



September 26, 2023

Via Electronic Mail: OCR@ed.gov  
Catherine E. Lhamon, Assistant Secretary for Civil Rights  
United States Department of Education  
Office for Civil Rights  
400 Maryland Avenue, SW  
Washington, DC 20202-1100

**Re: Request for Investigation regarding Violations of Title IX of the Higher Education Act of 1972 by the Georgia Institute of Technology**

Dear Ms. Lhamon:

America First Legal Foundation (“AFL”) is a national, nonprofit organization working to promote the rule of law, ensure due process and equal protection for all Americans, and combat invidious discrimination on the basis of race, color, national origin, and sex in America’s schools. Accordingly, AFL respectfully requests that the Department of Education open an investigation of the Georgia Institute of Technology (Georgia Tech) located in Atlanta, Georgia. As described below, the evidence is that Georgia Tech has violated Title IX of the Higher Education Act of 1972.<sup>1</sup>

### **Background**

In 2012, the Massachusetts Institute of Technology (“MIT”) began a program called “Rising Stars in EECS (Electrical Engineering and Computer Science)” (hereinafter “Rising Stars”) to encourage more women to participate in these areas of academia.<sup>2</sup> The program consisted of intensive training on the faculty selection process, as well as networking opportunities for doctoral candidates and graduates.<sup>3</sup> Rising Stars was, and remains, closed to all male applicants except those who identify as women or “nonbinary.”<sup>4</sup> MIT hosted Rising Stars again in 2013.<sup>5</sup> In 2014, Rising Stars was hosted by the University of California, Berkeley.<sup>6</sup> Since then, Rising Stars has been

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<sup>1</sup> 20 U.S.C. § 1681 et seq.

<sup>2</sup> MIT EECS, *Rising Stars in EECS*, <https://tinyurl.com/53tzxvzu> (last visited Sep. 22, 2023).

<sup>3</sup> GEORGIA INSTITUTE OF TECHNOLOGY, *EECS Rising Stars 2023*, <https://tinyurl.com/49jvttj2> (last visited Sep. 22, 2023).

<sup>4</sup> *Id.*

<sup>5</sup> MIT EECS, *Past Workshops*, <https://tinyurl.com/y96z3e8n> (last visited Sep. 22, 2023).

<sup>6</sup> *Id.*

hosted by Carnegie Mellon University, Stanford University, the University of Illinois at Urbana-Champaign, and this year is coming to Georgia Tech.<sup>7</sup>

Rising Stars, a program that began as a simple, on-campus networking and employment workshop, has become a sufficiently prestigious workshop that candidates from all over the country wish to attend and must submit an application for rigorous consideration.<sup>8</sup> Georgia Tech promises that this year’s Rising Stars will provide an “intensive workshop for graduate students and postdocs of historically marginalized or underrepresented genders who are interested in pursuing academic careers in electrical engineering and computer science.”<sup>9</sup> This year, Georgia Tech has announced that the program is open exclusively to “cisgender female, transgender (AMAB and AFAB), and nonbinary graduate students and postdocs.”<sup>10</sup> In other words, “straight men need not apply.”<sup>11</sup> By doing so, the program discriminates on the basis of sex, because women who identify with their biological sex are accepted, and men who do the same are not.<sup>12</sup>

### Georgia Tech Violates Title IX

Title IX of the Higher Education Act of 1972 states that “No person in the United States shall, on the basis of sex, be excluded from participation in ... any education program or activity receiving Federal financial assistance.”<sup>13</sup> As a public university that receives federal funding, Georgia Tech is bound by Title IX.

Since its inception, Rising Stars has excluded men from participation.<sup>14</sup> The program overtly discriminates against men by making the program open to myriad gender identities,<sup>15</sup> excluding only those “assigned male at birth” who still identify as male. This is illegal under Title IX.<sup>16</sup> The Supreme Court has held “that a party seeking to uphold government action based on sex must establish ‘exceedingly persuasive justification’ for the classification.”<sup>17</sup> Title IX provides few and exclusive “exceedingly

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<sup>7</sup> MIT EECS, *Past Workshops*, <https://tinyurl.com/y96z3e8n> (last visited Sep. 22, 2023); GEORGIA INSTITUTE OF TECHNOLOGY, *EECS Rising Stars 2023*, <https://tinyurl.com/49jvttj2> (last visited Sep. 22, 2023).

<sup>8</sup> GEORGIA TECH, *EECS Rising Stars 2023*, <https://tinyurl.com/49jvttj2> (last visited Sep. 22, 2023).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Despite AMAB standing for “assigned male at birth,” only men identifying as women are capable of applying.

<sup>12</sup> *Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731, 1742 (U.S.) (“transgender status [is] inextricably bound up with sex ... because to discriminate on these grounds requires ... treat[ing] individual[s] [] differently because of their sex.”).

<sup>13</sup> 20 U.S.C. § 1681(a).

<sup>14</sup> MIT EECS, *Rising Stars in EECS*, <https://tinyurl.com/53tzxvzu> (last visited Sep. 22, 2023).

<sup>15</sup> Even ignoring the open question whether there are, in fact, more genders than male and female, the program explicitly excludes men.

<sup>16</sup> GEORGIA TECH, *EECS Rising Stars 2023*, <https://tinyurl.com/49jvttj2> (last visited Sep. 22, 2023).

<sup>17</sup> *United States v. Virginia*, 518 U.S. 515, 524 (1996) (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

persuasive” justifications that allow an educational institution to discriminate based on sex.<sup>18</sup> Creating more employment opportunities for “historically marginalized or underrepresented genders” does not appear on the statutory list.<sup>19</sup> Rising Stars, therefore, violates Title IX.

Further, the University of Georgia system knows that programs like these violate Title IX and the Equal Protection Clause and has disclaimed the use of affirmative action since 2001 when the University of Georgia lost its appeal in *Johnson v. Board of Regents*. 263 F.3d 1234 (11th Cir. 2001).<sup>20</sup> In *Johnson*, the University of Georgia’s freshman admissions policy gave preferential treatment to some applicants based on race and sex. *Id.* at 1237. The University of Georgia did not dispute that it gave a fixed numerical bonus based on race and sex; a bonus that the plaintiffs did not receive because of those characteristics. *Id.* UGA declined to appeal the district court’s holding that its consideration of sex was unlawful, apparently conceding the point. *Id.* at 1242, n8. While the Rising Stars program is not an admissions policy, Title IX applies with equal force.

Subpart D of the Title IX implementing regulations provides that “no person shall, on the basis of sex, be excluded from participation in ... any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance.”<sup>21</sup> The University of Georgia here does just that by discriminating on the basis of sex. The Supreme Court, in *Bostock v. Clayton County, Ga*, explained that “transgender status [is] inextricably bound up with sex ... because to discriminate on these grounds requires ... treat[ing] individual[s] [] differently because of their sex.” In this case, the University allows women who identify with their biological sex to participate in this program, while excluding men who likewise identify with their own biological sex. This constitutes illegal sex discrimination under Title IX.<sup>22</sup>

While another section of the implementing regulations of Title IX (34 CFR § 106.3) allows for affirmative action programs in some cases, those regulations provide no safe harbor here.<sup>23</sup> First, Georgia Tech has not identified any “conditions which resulted in limited participation [for women]” at Georgia Tech, nor has it argued that

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<sup>18</sup> 20 U.S.C. § 1681(a).

<sup>19</sup> 20 U.S.C. § 1681; GEORGIA TECH, *EECS Rising Stars 2023*, <https://tinyurl.com/49jvttj2> (last visited Sep. 22, 2023).

<sup>20</sup> In *Johnson*, the Eleventh Circuit held that UGA’s affirmative action programs violated the Equal Protection Clause. Since that time, UGA (which, like Georgia Tech, is part of the University System of Georgia), has disclaimed the use of race in admissions. See Katie Tucker, UGA Recommits to a Welcoming Environment for All Amid SCOTUS Decision, WUGA (Jun. 30, 2023), <https://bit.ly/3RAn6Pc> (reprinting the University’s statement in full).

<sup>21</sup> 34 C.F.R. § 106.31(a).

<sup>22</sup> *Id.*

<sup>23</sup> It is even doubtful whether affirmative action is ever authorized under the statute, as the implementing regulations that purport to bless the practice go far beyond the text of Title IX, and the canons of statutory construction indicate that the statute should be read to create a sex neutral regime.

this program helps redress those conditions. Under the Equal Protection Clause, a remedial justification for affirmative action requires a specific showing of past discrimination, not merely a generalized showing of “societal discrimination.” See e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 485 (1989) (quoting *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274 (1986)).<sup>24</sup> This showing is not present here.

Allowing affirmative action programs without any finding of discrimination like that discussed in *Croson* and *Wygant* would undermine the entire text, creating an exception that would swallow the rule. Universities would be allowed to discriminate through affirmative action anytime they wanted, without even being required to identify the discrimination they are allegedly seeking to redress. A reading that undermines the purpose of the statute itself is disfavored.<sup>25</sup>

## Conclusion

Because Georgia Tech has treated women who identify with their biological sex better than men who likewise identify with their own biological sex, the University has discriminated based on sex in violation of Title IX and its implementing regulations.<sup>26</sup> At the same time, the University has failed to identify the kind of specific past discrimination required under the Equal Protection Clause before it could invoke the “remedial justification” for affirmative action programs. Thus, the University will find no safe harbor for its Rising Stars program in the Title IX regulations or in Title IX itself.

The EECS Rising Stars Program, as described herein, is patently illegal and clearly proscribed by Title IX.<sup>27</sup> It is also deeply harmful. Discrimination based on immutable characteristics such as race, color, national origin, or sex “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone.”<sup>28</sup> More broadly, the discrimination highlighted in

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<sup>24</sup> While *Wygant* and *Croson* both dealt with racial discrimination, the analysis has been frequently adopted by other courts considering sex discrimination cases because such cases also implicate both Title VII and the Equal Protection Clause. See e.g., *Cohen v. Brown University*, 101 F.3d 155, 171 (1st Cir. 1996) (treating a claim of sex discrimination in the Title IX context and citing *Croson* for the proposition that “the [Supreme] Court has taken the position that voluntary affirmative action plans cannot be constitutionally justified absent a particularized factual predicate demonstrating the existence of ‘identified discrimination’”).

<sup>25</sup> ANTONIN A. SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS*, 63 (2012) (“The presumption against ineffectiveness ensures that a text’s manifest purpose is furthered, not hindered.”).

<sup>26</sup> 20 U.S.C. § 1681(a); 34 C.F.R. § 106.31(a).

<sup>27</sup> *Bob Jones Univ. v. United States*, 461 U.S. 574, 593 (1983) (“racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals.”).

<sup>28</sup> *Brown v. Bd. of Education*, 347 U.S. 484, 494 (1954).

this case necessarily foments contention and resentment; it is “odious and destructive.”<sup>29</sup> It truly “is a sordid business, this divvying us up” by race or sex.<sup>30</sup>

Thus, the Department of Education’s Office of Civil Rights should open an investigation into this matter immediately.

Thank you in advance for your assistance. Please feel free to contact me if you have any questions.

Sincerely,

/s/ Nicholas R. Barry

Nicholas R. Barry

America First Legal Foundation

Cc: Christina Griffin, Title IX Coordinator, Georgia Institute of Technology

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<sup>29</sup> *Texas v. Johnson*, 491 U.S. 397, 418 (1989).

<sup>30</sup> *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part).