



Gender- and Race-Conscious Programs

BACKGROUND ON GENDER- AND RACE-CONSCIOUS PROGRAMS

Given the long history of discrimination against women and girls in education, under Title IX, schools can provide gender-conscious programs that are compensatory and help address barriers to equal educational opportunity by increasing women's and girls' participation in traditionally male-dominated education programs.

Women and girls, including women and girls of color, have made many strides in attending college and getting degrees, but they are a long way from truly equal representation. For example, although Latina women are 9 percent of the U.S. population, they hold only 4 percent of all bachelor's degrees, 2 percent of all computer science degrees, 3 percent of all master's degrees, and 2 percent of all doctoral degrees.¹ Similarly, although Black women are more than 7 percent of the U.S. population, they hold 3 percent of all computer science degrees, 5 percent of all master's degrees, and 3 percent of all doctoral degrees.²

In contrast, white men hold 47 percent of computer science degrees.³

Gender and racial disparities continue after graduation and in the workplace. Not only do women hold two-thirds of U.S. student debt⁴ but they—especially women of color—also have less disposable income to repay their student loans due to the gender and racial wealth gap,⁵ the wage gap,⁶ and their overrepresentation in low-paid jobs.⁷ In the legal profession, women make up 45 percent of associates but only 23 percent of partners.⁸ In medicine, women represent 40 percent of all physicians and surgeons but only 16 percent of permanent medical school deans.⁹ In higher education, women represent approximately half of administrators but less than 30 percent of top executive positions.¹⁰

Despite reaching an all-time high in 2020, women still comprise only 7 percent of Fortune 500 CEOs, and women of color only 0.6 percent.¹¹

In a world still dominated by male leaders, women and girls deserve the opportunity to gain leadership experiences through programs that empower women, help them build strong professional networks, and teach them how to navigate sexism or racism while building skills like public speaking, team building, and negotiation. Women and girls also deserve the opportunity to achieve financial equity and security through scholarships that help reduce the wealth gap and reduce inequitable student debt burdens. This is all needed to fulfill Title IX's equity mandate.

Developments Since 1972

The Supreme Court has made several rulings affirming and limiting the use of race-conscious admissions in colleges and universities. In 1978, the Court held that race can be one of several factors in college admissions, but in 2003, it struck down as unconstitutional the University of Michigan's point-based racially conscious affirmative action policy.¹² In 2013 and 2016, the Court issued a pair of decisions holding that race-conscious admissions policies must be narrowly tailored and use the least restrictive means possible to achieve a "compelling state interest," and that the University of Texas's policy of admitting the top 10 percent of each Texas high school's graduating class, regardless of their race, satisfied these requirements.¹³ In January 2022, the Court announced it would review whether race-conscious admissions policies at Harvard University and the University of North Carolina at

Chapel Hill are legal.¹⁴ Meanwhile, there has been a relative lack of legal precedent regarding the use of gender-conscious programs in education, apart from a 2014 Supreme Court decision holding that the U.S. Constitution does not prevent states from banning gender- and race-conscious admissions in public universities.¹⁵

The Department of Education has issued both regulations and guidances on affirmative action in education. In 1975, what was then the Department of Health, Education, and Welfare issued Title IX regulations allowing schools to offer gender-conscious affirmative action programs to help overcome the effects of discrimination and other conditions that have limited the participation of women and girls in education.¹⁶ The regulations also allow schools to offer sex-specific scholarships and

DEVELOPMENTS SINCE 1972 *continued*

fellowships if they were established by a will, trust, bequest, or similar legal instrument and the financial assistance meets certain requirements.¹⁷ During the Obama administration, the Department of Education issued Title IX guidance on how postsecondary schools can offer gender-conscious programs in career and technical education (CTE) to increase participation of students in underrepresented genders in fields like nursing, advanced manufacturing, information technology, computer science, and cybersecurity.¹⁸ The Departments of Education and Justice also issued a series of joint guidances on the voluntary use of race to achieve diversity in PK-12 schools and on race-conscious admissions in postsecondary schools.¹⁹ These helped inform and build on Title VI guidance issued under the G.W. Bush administration, which had required schools to consider race-neutral alternatives to advancing diversity before considering race when assigning students to PK-12 schools and when admitting students to postsecondary schools.²⁰ The Obama administration's Title IX and VI regulations and guidances were consistent with the Supreme Court's repeated recognition that there is a

compelling educational interest in fostering student diversity²¹ and that public universities can use gender- and race-conscious programs to promote equal opportunity and the full development of the talents and capacities of women and girls and of students of color.²²

Under the Trump administration, the Department took a number of steps to restrict gender-conscious and race-conscious programs. For example, the Department rescinded all of the above-mentioned Obama-era Title IX²³ and Title VI guidance²⁴ and opened hundreds of investigations into school districts and postsecondary schools that offer gender-conscious programs for women and girls, ranging from "Girls Who Code" camps to women-only college scholarships.²⁵ In the final days of the Trump administration, the Department also issued a guidance on how schools can offer gender-conscious and single-sex programs that comply with Title IX, but it was archived for not complying with the agency's internal procedures.²⁶

Recommendations

The Department of Education should:

- Issue Title IX guidance clarifying that gender-conscious affirmative action programs are permissible to address patterns of historical exclusion and discrimination and to promote educational diversity and clarifying how Title IX's affirmative action regulations interact with the regulations specific to sex-specific scholarships.
- Reissue Title VI guidance on the voluntary use of race to achieve diversity in PK-12 schools and on race-conscious admissions in postsecondary schools, to the extent possible after the Supreme Court weighs in on this issue.
- Ensure that education programs aimed at closing the racial opportunity gap address the needs of students of all genders.

- Dismiss frivolous complaints filed with the Department's Office for Civil Rights challenging gender- and race-conscious affirmative action programs, consistent with the regulations allowing affirmative action under Title IX and Title VI.

Schools should:

- Offer programs, scholarships, and other services to women and girls that seek to expand their participation in fields where they are underrepresented, while providing a gender-neutral or co-educational option if men and boys want to participate in similar activities.
- Make clear that programs limited to women and girls are open to transgender and nonbinary students on an equal basis.

- 1 National Women's Law Center, *Making the Case: Gender-Conscious Programs in Higher Education* 4, 4 n.9 (2020) [hereinafter NWLC Gender-Conscious Programs Report], <https://nwlc.org/resources/making-the-case-gender-conscious-programs-in-higher-ed>.
- 2 *Id.* at 4, 4 n.9.
- 3 *Id.* at 4.
- 4 American Association of University Women, *Deeper in Debt: Women & Student Loans* (updated May 2021), <https://www.aauw.org/resources/research/deeper-in-debt>.
- 5 See, e.g., Neil Bhutta *et al.*, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, Federal Reserve (Sept. 28, 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm>; Heather McCulloch, *Closing the Women's Wealth Gap: What It Is, Why It Matters, and What Can Be Done About It* (updated Jan. 2017), <https://womenswealthgap.org/wp-content/uploads/2017/06/Closing-the-Womens-Wealth-Gap-Report-Jan2017.pdf>.
- 6 See National Partnership for Women & Families, *America's Women and the Wage Gap* (Jan. 2022), <https://www.nationalpartnership.org/our-work/resources/economic-justice/fair-pay/americas-women-and-the-wage-gap.pdf>.
- 7 National Women's Law Ctr., *Low-Wage Jobs Are Women's Jobs: The Overrepresentation of Women in Low-Wage Work* (2017), <https://nwlc.org/resources/low-wage-jobs-are-womens-jobs-the-overrepresentation-of-women-in-low-wage-work>.
- 8 Center for American Progress, *The Women's Leadership Gap* (Nov. 20, 2018), <https://www.americanprogress.org/article/womens-leadership-gap-2>.
- 9 *Id.*
- 10 Jacqueline Bichsel & Jasper McChesney, *The Gender Pay Gap and the Representation of Women in Higher Education Administrative Positions: The Century So Far* 10 (2017), https://www.cupahr.org/wp-content/uploads/cupahr_research_brief_1.pdf.
- 11 Emma Hinchliffe, *The number of female CEOs in the Fortune 500 hits an all-time record*, *Fortune* (May 18, 2020), <https://fortune.com/2020/05/18/women-ceos-fortune-500-2020>.
- 12 *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978).
- 13 *Fisher v. Univ. of Texas*, 579 U.S. ___ (2016); *Fisher v. Univ. of Texas*, 570 U.S. 297 (2013).
- 14 Scott Jaschik, *Supreme Court Takes Affirmative Action Cases, Inside Higher Ed* (Jan. 31, 2022), <https://www.insidehighered.com/admissions/article/2022/01/31/supreme-court-will-hear-harvard-and-unc-affirmative-action-cases>.
- 15 *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291 (2014).
- 16 45 C.F.R. § 86.3(b) (issued in 1975 by Department of Health, Education, and Welfare). See also 34 C.F.R. § 106.3(b) (issued in 1980 by Department of Education); 28 C.F.R. § 54.110(b) (Department of Justice).
- 17 45 C.F.R. § 86.37(a)(1), 86.37(b)(1) (issued in 1975 by Department of Health, Education, and Welfare). See also 34 C.F.R. §§ 106.37(a)(1), 106.37(b)(1) (issued in 1980 by Department of Education).
- 18 Department of Education, Office for Civil Rights & Office of Career, Technical, and Adult Education, *Dear Colleague Letter: Gender Equity in Career and Technical Education* 2 (issued June 15, 2016; rescinded Aug. 26, 2020) [hereinafter CTE Guidance], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201606-title-ix-gender-equity-cte.pdf>.
- 19 Department of Education & Department of Justice, *Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education* (issued Dec. 2, 2011; rescinded July 3, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/guidance-pse-201111.html>; Department of Education & Department of Justice, *Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools* (issued Dec. 2, 2011; rescinded July 3, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.html>; Department of Education & Department of Justice, *Questions and Answers About Fisher v. University of Texas at Austin* [Fisher I] (issued Sept. 27, 2013; rescinded July 3, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-qa-201309.pdf>; Department of Education & Department of Justice, *Questions and Answers About Fisher v. University of Texas at Austin* [Fisher II] (issued Sept. 30, 2016; rescinded July 3, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-fisher-ii-201609.pdf>.
- 20 Department of Education, Office for Civil Rights, *Guidance on the Use of Race in Postsecondary Student Admissions* (Aug. 28, 2008), <https://www2.ed.gov/about/offices/list/ocr/letters/raceadmissionpse.html>; Dep't of Education, Office for Civil Rights, *Guidance on the Use of Race in Assigning Students to Elementary and Secondary Schools* (Aug. 28, 2008), <https://www2.ed.gov/about/offices/list/ocr/letters/raceassignmentese.html>; Dep't of Education, Office for Civil Rights, *Race-Neutral Approaches to Diversity in Education* (Feb. 1, 2004), <https://www2.ed.gov/about/offices/list/ocr/edlite-raceneutralreport2.html>.
- 21 See *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. Univ. of Texas at Austin*, 579 U.S. ___, 136 S. Ct. 2198 (2016).
- 22 *United States v. Virginia* (VMI), 518 U.S. 515, 533 (1996).
- 23 Department of Education, Office for Civil Rights, *Rescinded Policy Guidance* (last updated Aug. 26, 2021), <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/respolicy.html>.
- 24 Department of Education & Department of Justice, *Updates to Department of Education and Department of Justice Guidance on Title VI* (July 3, 2018), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-vi-201807.pdf>.
- 25 E.g., John Murawski, *The Growing Backlash Against Female-Only School Programs*, *RealClearInvestigations* (May 7, 2020), https://www.realclearinvestigations.com/articles/2020/05/06/a_building_backlash_to_women-only_preferences_123481.html.
- 26 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* (Jan. 14, 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-single-sex-20210114.pdf>.