

From: Guinto, Gloria
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To: T9PublicHearing
Subject: Written Comment: Title IX Public Hearing (Need for Revisions to the Regulation)

I am a staff attorney with the U.S. Department of Education, Office for Civil Rights. My comments are my own personal opinion which are not representative of any organization or anyone, other than myself. However, my opinion is informed on my experience working on single sex scholarship and program cases that make it difficult for recipients to address gender and gender identity disparities based on systemic, historic inequities.

Current OCR guidance at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-single-sex-20210114.pdf> prohibits recipients from considering national statistics as evidence of limited participation on the basis of sex. This guidance guts recipients' ability to voluntarily address longstanding, systemic sex-based disparities under 34 CFR 106.3 (b) which is contrary to the spirit of Title IX and its intended purpose of combatting "the continuation of corrosive and unjustified discrimination against women in the American educational system." 118 Cong. Rec. 5803 (1972).

The Department should require OCR to remove the guidance and no longer apply it. The Title IX regulation at 34 CFR 106.3(b) should be revised to clarify that recipients, in determining whether to take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex as follows:

(b) *Affirmative action.* In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take **voluntary**, affirmative action to overcome the effects of **systemic** conditions which resulted in limited participation **therein or in an occupation for which the program or activity prepares students** therein by persons of a particular **gender identity**. Nothing herein shall be interpreted to **prohibit recipients from considering national statistics in determining the need for affirmative action** or alter any affirmative action obligations which a recipient may have under Executive Order 11246.

In order to allow recipient to list third party scholarships, including scholarships that are gender and gender identity based, when the purpose of the assistance is to address current disparities caused by historic, systemic inequities, 34 CFR § 106.37 (b) should be revised as follows:

(b) *Financial aid established by certain legal instruments.* (1) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government which requires that awards be made to members of a particular sex specified therein; *Provided*, That the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex. **Recipients may inform students of third party, gender -based or gender identity-based scholarships, fellowships, or other forms of financial assistance when the purpose of the assistance is to address current disparities caused by historic, systemic inequities.**

In order to allow recipients to have gender-based third-party programs on their property, the regulation 34 CFR §106.14 should be revised as follows to permit organizations that provide gender-based programs to address disparities caused by historic, systemic inequity.

§106.14 Membership practices of certain organizations.

(a) *Social fraternities and sororities*. This part 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.

(b) *YMCA, YWCA, Girl Scouts, Boy Scouts and Camp Fire Girls*. This part 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.

(c) *Voluntary youth service organizations*. This part 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

(d) **STEM programs sponsored by federal or state agencies or non-profit organizations which are exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1954 and the program participants of which have been traditionally limited to members of one sex and principally to persons of less than nineteen years of age for the purpose of addressing disparities caused by historic, systemic inequities.**

Thank you for this opportunity to provide comments.

Sincerely,

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