



THE EQUAL PROTECTION PROJECT
A Project of the Legal Insurrection Foundation
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June 27, 2023

BY EMAIL (OCR.NewYork@ed.gov)

U. S. Department of Education
Office for Civil Rights - New York Office
32 Old Slip, 26th Floor
New York, NY 10005-2500

**Re: Civil Rights Complaint Against University at Buffalo School of Law
Concerning Program Giving Explicit Racial Preference to “Students of
Color”**

To Whom It May Concern:

This is a federal civil rights complaint pursuant to the U.S. Department of Education’s Office for Civil Rights (“OCR”) discrimination complaint resolution procedures. *See* 42 U.S.C. § 2000d-1; 34 C.F.R. §§ 100.7, 100.8, and 100.9.

We write on behalf of the Equal Protection Project (“EPP”) of the Legal Insurrection Foundation, a non-profit that, among other things, seeks to ensure equal protection under the law and non-discrimination by the government, and that opposes racial discrimination in any form.

We bring this civil rights complaint against the University at Buffalo School of Law (“UBL”) – a division of the State University of New York at Buffalo, and the State University of New York system’s only law school – a public institution, for creating, supporting, and promoting the Discover Law Undergraduate Scholars Program (“DLUSP”), a program for

undergraduates interested in pursuing a career in law that explicitly gives admission preference to “students of color.”

UBL’s creation, ongoing sponsorship and active promotion of a program that explicitly gives admissions preference based on race and skin color violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution as well as Title VI of the Civil Rights Act of 1964 (“Title VI”) and its implementing regulations.¹ *See Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003) (“We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI.”).

OCR should investigate this blatantly discriminatory program and the circumstances under which the creation and promotion of it was approved, take all appropriate action to end such discriminatory practices and impose remedial relief. This includes, if necessary, imposing fines, initiating administrative proceedings to suspend, terminate, or refuse to grant or continue federal financial assistance, and referring the case to the Department of Justice for judicial proceedings to enforce the rights of the United States.

The Discover Law Undergraduate Scholars Program

According to UBL’s website, the DLUSP “is a four-week residential summer program for 20 academically promising college students who have completed their freshman or sophomore year, but who will not begin their junior year before the end of the program. Preference is given to students of color and first-generation college students.”² There is no cost for participants in the program, and those who attend receive a monetary stipend.

¹ 42 U.S.C. § 2000d *et seq.*; 28 C.F.R. Part 100.

² *See* <https://www.law.buffalo.edu/discover-law/about.html> [<https://archive.is/pHbtH>] (accessed on June 21, 2023)



Vice Dean for Student Affairs Bernadette Gargano (center) with our 2018 Discover Law Scholars.

About the Program

The Discover Law Undergraduate Scholars Program at the University at Buffalo School of Law is a four-week residential summer program for 20 academically promising college students who have completed their freshman or sophomore year, but who will not begin their junior year before the end of the program. Preference is given to students of color and first-generation college students.

According to the UBL website, applications for the 2023 DLUSP were made available on February 17, 2023 and the application deadline was March 31, 2023.³ The program itself is currently underway – it commenced on June 3, 2023 and runs through June 30, 2023.⁴

The University at Buffalo (“UB”) – the law school’s parent institution – also has promoted the program on its website, stating explicitly that admissions “[p]reference will be given to students of color.”⁵

³ See <https://www.law.buffalo.edu/discover-law/faq.html> [https://archive.is/5JMU2] (accessed on June 21, 2023).

⁴ See <https://www.law.buffalo.edu/discover-law/application.html> [https://archive.is/3nvio] (accessed on June 21, 2023).

⁵ See <https://dailybulletin.buffalostate.edu/tell-students-discover-law-undergraduate-scholars-program-application-deadline-march-20?month=2023-03&var=2023-03-03> [https://archive.is/2zshr] (accessed on June 22, 2023).

BUFFALO STATE
The State University of New York

THE DAILY BULLETIN

FRIDAY, MARCH 3, 2023

Back to March 3, 2023 : Tell Students: Discover Law Undergraduate Scholars Program - Application Deadline March 20

Today's Message

Posted: Friday, March 3, 2023

Tell Students: Discover Law Undergraduate Scholars Program - Application Deadline March 20

The Buffalo State [Political Science and Public Administration Department](#) invites any Buffalo State student who is interested in pursuing a legal career to apply for the [Discover Law Undergraduate Scholars Program](#), a monthlong residential summer program designed to address the shortage of historically underrepresented students entering the field.

This award-winning immersive experience, held June 3–30 on the University at Buffalo's North Campus, is open to undergraduate students **in any major** who have completed their first (freshman), sophomore, or junior year but who will not begin their senior year before the program's end. The program is designed to expose students to critical thinking and help them develop their reading and analytical skills.

Preference will be given to students of color and first-generation college students. Applicants who can demonstrate a record of academic achievement in spite of economic challenges, social or cultural disadvantages, linguistic barriers, extraordinary family circumstances, or personal responsibilities will also be given favorable consideration.

There is no cost to attend the program, and participants receive a monetary stipend. The application deadline is Monday, March 20.

More information and application instructions are available on the [Discover Law Program website](#). Space is limited. Apply today.

Information about the [3+3 B.A./J.D. combined pathway](#), a partnership with the University at Buffalo, is available on the [Political Science and Public Administration website](#).

Submitted by: Patrick McGovern

Also appeared:
Monday, March 6, 2023
Wednesday, March 8, 2023

SUNY Buffalo State University | 1300 Elmwood Avenue | Buffalo, NY 14222 | (716) 878-4000
Marketing and Communications: (716) 878-4201 | marcomm@buffalostate.edu

The DLUSP Violates The Law

It violates Title VI for a recipient of federal money to create, support, and promote a racially segregated program. When a public institution does so, such conduct also violates the Equal Protection clause of the Fourteenth Amendment.⁶ Under clear case law existing at the time the program was created and promoted, such explicit use of racial classifications was unlawful. Because a law school should be presumed to know the law, the discrimination here was intentional.

⁶ The DLUSP similarly defies the civil rights protections of the New York State Human Rights Law, *see* N.Y. Exec. L. § 296, as well as UB's own non-discrimination policy. *See* <https://www.law.buffalo.edu/admissions/nonDiscrimination.html> [<https://archive.is/F6WKE#selection-195.0-195.1>] (accessed on June 22, 2023).

To be sure, certain race-based classifications can be upheld if they can withstand strict scrutiny. That is not the case here, however.

Under strict scrutiny, suspect classifications “are constitutional only if they are narrowly tailored measures that further compelling governmental interests.” *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995). A “racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.” *Shaw v. Reno*, 509 U.S. 630, 643-44 (1993) (citation omitted). This rigorous standard applies even when the government employs such classifications for “benign” reasons. *Bush v. Vera*, 517 U.S. 952, 984 (1996). Ultimately, it is the government that bears the burden to prove “that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate.” *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 505 (1989).

Here, UBL cannot demonstrate that giving admissions preference to “students of color” serves any legitimate governmental purpose, let alone an extraordinary one. Classifications based on immutable characteristics like skin color “are so seldom relevant to the achievement of any legitimate state interest” that government policies “grounded in such considerations are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

Indeed, the Supreme Court has recognized only two interests compelling enough to justify racial classifications. The first is remedying the effects of past de jure segregation or discrimination in the specific industry and locality at issue in which the government played a role, and the second is “the attainment of a diverse student body.” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720-22 (2007). Neither applies here.

In UBL’s brochure for the DLUSP, the law school states that the program “focus[es] on students of color,” in order “to diversify law school classes” with the ultimate goal of “mak[ing] the legal profession look more like America.”⁷

⁷ See https://www.law.buffalo.edu/content/dam/law/content/Discover_Law_Brochure-2023.pdf [https://archive.is/O79Bn] (accessed on June 21, 2023).

A Bridge to Law School

How can we make the legal profession look more like America?

Invite more diverse and talented students to consider legal education and a legal career – and support them to make that dream a reality. Our Discover Law program is doing just that, giving dozens of bright young scholars a taste of law school life and opening their imaginations to the rewarding possibilities of a legal career. Focusing on Students of Color who have completed one to three years of college, the program is helping to diversify law school classes, and eventually the profession, one promising young person at a time.

Such justifications for racial discrimination are not legally sufficient.

Indeed, achieving racial balance is an objective that the Supreme Court has “repeatedly condemned as illegitimate” and “patently unconstitutional.” *Parents Involved in Cmty. Sch.*, 551 U.S. at 726, 730 (“Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that at the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class”) (cleaned up, citation omitted).

And, irrespective of whether the DLUSP program furthers a compelling interest, it is not narrowly tailored. *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (to be to be narrowly tailored, a race-conscious program must be based on “individualized consideration,” and race must be used in a “nonmechanical way”). Here, the DLUSP is mechanically applied. If applicants are not “students of color,” they are automatically excluded from consideration unless they can demonstrate that they are first-generation college students. To the extent that any individualized consideration exists, it only applies to distinguish between applicants who first satisfy the threshold racial litmus test.

Further, a policy is not narrowly tailored if it is either overbroad or underinclusive in its use of racial classifications. *J.A. Croson Co.*, 488 U.S. at 506. Because the DLUSP applies in undifferentiated fashion to multiple racial and ethnic groups, it is overbroad and therefore not narrowly tailored. *Id.* (the “gross overinclusiveness” and undifferentiated use of racial classifications suggests that “the racial and ethnic groups favored by the [policy] were added without attention to whether their inclusion was justified”).

Similarly, the requirement that white applicants demonstrate that they are first-generation college students to qualify for the DLUSP makes the program underinclusive since it arbitrarily

excludes from its coverage those whose progenitors may have enrolled in some college-level courses. *See, e.g., Vitolo*, 999 F.3d at 363 (a government grant program that gave preference to restaurants that were 51% owned and controlled by women or minorities was underinclusive because “the government fail[ed] to explain why that [percentile] cutoff relate[d] to its stated ... purpose”).

Finally, for a policy to survive narrow-tailoring analysis, the government must show “serious, good faith consideration of workable race-neutral alternatives,” *Grutter*, 539 U.S. at 339, and that “no workable race-neutral alternative” would achieve the purported compelling interest. *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 312 (2013). There is no evidence that any such alternatives were ever contemplated here.

To be sure, Title VI’s implementing regulations provide that a recipient of federal funds may engage in affirmative action where doing so will “overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.” 34 C.F.R. § 100.3(b)(6)(ii). But UBL does not claim that its purpose in giving DLUSP admissions preference to “students of color” is to overcome any specifically identified past unlawful discriminatory practices at the school. But even if it had, UBL would still have to demonstrate that the program satisfies the requirements of strict scrutiny – i.e., that it furthers a compelling interest and is narrowly tailored. *Greer’s Ranch Café v. Guzman*, 540 F. Supp. 3d 638, 649 (N.D. Tx 2021) (“The fact that [a statute] is constitutional on its face ... does not give [a] government agency carte blanche to apply it without reference to the limits of strict scrutiny”) (citation omitted). For the reasons described, it cannot do this.

Because UBL’s blatant racial preference system for the DLUSP is presumptively invalid, and since there is no extraordinary government justification for such invidious discrimination, UBL’s use of racial preferences violates state and federal civil rights statutes and constitutional equal protection guarantees.

OCR Has Jurisdiction

OCR has jurisdiction over this complaint.

Title VI of the Civil Rights Act prohibits intentional discrimination on the basis of race, color or national origin in any “program or activity” that receives federal financial assistance. 42 U.S.C. § 2000d. The term “program or activity” means “all of the operations ... of a college, university, or other postsecondary institution, or a public system of higher education.” 42 U.S.C. § 2000d-4a(2)(A). *See Rowles v. Curators of the Univ. of Mo.*, 983 F.3d 345, 355 (8th Cir. 2020) (“Title VI prohibits discrimination on the basis of race in federally funded programs,” and thus applies to public universities receiving federal financial assistance).

Moreover, where a public university engages in discrimination by expressly classifying persons on the basis of race, it violates the Equal Protection Clause of the U.S. Constitution.

Hayden v. County of Nassau, 180 F.3d 42, 48 (2d Cir. 1999) (citing *Adarand*, 515 U.S. at 227-29).

Here, UBL – which is a public institution and whose parent university is a recipient of federal funds⁸ – is a state actor, and therefore is liable for violating Title VI and the Equal Protection Clause.

The Complaint Is Timely

This complaint is timely brought because it includes allegations of discrimination based on race that occurred within the last 180 days.

Request For Investigation And Enforcement

In *Richmond v. J. A. Croson Co.*, Justice Scalia aptly noted that “discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong and destructive of a democratic society.” 488 U.S. at 505 (citation omitted). This is true regardless of which race suffers – discrimination against white applicants is just as unlawful as discrimination against black or other non-white applicants.

Because the exclusion of white applicants in the DLUSP is presumptively invalid, and since UBL cannot show any extraordinary government justification for having created, engaged in or promoted such invidious discrimination, UBL’s conduct violates federal civil rights statutes and constitutional equal protection guarantees.

The Office for Civil Rights has the power and obligation to investigate UBL’s role in creating, sponsoring, supporting and promoting the DLUSP – and to discern whether UB and UBL are engaging in such discrimination in their other activities – and to impose whatever remedial relief is necessary to hold the school accountable for that unlawful conduct. This includes, if necessary, imposing fines, initiating administrative proceedings to suspend or terminate federal financial assistance, and referring the case to the Department of Justice for judicial proceedings to enforce the rights of the United States under federal law. After all, “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” *Parents Involved in Cmty. Sch.*, 551 U.S. at 748.

⁸ See <https://www.buffalo.edu/content/dam/www/administrative-services/pdf-docs/Financial/Budget%20Book%202022-23.pdf> [https://archive.is/v7cJy] (accessed on June 26, 2023).

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Accordingly, we respectfully ask that the Department of Education's Office for Civil Rights impose remedial relief as the law permits for the benefit of those who have been illegally excluded from the DLUSP based on racially discriminatory criteria, and that it ensure that all ongoing and future programming through UB and UBL comports with the Constitution and federal civil rights laws.

Sincerely,



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