



**THE EQUAL PROTECTION PROJECT**  
**A Project of the Legal Insurrection Foundation**  
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November 25, 2024

**BY EMAIL** ([ocr.chicago@ed.gov](mailto: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 Northern Illinois University  
For Discriminatory Race- and Sex-Based Programs**

To Whom It May Concern:

This is a federal civil rights complaint submitted pursuant to the U.S. Department of Education’s Office for Civil Rights (“OCR”) discrimination complaint resolution procedures.<sup>1</sup> We write on behalf of the Equal Protection Project of the Legal Insurrection Foundation, a non-profit entity 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 make this civil rights complaint against the Northern Illinois University (“NIU”), based in DeKalb, Illinois, a public university, for sponsoring and promoting (1) a program called the Black Student Achievement Program (BSAP) which discriminates on the basis of race and color, in violation of Title VI and the 14<sup>th</sup> Amendment, and (2) a program called the Black Male Initiative

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<sup>1</sup> See 42 U.S.C. § 2000d-1; 34 C.F.R. §§ 100.7, 100.8, and 100.9.

(BMI) that discriminates on the basis of race and color, and sex, in violation of Titles VI and IX and the 14<sup>th</sup> Amendment.

BSAP and BMI are both official programs of NIU’s Center for Black Studies (CBS) which was “established in 1971 as part of the International Studies program as a hybrid (academic and student services) program. CBS currently operates from a nine room facility built in 1993, consisting of offices for its professional staff, some organizations, a computer lab and a smart classroom.”<sup>2</sup>

The contact person for each program is NIU’s CBS Interim Co-director - Retention, Engagement and Programming.<sup>3</sup>

### **The Black Student Achievement Program (BSAP)**

According to NIU’s website,<sup>4</sup> BSAP “aims to support the retention and graduation of Black identified students ... by providing:

- Academic and personal support to 1st year and transfer students.
- Transition to college support through peer mentoring assistance.
- Assistance in navigating the college environment.”

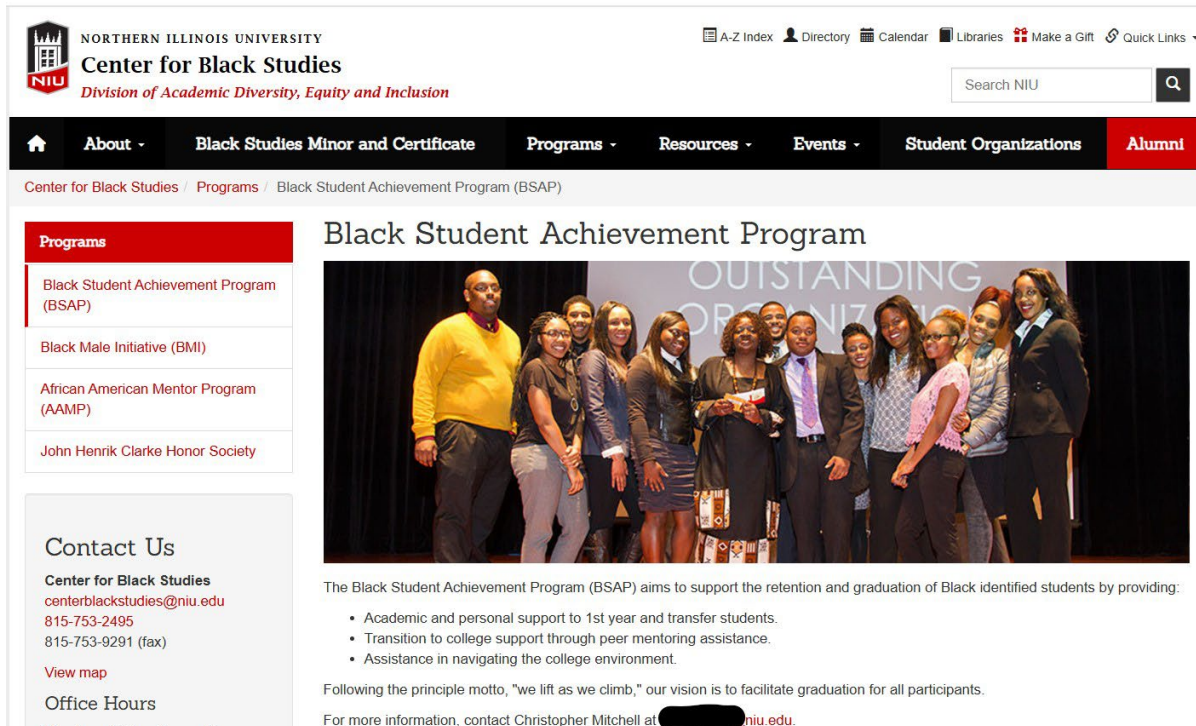
By its titling and description, BSAP makes clear that the program is intended only for black students.

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<sup>2</sup> See, <https://www.niu.edu/blackstudies/about/index.shtml> [https://archive.is/DDUeb] [accessed Nov. 18, 2024]

<sup>3</sup> See, <https://www.niu.edu/blackstudies/about/staff.shtml> [https://archive.ph/KYiL8] [accessed Nov. 17, 2024]

<sup>4</sup> See <https://www.niu.edu/blackstudies/programs/achievement-program.shtml> [https://archive.ph/MJqkh] [accessed Nov. 17, 2024]



The screenshot shows the website for the Northern Illinois University Center for Black Studies, specifically the Black Student Achievement Program (BSAP). The page features a navigation menu with options like 'About', 'Black Studies Minor and Certificate', 'Programs', 'Resources', 'Events', 'Student Organizations', and 'Alumni'. A search bar is located in the top right corner. The main content area is titled 'Black Student Achievement Program' and includes a photograph of a group of students and staff members. Below the photo, there is a description of the BSAP's mission and a list of services provided, such as academic and personal support, transition to college support, and assistance in navigating the college environment. A contact information section is also visible on the left side of the page.

### **The Black Male Initiative (BMI)**

According to NIU’s website,<sup>5</sup> BMI “assists in retaining collegiate black males in achieving their academic, social and personal goals on their journey to graduating with their chosen academic degree.” Among other things BMI provides the following services to black male students:

Black Male Initiative focuses heavily on encouraging academic success. We do this by highlighting and rewarding student achievement via our semesterly 3.0 club ceremony, we assist students in maintaining dialogue with professors throughout the semester for progress report updates and provide resources for academic success, such as study tables, peer collaboration and helping students find where to go when in need.

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<sup>5</sup> See <https://www.niu.edu/blackstudies/programs/black-male-initiative.shtml> [https://archive.ph/AnJsG] [accessed Nov. 17, 2024]

The screenshot shows the website for the Center for Black Studies at Northern Illinois University. The header includes the university's name and logo, along with navigation links like 'A-Z Index', 'Directory', 'Calendar', 'Libraries', 'Make a Gift', and 'Quick Links'. A search bar is also present. The main navigation menu includes 'About', 'Black Studies Minor and Certificate', 'Programs', 'Resources', 'Events', 'Student Organizations', and 'Alumni'. The current page is titled 'Black Male Initiative (BMI)' and features a sidebar with links to 'Black Student Achievement Program (BSAP)', 'Black Male Initiative (BMI)', 'African American Mentor Program (AAMP)', and 'John Henrik Clarke Honor Society'. The main content area has a title 'Black Male Initiative (BMI)', a photograph of two men embracing, and a 'Purpose' section. The purpose section states: 'The Black Male Initiative assists in retaining collegiate black males in achieving their academic, social and personal goals on their journey to graduating with their chosen academic degree. The goal of BMI is retention and ultimately graduation. For more information contact information Christopher Mitchell [redacted]@niu.edu.'

By its titling and description, BMI makes clear that the program is intended only for black male students.

BSAP and BMI, through promotional materials and program details signal race-based (both BSAP and BMI) and sex-based (BMI only) exclusiveness and exclusion. A reasonable student would understand that only blacks (both programs) and male blacks (BMI) are eligible, and others would be dissuaded from even trying to participate. *See, e.g.*, OCR Guidance on Race and School Programming (2023).<sup>6</sup>

### **BSAP and BMI Violate Title VI**

BSAP and BMI violate Title VI because they condition eligibility for participation on a student's race and skin color. And, because NIU is a public university, its sponsorship, promotion

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<sup>6</sup> <https://www.ed.gov/sites/ed/files/about/offices/list/ocr/letters/colleague-20230824.pdf> [https://web.archive.org/web/20240919154554/https://www.ed.gov/sites/ed/files/about/offices/list/ocr/letters/colleague-20230824.pdf] (“In determining whether an opportunity to participate is open to all students, OCR may consider, for example, whether advertisements or other communications would lead a reasonable student, or a parent or guardian, to understand that all students are welcome to participate.”)

and hosting of these discriminatory programs also violates the Equal Protection Clause of the Fourteenth Amendment.<sup>7</sup>

Title VI prohibits intentional discrimination based on 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 public system of higher education.” *See* 42 U.S.C. § 2000d-4a(2)(A). As NIU receives federal funds, including from the U.S. Department of Education, it is subject to Title VI.<sup>8</sup>

Indeed, based on the requirement that participating students be black (BSAP) or black male (BMI), these campus meetings would be *de facto* segregated by race and skin color. Any reasonable student viewing the information on the NIU website would understand the racially exclusionary basis of the programs, and non-black students would be dissuaded from even applying or attempting to participate.<sup>9</sup>

The BSAP and BMI programs clearly fall within the scope of Title VI and OCR’s jurisdiction. It does not matter that a particular program may be considered “extracurricular” or just a “club” or “group,” the same considerations apply as OCR noted in its 2023 Guidance on Race and School Programming<sup>10</sup> recognizing that “[s]chool programs – including the implementation of curricula or the establishment, recognition, or support of a school group, club, or other extracurricular organization” are covered by Title VI.

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<sup>7</sup> 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 NIU. 42 U.S.C. § 2000(a)(a). These programs also violate the Illinois Human Rights Act, which prohibits discrimination based on, among other categories, race, color, sexual orientation and gender-identity. 775 I.L.C.S. 5/1 et seq. Finally, these programs defy NIU’s own non-discrimination policy. *See* <https://www.niu.edu/policies/policy-documents/nondiscrimination-harassment-policy.shtml> [<https://archive.ph/nr5A5>] [accessed Nov. 17, 2024]

<sup>8</sup> *See* <https://www.usaspending.gov/recipient/c3c0a534-6ceb-2bca-e94d-83742848871a-C/latest> [<https://archive.ph/r3AXZ>] (accessed on Nov. 17, 2024).

<sup>9</sup> *See* OCR Guidance on Race and School Programming (2023), <https://www.ed.gov/sites/ed/files/about/offices/list/ocr/letters/colleague-20230824.pdf> [<https://web.archive.org/web/20240919154554/https://www.ed.gov/sites/ed/files/about/offices/list/ocr/letters/colleague-20230824.pdf>] (“In determining whether an opportunity to participate is open to all students, OCR may consider, for example, whether advertisements or other communications would lead a reasonable student, or a parent or guardian, to understand that all students are welcome to participate.”)

<sup>10</sup> *Id.*

It is no defense that the recipient of federal funding discriminates in order to advance a benign “intention” or “motivation.” *Bostock v. Clayton Cnty.*, 590 U.S. 644, 661 (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 Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 289-90 (2023) (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 \*290 (cleaned up). Thus, regardless of the reasons why NIU sponsors and promotes BSAP and BMI, it violates Title VI by doing so.

And, because NIU is a public university, its sponsorship and promotion of the BSAP and BMI 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 184 (internal quotation marks and citation omitted). The program at issue here 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, Inc. v. Pena*, 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, NIU 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). Restricting eligibility for these programs based on race and skin color serves no legitimate governmental purpose, let alone an extraordinary one. Classifications based on such immutable characteristics “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*, 600 U.S. at 207 (citation omitted).<sup>11</sup> Neither applies here.

If NIU intended to advance racial and ethnic balance, such an objective has been “repeatedly condemned as illegitimate” and “patently unconstitutional” by the Supreme Court. *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 BSAP and BMI further a compelling interest, they are not narrowly tailored. *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (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 race and color selection criteria are mechanically applied. If applicants are not black, they are automatically ineligible for the programs. To the extent that any individualized consideration exists, it only applies to distinguish between students who have first satisfied the threshold racial and color 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 black eligibility requirement applies in an undifferentiated fashion based on how a person identifies, 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 categories as those being used by NIU for BSAP and BMI were “imprecise,” “plainly overbroad,” “arbitrary,” “undefined” and “opaque.” *Students for Fair Admissions*, 600 U.S. at 186-87, 217, 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.* at 217.

Similarly, the ineligibility of white, Asian, non-black Hispanic, and other students for BSAP and BMI makes the programs underinclusive, since the racial restriction is arbitrary and excludes swaths of candidates who could benefit from the programs but who are not permitted to apply due to their race and skin color.

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<sup>11</sup> Until recently the courts represented a third interest, “the attainment of a diverse student body,” 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*. *Students for Fair Admissions*, 600 U.S. at 233 (Thomas, J. concurring).



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 racial and color requirements for BSAP and BMI are presumptively invalid, and in the absence of any compelling government justification for such invidious discrimination, the use of such criteria violates federal civil rights statutes and constitutional equal protection guarantees.

### **BMI Also Violates Title IX**

Title IX makes it unlawful to discriminate in education based on sex. That statute provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>12</sup> For this reason, a school may not administer programs that impose a preference or restriction based on sex, with limited exceptions not applicable here.<sup>13</sup> In sex discrimination cases, it does not matter if a recipient of federal funding discriminates to advance a benign “intention” or “motivation.” *Bostock v. Clayton Cnty.*, 590 U.S. 644, 661 (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.”); *see also* cases cited above as to Title VI.

Although sex-based discrimination is subject to a “heightened” standard of review, *Sessions v. Morales-Santana*, 582 U.S. 47, 57 (2017); *United States v. Virginia*, 518 U.S. 515, 532-34 (1996), it is less exacting than the strict scrutiny standard applicable to race-based classifications. Under Supreme Court precedent, however, sex-based classifications by the government require an “exceedingly persuasive justification.” *Virginia*, 518 U.S. at 531. To make this showing, the government must demonstrate “at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.” *Id.* at 533. BMI falls short of satisfying this standard for the same reasons it fails strict scrutiny. *Virginia*, 518 U.S. at 531.

Concerning Title IX in particular, OCR has stated that a school may not justify discrimination for purposes of addressing an “imbalance” in participation by relying on national statistics of limited participation in a discriminatory program. Rather, it “must instead clearly articulate why the particular sex-based scholarship or program was necessary to overcome the

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<sup>12</sup> *See* 20 U.S.C. §1681(a)

<sup>13</sup> *See* 34 C.F.R. § 106.37(a).



conditions in its own education program or activity which resulted in limited participation therein.”<sup>14</sup> There is no indication of such circumstances with regard to BMI.

Here, the sex-based eligibility criteria for BMI is clear, it is only open to men. Females need not apply. The sex-based eligibility criterion is, by its terms, applied mechanically, and without any statistical justification warranted by any alleged past discrimination by NIU. Accordingly, NIU’s sex discrimination through BMI is unlawful.

### **OCR Has Jurisdiction**

OCR has jurisdiction over this complaint. NIU is a public university and a recipient of federal funding, including from the U.S. Department of Education.<sup>15</sup> It is therefore liable for violating Title VI, Title IX, and the Equal Protection Clause, and is subject to OCR’s jurisdiction.<sup>16</sup>

### **The Complaint is Timely**

This complaint is timely brought because it includes allegations of discrimination based on race and color, and sex that occurred within the last 180 days and that are ongoing.<sup>17</sup>

### **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. This is true regardless of which race suffers discrimination. Race- color- and nationality-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*, 600 U.S. at 287 (Thomas, J., concurring).

Because the discriminatory eligibility criteria of the BSAP and BMI are presumptively invalid, and because NIU cannot show any compelling justification for those restrictions, the

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<sup>14</sup> OCR “Questions and Answers Regarding OCR’s Interpretation of Title IX and Single Sex Scholarships, Clubs, and other Programs,” January 14, 2021, at 4 (found at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-single-sex-20210114.pdf>) (emphasis in original).

<sup>15</sup> See <https://www.usaspending.gov/recipient/c3c0a534-6ceb-2bca-e94d-83742848871a-C/latest> [<https://archive.ph/r3AXZ>] (accessed Nov. 17, 2024).

<sup>16</sup> See <https://legalinsurrection.com/wp-content/uploads/2024/09/OCR-Case-Processing-Manual.pdf> at 7-8.

<sup>17</sup> See, e.g., [https://www.instagram.com/bmi\\_niu/?hl=en](https://www.instagram.com/bmi_niu/?hl=en) [<https://equalprotect.org/wp-content/uploads/2024/11/Northern-Illinois-BMI-Instagram.png>] [accessed Nov. 18, 2024][ongoing BMI events]

limitation of these programs based on race and color (BSAP and BMI) and sex (BMI) violates federal civil rights statutes and constitutional equal protection guarantees.

The Office for Civil Rights has the power and obligation to investigate NIU's role in promoting and administering these programs and to impose whatever remedial relief is necessary to hold it 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," the Supreme Court has taught, "is to stop discriminating[.]" *Parents Involved in Cmty. Sch.*, 551 U.S. at 748.

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

Respectfully submitted,

*/William A. Jacobson/*

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