

July 12, 2022



Dr. Jill Liss
Assistant Professor, OB-GYN Clerkship Director
University of Colorado, Anschutz Medical Campus

Dr. Amy Markese
Assistant Professor, OB-GYN Clerkship Co-Director
University of Colorado, Anschutz Medical Campus

Sent via email

Dear Drs. Liss and Markese,

I am an attorney at the Foundation Against Intolerance & Racism (FAIR), a nonpartisan, nonprofit organization dedicated to advancing civil rights and promoting a common culture based on fairness, understanding, and humanity. We have more than ninety chapters and tens of thousands of members nationwide, including in Colorado. Our website, fairforall.org, can give you a fuller sense of our identity and activities.

We write in response to an [incident report](#) submitted through our transparency website, fairtransparency.org regarding the University of Colorado's Department of Obstetrics and Gynecology's [Diversity, Equity and Inclusion \(DEI\) Externship Scholarship](#), which provides \$1,000 in expense reimbursement and various mentorship benefits to students who are from “underrepresented or disadvantaged backgrounds,” which the [application form](#) defines as “racial, ethnic, socioeconomic status, gender identification.” This language seems to suggest that some otherwise qualified applicants may not be eligible for the scholarship on the basis of certain immutable characteristics.

As an organization committed to pro-human anti-racism, FAIR supports efforts to achieve greater fairness and advance worthy initiatives in medical education. We believe, however, that establishing funding opportunities based on skin color, ancestry, and other characteristics, as the DEI Externship Scholarship appears to do, violates Title VI of the Civil Rights Act. That statute provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

42 U.S.C. § 2000d. As recipients of federal funds, public universities—including the University of Colorado—must comply with Title VI's prohibition on discrimination.

The DEI Externship Scholarship appears to be facially discriminatory, classifying people on the basis of protected immutable characteristics to determine their eligibility for a benefit. Under Title VI (and the Equal Protection clause from which it is derived), all such distinctions based on skin color are “strictly

scrutinized” by the courts. *Adarand Constr., Inc. v. Pena*, 515 U.S. 200, 227 (1995). Strict scrutiny “is a searching examination” that is rarely survived. *Fisher v. University of Texas*, 570 U.S. 297, 310 (2013); *Burson v. Freeman*, 504 U.S. 191, 211 (1992). Racial classifications such as those used in the DEI Externship Scholarship will pass strict scrutiny only if the entity proves it has a “compelling interest” in treating individuals differently based on skin color, and the means used to achieve that interest are “narrowly tailored.” *Adarand*, 515 U.S. at 227. A policy is not narrowly tailored if a “less restrictive alternative is readily available.” *Boos v. Barry*, 485 U.S. 312, 329 (1988).

It appears that the racial classifications used in the DEI Externship Scholarship do not satisfy strict scrutiny. While it is laudable for the University of Colorado to have an interest in diversity, the courts have clearly established that furthering the compelling interest in diversity requires programs “flexible enough to consider all pertinent elements of diversity” beyond just racial categorization or ancestry. *Grutter v. Bollinger*, 539 U.S. 306, 309. Accordingly, any program that makes “race or ethnicity the defining feature of the application,” cannot be narrowly tailored. *Ibid*.

We appreciate the medical school’s [diversity plan](#) emphasizes that diversity is not based solely on immutable characteristics and that it includes factors beyond them, such as “life experiences, record of service and employment and other talents and personal attributes that can enhance the scholarly, clinical care and learning environment.” We also recognize that the DEI externship scholarship application asks potential candidates to broadly discuss how “experiences in your personal life or education shaped who you are and your goals for your career in medicine,” which invites the consideration of elements of diversity beyond just skin color and ethnicity.

We urge the University of Colorado to amend the description of the DEI Externship Scholarship to make clear that the program is not only available on the basis of applicants’ “racial, ethnic, socioeconomic status, gender identification,” but rather that the program is open to everyone regardless of these immutable characteristics. We hope these changes will be made and announced promptly so that anyone interested has an opportunity to apply in future cycles. We believe that doing so would demonstrate the University’s commitment to non-discrimination and equal access, as well as the medical school’s expressed goal of promoting forms of diversity beyond peoples’ immutable characteristics.

We would like to give the University of Colorado an opportunity to respond. Please let us know within the next week if you intend to do so.

Very truly yours,



Leigh Ann O’Neill

Staff Attorney

Foundation Against Intolerance & Racism

Cc: Carly Hollingshead, Medical Student Clerkship Coordinator