



THE EQUAL PROTECTION PROJECT
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November 4, 2023

BY EMAIL (OCR.Chicago@ed.gov)

U. S. Department of Education
Office for Civil Rights - Chicago Office
John C. Kluczynski Federal Building
230 S. Dearborn Street, 37th Floor
Chicago, IL 60604

Re: Civil Rights Complaint Against The University Of North Dakota For Racially Discriminatory “Cultural Diversity Scholarship” 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 North Dakota (“UND”), a public institution, for its Cultural Diversity Scholarship (“CDS”) program – a racially discriminatory program that reduces tuition for specific racial and ethnic groups for the purpose

of achieving a “diverse student population.”¹ To be eligible for the tuition reduction, students must be “African American/Black, American Indian, Alaska Native, Asian American, Native Hawaiian, Pacific Islander, Latino/a/x, Hispanic American or Multiracial.”² The CDS program is *only* available to non-white applicants.

UND’s ongoing sponsorship and active promotion of a tuition reduction program for which eligibility depends on ethnicity and race 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 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 UND’s blatantly discriminatory CDS program and the circumstances under which 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.

UND’s Cultural Diversity Scholarship Program

On or about August 1, 2021, the North Dakota State Board of Higher Education promulgated Policy 820(1), which provides that institutions of higher education in the state are “encouraged” to “provide for ... [a] waiver of tuition and fees to promote enrollment of a culturally diverse student body.”³

¹ *See* <https://und.edu/one-stop/financial-aid/scholarships.html>
[<https://web.archive.org/web/20231030135358/https://und.edu/one-stop/financial-aid/scholarships.html>]
(accessed on Nov. 3, 2023).

² *Id.*

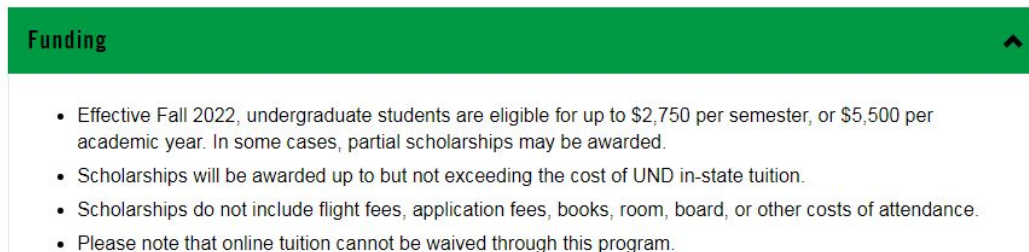
³ *See* <https://tinyurl.com/y7wzavvb>

**NORTH DAKOTA
STATE BOARD OF HIGHER EDUCATION
Policy Manual**

Policy: 820 Waivers and Tuition Assistance
Effective: August 1, 2021

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1. In addition to waivers provided under SBHE Policy 820(2), institutions may provide for additional waiver of tuition and fees. Institutions are encouraged to use this authority to promote enrollment of a culturally diverse student body, including members of Indian tribes and economically disadvantaged students, for the benefit of all students and the academic community, to promote enrollment of graduate students and research, and for other purposes consistent with an institution's mission. Institutions may grant partial waivers or waive non-resident or resident tuition. Institutions may also waive tuition and fees as part of a program guarantee under which the institution guarantees that graduates or program completers are minimally qualified for at least entry-level positions in an occupation or job classification.

Based on this authority, UND created, implemented and promoted a program called the Cultural Diversity Scholarship (“CDS”), pursuant to which UND reduces eligible undergraduate students’ tuition by up to \$2,750 per semester, or \$5,500 per academic year.⁴



Funding

- Effective Fall 2022, undergraduate students are eligible for up to \$2,750 per semester, or \$5,500 per academic year. In some cases, partial scholarships may be awarded.
- Scholarships will be awarded up to but not exceeding the cost of UND in-state tuition.
- Scholarships do not include flight fees, application fees, books, room, board, or other costs of attendance.
- Please note that online tuition cannot be waived through this program.

As the screen capture below reveals, the CDS program for Academic Year 2023-2024 was available only to undergraduate students who were “African American, American Indian, Asian American or Hispanic American.”⁵

⁴ See <https://und.edu/one-stop/financial-aid/scholarships.html>
[<https://web.archive.org/web/20231030135358/https://und.edu/one-stop/financial-aid/scholarships.html>]
(accessed on Nov. 3, 2023). Of course, the fact that a state policy permits tuition waivers to promote “cultural diversity” is legally irrelevant, since no statute or regulation required UND to create or promote a racially discriminatory program such as the CDS.

⁵ See <https://tinyurl.com/44jx9ap5>
[<https://web.archive.org/web/20231030131612/https://und.academicworks.com/opportunities/24984>]
(accessed on Nov. 3, 2023).



Sign In

▼ Opportunities

Cultural Diversity Tuition Scholarship

Who is eligible for the Cultural Diversity Tuition Scholarship?

You must meet all of the following definitions for eligibility under this program:

1. Individuals historically under-represented (African American, American Indian, Asian American or Hispanic American)
2. Incoming first-year students with a minimum high school GPA of 3.00 OR transfer students, having earned 24 or more credits with a minimum cumulative transfer GPA of 3.00 from a tribal college, are eligible to apply for the Cultural Diversity Tuition Scholarship.
3. Funding will be reviewed based on academic eligibility and when the application is received, priority in which it was received
4. Must demonstrate financial need through the Free Application for Federal Student Aid (FAFSA).
5. Must be a United States Citizen

For Academic Year 2024-2025, however, the CDS program was expanded to include students who identify as “African American/Black, American Indian, Alaska Native, Asian American, Native Hawaiian, Pacific Islander, Latino/a/x, Hispanic American or Multiracial.”⁶ A screen capture from an informational page about the current CDS program on UND’s website is reproduced below:

Cultural Diversity Scholarship

The University of North Dakota recognizes the educational benefit of a diverse student population and has developed a policy to recruit, assist and retain enrolled members of federally recognized American Indian tribes and Alaska Natives and Villages, American Indian graduates of tribally-controlled community colleges in North Dakota, and other under-represented groups and economically disadvantaged students.

[Open All](#)

Eligibility

In order to be eligible for this scholarship, you must meet all of the following criteria:

1. Member of a historically underrepresented population (African American/Black, American Indian, Alaska Native, Asian American, Native Hawaiian, Pacific Islander, Latino/a/x, Hispanic American or Multiracial).
2. Incoming freshman with a high school GPA of 3.00 or higher, OR transfer student from a tribal college with 24 or more college credits, AND a cumulative GPA of 3.00 or higher.
3. Enrolled as an on-campus student at UND.
4. Be a United States citizen.
5. Demonstrate financial need through the Free Application for Federal Student Aid (FAFSA).

Applications for the CDS for the 2024-25 Academic Year opened on October 1, 2023. The completed applications are due on February 1, 2024 for new students and March 1, 2024 for returning students.⁷

⁶ *Id.*

⁷ See <https://und.edu/one-stop/financial-aid/scholarships.html#d57e389--1> [https://web.archive.org/web/20231030135358/https://und.edu/one-stop/financial-aid/scholarships.html#d57e386—1] (accessed on Nov. 3, 2023).

Scholarship Central

Apply for 975+ scholarships with one application. The 2024-25 application opens Oct. 1, 2023.

EXPLORE SCHOLARSHIPS

ELIGIBILITY: Must be admitted as an undergraduate, graduate or law student.

OPENS: Oct. 1 for the following academic year

DEADLINE: Feb. 1 (new, incoming students) | March 1 (current, returning students)

RENEWAL: Varies by scholarship

Returning students who wish to apply for renewal of their tuition reduction under the CDS program must satisfy the program’s “renewal criteria,” one of which is to be an “approved” ethnicity, meaning that they must be either “African American/Black, American Indian, Asian American, Pacific Islander, or Hispanic American.”⁸

Renewal

The duration of the Cultural Diversity Scholarship is up to 120 total credits, first bachelors' degree or eight semesters (fall/spring) as long as the following renewal criteria have been met:

- Campus Connection must list the individual's ethnicity as being an approved under-represented population (African American/Black, American Indian, Asian American, Pacific Islander, or Hispanic American).
- Earn 12 credit hours per semester.
- Maintain a 2.75 Institutional Cumulative Grade Point Average (GPA).
- Meet with CDS Advisor | 2 visits per semester.
- Meet with Academic Advisor | 1 visit per semester.

UND’s Cultural Diversity Scholarship Program 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.⁹

⁸ See <https://und.edu/one-stop/financial-aid/scholarships.html> [https://web.archive.org/web/20231030135358/https://und.edu/one-stop/financial-aid/scholarships.html] (accessed on Nov. 3, 2023).

⁹ 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 UND. 42 U.S.C. § 2000(a)(a). Similarly, the CDS program defies UND’s own non-discrimination policy. See

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 UND receives federal funds, it is subject to Title VI.¹⁰

Discrimination does not become lawful simply because the recipient of federal funding engages in the discrimination 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).¹¹

“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 UND’s reasons for employing racial and ethnic eligibility criteria for the CDS program, it violated Title VI by doing so.

And, because UND is a public institution, its introduction of invidious discrimination into the scholarship eligibility criteria violates the Equal Protection clause of the Fourteenth Amendment.

The inclusion of racial criteria in the promotional materials about the scholarship undoubtedly deters students of other races and ethnicities from applying for it. That, in itself,

<https://campus.und.edu/equal-opportunity/required-notices.html#notice-of-nondiscrimination>
[<https://tinyurl.com/3hv43rfv>] (accessed on Nov. 3 2023).

¹⁰ *See* <https://tinyurl.com/jekzmnjf>
[https://web.archive.org/web/20231030140304/https://campus.und.edu/finance/resource-planning-allocation/_files/docs/biennial_schedules_fy22_23_final_schedules_1_through_5.pdf] (accessed on Nov. 3, 2023).

¹¹ While *Students for Fair Admissions* condemned the use of racial preferences in college admissions, the broad principles of that case apply with equal force to the use of racial criteria in this context as well.

violates the Equal Protection Clause. “When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group,” the constitutional harm is “the imposition of the barrier, not the ultimate inability to obtain the benefit.” *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). The scholarship’s racial litmus test is therefore patently unconstitutional under 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 CDS program 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, UND cannot demonstrate that imposing racial and ethnic restrictions on the CDS program furthers 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 “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). Neither applies here.

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.”). Thus, insofar as UND’s stated purpose for employing racial

preferences under the CDS is to obtain “the educational benefit of a diverse student population,”¹² that objective is no longer a legitimate one.

And, irrespective of whether the CDS 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 racial criterion is mechanically applied. If applicants are not African American/Black, American Indian, Alaska Native, Asian American, Native Hawaiian, Pacific Islander, Latino/a/x, Hispanic American or multiracial, they are automatically ineligible for the tuition reduction. To the extent that any individualized consideration exists, it only applies to distinguish between applicants who have first satisfied the threshold ethnic/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 “culturally diverse group” that is “historically underrepresented” eligibility requirement for the CDS program applies in an 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”).

Indeed, in *Students for Fair Admissions*, the Supreme Court found that similar racial and ethnic categories were “imprecise,” “plainly overbroad,” “arbitrary,” “undefined” and “opaque.” *Students for Fair Admissions*, 2023 U.S. LEXIS 2791, at *47-48,¹³ 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 UND’s ethno-racial eligibility criteria for the CDS program are presumptively invalid, and since there is no extraordinary government justification for such invidious

¹² See <https://und.edu/one-stop/financial-aid/scholarships.html>
[<https://web.archive.org/web/20231030135358/https://und.edu/one-stop/financial-aid/scholarships.html>]
(accessed on Nov. 3, 2023).

¹³ In his concurrence, Justice Thomas criticized these categories as being “artificial.” *Students for Fair Admissions*, 2023 U.S. LEXIS 2791, at *134 (Thomas, J., concurring).

discrimination, UND's use of those requirements violates state and federal civil rights statutes and constitutional equal protection guarantees.

OCR Has Jurisdiction

OCR has jurisdiction over this complaint. UND is a public institution and a recipient of federal funds. 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 and that are ongoing.

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 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 awarding education scholarships on the basis of race and ethnicity is presumptively invalid, and since UND cannot show any extraordinary government justification for 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 UND's role in creating, sponsoring, supporting and promoting the CDS program – and to discern whether UND is engaging in such discrimination in its 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 CDS program based on discriminatory criteria, and that it ensure that all ongoing and future programming through UND comports with the Constitution and federal civil rights laws.

U.S. Dept. of Education, Office for Civil Rights
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Sincerely,

A handwritten signature in black ink, appearing to read "Ameer Benno".

Ameer Benno, Esq.
The Equal Protection Project
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-And-

William A. Jacobson, Esq.
President
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