

THE EQUAL PROTECTION PROJECT
A Project of the Legal Insurrection Foundation
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June 8, 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: Discrimination Complaint Against University at Albany Concerning Program Excluding White Applicants

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 Albany ("UAlbany"), a public institution, for creating, supporting, and promoting a racially-restrictive paid internship program at the Albany Public Library ("APL") known as the Touhey Library Equity Fellowship ("TLEF"). The TLEF is a paid summer internship at two of the APL's branches, and is available only to black graduates of library school programs.

As this program is racially exclusionary, UAlbany's creation and active promotion of the fellowship violates Title VI of the Civil Rights Act of 1964 ("Title VI") and its implementing regulations¹ as well as the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

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 Touhey Library Equity Fellowship – White Candidates Need Not Apply

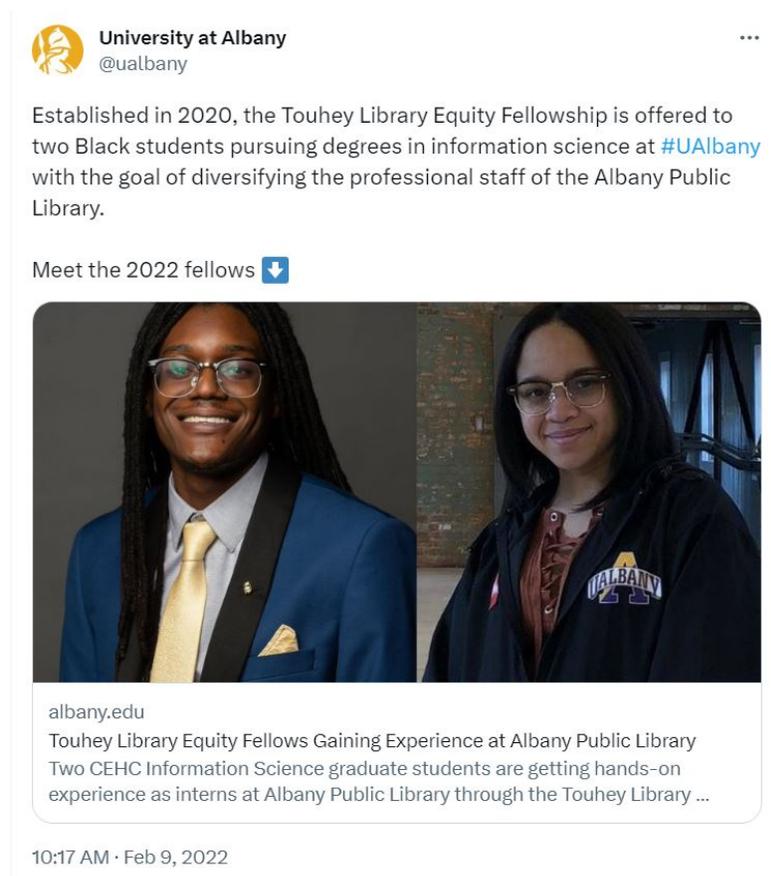
According to the UAlbany's Office of Diversity and Inclusion's webpage, the TLEF was created in 2020 out of a "partnership" between UAlbany and the APL, and was designed to offer a fellowship limited to "students of color" in UAlbany's College of Emergency Preparedness, Homeland Security and Cybersecurity."² A search of UAlbany's website reveals numerous promotions of the Touhey Fellowship.³ UAlbany has also promoted the program on social media:⁴

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

² See <https://www.albany.edu/diversity-and-inclusion/news/2020-new-touhey-library-equity-fellowship-partners-ualbany-albany> [https://archive.is/Kp4V2] (accessed on April 12, 2023).

³ See <https://tinyurl.com/4kwbz8ym> [https://archive.is/iR6Y1] (accessed on June 7, 2023).

⁴ See <https://twitter.com/ualbany/status/1491430942837297156> [https://archive.is/XrxDo] (accessed on June 7, 2023).



The TLEF – which offers a \$1,500 scholarship and up to \$11,500 in stipend for each selected fellow⁵ – was, until very recently, described on the APL’s website as being open only “to Black graduates of master of library and information science ... or master of science in information systems ... programs at American Library Association-accredited institutions who completed their degrees between 2020 and May 2023.” The APL website further noted that “[t]he paid internship gives recent Black graduates of library school programs the opportunity to gain valuable practical skills and proficiency in many aspects of public librarianship.”

After our organization served a cease and desist letter⁶ on the APL on March 20, 2023, the library deactivated this webpage. Nevertheless, a screenshot of the relevant portion of the website is reproduced below:

⁵ See <https://www.albany.edu/news-center/news/2022-touhey-library-equity-fellows-gaining-experience-albany-public-library> [https://archive.is/g0UIp] (accessed on June 7, 2023); <https://archive.ph/K2wr1> (accessed on June 7, 2023).

⁶ See <https://legalinsurrection.com/wp-content/uploads/2023/03/Equal-Protection-Project-Letter-re-Albany-Public-Library-Touhey-Equity-Fellowship.pdf> [https://archive.is/1YXFv] (accessed on June 8, 2023).

The screenshot shows the Albany Public Library website. At the top, there are navigation links: "View OUR CATALOG" and "Download OUR APP". The main navigation bar includes "USE THE LIBRARY", "BOOKS & MEDIA", "PROGRAMS", "EVENT CALENDAR", "LOCATIONS", and "ABOUT". A breadcrumb trail reads "Home • Blog • **Deadline Extended to April 15 to Apply for Paid Summer Equity Internship**". The article title is "Deadline Extended to April 15 to Apply for Paid Summer Equity Internship", dated February 22, 2023, from Library News. The article text includes: "UPDATE: Deadline for application to this internship is now April 15, 2023." "Albany Public Library (APL) is seeking applicants for the 2023 Touhey Library Equity Fellowship. The paid internship gives recent Black graduates of library school programs the opportunity to gain valuable practical skills and proficiency in many aspects of public librarianship." "The aspirational goal is for fellows to continue their professional careers at APL after the program is complete. The program is administered through the Friends and Foundation of Albany Public Library (FFAPL). The fellowship is in its third year." "This year, the Touhey Fellowship takes the form of a summer internship. Two fellows will work up to 150 hours between June and August at APL's Washington Ave. and Arbor Hill/West Hill branches at a pay rate of \$19.59 per hour." "The internship is open to Black graduates of master of library and information science (MLIS) or master of science in information systems (MSIS) programs at American Library Association-accredited institutions who completed their degrees between 2020 and May 2023." "Applications for the fellowship are now due by April 15. A cover letter, resume, and one reference are required and must be submitted online."

Similarly, the application for the Summer 2023 fellowship restricted participation in the program to “two Black recent Library and Information Science graduates,” and limited eligibility to “Black students or new professionals who completed their MLIS/MSIS at an ALA-accredited program anywhere in the United States or Canada since May 2020, or who expect to graduate by May 30, 2023.”⁷ A screenshot of the relevant portion of the application follows:

⁷ See <https://archive.ph/4lmtK> (accessed on June 7, 2023).

Application for Summer 2023 Touhey Library Equity Fellowship at Albany Public Library

The Touhey Library Equity Fellowship is a paid internship at the Albany Public Library offered by the Friends & Foundation of APL thanks to a generous gift from the Carl E. Touhey Family Foundation. This program will offer library experience to two Black recent Library and Information Science graduates. Interns will work as Part-Time Library Assistants at the Central Branches (Washington Ave. Branch and Arbor Hill/West Hill Branch) of the Albany Public Library. Library staff work with fellows to design a mutually beneficial experience in the realm of public library service. Frontline public service as well as “behind-the-scenes” opportunities are available.

Two fellows will be selected for a paid summer internship.

Please use the form below to submit a statement of interest for the Touhey Library Equity Fellowship. Please send your statement by 11:59 pm on Saturday, April 15, 2023.

Finalists will be invited for an interview to take place between April 24 and April 28. Selected fellows will be notified in early May.

ELIGIBLE APPLICANTS:

Eligible applicants for this fellowship are Black students or new professionals who completed their MLIS/MSIS at an ALA-accredited program anywhere in the United States or Canada since May 2020, or who expect to graduate by May 30, 2023.

On April 12, 2023, we also served a cease and desist letter on UAlbany.⁸ In response to that letter, an in-house attorney for UAlbany asserted that UAlbany does not “administer” the program – the implication being that the university therefore is not responsible for the discrimination. But as shown above, UAlbany created the racially-restrictive program and continues to promote it, which is a violation of law regardless of who administers it.

Although our organization served letters on both the APL and UAlbany demanding that they stop holding, supporting and promoting the TLEF in any way as long as eligibility in the program and selection of participants is based on unconstitutional and invidiously discriminatory racial criteria, neither has agreed to do so.

⁸ See <https://legalinsurrection.com/wp-content/uploads/2023/04/Letter-to-UAlbany-re-TLEF.pdf> [https://archive.is/vNEXa] (accessed on June 8, 2023).

The TLEF Violates The Law

It violates Title VI for a recipient of federal money, such as UAlbany, to create, support, and promote a racially segregated program.⁹ And, where a public institution does so, such conduct violates the Equal Protection clause of the Fourteenth Amendment.¹⁰

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. Peña*, 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, UAlbany cannot demonstrate that creating and then limiting the TLEF to just black students and black recent graduates of library science programs served 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

⁹ See, e.g., *Brook v. Sistema Universitario Ana G. Mendez, Inc.*, No. 17 Civ. 171 (JSM), 2017 U.S. Dist. LEXIS 67940, at *9 (M.D. Fla. May 4, 2017) (“It is the combination of the targeted advertising and the ... educational program that allows the Court to infer intentional discrimination” under Title VI); *accord Carroll v. Walden Univ., LLC*, No. 22 Civ. 51 (JRR), 2022 U.S. Dist. LEXIS 214538, at *16-17 (D.Md. Nov. 28, 2022).

¹⁰ Although OCR does not enforce Title II of the Civil Rights Act of 1964, that statute makes it unlawful for a place of “public accommodation,” such as the APL, to discriminate on the basis of race or ethnicity. See 42 U.S.C. § 2000a(a). By promoting and hosting the segregated fellowship, UAlbany has violated that anti-discrimination law, too. The TLEF similarly defies the civil rights protections of the New York State and Albany City Human Rights Laws, see N.Y. Exec. L. § 296; Albany City Code, Art. III, § 48-26, as well as UAlbany’s own non-discrimination policy. See <https://www.albany.edu/equity-compliance/laws-policies-procedures#UAlbany> [<https://archive.is/RBD8v>] (accessed on April 12, 2023).

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.

On the APL’s website, its executive director avowed that the purpose of the TLEF was to “attract Black librarians to Albany Public Library” because “[t]he library profession isn’t as racially diverse as it could be.”¹¹ And, in a statement about the fellowship made to the Albany Times Union, she reaffirmed that objective, stating that the blacks-only fellowship served the purpose of “diversity,” and that “[t]he library programs and its collections benefit when an array of viewpoints are included in the decision-making.”¹²

After the fellowship was launched in 2020, the Vice Dean of UAlbany’s College of Emergency Preparedness, Homeland Security and Cybersecurity stated that the TLEF “aims to diversify the professional staff of the Albany Public Library Diversity is one of the cornerstones of our college. This fellowship not only exemplifies that, but also offers students a valuable experiential learning opportunity with one of our closest community partners.”¹³

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).

Even if the TLEF program furthered a compelling interest, however, it was 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

¹¹ See <https://www.albanypubliclibrary.org/blog/apl-seeks-applicants-for-paid-summer-equity-internship/> [https://web.archive.org/web/20230319164703/https://www.albanypubliclibrary.org/blog/apl-seeks-applicants-for-paid-summer-equity-internship/] (accessed on March 19, 2023).

¹² See <https://www.timesunion.com/news/article/albany-library-criticized-only-black-librarians-17878081.php> [https://archive.ph/CZjBp#selection-2425.0-2425.84] (accessed on April 12, 2023). When the fellowship was first created in 2020, the then-Executive Director of the Albany Public Library stated that the program “directly works to ensure that APL’s workforce is as diverse and inclusive as the communities we serve.” <https://www.albany.edu/news/94021.php> [https://archive.is/pydxM] (accessed on June 7, 2023).

¹³ See <https://www.albany.edu/news-center/news/2020-information-science-graduate-students-named-touhey-library-equity-fellows> [https://archive.is/WlIGv] (accessed on June 7, 2023).

“nonmechanical way”). Here, the TLEF was mechanically applied. If applicants were not black, they were automatically excluded from consideration. To the extent that any individualized consideration existed, it only applied to distinguish between applicants who first satisfied the threshold racial litmus test.

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.

Because the blatant racial classification utilized to determine eligibility for the TLEF was presumptively invalid, and since there was no extraordinary government justification for engaging in such invidious discrimination, UAlbany transgressed 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 Constructors, Inc. v. Pena*, 515 U.S. 200, 213, 227-29, (1995)).

Here, UAlbany – which is both a recipient of federal funds¹⁴ and, as a public institution, a state actor – is liable for violating Title VI and the Equal Protection Clause under three separate grounds:

- *First*, UAlbany’s promotion of the fellowship over the past several months was the most recent activity in a continuing violation and/or pattern and practice of

¹⁴ See <https://www.albany.edu/cost-aid/federal-funding> [https://archive.is/IEw4f] (accessed on June 7, 2023).

racial discrimination dating back to 2020 when UAlbany created the TLEF in partnership with the APL;¹⁵

- *Second*, UAlbany’s promotion of the TLEF, standing alone, is sufficient to impose liability on it as a principal for violating Title VI and the Fourteenth Amendment; and
- *Third*, by promoting the TLEF on its campus and website, UAlbany aided and abetted the violation of Title VI and the Fourteenth Amendment by the APL – another public entity that receives federal funds¹⁶ – thus subjecting UAlbany to liability under an acting-in-concert theory.¹⁷

The Complaint Is Timely

This complaint is timely brought because it alleges that UAlbany has been engaged in a continuing violation and an ongoing pattern or practice of discrimination.¹⁸ Further, this complaint includes allegations of discrimination based on race that occurred within the last 180 days.

¹⁵According to Section 106 of OCR’s Case Processing Manual, “[t]imely allegations may include those where OCR determines that the complainant has alleged a continuing violation and/or a pattern or practice of discrimination.” See <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf> [https://archive.is/3M4re] (accessed on June 7, 2023); see *Mussington v. St. Luke's-Roosevelt Hosp. Ctr.*, 824 F.Supp.427, 433 (S.D.N.Y. 1993), *aff'd*, 18 F.3d 1033 (2d Cir. 1994) (“To show a continuing violation, plaintiffs must show a sequence of related discriminatory acts, at least one of which occurred during the limitations period, or a discriminatory system maintained during that period.”).

¹⁶ According to budget documents available on the APL’s website, the APL received \$35,000 in federal grant money in FY 2021-2022, and an identical line item was included in the APL’s proposed budget for 2022-2023. That proposed budget was approved in May 2022. See https://www.albanypubliclibrary.org/wp-content/uploads/2022/03/22-23budget_3.9.22.pdf [https://web.archive.org/web/20220523210508/https://www.albanypubliclibrary.org/wp-content/uploads/2022/03/22-23budget_3.9.22.pdf] (accessed on March 19, 2023); <https://www.albanypubliclibrary.org/blog/budget-vote-trustee-election-results/> [https://web.archive.org/web/20230319204357/https://www.albanypubliclibrary.org/blog/budget-vote-trustee-election-results/] (accessed on March 19, 2023).

¹⁷ See, e.g., *Robinson v. Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir. 1971) (recognizing that parties may be liable for violating the Civil Rights Act of 1964 under an acting in concert theory).

¹⁸ *Garnes v. Pritchard Indus., Inc.*, No. 20 Civ. 3843 (PAE), 2023 U.S. Dist. LEXIS 9035, at *26 (S.D.N.Y. May 23, 2023) (“[w]hen a plaintiff experiences a continuous practice and policy of discrimination, the commencement of the statute of limitations may be delayed until the last discriminatory act in furtherance of it.”) (citing *Cornwell v. Robinson*, 23 F.3d 694, 703 (2d Cir. 1994)).

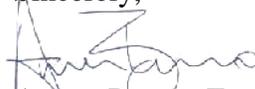
Request For Investigation And Enforcement

Racial discrimination by a public institution is illegal 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 TLEF was presumptively invalid, and since UAlbany cannot show any extraordinary government justification for having created, engaged in or promoted such invidious discrimination, UAlbany’s conduct violated federal civil rights statutes and constitutional equal protection guarantees.

The Office for Civil Rights has the power and obligation to investigate UAlbany’s role in creating, supporting, and promoting the TLEF program – and to discern whether UAlbany is engaging in such discrimination in its other activities – and impose whatever remedial relief is necessary to hold the university 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.

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 TLEF based on racially discriminatory criteria, and that it ensure that all ongoing and future programming through UAlbany comports with the Constitution and federal civil rights laws.

Sincerely,



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