



THE EQUAL PROTECTION PROJECT
A Project of the Legal Insurrection Foundation
18 MAPLE AVE. #280
BARRINGTON, RI 02806
www.EqualProtect.org

August 6, 2023

BY EMAIL (OCR.KansasCity@ed.gov)

U. S. Department of Education
Office for Civil Rights - Kansas City Office
One Petticoat Lane
1010 Walnut Street, Suite 320
Kansas City, MO 64106

Re: Civil Rights Complaint Against University of Nebraska-Lincoln's Racially Discriminatory "Black Public Media Residency" Educational Program

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 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 of Nebraska-Lincoln ("UNL"), a public institution, for creating, supporting, and promoting – in connection with a New York

City-based nonprofit called Black Public Media¹ – a program called the “Black Public Media Residency” (“BPMR”) for “Black filmmakers, creative technologists and artists who need access to emerging technology, studio time or work space.”²

UNL’s creation, ongoing sponsorship and active promotion of a program giving 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. See 42 U.S.C. § 2000d et seq.; 28 C.F.R. Part 100; see also *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.”).

The unlawfulness of such racial preferences in admissions was confirmed recently by the United States Supreme Court in *Students for Fair Admissions Inc. v. President & Fellows of Harv. Coll.*, 2023 U.S. LEXIS 2791 (2023). There, the Court declared that “[e]liminating racial discrimination means eliminating all of it The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.” *Id.* at 34 (cleaned up). “Distinctions between citizens solely because of their ancestry [and race] are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.” *Id.* at 35 (citation omitted).

OCR should investigate the blatantly discriminatory UNL BPMR program and the circumstances under which it was created, promoted, and 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 Black Public Media Residency

According to the UNL website, the BPMR “was launched at the University of Nebraska–Lincoln during the summer of 2022” as “a collaboration” between Black Public Media and UNL’s Johnny Carson Center for Emerging Media Arts (“Carson Center”).³

¹ Black Public Media’s mission is to “support[] the development of visionary content creators and distribute[] stories about the global Black experience to inspire a more equitable and inclusive future.” See <https://blackpublicmedia.org/about/> [https://archive.is/iQFze] (accessed on Aug. 4, 2023).

² See <https://arts.unl.edu/carson-center/news/submissions-open-black-public-media-residency-carson-center> [https://archive.is/xyJpw] (accessed on Aug. 4, 2023).

³ *Id.*

Submissions open for Black Public Media residency at Carson Center

📅 14 Apr 2023

Lincoln, Neb.--Black Public Media (BPM) and the Johnny Carson Center for Emerging Media Arts are continuing a collaboration for the second year on a new residency for Black filmmakers, creative technologists and artists who need access to emerging technology, studio time or work space.

The in-person residency was launched at the University of Nebraska-Lincoln during the summer of 2022.

Its purpose is “to serve Black filmmakers, artists and creative technologists – given the well-documented, low numbers of Black filmmakers, executives and artists working in the tech industry and the high cost to acquire specialized equipment ... and training on emerging technology equipment and software.”⁴

The Carson Center and BPM designed this residency to serve Black filmmakers, artists and creative technologists—given the well-documented, low numbers of Black filmmakers, executives, and artists working in the tech industry and the high cost to acquire specialized equipment, such as motion capture rigs, professional 360 cameras, and VR headsets, and training on emerging-tech equipment and software.

The residency is an in-person one- to three-week experience on UNL’s campus that provides participants “access to specialized equipment, studio facilities and workspace ... [and] formal instruction.”⁵ In addition, the residency provides each participant with a \$5,000 to \$10,000 grant from Black Public Media “to develop their projects further.”⁶ This year’s residency took place between July 7 and July 29.⁷

According to the program’s “FAQ” on the Black Public Media website – which is described as “the fine print” – the program seeks “to develop the talent of producers of color,”

⁴ See <https://arts.unl.edu/news/next-carson-center-black-public-media-internship-cohort-announced> [https://archive.is/vWina] (accessed on Aug. 4, 2023).

⁵ See <https://arts.unl.edu/carson-center/news/carson-center-black-public-media-launch-emerging-media-residency-program> [https://archive.is/UcyAq] (accessed on Aug.4, 2023).

⁶ *Id.* These grants were funded by a \$40,000 award from the National Endowment for the Arts. See <https://arts.unl.edu/carson-center/news/black-public-media-wins-40000-nea-grant-support-carson-center-residency> [https://archive.is/nvlix] (accessed on August 4, 2023).

⁷ See <https://tinyurl.com/yc8k7w5t> (accessed on August 4, 2023).

and therefore “seek[s] projects in which a person of African descent is in a key creative position” such as “writer, director, and producer roles.”⁸ Once that Artist-In-Residence has been selected, one additional team member of that artist’s project may accompany him or her to the program at UNL at their own expense, and “[t]he second team member does not need to be Black or of African descent.”⁹

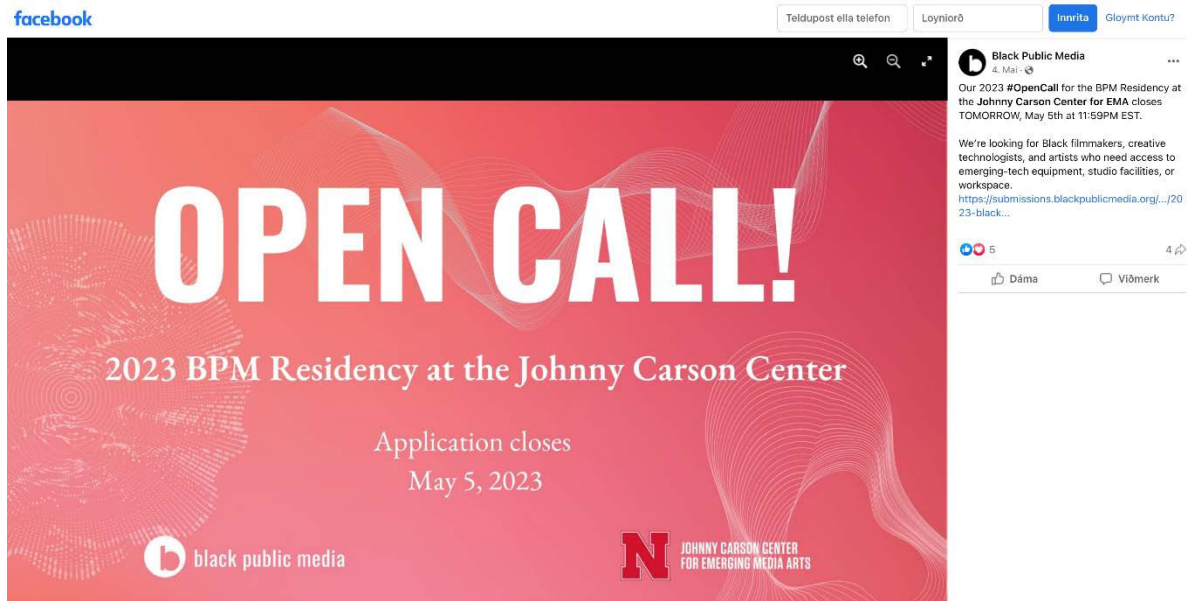
FAQ - Expectations, key dates, and the fine print

1. The residency runs 1 to 3 weeks in summer 2023 from July 7 to July 29.
2. Filmmakers, artists and creative technologists will be accepted on a rolling basis between now and May 8, 2023.
3. Black Public Media seeks to develop the talent of producers of color. Thus we seek projects in which a person of African descent is in a key creative position. Key creative positions include writer, director, and producer roles.
4. Applicants must be at least age 25 when applying for this program.
5. Applicants based outside the United States are welcome to apply, although they would be expected to pay for their travel to the United States on their own. The residency will cover up to \$500 in round-trip flights, per participant, from a U.S. airport to Nebraska.
6. Participants will receive on-campus housing during their residency.
7. Participants must apply with a story- or content-driven project that they have in development. Narrative and documentary projects are both acceptable. Your project may be at any stage of development, from concept to post-production.
8. Up to one project team member may attend the residency in Nebraska with each accepted Artists-in-Resident. Project collaborators will not receive travel support or funding and will need to arrange their own accommodations. The second team member does not need to be Black or of African descent. The second team member will NOT be designated Black Public Media & Carson Center Artists-in-Resident.
9. Each Artist-in-Resident is required to give a public lecture or teach a workshop during or immediately after their residency.
10. Participants of this joint residency program retain full ownership and IP of their projects.
11. Both the Johnny Carson Center and Black Public Media will receive executive producer credit on your production, project, or idea, as well as public credit whenever your project is screened, exhibited, presented, pitched or distributed.

⁸ *Id.*

⁹ *Id.* The FAQ reinforces that UNL has an active role in the program. Among other things, the FAQ provides that both UNL’s Carson Center and Black Public Media “will receive executive producer credit” on each Artist-In-Residence’s “production, project, or idea, as well as public credit whenever [the] project is screened, exhibited, presented, pitched or distributed.” *Id.*

And, in promoting the residency on Facebook, Black Public Media explicitly stated that the program was looking for “Black filmmakers, creative technologists and artists.”¹⁰



The UNL BPMR 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.¹¹

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. See 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.” See 42 U.S.C. § 2000d-4a(2)(A); *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 universities receiving federal financial assistance). As UNL receives federal

¹⁰ See <https://www.facebook.com/photo.php?fbid=685408443595906&set=pb.100063802695536.-2207520000.&type=3&locale=fo> FO [https://archive.is/eKYnT] (accessed on Aug. 4, 2023).

¹¹ Although OCR does not enforce Title II of the Civil Rights Act of 1964, that statute makes it unlawful to discriminate on the basis of race or color in a place of “public accommodation,” such as UNL and its Carson Center. 42 U.S.C. § 2000(a)(a). Similarly, the BPMR defies UNL’s own non-discrimination policy. See <https://ucomm.unl.edu/toolbox/nondiscrimination-statements> [https://archive.is/r9kgb] (accessed on Aug. 4, 2023).

funds – and because the program funds the BPMR with federal money granted by the National Endowment of the Arts – it is subject to Title VI.¹²

It does not matter if the recipient of federal funding discriminates in order to advance a benign “intention” or “motivation.” *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1742 (2020) (“Intentionally burning down a neighbor’s house is arson, even if the perpetrator’s ultimate intention (or motivation) is only to improve the view.”); *accord Automobile Workers v. Johnson Controls, Inc.*, 499 U. S. 187, 199 (1991) (“the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect” or “alter [its] intentionally discriminatory character”). “Nor does it matter if the recipient discriminates against an individual member of a protected class with the idea that doing so might favor the interests of that class as a whole or otherwise promote equality at the group level.” *Students for Fair Admissions*, 2023 U.S. LEXIS 2791, at *154 (Gorsuch, J., concurring).

Simply put, “Title VI prohibits a recipient of federal funds from intentionally treating any individual worse even in part because of his race, color, or national origin and without regard to any other reason or motive the recipient might assert.” *Id.* at *170 (cleaned up). Thus, regardless of UNL’s reasons for creating, sponsoring and promoting the BPMR, it violated Title VI by doing so.

And, because UNL is a public institution, its creation, sponsorship and promotion of the BPMR also violates the Equal Protection clause of the Fourteenth Amendment.

“Any exception to the Constitution’s demand for equal protection must survive a daunting two-step examination known ... as strict scrutiny.” *Id.* at *34 (internal quotation marks and citation omitted). The BPMR flunks that exacting test.

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). 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, the government cannot carry its burden.

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). Here, UNL cannot demonstrate that restricting the artist residency to black filmmakers, creative technologists and artists furthers any legitimate governmental purpose, let alone an extraordinary one. Classifications based on immutable characteristics like

¹² See <https://nebraska.edu/-/media/projects/unca/offices-policies/business-and-finance-office/operating-budget/2024/2023-2024-unl-operating-budget.pdf> [https://archive.is/II6Vi] (accessed on Aug. 5, 2023).

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 “avoiding imminent and serious risks to human safety in prisons, such as a race riot.” *Students for Fair Admissions*, 2023 U.S. LEXIS 2791, at *35 (citation omitted).¹³ Neither applies here.

To the extent that the purpose of the BPMR is to increase the numbers of black filmmakers, executives and artists working in the tech industry,”¹⁴ achieving such 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 BPMR 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 racial criterion is mechanically applied. If applicants are not black, they are automatically ineligible for the program. To the extent that any individualized consideration exists, it only applies to distinguish between applicants who have first satisfied 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 “person of color” and “black or African descent” eligibility requirement for the BPMR applies in an undifferentiated fashion to multiple ethnic groups, it is overbroad and therefore not narrowly tailored. *Id.* (the “gross overinclusiveness” and undifferentiated use of racial classifications suggests that “the

¹³ Until recently, a third interest, “the attainment of a diverse student body,” existed, see *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720-22 (2007), but that was substantively overruled by *Students for Fair Admissions*, a fact recognized by Justice Thomas in his concurring opinion. *Students for Fair Admissions*, 2023 U.S. LEXIS 2791, at *149 (Thomas, J. concurring) (“The Court’s opinion rightly makes clear that *Grutter* is, for all intents and purposes, overruled.”).

¹⁴ See <https://arts.unl.edu/news/next-carson-center-black-public-media-internship-cohort-announced> [https://archive.is/vWina] (accessed on Aug. 4, 2023).

racial and ethnic groups favored by the [policy] were added without attention to whether their inclusion was justified”).

Indeed, In *Students for Fair Admissions*, the Supreme Court found that similar racial categories are “imprecise,” “plainly overbroad,” “arbitrary,” “undefined” and “opaque.” *Students for Fair Admissions*, 2023 U.S. LEXIS 2791, at *47-48,¹⁵ and declared that “it is far from evident ...how assigning students to these racial categories and making admissions decisions based on them furthers the educational benefits that the universities claim to pursue.” *Id.*

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 UNL’s blatant racial eligibility criteria for BPMR is presumptively invalid, and since there is no extraordinary government justification for such invidious discrimination, UNL’s use of racial admissions requirements violates state and federal civil rights statutes and constitutional equal protection guarantees.

OCR Has Jurisdiction

OCR has jurisdiction over this complaint. UNL is a public institution and a recipient of federal funds.¹⁶ It 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 and national origin 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. As Justice Thomas correctly noted in *Students for Fair*

¹⁵ In his concurrence, Justice Thomas criticizes these categories as being “artificial.” *Students for Fair Admissions*, 2023 U.S. LEXIS 2791, at *134 (Thomas, J., concurring).

¹⁶ See <https://nebraska.edu/-/media/projects/unca/offices-policies/business-and-finance-office/operating-budget/2024/2023-2024-unl-operating-budget.pdf> [https://archive.is/II6Vi] (accessed on Aug. 5, 2023).

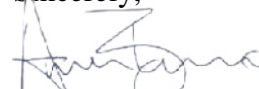
Admissions, race-based admissions preferences “fly in the face of our colorblind Constitution and our Nation’s equality ideal” and “are plainly – and boldly – unconstitutional.” *Students for Fair Admissions*, 2023 U.S. LEXIS 2791, at *150 (Thomas, J., concurring).

Because limiting artist residencies to those who are “persons of color,” “black” or of “African descent” is presumptively invalid, and since UNL cannot show any extraordinary government justification for having created, engaged in or promoted such invidious discrimination, its conduct violates federal civil rights statutes and constitutional equal protection guarantees.

The Office for Civil Rights has the power and obligation to investigate UNL’s role in creating, sponsoring, supporting and promoting the BPMR program – and to discern whether UNL is engaging in such discrimination in their other activities – and to impose whatever remedial relief is necessary to hold the school accountable for its 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 UNL BPMR based on racially discriminatory criteria, and that it ensures that all ongoing and future programming through UNL comports with the Constitution and federal civil rights laws.

Sincerely,



Ameer Bennó, Esq.
Director of Litigation
The Equal Protection Project
Ameer@legalinsurrection.com

-And-

William A. Jacobson, Esq.
President
Legal Insurrection Foundation
[Contact@legalinsurrection.com](mailto>Contact@legalinsurrection.com)