

The Educational Experience of Young Men of Color

Federal Legal Implications
and Policy Guidance

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About the Authors

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This paper provides an overview of the federal legal implications associated with educational strategies and programs designed to promote sound solutions to address challenges associated with the educational underperformance of minority males. It has been prepared in furtherance of the College Board’s College Completion Agenda and as part of the ongoing work of the College Board’s Advocacy & Policy Center that addresses issues of postsecondary access and completion.

This paper is organized as follows:

I. Background — provides a brief, research-based overview of the nature of the educational crisis facing young men of color.

II. Meeting the Challenges — provides a policy-oriented framework, derived from federal law, to guide the consideration of institution- and district-based educational initiatives that may address that crisis.

III. Federal Nondiscrimination Law — provides an overview of the relevant federal nondiscrimination laws, regulations and principles upon which Section II is based (and upon which institutional judgments should be grounded).

IV. Conclusion — synthesizes key considerations that should guide relevant institutional action.

I. Background

In recent years, growing attention has been given to deficits in minority boys' academic performance, a profound crisis with long-term societal, economic and civic impact. Life outcomes for minority boys (particularly African Americans, Hispanic Americans, Native Americans, and certain Pacific Islander and Southeast Asian populations) too often involve academic failure and dropout, unemployment, and — in too many cases — incarceration. If our nation's current demographic and educational attainment trends, exacerbated by these trends for minority males, continue, the general educational levels of Americans will decline, and the United States will be unable to attain our shared goals of leading the world with the highest proportion of students obtaining postsecondary degrees who are prepared to be engaged citizens and productive members of our nation's workforce.

Demographic trends confirm that in order to regain our nation's once-preeminent international position in educational attainment, we must begin to matriculate and graduate populations of American students who traditionally have been underrepresented at the postsecondary levels. The educational achievement of minority males is a central part of this picture.¹

Generally, men — and especially minority men — lag behind their female counterparts in educational attainment and employment. In secondary education, National Center for Education Statistics (NCES) data indicate that in all racial/ethnic groups (except for Native Hawaiian/Pacific Islanders),² males drop out of high school at higher rates than their female peers — in 2008, dropout rates were 22 percent for Hispanic boys, 17 percent for American Indian/Alaska Native boys, 12 percent for African American boys and 8 percent for Native Hawaiian/Pacific Islander boys.³

The postsecondary picture is similarly bleak for minority males. Enrollment in postsecondary institutions has become increasingly female; for example, women account for two-thirds of the postsecondary degrees awarded to African Americans. Native American and Hispanic women earn more than 60 percent of postsecondary degrees.⁴ Thus, across the board in each of these groups, young women are significantly outperforming young men with respect to the attainment of high school diplomas, with even more pronounced disparities at the postsecondary level.

Rounding out this picture is the unfortunate reality reflected in the data where minority men outpace their female counterparts. In the “postsecondary” outcomes of unemployment and incarceration, minority men hold an unenviable preeminence. Men of color are more likely to be unemployed than their female counterparts. 2008 Census Bureau data show that Asian males constituted 59 percent of the unemployed Asian population, ages 15–24; Hispanic men made up 57 percent of the unemployed Hispanic population; and African American males comprised over 52 percent of the unemployed African American population.⁵ Similarly, both African American and Hispanic men are disproportionately incarcerated.

Although African Americans constitute only 13 percent of the U.S. population, African American males comprise 42.2 percent of the male prison population, ages 18–24.⁶ Data from the Bureau of Justice Statistics document that one in six black men has been incarcerated as of 2001 (nearly six times the rate of white males), and if current trends continue, one in three black males today can expect to spend time in prison.⁷ Similarly, while Hispanics are just 16 percent of the U.S. population, Hispanic males, ages 18–24, comprise 23.1 percent of the male prison population.⁸ Today, one of every six Hispanic males can expect to go to prison in his lifetime, more than double the rate of non-Hispanic whites.⁹

In the context of these trends, the U.S. Census projection that minorities will represent more than half of all children in the United States by 2023 affirms the imperative of ensuring that our national aims regarding postsecondary access and success include particular focus on the current challenges that face minority males — just as other segments of our population merit focus as well.

II. Meeting the Challenges

A Spectrum of Educational Strategies and Options in Light of Federal Nondiscrimination Law

Broadly speaking, numerous strategic and programmatic options exist for improving the educational achievement and life outcomes of minority males. Differences in policy and program design and implementation will surface based on the precise context, setting and objectives of the policy or program at issue. These differences can be manifested in the articulation of goals and objectives (what one is trying to achieve), just as they are reflected in the wide array of strategies that might be pursued (how one may pursue those goals and objectives).

Inevitably, one question associated with minority male initiatives is likely to arise, regardless of the precise context at issue: Within a range of potentially educationally valid options, what are the legal rules and implications that should guide the design and development of policies and programs that will address the educational challenges associated with minority males?¹⁰

Policies and programs that confer some benefit or opportunity to students on the basis of their race, ethnicity¹¹, or sex — which are not correspondingly provided to other similarly situated students — raise important questions that should be addressed to

ensure that they will comport with relevant nondiscrimination principles under federal law. By definition, policies and programs that are developed with a focus on minority males implicate the full range of these laws.¹²

Therefore, as a foundation for any assessment of policy and program development, key principles (along with the relevant questions that must be addressed) should be understood. These legal principles (detailed in Part III of this paper) reflect key points of guidance that should be considered in policy and program design and implementation.

Key Principles

1 **Goals and objectives.**

Goals and objectives associated with policies or programs developed to enhance minority male achievement and success should reflect strong educational foundations, based on relevant educational research and experience.

2 **Race, ethnicity and sex preferences.**

To the extent that the race, ethnicity or sex preferences are reflected in the design and implementation of a policy or program developed to enhance minority male achievement and success, fundamental coherence between the educational goals and the design of the policy or program must exist. Practically speaking, such preferences should have the necessary positive impact, but should neither be over- nor under-inclusive in their design.

3 **Race- and ethnicity-exclusive policies.**

Policies or programs including race-conscious preferences that are limited to members of a particular race (or races) or ethnicity (or ethnicities) — and exclude others of different races or ethnicities — are difficult to sustain under federal law. To do so, the design of those policies and programs must reflect an exceedingly strong educational foundation (a “compelling interest” in legal terms). They must do so in a way in which the exclusive nature of the preferences is clearly justified. In other words, if the goals of the program could likely be effectively achieved with a less race- or ethnicity-exclusive design, then the program will most likely not be sustainable under federal law.

4 **Sex-exclusive policies.**

Similarly, policies or programs including sex-conscious preferences that are limited to members of a particular sex are challenging to sustain under federal law. To do so, the design of those policies and programs must reflect a strong educational foundation (an “important interest,” in legal terms); and they must do so in a way in which the exclusive nature of the preferences is clearly justified.

More conceptually, it may be useful to consider policy and program prospects as points along a continuum, ranging from fully inclusive to totally exclusive in their design.

Serving comparable (if not identical) purposes, policies and programs can range from those that are broadly inclusive but that reflect some sort of pedagogical focus on minority males (point A along the spectrum, the most likely legally sustainable, as a general rule) to those that are pursued for the exclusive benefit of minority males within a broader education setting (point B along the spectrum, the most legally challenging, generally speaking).

Inclusive Programs

Reflected in the A range might be programs with affiliations and concentrations that match and appeal to minority male interests and needs — e.g., ethnic studies, urban male leadership, etc. So long as these programs do not prevent white male or female students from joining and participating, the activities may effectively end up satisfying core educational goals without the imposition of participation barriers — and thus qualify as “inclusive” in the range of options reflected in **Figure 1**.¹³

Figure 1
Young Men of Color Policy and Program Design:
Spectrum of Analysis Under Federal Nondiscrimination Laws

	Inclusive		Exclusive
	A		B
Policy and Program Design	Inclusive program that in goals, objectives and design addresses the academic needs of all students, with a focus on various groups represented in the school, including minority males.	Inclusive program reflected in goals and objectives that includes discrete strands of activity, including a set of targeted strategies or preferences such as addressing academic needs of minority males in a broader context in which other student needs are comparably addressed in targeted ways.	Exclusive program in which participation is restricted — such as in the establishment of a program that addresses minority males’ academic needs (in a setting in which other groups of students that may have comparable needs do not benefit from such targeted initiatives).
Legal Risk Under Federal Law, Generally	Low level of legal risk, as a general rule. Program is broadly comprehensive.	Moderate level of legal risk — Program’s targeted focus creates a substantial issue that may be mitigated by the fact that all students, regardless of race or sex, have needs comparably met — albeit in different, targeted ways.	High level of legal risk, given that certain educational benefits/opportunities are provided to certain students, based on race and sex, and not to others.

Reflective of programs that may fall within this range of inclusive programs, guidance issued by the National School Boards Association is of particular relevance:

Some urban school districts have operated African-American/Black immersion programs or schools for close to two decades. Most of these programs are geared toward at-risk African-American males and use Afro-centric curricula to build self-esteem. Many legal and social science scholars believe that such programs and curricula are in keeping with Brown's promise to lift the academic performance of minorities.

These immersion programs have avoided equal protection challenges because they may not explicitly exclude enrollment by students of other races, and the programs draw students from neighborhoods where the population is predominantly African-American with little, if any, demand for enrollment by other groups. The Supreme Court's decision [in *PICS v. Seattle School District*] certainly leaves the door open for school districts to carry out similar practices [such as] involving the drawing of attendance zones without resorting to racial classification of individual students so that African-American students would constitute the overwhelming majority of the student body in a school.¹⁴

Moving slightly more to the center of the diagram, a school district might identify the issue of minority male engagement and achievement as one that merits significant focus, but incorporate an array of targeted strategies and initiatives into a broader cluster of initiatives that address underperformance and engagement issues more broadly. For instance, a set of targeted after-school programs designed to provide support to significantly underperforming students might be established without regard to race, ethnicity or sex, but in the context of that offering, a school might pursue efforts to maximize student participation with some enhanced outreach to minority male students in an instance where, as a group,

academic performance is particularly low. Thus, the potential impact of the focus on minority males may not be lessened even as the district's effort does not draw a hard and fast line regarding eligibility for the support based on race or sex. In short, all students are receiving key support, albeit targeted to meet specific, sometimes group needs.

Sex-But-Not-Race-Exclusive Programs

By contrast, there are some instances where participation may be targeted or limited to males, and the issue of race may be less relevant to the program design, such as programs on Native American reservations or in urban school districts. In those instances, schools must show that their efforts to provide — either directly or by supporting a third-party provider — all-male programs and activities are substantially related to an important governmental or educational interest. This exercise must link the single-sex setting (the means) to the intent to address and provide solutions to the academic and emotional-social issues facing minority boys (the ends). In other words, the school must “tell the story” that illustrates why a single-sex setting is substantially related and responsive to the minority male crisis.

At the same time, under Title IX regulations, which prohibit discrimination on the basis of sex in such federally funded education programs, the school must consider comparable alternatives for girls, though the alternatives need not necessarily be offered in a single-sex setting. (This consideration is acknowledged in the College Board's own materials, which also address the challenges that girls and women face.) Thus, if a school plans to provide a single-sex opportunity to its male students to address academic and emotional-social issues, it should evaluate the degree to which female students also could benefit from a comparable opportunity — whether in a single-sex or coeducational environment. This requirement should resonate beyond the legal requirement. Envisioning all-male programs as part of a more comprehensive approach to improving academic and life outcomes for all students is sound educational practice as well.

III. Federal Nondiscrimination Law

A Primer on Federal Legal Standards and Case Law

Because they can implicate preferences based on race, ethnicity and sex, policies and programs targeting young men of color must be designed and implemented with care — with attention to two distinct but sometimes overlapping sets of legal principles.

Under the United States Constitution, the Equal Protection Clause of the Fourteenth Amendment provides that “no state ... shall deny to any person ... the equal protection of the laws.” Citing this authority, in 1964, Congress passed Title VI of the Civil Rights Act, which prohibits discrimination on the basis of race, color or national origin in programs and activities receiving federal financial assistance. And Title IX of the Education Amendments of 1972 similarly prohibits discrimination on the basis of sex in such education programs.

Federal courts use different standards of review (legal tests) for programs, depending on whether the program characterizes persons on the basis of race, ethnicity and national origin (which requires the most stringent test, strict scrutiny); sex and gender (which requires intermediate scrutiny); or other classifications (which requires the lowest level of scrutiny, rational basis).

Race- and Ethnicity-Conscious Programs and Activities

Under federal nondiscrimination law, educational policies and practices that treat students differently on the basis of race or ethnicity (race-conscious policies) implicate the most rigorous standard of judicial review, called *strict scrutiny*, because

distinctions based on race and ethnicity are “inherently suspect.” To satisfy this standard, the race-conscious policy or practice must serve a *compelling interest* and be *narrowly tailored* to achieve that interest. In lay terms, this means that such policies and programs must serve very significant educational ends that are essential to the success of the entity that is pursuing those goals and that the methods by which those goals are to be attained must be very carefully calibrated (neither over- nor under-inclusive, not based on stereotypes or generalizations, etc.) to achieve those important ends.

Although the U.S. Supreme Court has addressed a number of instances in which the strict scrutiny standard applies (upholding and striking down an array of policies and programs, depending on their particular contexts, facts, etc.),¹⁵ it has not specifically addressed minority male programs of the sort examined in this guidance.

Under federal law, race-exclusive programs — those that provide certain benefits or opportunities to students of some but not all races — are generally viewed as inherently suspect — even if sustainable in very limited settings.¹⁶ In some cases, they are considered to be outright unlawful.¹⁷

Strict Scrutiny Requires:

A **compelling interest** — the *end* that must be established as a foundation for maintaining lawful race- and ethnicity-conscious policies that confer benefits to students based on race or ethnicity.

Narrow tailoring — the *means* used to achieve the compelling interest must “fit” that interest precisely, with race or ethnicity considered only in the most limited manner possible. Federal courts examine several interrelated criteria in determining whether a program is narrowly tailored, including:

- The necessity of using race or ethnicity,
- The burden imposed on the nonbeneficiaries of the racial/ethnic preference,
- The flexibility of the program, and
- Whether the policy has an end point and is subject to periodic review.

Intermediate Scrutiny Requires:

An **important interest** — the end that must be established as a foundation for maintaining lawful sex-conscious policies that confer benefits to students based on their sex.

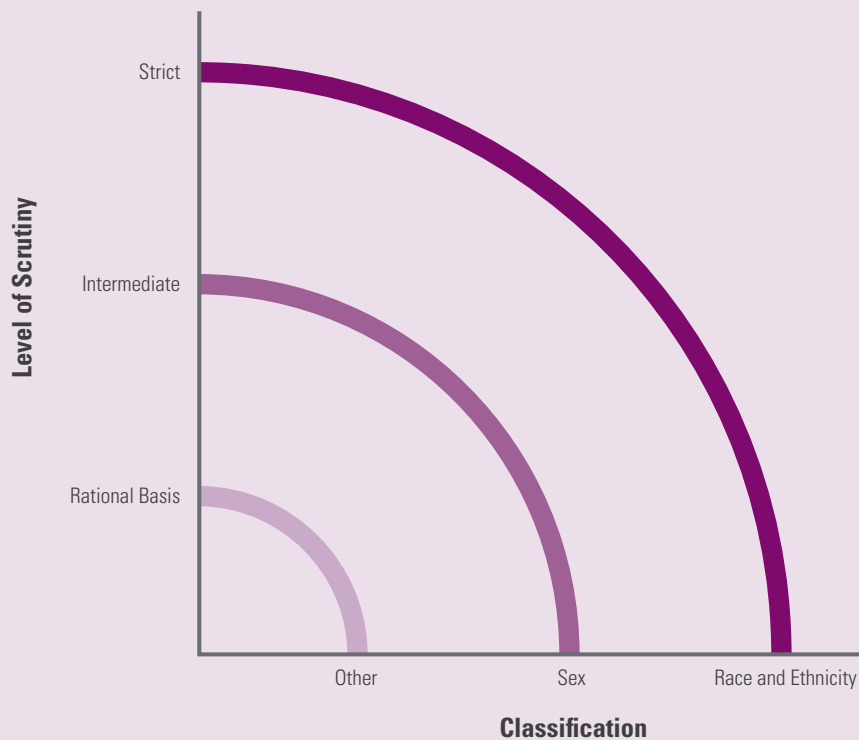
Substantial relationship — the *means* used to achieve the important interest must be substantially related to that interest.

Rational Basis Requires:

A **legitimate interest** — the end that must be established as a foundation for maintaining lawful policies that confer benefits to students in a race-, ethnicity- and sex-neutral way.

Rational relationship — the means used to achieve the legitimate interest must be rationally related to that interest.

Figure 2
Federal Standards of Review¹⁸



Sex-Conscious and Sex-Exclusive Programs and Activities

Where educational programs condition opportunities or benefits on the basis of sex, federal courts have applied *intermediate scrutiny* (rather than strict scrutiny), which demands less scrutiny than race-conscious programs. Under this standard of review, a program must serve an *important governmental objective* (rather than a compelling objective) and be *substantially related* (rather than narrowly tailored) to the achievement of those objectives.¹⁹ The Supreme Court has noted that to rise to the level of an important governmental objective, the justification for a sex-conscious program “must be genuine... [a]nd it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”²⁰

Although the Supreme Court has not provided express guidance on elementary and secondary single-sex policies and programs, it has examined two single-sex postsecondary institutions.²¹

In these cases, the Court found unconstitutional an all-female nursing school and an all-male military academy. In those fact-based decisions, the Court acknowledged the following government interests that might be sufficiently important to justify a single-sex program: intentional and direct redressing for members of the disproportionately burdened sex; pedagogical benefits for at least some students; and diversity among public educational institutions to serve the public good.

By contrast, the U.S. Department of Education has specifically addressed the issue of single-sex programs in elementary and secondary settings — most recently in its 2006 revised Title IX single-sex regulations. The Department’s regulations provide public elementary and secondary schools with important flexibility to offer single-sex classes, extracurricular activities, and schools,²² distinguishing single-sex education from race-segregated education: “Although the Supreme Court has ruled race-segregated public education per se unconstitutional [citing *Brown v. Board*

of Education], the Court has not struck down the legality of single-sex public elementary or secondary schools.”²³

The Title IX regulations assert two important government objectives to justify single-sex programs — increasing the diversity of educational options to improve student outcomes and meeting specific needs of students. Under the regulations, student enrollment in single-sex classes, extracurricular activities, and schools must be completely voluntary, and recipients of federal funding (including districts and schools) must conduct periodic evaluations of single-sex programs/offerings every two years. Meanwhile, the regulations provide that there must be substantially equal coeducational opportunities for the excluded sex and that a recipient that provides a single-sex class or extracurricular activity may be required to provide a substantially similar single-sex class or extracurricular activity for members of the excluded sex.

The Department has also reasoned that a district or school can offer single-sex classes or extracurricular activities to one sex alone only if it can show that students of the excluded sex are disinterested in single-sex classes or extracurricular activities or that the excluded students do not have educational needs that can be addressed in a single-sex class or extracurricular activity. Meanwhile, under the revised regulations, the Department no longer requires districts to provide an excluded sex with a corresponding single-sex school. Ultimately, mirroring the language of the intermediate scrutiny standard, the Department encouraged recipients “to make an individualized decision about whether single-sex educational opportunities will achieve [an] important objective and whether the single-sex nature of those opportunities is substantially related to the [objective’s] achievement.”

Race- and Sex-Neutral Programs: Rational Basis Review

Finally, schools committed to addressing the issues facing their minority male students should consider race- and sex-neutral alternatives that may prove as effective in achieving desired goals. The

consideration of neutral, inclusive policies that would achieve the educational goals sought is a clear requirement as a matter of federal law — under constitutional principles as well as under Titles VI and IX.²⁴ Further, programs that do not treat students differently on the basis of their race or sex are not subject to strict scrutiny or intermediate scrutiny. Instead, courts will review these programs using the least rigorous standard of review, *rational basis*, which requires only that the program be *rationally related* to a *legitimate governmental interest*. Under rational basis review, courts provide schools with significant deference when reviewing their decisions and programs.

As the College Board previously has counseled,

As [schools] continue their mission-driven efforts..., it is imperative that they fully evaluate viable race- [and sex-] neutral strategies that may help them achieve educational success. The pursuit of these strategies — if driven by clear, focused, mission-driven goals — may advance the development of more effective policies and, at the same time, mitigate litigation-related risk.²⁵

Indeed, from an educational perspective, neutral alternatives often can support directly a school's goals for its students and, though an inclusive environment, address the needs of all students, perhaps with focuses on various groups. Schools should not assume that every program designed to respond to the crises facing minority males necessitate participation limited to minority males. Instead, inclusive strategies may be successfully designed to address the needs (academic, emotional, etc.) of minority males within a broader context — while simultaneously exposing the school to less legal risk.

IV. Conclusion

Policies and programs addressing the plight of minority boys can range from the fully inclusive (and thus less likely to trigger legal concerns) to the exclusive (where legal concerns are prevalent). In the end, the array of issues that may surface are likely to center on the educational justification and rationales for relevant policies and programs — with a corresponding demand regarding the coherence of the design of any policy or program pursuant to which minority males are the beneficiaries. Just as the minority male initiative is but one piece of College Board’s multifaceted work, an exclusive program should exist within a rich tapestry of other offerings.

Notes

- 1 See generally, *From High School to Higher Education: The Educational Crisis Facing Young Men of Color* (College Board, Jan. 2010).
- 2 Note that within the larger Asian group, as within other ethnic groups, there are nuances and disparities. For example, foreign-born “Other Asians” (which includes Cambodian, Hmong and others) and Native Hawaiian/Pacific Islanders incur dropout rates three to four times higher than the aggregate “Asian” dropout rate. Aud, Fox, and Ranani, *Status and Trends in the Education of Racial and Ethnic Groups* (U.S. Department of Education, NCES, July 2010).
- 3 *Id.*
- 4 Just 26 percent of African Americans, 24 percent of Native Americans and Pacific Islanders, and 18 percent of Hispanic Americans have been awarded at least an associate degree. *The Educational Crisis Facing Young Men of Color*, supra note 1.
- 5 U.S. Census Bureau, Current Population Survey, 2008.
- 6 U.S. Bureau of Justice Statistics, 2008.
- 7 Mauer and King, *Uneven Justice: State Rates of Incarceration by Race and Ethnicity* (The Sentencing Project, 2005) (citing Thomas P. Bonczar, *Prevalence of Imprisonment in the U.S. Population, 1974-2001* (Bureau of Justice Statistics, 2003)).
- 8 U.S. Bureau of Justice Statistics, 2008.
- 9 Mauer and King, supra note 8 (citing Bonczar, *Prevalence of Imprisonment in the U.S. Population, 1974-2001* (Bureau of Justice Statistics, 2003)).
- 10 As reflected in this paper, there is a dearth of federal case law that directly addresses the question of minority male (and similar) initiatives. As a consequence, a Freedom of Information Act request was submitted to the U.S. Department of Education’s Office for Civil Rights (OCR), for policies and case resolutions and findings of direct relevance to the issues discussed in this paper. OCR is the federal agency responsible for enforcement of Title VI of the Civil Rights Act of 1964, which prohibits discrimination among recipients of federal funds (including school districts and schools) on the basis of race and national origin, and Title IX of Education Amendments of 1972, which prohibits sex discrimination. To date, OCR has not responded with any federal policy or case-related correspondence that addresses these issues, specifically.
- 11 The terms “race” and “ethnicity,” despite their different meanings, are used interchangeably throughout this memo, given that the relevant legal analysis (“strict scrutiny”) required by federal nondiscrimination law (discussed below) treats them the same.
- 12 This paper addresses issues of relevant federal law, only. In addition to federal law, some state laws establish more stringent requirements associated with race and sex preferences. In a number of states — through voter initiatives and executive orders — such preferences may be prohibited. See, e.g., *Access & Diversity Toolkit*, “Tool 9: Beyond Federal Law: State Voter Initiatives and Their Consequences” (College Board, 2009); Coleman, et al., *From Federal Law to State Voter Initiatives: Preserving Higher Education’s Authority to Achieve the Educational, Economic, Civic, and Security Benefits Associated with a Diverse Student Body* (College Board, March 2007). As reflected in this paper, the prohibition regarding race- or gender-conscious preferences would not necessarily mean that minority male-centric initiatives could not be pursued (e.g., in cases where those policies and programs did not establish such preferences). Ultimately, when contemplating any policy or programmatic initiative to address the needs of minority males, one must evaluate the state context in which an envisioned program or activity might take place.
- 13 Again, however, federal law is only the beginning of the inquiry. In this example — where federal law might sanction the contemplated action — certain state laws might not. For example, in 2010, Arizona passed a law banning ethnic studies classes and courses, defined as those courses that “[a]re designed primarily for pupils of a particular ethnic group.” See *A.R.S. 15–112*.
- 14 *An Educated Guess: Initial Guidance on Diversity in Public Schools after PICS v. Seattle School District* (National School Boards Association, 2007).

Note, as well, that NSBA opined that “to the extent a school program admits or excludes individual students solely on the basis of race, the practice would be impermissible under the [Supreme Court’s] opinion.” That position, likely reflective of the views of many, potentially overstates the bar. For instance, and in contrast to the inclusive illustrations described above, a school principal might determine that she has a very specific set of issues associated with minority males and that as a practical matter, the *only* way she will be able to effectively deal with the issue is to periodically assemble the relevant group of minority males with one or two teachers who are also minority males — and who may have particular credibility with the group. In essence, if a clear and compelling pedagogical case can (with evidence) be made that the likely success of the initiative is dependent on engagement among minority males only, then this exclusive endeavor may pass legal scrutiny (and the very high bar federal law imposes, described below). Regardless of one’s view of how federal law might apply in such an instance,

- however, this much is clear: that kind of exclusive, limiting practice should be pursued only as a last resort — after all other more inclusive options have been considered and evaluated (and potentially, tried), in light of the educational goals established. See generally Coleman, Palmer, and Winnick, *Race-Neutral Policies in Higher Education: From Theory to Action* (College Board, June 2008).
- 15 For opinions analyzing educational programs under the strict scrutiny standard, see *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701 (2007) (striking down two race-conscious student assignment plans in the K–12 setting, but with a separate majority of Justices recognizing two compelling interests that might justify race-conscious plans — achieving the educational benefits of diversity and avoiding the harms of racial isolation); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that law school’s race-conscious admissions policy satisfied the strict scrutiny standard because it served a compelling interest in achieving the educational benefits of diversity, and race was considered as part of a holistic review of applicants); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (striking down undergraduate race-conscious admission policy because it mechanically awarded points to underrepresented racial groups and therefore was not narrowly tailored); *Regents v. Bakke*, 438 U.S. 265 (1978) (striking down medical school’s race-conscious admission program that employed a quota system but recognizing the educational benefits that flow from a diverse student body).
 - 16 See U.S. Department of Education, “Title VI Policy Guidance,” 59 Fed. Reg. 8,756 (Feb. 23, 1994); *Federal Law and Financial Aid*, supra note 12; *Navigating a Complex Landscape to Foster Greater Faculty and Student Diversity in Higher Education* (American Association for the Advancement of Science, 2010).
 - 17 See *An Educated Guess*, supra note 5; see also U.S. Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 71 Fed. Reg. 62,530, 62,532 (Oct. 25, 2006) (codified at 34 C.F.R. pt. 106) (citing *Brown v. Board of Education*, recognizing that “race-segregated public education [is] per se unconstitutional”).
See generally 42 U.S.C. § 2000d; see 34 C.F.R. § 100.3(a) (“No person in the United States shall, on the grounds of race, color or national origin be excluded from participation in . . . any program.”); but see 34 C.F.R. § 103(b)(6)(ii) (“[A] recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.”). See also U.S. Department of Education, *Nondiscrimination in Federally Assisted Programs* (Feb. 23, 1994) (recognizing potential for colleges to use race-exclusive scholarships).
 - 18 Visual adapted from Coleman, et al., *Federal Law and Financial Aid: A Framework for Evaluating Diversity-Related Programs* (College Board, 2005). For in-depth information regarding the relevant standards, see *Handbook on Diversity and the Law: Navigating a Complex Landscape to Foster Greater Faculty and Student Diversity in Higher Education* (Keith and Coleman, eds., 2010) available at: <http://php.aaas.org/programs/centers/capacity/publications/complexlandscape/PDFs/LawDiversityBook.pdf>. See also Coleman, Palmer, and Winnick, *Race-Neutral Policies in Higher Education: From Theory to Action* (College Board, June 2008).
 - 19 *Craig v. Boren*, 429 U.S. 190, 200 (1976). See, e.g., *Federal Law and Financial Aid*, supra note 12.
 - 20 *U.S. v. Virginia*, 518 U.S. 515, 533 (1996).
 - 21 See *id.* (ruling that public all-male admission policy for postsecondary military academy was unconstitutional, noting shortcomings at the state’s companion female school in terms of methodology, instructor qualification, funding, alumni connections and prestige); *Mississippi University of Women v. Hogan*, 458 U.S. 718 (1982) (finding public all-female nursing school unconstitutional because its policy perpetuated stereotypes on women’s appropriate professional fields, and therefore failed to articulate a permissible government objective; and was not substantially related to a permissible compensatory purpose). See also *Garrett v. Board of Education*, 775 F. Supp. 1004 (E.D. Mich. 1991) (holding that city — in creating three all-male academies, developed as a response to the crisis facing African American males — had not addressed the crisis facing female students as well and had not demonstrated that the presence of girls in the classroom bore a substantial relationship to the difficulties facing urban males — thus failing to satisfy the narrow tailoring prong of strict scrutiny). *Nondiscrimination on the Basis of Sex*, 71 Fed. Reg. at 62,530.
 - 22 *Id.*
 - 23 *Id.* at 62,533.
 - 24 The need to consider (and try, as appropriate) race- and sex-neutral alternatives does not require schools to exhaust “every conceivable . . . neutral alternative.” See Coleman, Palmer, and Winnick, *Race-Neutral Policies in Higher Education: From Theory to Action* (College Board, June 2008).
 - 25 *Id.*

EducationCounsel's team serves as a core partner of the College Board, having led the College Board's Access and Diversity Collaborative since its inception in 2004; and by providing policy and legal guidance on key issues of education reform to its members.

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