106.31(b)(6).

[12] See U.S. Department of Education Office for Civil Rights, [Dear Colleague Letter: Voluntary Youth Services Organization](#) (December 15, 2015).

[13] 34 C.F.R. § 106.37(a)(2).

[14] See U.S. 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).

[15] 34 C.F.R. § 106.37(a)(1).

[16] See U.S. Department of Education, Office for Civil Rights, *supra* note 9, at 2.

[17] 34 C.F.R. § 106.37(b)(2).

[18] The Office for Civil Rights has frequently provided unofficial guidance to recipients (including many NACUA member institutions) that irrevocable lifetime gifts qualify as “other similar legal instruments,” but the authors are not aware of any instance where the Department has officially stated that it interprets the regulation in that way for enforcement purposes. Recipients should proceed with due caution and carefully assess risk when taking that position in light of the plain language of the regulation.

[19] 34 C.F.R. § 106.37(b)(1) states that a sex-restricted scholarship may be administered using the pool and match approach, when it “**requires** that awards be made to members of a particular sex specified therein.” (emphasis added). In its now-archived 2021 Q&A, OCR adopted a strict textual interpretation of the regulation taking the position that, to qualify as a sex-restricted scholarship eligible for the pool and match safe harbor, the scholarship must require that awards be made to a particular sex, implying that scholarships that merely include a sex preference (as opposed to an absolute requirement) are ineligible to be administered using pool and match. See U.S. Department of Education, Office for Civil Rights, *supra* note 9. It remains to be seen whether the Education Department under Secretary Cardona will adopt a similar, strictly technical interpretation of the regulation.

[20] Whether the Department’s own justification underlying the pool and match safe harbor for sex-restricted scholarships is applicable to a broader set of funding sources apart from those established pursuant to wills, trusts, bequests, and other similar instruments is a matter that an institution with a significant mission-driven imperative to expand participation by one sex might consider. Such an approach is not explicitly authorized by the regulations, and has met with resistance with OCR in the past. Nevertheless, it is possible that an institutionally created scholarship included in a “pool and match” financial aid system is defensible on the rationale that there is no overall discriminatory purpose or effect.

[21] 40 F.R. 24133 (Jun. 4, 1975).

[22] 106 C.F.R. § 106.37(b)(2).

[23] See *id.*

[24] 34 C.F.R. § 106.34(a).

[25] *Id.*

[26] This includes any sports where there is focus on bodily contact such as football, wrestling, boxing, and basketball.

[27] 34 C.F.R. § 106.34(a)(1-2,4).

[28] 34 C.F.R. § 106.14.

[29] In 2018 the University of Central Missouri agreed to resolve a complaint against its women's self-defense course by agreeing to offer a "men's self-defense course with comparable availability as the women's self-defense course." The University of Central Missouri Resolution Agreement, OCR Docket No. 07-17-2293, at 1 (2018).

[30] 34 C.F.R. § 106.31(b)(6).

[31] See U.S. Dep't of Educ., Office for Civil Rights, [Dear Colleague Letter: Voluntary Youth Services Organizations](#), (December 15, 2015).

[32] Special thanks to Duke Law student and Fall 2021 extern in the Duke Office of Counsel, Lauren Cohen, who pored through these cases and identified select examples to be highlighted in this Note.

[33] Pace University Letter, Case No. 02-20-2084 (2020).

[34] *Id.*

[35] Grand Valley State University Letter at 2, OCR Docket No. 15-19-2052 (2020).

[36] *Id.*

[37] *Id.*

[38] Pacific College of Oriental Medicine Letter at 2, OCR #05-12-2073 (2012).

[39] *Id.*

[40] *Id.*

[41] Seattle University Resolution Agreement, OCR Docket Nos. 10152145, 10152146, 10152147, and 10152148 (2015).

[42] See, e.g., Eastern Washington University Letter, OCR Reference No. 10202217 (2020); Highline College Letter, OCR Reference No. 10202039 (2020), Pace University Letter, Case No. 02-20-2084 (2020).

[43] Wake Technical Community College designed women-only courses "to meet the purpose of the learning community and to ensure fairness and access for all students, regardless of sex." However, because this program did not fall into one of the exceptions to the prohibition of having separate programs or activities based on sex, OCR concluded, notwithstanding a worthy purpose, that the program discriminated against male students, on the basis of sex. Wake Technical Community College Letter of Findings at 4, OCR Complaint No. 11-16-2258 (2017); see also Rogue Community College, OCR Reference No. 10202169 (2020) (finding the stated purpose of the program—that is, "to ensure that every girl has access to a better future, and to ensure that girls have the tools to pursue STEM fields"—insufficient to maintain a gender-exclusive program).

[NACUANOTES Issues](#) | [Contact Us](#) | [NACUA Home Page](#)

NACUANOTES Copyright Notice and Disclaimer

Copyright 2022 by Nichole R. Davis, Christopher A. Lott, Joshua W. B. Richards, and Carolyn M. Toll. NACUA members may reproduce and distribute copies of NACUANOTES to other members in their offices, in their law firms, or at the institutions of higher education they represent if they provide appropriate attribution, including any credits, acknowledgments, copyright notice, or other such information contained in the NACUANOTE.

Disclaimer: This NACUANOTE expresses the viewpoints of the authors and is not approved or endorsed by NACUA. This NACUANOTE should not be considered to be or used as legal advice. Legal questions should be directed to institutional legal counsel.