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Association of  
Title IX Administrators

# Single-Sex Programs Under Title IX: Law & Best Practices

Madison College  
February 20, 2023



Strategic Risk  
Management Solutions



Any advice or opinion provided during this training, either privately or to the entire group, is never to be construed as legal advice. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law, any applicable state or local laws, and evolving federal guidance.

# CONTENT ADVISORY

The content and discussion in this course will necessarily engage with sex- and gender-based harassment, discrimination, and violence and associated sensitive topics that can evoke strong emotional responses.

ATIXA faculty members may offer examples that emulate the language and vocabulary that Title IX practitioners may encounter in their roles including slang, profanity, and other graphic or offensive language.

# AGENDA

1 Terminology and Basic Premise

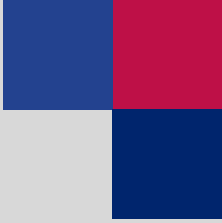
2 Regulatory Exceptions

3 Separate but Equal

4 “Preferred Sex” Programs

5 Affirmative Action

6 Case Studies



# **TERMINOLOGY AND BASIC PREMISE**

# DEFINING TERMS

- **Single-sex program** means an activity or program of a federal education funding recipient designated men-only or women-only; members of the other sex are only permitted to participate programs designated for their sex.
- “**Preferred sex**” programs describe a set of programs common in higher education (and K-12 to a lesser extent) which are open to all, but which are advertised or named in such a way as to indicate participation by one sex is preferred.

# GENDER DIVERSITY

- Transgender or transitioning students have a legal right to participate in single-sex programs that match their gender identity, regardless of birth-assigned sex.
  - In a “Notice of Interpretation” in June 2021, OCR wrote: “The Department interprets Title IX’s prohibition on sex discrimination to **encompass** discrimination based on **sexual orientation and gender identity.**”
- Excluding nonbinary students from any program on the basis of sex/gender can run afoul of Title IX.

Source: <https://www.govinfo.gov/content/pkg/FR-2021-06-22/pdf/2021-13058.pdf>

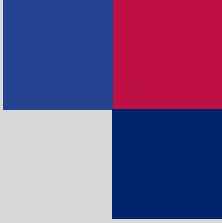


# BASIC PREMISE

**The Title IX regulations generally prohibit sex-based discrimination in education programs or activities receiving Federal financial assistance.**

“A Recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.”

31 C.F.R. § 28.415



# REGULATORY EXCEPTIONS

# REGULATORY EXCEPTIONS

## **Boys/Girls State/Nation Conferences**

- Any program or activity of any secondary school or educational institution specifically intended for the promotion of any Boys State conference, Boys State/Nation conference, Girls State/Nation conference, or for the selection of students to attend such a conference is exempt (20 U.S.C. § 1681(a)(7)(B))

## **Father-Son and Mother-Daughter Activities**

- The law does not preclude father-son or mother-daughter activities at an educational institution. However, if those activities are provided for students of one sex, opportunities for reasonably comparable activities must be provided for students of the other sex. Accordingly, these activities are permitted on a single-sex basis if the requirements of the statute are met.  
(20 U.S.C. § 1681(a)(8))

# REGULATORY EXCEPTIONS (CONT.)

## Classes

- The Title IX regulations contain two categorical exceptions for specific types of classes or portions of classes that may be segregated by sex.
  - 1) physical education classes during participation in sports the purpose or major activity of which involves bodily contact (34 C.F.R. § 106.34(c))
  - 2) portions of classes in elementary and secondary schools which deal exclusively with human sexuality (34 C.F.R. § 106.34(e))
- Separation of students by sex is permitted if it constitutes remedial or affirmative action (34 C.F.R. § 106.32)

# REGULATORY EXCEPTIONS (CONT.)

## Physical Education

- Title IX regulations permit Recipients to group students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex (34 C.F.R. § 106.34(b))

## Chorus

- Title IX regulations permit Recipients to group students based on vocal range or quality which may result in a chorus or choruses of one or predominantly one sex (34 C.F.R. § 106.34(f))

# REGULATORY EXCEPTIONS (CONT.)

## **Social Fraternities and Sororities**

- Title IX does not apply to the membership practices of social fraternities and sororities which are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, the active membership of which consists primarily of students in attendance at institutions of higher education (20 U.S.C. § 1681(a)(6)(A); 34 C.F.R. § 106.14)

## **Scouts, YMCA, and YWCA**

- Title IX does not apply to the membership practices of the Young Men's Christian Association, the Young Women's Christian Association, the Girl Scouts, the Boy Scouts, and Camp Fire Girls (20 U.S.C. § 1681(a)(6)(B); 34 C.F.R. § 106.14)

# REGULATORY EXCEPTIONS (CONT.)

## Voluntary Youth Service Organizations

- Title IX does not apply to the membership practices of voluntary youth service organizations which are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954 and the membership of which has been traditionally limited to members of one sex and principally to persons of less than nineteen years of age (20 U.S.C. § 1681(a)(6)(B); 34 C.F.R. § 106.14)

# REGULATORY EXCEPTIONS (CONT.)

## Religiously Affiliated Institutions

- The statute exempts activities of educational institutions controlled by religious organizations to the extent that the application of Title IX would be inconsistent with the religious tenets of the organization (20 U.S.C. § 1681(a)(3))
- Such exemptions may relate to single-sex issues, such as the common practices of Catholic colleges to only hire priests, brothers, or nuns for high-ranking positions, including presidencies, or for Talmudic schools that only admit men.



# REGULATORY EXCEPTIONS (CONT.)

## Admissions

- With respect to admissions, Title IX applies only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education. As such, non-vocational elementary and secondary schools are exempt as are private colleges and schools (many of which are single-sex)  
(20 U.S.C. § 1681 (a)(1); 34 C.F.R. §§ 106.15(d), (e))

# REGULATORY EXCEPTIONS (CONT.)

## Athletic Teams

- A Recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport (34 C.F.R. § 106.41(b))
- However, where a Recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport (34 C.F.R. § 106.41(b))

# REGULATORY EXCEPTIONS (CONT.)

- Contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact (34 C.F.R. § 106.41(b))
- The rights of transgender, transitioning, and nonbinary students with respect to participation on athletic teams is an area of emerging law and policy impacted not just by Title IX, but by equal protection rights (federal and state), specific state statutes, league rules, and requirements of sport governing bodies.

# REGULATORY EXCEPTIONS (CONT.)

## Single-Sex Housing

- Permitted by Title IX (34 C.F.R. § 106.32(b)(1))
- Housing provided by a Recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:
  - Proportionate in quantity to the number of students of that sex applying for such housing
  - Comparable in quality and cost to the student (34 C.F.R. § 106.32(b)(2))

# REGULATORY EXCEPTIONS (CONT.)

## Single-Sex Restrooms and Locker Rooms

- Permitted by Title IX (34 C.F.R. § 106.32(a))
- A Recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex (34 C.F.R. § 106.33)

# REGULATORY EXCEPTIONS (CONT.)

## Academic Scholarships

- Single-sex academic scholarships are **not compliant**, but OCR will be unlikely to make a non-compliance finding as long as the monetary total of available scholarships for men and women is roughly the same (34 C.F.R. § 106.37(b))
  - Beauty pageant scholarships/awards, however, have a specific exemption under the regulations, and are permitted. (20 U.S.C. § 1681(a)(9))
- The non-athletic scholarship approach is not like the proportionality rule for athletics, which states that to the extent that a Recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

# REGULATORY EXCEPTIONS (CONT.)

## Non-funded Fellowship, Leadership, or Other Advancement Programs

- Where a school publicizes or supports the sex-segregated activities of a third-party organization, the school violates Title IX if it provides “significant assistance” to that program.
  - OCR has long interpreted “**significant assistance**” to include a school’s “giv[ing] an organization special status or privileges that it does not offer to all community organizations,” including “official recognition of the organization, the designation of faculty sponsors, or the use of campus facilities at less than fair market value.”

Letter from Joseph A. Califano, Jr., Secretary, Department of Health, Education, and Welfare, to the Hon. Trent Lott, Member, U.S. House of Representatives (Dec. 27, 1978)



# SEPARATE ~~BUT~~ AND EQUAL

- K-12 Education
- Single-Sex Schools



# SEPARATE AND EQUAL IN K-12

A nonvocational coeducational elementary or secondary school may provide nonvocational single-sex classes or extracurricular activities, if each single-sex class or extracurricular activity is based on the Recipient's important objective—

- To improve educational achievement of its students, through a recipient's overall established policy to provide diverse educational opportunities, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective
- To meet the particular, identified educational needs of its students, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective

# SEPARATE AND EQUAL IN K-12 (CONT.)

## **The provisions on the preceding slide require that:**

- 1) The Recipient implements its objective in an evenhanded manner;
- 2) Student enrollment in a single-sex class or extracurricular activity is completely voluntary; and
- 3) The Recipient provides to all other students, including students of the excluded sex, a substantially equal coeducational class or extracurricular activity in the same subject or activity.

# SEPARATE AND EQUAL IN K-12 (CONT.)

- A Recipient that provides a single-sex class or extracurricular activity, in order to comply with paragraph (b)(1)(ii) of this section, may be required to provide a substantially equal single-sex class or extracurricular activity for students of the excluded sex (34 C.F.R. § 106.34(b)(2))
- **This approach is not permitted for higher education.**

# SINGLE-SEX SCHOOLS (SEPARATE AND EQUAL)

- Title IX exempts the admissions practices of non-vocational elementary and secondary schools, thus permitting single-sex admissions policies in non-vocational elementary and secondary schools (34 C.F.R. § 106.15(d))
- However, the regulations specifically provide that a local education agency (LEA) may exclude any person from admission to a non-vocational elementary or secondary school on the basis of sex only if such Recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools (34 C.F.R. 106.35 §(b))

# SINGLE-SEX SCHOOLS (SEPARATE AND EQUAL) (CONT.)

- An LEA cannot use a single-sex admissions policy — which is not itself subject to Title IX’s prohibition — as the predicate for otherwise causing students, on the basis of sex, to be subjected to discrimination.
- For example, school districts may not establish a single-sex school for one sex that provides the district’s only performing arts curriculum. Students of the other sex also must have access to a comparable school with that curriculum.
- It has been OCR’s longstanding interpretation, policy, and practice to require that the comparable school must also be single-sex.

# SINGLE-SEX SCHOOLS (SEPARATE AND EQUAL) (CONT.)

- An LEA may offer a single single-sex school if such an action constitutes remedial or affirmative action (34 C.F.R. § 106.3)
- While the statutory exemption precludes the Department from examining an LEA's justification for a single-sex school, LEAs also should be aware of constitutional requirements in this area, if single-sex schools deny students equal protection under the law.

# SINGLE-SEX SCHOOLS (SEPARATE AND EQUAL) (CONT.)

- The Supreme Court has addressed this in:
  - ***United States v. Virginia, 518 U.S. 515 (1996)***
    - male-only military college violated Equal Protection Clause
  - ***Mississippi University for Women v. Hogan, 458 US 718 (1982)***
    - female-only nursing school violated Equal Protection Clause



# **“PREFERRED SEX” PROGRAMS**



# “PREFERRED SEX” PROGRAMS

- Historical justifications for disparate treatment through single-sex programs are no longer legally supportable in many circumstances because most colleges and universities enroll roughly equal numbers of male and female students, or even a majority of female students
- Yet, most colleges (and many K-12 schools) still offer ancillary programs that are ostensibly single-sex, such as camps, women’s leadership programs, women in STEM programs, self-defense programs like RAD, etc.
- At the postsecondary level, offering separate, but equal programs will not satisfy Title IX (this would be permitted for K-12).

# “PREFERRED SEX” PROGRAMS (CONT.)

- OCR’s Title IX enforcement with respect to such programs lacks clear policy guidance, but from reading enforcement letters, it seems that OCR will tolerate what we call “preferred sex” programs as opposed to single-sex-exclusive programs.
  - OCR might approve a Women’s Leadership or Empowerment camp or program if the program is open to all students regardless of sex, **and** if the program is not advertised exclusively to only female students. While OCR may not like the single-sex title of the program or event, they seem not to take issue as long as it is open to all, at least for now.

# “PREFERRED SEX” PROGRAMS (CONT.)

- As a result, many institutions offer programs that prefer one sex in participation — and that are functionally single-sex when students of only one sex sign up or show up — but could include small numbers of students of any sex if they choose to attend/participate



# **“AFFIRMATIVE ACTION” PROGRAMS**

# “AFFIRMATIVE ACTION” PROGRAMS

- Title IX permits affirmative action but does so more in theory than in practice, in most cases. To establish a basis for affirmative action in higher education, the bar is high. A Recipient must demonstrate:
  - A historical exclusion of one sex has created a legacy today that hinders or creates a barrier to access on the basis of sex in specific institutional programs that can be demonstrated by data.
  - Affirmative action to increase participation by the excluded sex will help to alleviate this disparity.
  - See *Cf. Hill v. Ross*, 183 F.3d 586, 590 (7th Cir. 1999) and *United States v. Virginia*, 518 U.S. 515, 533 (1996).

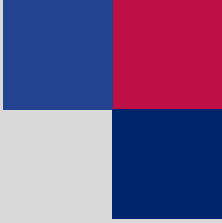
# “AFFIRMATIVE ACTION” PROGRAM EXAMPLE

Women in STEM feeder programs must allow equitable access to all sexes under Title IX, unless it can be shown that the Women in STEM program serves as affirmative action to increase equitable participation by women in the institution’s STEM programs. Thus, it is not the STEM feeder program that has an equity issue, but the STEM educational programs that do, where the STEM feeder is the remedy to those programmatic disparities.

# “AFFIRMATIVE ACTION” PROGRAM EXAMPLE (CONT.)

What if the number of women in undergrad STEM programs is proportional to their enrollment and to men’s enrollment?

Then, an affirmative action argument won’t work. But an institution that has data demonstrating that while undergrad STEM programs are equitable, the graduate-level STEM programs are disproportionately male (this is common) could use that data to support single-sex STEM feeder programs for women, as long as the institution can demonstrate over time that the STEM feeder does in fact increase the number of women enrolled in STEM graduate programs.



# CASE STUDIES



# CASE STUDY #1: HOMECOMING

- Your school or college has an annual student “Homecoming Court,” including a King and a Queen who elected by popular vote. This tradition is at least 70-years old. The Court is a program of the student government and finds itself enmeshed in controversy this year.
- Some student government reps want to keep the Court just like it is, with a male King and a female Queen.
- Other student reps like the Court idea, but only support it if any student of any gender can be elected King or Queen.

# CASE STUDY #1: HOMECOMING (CONT.)

- Still a third contingent of student reps wants to brand the Court the “Homecoming Heroes,” thus removing any gendered references to a King or Queen and removing any sex or gender-based restrictions on eligibility.
- The student government president is asking for the Title IX staff’s recommendations.

**As a Title IX professional, what would you advise the student government to do, and why?**

# CASE STUDY #2: A NEW CLUB

- Your school or college offers a for-credit program in auto repair and maintenance. Males make up 90% of those enrolled in the program, and this has been fairly consistent for nearly 40 years.
- A group of female students complains to the Title IX Team that their application to for a new club has been denied. They want to start a chapter of “Gearhead Girls,” a new organization springing up all over the country to encourage young girls (ages 10 and up) who love cars, motorcycles, and mechanics to support each other on a career path in auto repair and maintenance.

# CASE STUDY #2: A NEW CLUB (CONT.)

- The staff overseeing the club application process explains that a co-ed club would serve the same purpose, and that they denied the application because institutional policy requires all clubs to accept “all comers.”

**As a Title IX professional, what should you do?**

# CASE STUDY #3: WOMEN IN STEM

- The Women's Studies department at your school is vocal, active, and engaged in ensuring equity in institutional programs.
- The Department presents the Title IX office with a proposal for a Women in STEM feeder program. The Department has done its homework and has strong data showing that there is a need for female STEM graduates in your state, where many employers have placed emphasis on hiring qualified female applicants but claim that the applicant pool is not robust enough because the colleges in the state are not producing enough STEM majors, or women who have graduate-level STEM degrees.

# CASE STUDY #3: WOMEN IN STEM (CONT.)

- While your college graduates proportionate numbers of men and women in STEM at both the undergraduate and graduate levels, the Women's Studies department makes the case that your college has a moral obligation to help address the state-level employment disparity for men and women in STEM-related professions with this feeder program.

**Would you permit this program as affirmative action?  
Why or why not?**

# CASE STUDY #4: WOMEN IN LEADERSHIP CLUB

- The local Women in Leadership Club has long conducted outreach programs at your school, including an annual symposium on Women's Leadership opportunities and a boot camp for Women Leaders of Tomorrow.
- As this year's planning process gets underway for these events, the local Club asks your school once again to help promote these events to your students. The symposium event announcement states that the event is for women students, with a small print explanation that men may attend upon request. There is no exception or explanation for the boot camp, which is directed at women only. The Club asks for your school to send these announcements to every female student.

# CASE STUDY #4: WOMEN IN LEADERSHIP CLUB

- Please note that in the long history of the Club, no man has ever asked to participate in Club activities or made a complaint that they could not participate. The Club activities do not take place on campus.

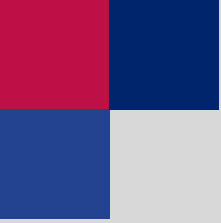
**Your office is contacted about these long-standing events. What should you do?**



# CASE STUDY #5: BOY SCOUTS

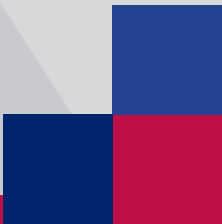
- A local Boy Scout troop has been using school facilities for their meetings for many years.
- Ever since the Boy Scouts went co-ed, the local troop that uses the school has remained all male.
- The Scout Leader claims that no females have ever applied or shown interest because the local Girl Scout program is so strong.
- Community members have raised the issue with the Title IX Coordinator that it may violate Title IX if the school permits the troop to use public facilities for a program that is sex-exclusive in practice, even if it is open to all on paper.

**What should you do? Roadmap your response.**



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# Questions?



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**Thanks for joining us today.**

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