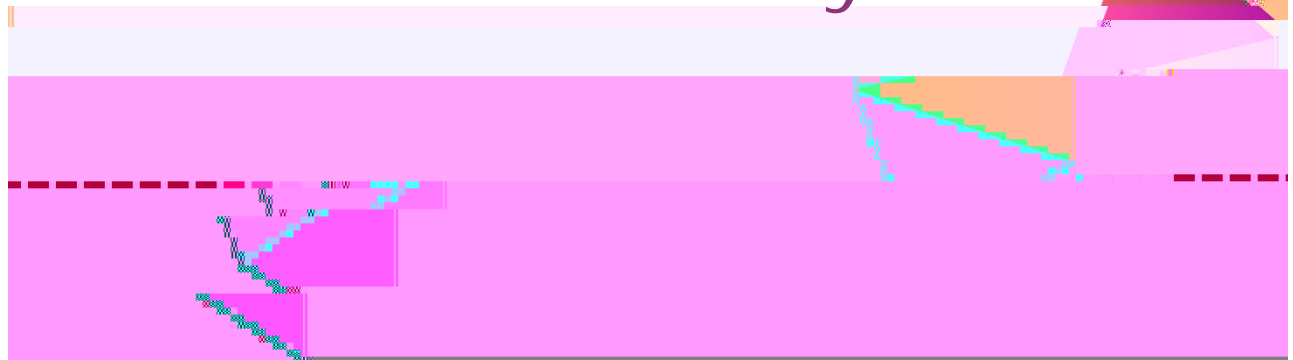




Diversity in the Face of Adversity:





The Law and the Regulations

3



Title VI

4

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.)

5

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.

6

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).

7

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

8

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.

9

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.”

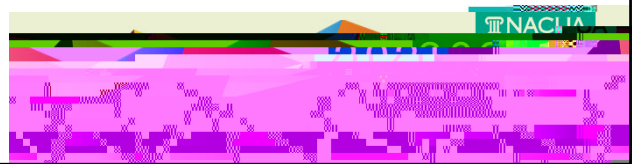
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Title IX

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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).

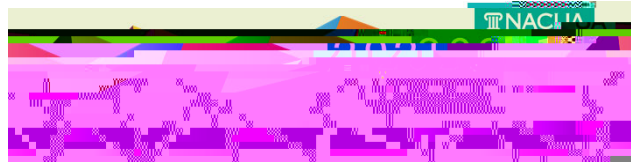
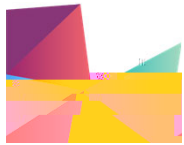


Title IX

- The Title IX regulations are somewhat less restrictive than the



Title IX



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).



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.”



Contexts to Consider

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

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General Principles

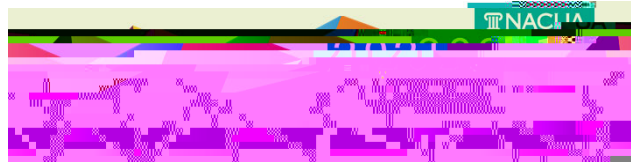
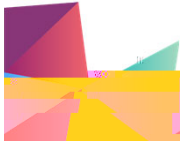
- Promoting diversity is a lawful objective, as long as the *means* used are lawful
 - “Lawful means” may vary by state
 - “Lawful means” may vary by institution type
 - “Lawful means” may vary by context! – *Grutter* (“context matters”)
- Legal risk increases as eligibility exclusivity increases

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Employment (Staff and Faculty)

- **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



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

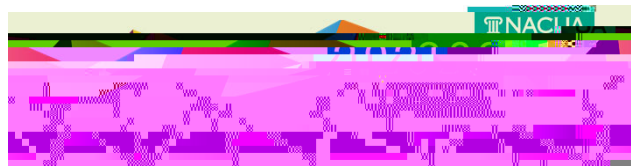
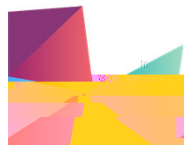
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Student Scholarships and Fellowships

• 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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A decorative footer featuring a colorful geometric pattern of triangles and polygons in shades of purple, blue, and yellow. In the top right corner of this section, there is a small logo for NACUA, consisting of a stylized 'N' and 'A' followed by the text "NACUA".

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