LEGAL ACCESS AND POSTSECONDARY HISPANIC STUDENTS

Monograph 84-10

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28 Geary St.
San Francisco, CA 94106

$3.00
(1984)
University of Houston Law Center/Institute for Higher Education Law and Governance (IHELG)

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This chapter provides an overview of the rights of Hispanic students in higher education. Four broad categories are covered. First, what are the rights of students and the responsibility of states to provide access to higher education. Second, what are the rights of Hispanic students in being admitted to particular colleges or universities and related to that, what admissions practices may be lawful or fair as applied to Hispanic students. Third, once admitted what are the rights of Hispanic students to be treated in an equitable manner and entitled to receive supportive services or financial aid necessary to allow them to continue. Finally, what is the role of federal government policies and legislation which shape minority students access, and the rights of Hispanic students attendant to such government policies.

For the most part, the focus is on the rights of Hispanic students to obtain access into higher education institutions, and the concomitant obligations of such institutions to provide an equal opportunity to receive a higher education degree. Not all of the issues discussed, however, affect Hispanic students with the same degree of importance. Nevertheless, it is important for individuals concerned with minority access to recognize the legal issues
which are of concern to Hispanic students and how these issues shape the rights of these students in terms of higher education access.

The legal rights of Hispanic students are shaped by two factors. First, in the "eyes" of the law, colleges and universities have been traditionally viewed as autonomous. Thus, decisions on who is admitted and who graduates is generally left, with some exceptions, to the discretion of postsecondary institutions.¹ Moreover, colleges and universities have generally resisted outside authorities from interfering in "internal affairs"² This factor certainly affects the legal rights of Hispanic students in courts or legislative bodies when seeking to define equitable access and how it must be met.

Second, Hispanics have been recognized as a distinct racial or national origin group entitled to certain protections under federal and state law.³ This "special status" places certain constitutional obligations on postsecondary institutions not to discriminate against Hispanic students and, in certain instances, requires them to take meaningful steps to insure Hispanic student access to education. Because they are "a protected group" any policy which infringes or denies them education benefits will be looked upon with strict scrutiny by the courts.

Coupled with these two factors is the realization that higher education policies in our society are constantly in a state of flux. It is not always possible to say that the

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rights of Hispanic students seeking access to postsecondary institutions are unique to them alone or, indeed, can be classified as of a legal nature. For example, the issue of financial aid is an area of concern not just to Hispanics but to all low income college students. Moreover, legislative policies dealing with financial aid are susceptible to change each year. Thus, in speaking of the rights of Hispanic students, much larger policy developments may alter those rights, or such rights may not be unique to Hispanic students alone.

One final precautionary note. The legal issues discussed in this chapter are not adapted to the law of any particular state or type of postsecondary institution. There are numerous treatises, articles and other resources available for individuals who wish to go into the legal complexities that surround the rights of students in higher education. Needless to say, the rights of Hispanic students can only be considered here in a very broad manner. However, so that the reader will have sufficient basis for understanding subsequent topics the reader should understand the basic legal framework of the student-university relationship, and the private versus public college distinction. To this we now turn.
II

LEGAL OVERVIEW

Traditionally, our legal system has viewed higher education institutions as a unique enterprise which could regulate itself through reliance on tradition and common agreement. As early as 1819, in one of the very first cases affecting higher education institutions, the United States Supreme Court expressed reservations about the authority of a state to regulate colleges which were chartered by the state to perform a higher education function.\(^5\) While the law's relationship to colleges has evolved somewhat, it can generally be said that postsecondary institutions enjoy considerable autonomy in internal matters particularly as they relate to decisions impacting on the academic mission of the college.\(^6\) Likewise, because enrollment in a higher education institution was often viewed as a privilege, courts many times indicated students had no legally articulated rights when dealing with higher education institutions.\(^7\)

If the courts did review the rights of students enrolled in higher education institutions, their analyses of such rights were often stated in terms of the educational institutions standing in the place of the parent's shoes. This \textit{in loco parentis} concept gave colleges the discretion and authority to adopt whatever rules or regulations were necessary to operate the college.\(^8\) Viewed in this light the
United States Supreme Court stated in *Hamilton v. Regents of University of California* that attendance in higher education institutions could constitutionally be extended or terminated on whatever conditions the college determined were in the colleges and the students best interests.\(^9\) This traditional view was slowly eroded by several factors. Chief among these were increased student demands for access to higher education, government becoming more heavily involved in education matters, and a different perspective from the courts on the student-school relationship. One case, in particular, illustrates these changing perspectives.

In *Dixon v. Alabama State Board of Education* \(^10\) students had been expelled from school for participating in various civil rights demonstrations. The students were given no notice or hearing that they would be expelled, and the students sought to enjoin their expulsion claiming they had a right to attend a public college. In reversing the trial court, the Court of Appeals implicitly rejected the notion that education in state college or universities was a privilege to be dispensed with on whatever conditions the state in its sole discretion seemed advisable. The Court of Appeals ruled that students were entitled to some type of notice and opportunity for hearing before any expulsion could occur. The court also expressed a willingness to reject the "in loco parentis" concept whenever it could be found that a college acts arbitrarily with students. Since
the Dixon case, federal and state courts at all levels have followed the lead in recognizing and expanding these principles. 11

There are three caveats to this expansion of student's rights in higher education. First, insofar as the federal constitution is concerned the law treats public and private institutions differently. Before a court will extend constitutional guarantees to colleges it must first determine that there is some involvement by the federal or state government. 12 This "state action" concept, because of varying patterns of government involvement and assistance, is often difficult to define in distinguishing a private versus a public postsecondary education institution. The continuum exists from the obvious tax supported state university to the private college seminary. The large gray area between these extremes has provided a continuing source of debate as to how far the government must be involved before a private institution may be considered "public" in the eyes of the law. 13

Generally speaking a "true" private university may engage in acts of discrimination, prohibit student protests or expel a student without affording the safeguards or rights that a public university is constitutionally required to provide. To circumvent these restrictions courts are often apt to protect the rights of students by looking at the contractual relationship a student has with a university. 14 Under this theory, courts are of the view
that if a student complies with the terms prescribed by the university, then the institution should be contractually bound by the rules and regulations it has set forth. A spate of court cases have concluded that this contractual relationship extends beyond terms of express contracts found in financial aid, housing or food service agreements, and covers implied promises to provide admission, adequate curriculum, and the issuance of a grade or degree, provided the student has met the terms of the contract. ¹⁵

The second caveat, even as to the application of the contract theory, is that courts are still reluctant to infringe on university decisions in areas solely of academic concern. Thus, it is important to recognize that as to matters considered "academic decisions" the courts, absent arbitrary circumstances, will generally leave university policies or decisions undisturbed. The reasons for this were summarized recently by the United States Supreme Court in the case of Horowitz v. Board of Curators of University of Missouri. ¹⁶ In the latter case, a medical student contended she was entitled to a hearing and other due process guarantees before she was dismissed for academic reasons. In distinguishing the principles laid out in Dixon v. Alabama State Board of Education, the Court stated that academic decisions are not readily adaptable to the procedural tools of administrative or judicial decision making and because such decisions are so intertwined with academic considerations, courts are best suited to leave
them undisturbed absent some obvious arbitrary or capricious circumstances.

The third caveat is that unlike elementary and secondary education which has a compulsory aspect\textsuperscript{17}, students do not have a right to higher education. At most, states have established comprehensive public systems of higher education which provide for the opportunity to enroll in postsecondary education institutions. Thus, as discussed in the next section, the constitutional rights of higher education students may not be given the full degree of protection or concern as they would in the elementary/secondary school setting.

Given this overview, it is important to keep in mind that the rights of Hispanic students will be markedly different depending on the type of institution affected, whether the issue relates to matters of academic concern or discipline, and whether some policy which provides access has been contractually breached. Noting these principles, let us now turn to the rights of Hispanic students to receive a higher education in general.

III

HIGHER EDUCATION SYSTEMS AND EQUAL OPPORTUNITY

A. EDUCATION AS A FUNDAMENTAL RIGHT

Public higher education has always been a state responsibility and every state in the United States has established some form of public higher education system.
Such systems may be hierarchal in nature, composed of universities, state colleges and two year-year colleges, such as in New York or California; or, in smaller states, systems of higher education may encompass perhaps one university and one or two colleges.\textsuperscript{18} In virtually every state, however, these public systems of higher education are the chief vehicle by which students leaving secondary schools continue their postsecondary education aspirations. Since no state makes higher education compulsory and because many public colleges and universities have "selective" admissions, the right of Hispanic students to obtain access to higher education differs markedly from a right to an elementary or secondary education within a state. Nevertheless, a state established system of higher education is the focal point for any student seeking access to college, and to future life options. This point was underscored by the Washington Supreme Court: \textsuperscript{19}

That it is the public policy of the state that college education should be had, if possible, by all its citizens, is made manifest by the fact that the state of Washington maintains so many institutions of higher learning at public expense. It cannot be doubted that the minor who is unable to secure a college education is generally handicapped in pursuing most of the trades or possessions of life, for most of those with whom he is required to compete will be possessed of that greater skill and ability which comes from such an education.

A starting point for discussing the right of access to public systems of higher education is noting that, contrary to popular opinion, education is not a fundamental right which deserves special protection under the Federal
This issue was addressed in *San Antonio School District v. Rodriguez* where the United States Supreme Court held that the United States Constitution contains no explicit or implied right of an individual to receive an education. The practical consequence of this finding was the ruling in *Rodriguez* that a state policy which provides a rational, albeit unfair, method of financing schools is nevertheless legal (under the federal constitution) since the state could justify such a policy was meeting the legitimate state goal of financing schools in the state.

This holding was modified somewhat in a subsequent Supreme Court case entitled *Plyler v. Doe*. In *Plyler*, the Supreme Court was concerned with the validity of a state policy which excluded illegal alien students from elementary and secondary schools. The Supreme Court, while acknowledging that education was not a fundamental right, was of the opinion that education played an important role in our society which could not be characterized as just another government benefit. Citing education's importance, the Court was compelled to distinguish the factual situation in *Rodriguez* where all pupils received an education (even though unequally financed), with the facts in *Plyler* where students were excluded from any education benefits. In the latter situation, the Court held the state's burden is to show not just that a policy was rationally related to meeting a legitimate government interest, but that this
policy furthers some substantial goal of the state.  
Adopting this middle-tier approach the Supreme Court in 
*Plyler* ruled that Texas could not justify its exclusion of 
undocumented alien students since this policy could not be 
found to further any substantial goals of the state. 

Since the facts in *Rodriguez* and *Plyler* concerned 
elementary and secondary schools it remains to be seen if 
the Supreme Court, faced with a higher education system 
which had a policy of excluding or preventing an entire 
class of persons from access to higher education, would 
apply these principles of equal fairness in higher education 
systems. The *Rodriguez* and *Plyler* cases must also be 
distinguished from those situations in which education is 
being denied or infringed upon because of racial 
considerations. In those situations where the court finds 
that a state policy or scheme which limits or denies 
education benefits is based on a "suspect" classification -- 
such as race -- then the state's burden of justification is 
more than a mere showing that these policies meet or further 
rational and legitimate goals of the state. 

As to suspect classifications, the state has the burden 
of showing that such policies or classifications are 
necessary to meet a compelling state interest and the 
policies are precisely tailored to meeting those goals.  
The seminal case in this area is the 1954 Supreme Court case 
of *Brown v. Board of Education*, which overturned legally 
compelled segregation in public schools and required all
public schools to remove vestiges of past segregation "with all deliberate speed." These protections have been specifically applied to Mexican American students.26

While commentators agree that public colleges and universities can no longer maintain dual systems of higher education there is still some question as to the specific steps states should take in providing a "racially neutral" system of higher education. The reason why is that courts have pointed to the educational differences between higher education and elementary and secondary education. In Alabama State Teachers Ass'n. v. Alabama Public School and College Authority, 27 the court noted these differences:

"Plaintiffs fail to take account of some significant differences between the elementary and secondary public schools and institutions of higher education and of some related differences concerning the role the courts should play in dismantling the dual systems.
...Higher Education is neither free nor compulsory. Students choose which, if any, institution they will attend. In making that choice they face the full range of diversity in goals, facilities, equipment, course offerings, teacher training and salaries, and living arrangements, perhaps only to mention a few. From where legislators sit, of course, the system must be viewed on a statewide basis. In deciding to open a new institution or.... where to locate it, the legislature must consider a very complicated pattern of demand for and availability of the above-listed variable, including, also, impact on the dual system. We conclude that in reviewing such a decision to determine whether it maximized desegregation we would necessarily be involved, consciously or by default, in a wide range of educational policy decisions in which courts should not become involved."

In the next part we consider some of these difficulties in the context of Hispanic student's rights.
B. INTEGRATING HIGHER EDUCATION SYSTEMS

While no case has yet to rule on the issue of segregation of Hispanic students in higher education, there have been several state and federal cases which have ruled that the segregation of Hispanic students in elementary and secondary schools is just as impermissible and egregious as for black students.\textsuperscript{28} It could thus be argued that a situation in which Hispanic students were found to be excluded from publicly supported systems of higher education would be susceptible to legal challenge and protection. In order to consider these possibilities, it is helpful to review the litigation and principles that have arisen in cases involving dual systems of higher education for black and white students.

As noted in the previous section, the United States Supreme Court in \textit{Brown v. Board of Education} made clear that school systems are required to take affirmative steps to remove the vestiges of past racial segregation "with all deliberate speed."\textsuperscript{29} These principles have been applied, in varying degrees, to higher education systems as well in cases where black students have been excluded from "white" postsecondary institutions.\textsuperscript{30}

In a series of cases beginning with \textit{Missouri ex rel Gaines v. Canada},\textsuperscript{31} the Supreme Court found that a state must offer black students the opportunity to enroll in educational facilities substantially equal to those which the state offers "to persons of the white race." Following this decision, the Court held in \textit{Sweatt v. Painter} that a
state's provision of a minority law school was unconstitutional where it could not compare with the "white" law school,\textsuperscript{32} and in \textit{Mclaurin v. Oklahoma State Regents} it prohibited segregation within a graduate department because it provided unequal educational opportunities.\textsuperscript{33} These cases set the bedrock for the first principle that, likewise, Hispanic students must be provided equal access to state systems of higher education and may not be excluded on the basis of their race, color or national origin.

When it can be shown that state policies intended to discriminate against, or exclude Hispanic students from higher education systems, then courts will impose an affirmative duty on states, under the Fourteenth Amendment, to desegregate its higher education facilities, much like in elementary and secondary education.\textsuperscript{34} This affirmative duty will not be discharged by the mere adoption of a good faith, but unsuccessful "open door" admissions policy. States will be required to adopt specific remedies to eliminate past discrimination.\textsuperscript{35} The caveat to this principle, at least for Hispanic students, is that courts have limited this affirmative duty to situations where it has been recognized that segregated systems of higher education were once the legal policy of the state. Thus, since no court has yet to find that Hispanic students have been subject to \textit{de jure} segregation within higher education systems it would be premature to conclude that states have an affirmative duty to integrate Hispanic students because they may be
disproportionately represented in higher education systems. There must be a state policy of intentional segregation or discrimination.\textsuperscript{36}

Only one case thus far, has touched on the issue of integration Hispanic students into "white" higher education systems. In 1970, various civil rights groups brought suit, entitled Adams v. Bell, against the Department of Health Education and Welfare (HEW) claiming HEW was in violation of civil rights law by continuing to provide federal funds to states and their higher educational institutions which practiced segregation against black students.\textsuperscript{37} The practical intent of the suit was to require HEW to bring enforcement proceeding against states that had maintained segregated college systems.

In 1976 a variety of Hispanic groups intervened in the ongoing Adams litigation to seek prohibitions in federal funding to states which engaged in discriminatory violations against Hispanic students. As part of the Adams litigation, Texas was required to adopt a statewide "equal opportunity plan for higher education" which would establish goals and timetables for increasing Hispanic access to Texas higher education institutions. The Texas plan, whose substantive merits must still be addressed by the courts, was developed in keeping with guidelines that are to be used to integrate black students into white postsecondary institutions. Thus, while Adams does not apply directly, its application makes
it the only case focusing on the issue of Hispanic segregation in state systems of higher education.

It has also been suggested by at least one commentator that state systems of higher education which engage in hierarchical education opportunities may be engaging in a form of segregation which does not provide "anything remotely resembling equal educational opportunities" to Hispanic students. The argument posed is that Hispanic students may be tracked or relegated to two-year colleges or institutions which lack adequate resources for insuring that Hispanic students are receiving a meaningful higher education program. Related to this are views that state systems of higher education which finance postsecondary institutions in an inequitable manner may be in violation of the Fourteenth Amendment if it can be shown that there is a strong correlation between racial enrollments and funding. The difficulty with the latter two arguments is the initial burden of showing there was the necessary discriminatory intent on the part of the state in establishing or maintaining such a system of higher education. As long as it can be shown that states have previously provided neutral policies of access to its public colleges and universities, it will be difficult to invoke the protections of the Federal Constitution.

Hispanic students may circumvent this burden by seeking relief under the administrative regulations adopted to implement Title VI of the 1964 Civil Rights Act which was
enacted pursuant to Congress' power to enforce the equal protection provisions of the Fourteenth Amendment. Title VI of the 1964 Civil Rights Act provides:

No person in the United States shall, on the grounds 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.

As discussed in Part IV and VI, the Department of Education, as part of its dispersal of federal funds, is required to establish standards and procedures for determining that grant recipients do not discriminate on the basis of race, color or national origin. While courts have held that the burden of showing a discriminatory violation under Title VI is the same as under the Fourteenth Amendment, the Supreme Court in Guardian's Assn. v. Civil Service Commission of the City of New York has given separate legal force to the administrative guidelines promulgated pursuant to Title VI of the 1964 Civil Rights Act. 40

In the Guardian's case minority police officers brought an action seeking to enforce the provisions of Title VI arguing that Title VI prohibited conduct which had a discriminatory effect on hiring of minority police officers. The Supreme Court rejected this contention, stating that only proof of discriminatory intent could suffice under the legislative mandates of Title VI. However, a majority of the Court held that the administrative regulations issued under Title VI could reach unintentional, disparate-impact discrimination. The court made an important distinction
however. The court held that only a showing of discriminatory effect, not purpose, would be sufficient as a prerequisite to injunctive relief (but not compensatory relief) under the regulations issued pursuant to Title VI and that compensatory relief could be obtained only by a showing of intent under the legislative statute. 41 Consequently, following the Guardian decision, Hispanic students might raise a second argument that because the policies adopted by colleges and universities have a racially disparate impact they would be entitled to injunctive relief under Title VI.

In summary, Hispanic students can not claim any right to higher education under the federal constitution. However, when states provide public higher education to its residents, those systems of higher education must provide access to Hispanic students which conform to principles of constitutional fairness. Statewide systems of higher education which intentionally exclude or segregate Hispanic students would be impermissible.

Likewise, where it is ascertained that Hispanic students are being disproportionately excluded or enrolled in certain institutions through "racially neutral" policies or practices, then previous case law states there must be a finding that such policies or purposes were designed with the intent or purpose of discriminating against Hispanic students. Once such a finding is made, the courts will impose an affirmative obligation on state systems of higher
education to immediately integrate its facilities. In certain situations a finding of discriminatory effect may be sufficient to provide relief. Finally, in contrast to public systems of higher education, private universities that discriminate against Hispanic students may not necessarily violate the rights of students. The courts will look to the degree of state involvement with the private university to determine if constitutional principles apply or the courts may apply principles of contract law to determine the rights of Hispanic students.

The more troublesome issue as to access involves the admissions procedures at particular colleges or institutions within the statewide framework of higher education. It is in this arena that the rights of minority students have been most often subjected to court interpretation and to this we now turn.
IV

ADMISSIONS

This section concerns the rights of Hispanic students attendant to the admissions procedures at a particular college or university. Despite the limited authority and reluctance of courts to become involved in the admissions process, courts have recognized three general rights that students have in the admissions process. First, students have the right to be considered for admission under reasonable, ascertainable standards. Or, stated conversely, colleges and universities may not engage in arbitrary or capricious choosing among applicants to determine who is admitted,\(^42\) and are obligated to show that admissions criteria bears some relationship to state goals.\(^43\) Second, relying on the contractual relationship between students and colleges, postsecondary institutions are duty bound to adhere to its published admission standards in their brochures.\(^44\) Finally, state colleges and universities may not exclude applicants on the basis of race, color or national origin.\(^45\) These rights are directly applicable to Hispanic students.

A. ARBITRARY AND CAPRICIOUS ADMISSIONS CRITERIA

Hispanic students have the right to be considered for admission under requirements which are authorized ascertainable criteria and bear some relationship to the purposes of the institution. Moreover, officials
establishing such procedures must have the authority to do so. The leading case on this issue, insofar as Hispanic rights are concerned is *McDonald v. Hogness*. 46

In *McDonald*, an unsuccessful white applicant alleged that the use of racial criteria in the admissions process served no state interest and the process by which applicants were chosen was arbitrary. The court examined the state interest in achieving a diversified medical school class and found that the use of racial criteria, as but one factor in achieving diversity, was permissible. The court also found that the selection process was neither arbitrary or capricious stating that: 1) the admissions committee employed pre-determined standards; 2) admissions committee members were trained and experienced in their functions; 3) guidelines were provided for and distributed before interview sessions; and 4) the legislature had properly delegated to the School of Medicine the power to establish such admission procedures.

Of more importance, the Washington Supreme Court rejected the argument that subjective factors such as "race" or "disadvantaged" are not "definable, meaningful concepts which can be reasonably applied." The Court did suggest by its opinion that admissions criteria which utilize racial factors in a haphazard way may be suspect. In such instances, colleges have a greater obligation to establish procedures that assure a uniform application of objective standards to individual cases.
In several instances courts have also struck down admissions criteria precisely because the discretionary power it placed in the hands of school officials was being used in a discriminatory manner. For example, in a 1958 case entitled Board of Supervisors v. Ludley,\textsuperscript{47} school officials were prohibited from using criteria which denied admission to applicants because of their failure to present a "certificate of eligibility" attesting to good moral character. Such a certificate had to be signed by various school officials. The court found that such a requirement contained no objective standards and officials were implicitly using the "certificate" to deny minority students the opportunity to attend certain colleges within the state.

One commentator has also suggested that the use of objective ascertainable standards applies to the entire admissions process including interviews. Thus, to protect students from abuse it may be necessary to publish in advance the criteria to be used in evaluating an applicant during an interview, and allow no other input or evaluations.\textsuperscript{48} Despite this admonition, no court has imposed such requirements on colleges or universities. However, several cases have considered the question of whether oral interviews for admission carry latent dangers of discriminatory abuse. In Chance v. Board of Examiners, the court's opinion serves as a useful reminder of the rights Hispanic students have to objective,
ascertainable standards: 49

Turning to the oral interview and conference tests, we are handicapped in our ability to appraise their validity by the absence of any tangible, objective data, since the principal qualities that should be evaluated by the examining committee in the oral interview (e.g., leadership, speech, poise, comprehension, soundness of judgment and ability to present ideas and meet challenges) are intangible, and the judgment of the interviewing committee can only be as sound as the capacity of its members to recognize the presence or absence of these qualities in each candidate. In the absence of any record of such interviews or of any proof that the examiners are incompetent or that the interview problems or questions have been irrelevant, we make no finding as to the content validity of the oral examinations, standing alone.

With respect to the question of the objectivity of ....the oral interviews, we are not persuaded by vague and speculative hearsay statements that members of the examining committees intentionally discriminate against Black or Puerto Rican candidates because of their color, use of "southernisms," or the like....[T]he examiners are dealing with a group of well educated applicants. One the other hand the hard, cold facts are that all members of the Board of Examiners are white, the great majority of the oral examiners or examination assistants are white, and white candidates have passed the combined oral and written tests at a much higher rate than Black and Puerto Rican candidates, resulting in de facto discrimination against the latter. This raises a "serious and substantial question" as to whether discrimination.... is not being unconsciously practiced by white interview examiners.

In summary, criteria such as "racial diversity" may be used so long as used in a uniform objective manner and contain standards for testing the arbitrariness of a decision. At the same time, when admissions criteria produces or results in racial disparity such criteria may be more susceptible to review because of the inference of a discriminatory purpose.
THE CONTRACTUAL OBLIGATION TO ADMIT A STUDENT.

While courts recognize the discretionary power to admit or deny applicants, an applicant may nevertheless be able to prove that they have a contractual "property" interest in being accepted. Thus, a student may assert an implied contractual obligation to be admitted if he or she has met all of the eligibility criteria specified as conditional for admission.\(^50\) This right was asserted in *Steinberg v. Chicago Medical School*.\(^51\) In *Steinberg*, a student applied for admission to medical school, paying the requisite application fee. His application was rejected and he subsequently filed suit against the school claiming his application was not evaluated according to the academic entrance criteria stated in the school's bulletin. The court found that the school brochure constituted an invitation to make an offer, that the student's application and fee submission was an offer, and the school's acceptance of the application was an acceptance of a contractual obligation to evaluate candidates according to the criteria stated in the bulletin. However, the student won a hollow victory. Despite the court's holding, the college was not required to admit the rejected applicant but merely ordered to refund the application fee to those applicants who were harmed. It remains to be seen whether any court would specifically order that a student be admitted.

These contractual restraints do have some importance in limiting the discretionary power that private universities may have in choosing racially discriminatory admissions.
criteria. Because courts have viewed the admissions process as one of offer and acceptance, a civil rights statute has been interpreted by the Supreme Court to prohibit private schools from racial discrimination in their admissions policies. In Runyon v. McCrary, the court ruled that 42 U.S.C. § 1981, a civil rights statute which provides that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts... as is enjoyed by white citizens," could prohibit private schools from excluding qualified children solely because of their race. The court noted that while there was no implicit right to receive a private education, the school's offer and the students purported acceptance was contractual in nature and could be enforced.

In Gonzales v. Southern Methodist University one court did state that § 1981 was specifically applicable to Hispanic students who seek admission to a private college. In the latter case, a female Mexican-American applied to the law school at Southern Methodist University (SMU), a private educational institution. When her application was denied, she filed suit alleging that SMU had discriminated against her because of her race. The court found that she had stated a claim under 42 U.S.C. § 1981 and could be awarded relief if "she could advise the facts necessary to show race-based discrimination against her by SMU."
However, applying the statute, and looking at the facts the court found no evidence of discrimination. Of relevance to our next discussion, the court in Gonzales noted:

SMU had a policy of fully reviewing the application of any minority student whose undergraduate grades and LSAT score failed to gain him automatic admission. (sic) The point of this review was to examine the record of the minority applicant in order to determine that applicants' merit in light of a broader view of his record (sic), thus vitiating the effects of any possible 'cultural bias' in the LSAT testing.

1. THE USE OF OBJECTIVE, RACIALLY NEUTRAL CRITERIA THAT HAS A DISCRIMINATORY IMPACT

As one article recently noted, few cases have been brought based on direct denial of admissions because of criteria that were racially exclusionary. This is for the reason that to show a constitutional violation, Hispanic students must prove that their exclusion was due, in part, to admissions criteria that had a discriminatory purpose. While it is well settled that public institutions of higher education may not utilized admissions criteria that facially exclude applicants based on race, color or national origin, the more difficult issue as the Gonzales case illustrates, concerns admissions criteria that is racially neutral yet, in its application, produces a discriminatory impact.

Courts have applied two different approaches in looking at these issues. In those instances where courts are confronting previously segregated institutions, courts will not allow racially neutral policies if they result in
continued disparities in minority student access. For example, in several cases the use of standardized tests have been prohibited if their continued use fails to integrate education systems which were previously segregated.\textsuperscript{58}

In the same way, courts have struck down "neutral" admissions requirements such as letters of recommendation from alumni,\textsuperscript{59} and graduation from an accredited institution on the grounds that their burden falls more heavily on black students resulting in the continued segregation of such students.\textsuperscript{60}

In one case, Sanders v. Ellington\textsuperscript{61} the court held that a state's affirmative duty to desegregate higher education facilities would not be discharged by the adoption of a good faith but unsuccessful "open door" policy. By holding that a state has a duty to integrate its colleges and such a duty extends beyond the mere adoption of a nondiscriminatory admissions policy, the court noted that a college may be obligated to consider its recruitment practices and long range construction plans in providing access to minority students.\textsuperscript{62}

In Lee v. Macon County Board of Education\textsuperscript{63} one court did rule that prohibition of discriminatory admissions policies would logically extend to recruitment patterns. Thus, in those situations where previous dual systems of higher education existed, recruitment efforts would be required to encompass minority applicants and preferential
outreach would be encouraged if necessary to dissipate previous discrimination.\textsuperscript{64}

In contrast to the latter situations where a previous finding of segregation existed, Hispanic students will have a difficult burden in showing that neutral admission policies are invalid where no previous finding of discrimination exists. This is true even where it results in disproportionate access to higher education. An example of this difficulty was suggested in \textit{Ramos v. Texas Technological University}.\textsuperscript{65} In the latter case a female Mexican American claimed discrimination in the decision to deny her admission into a Masters degree program. In reviewing the evidence, the court noted:

\textit{Plaintiff is Mexican American, and the court recognizes that tests and examinations can be so framed and designed that the examinations themselves can result in a futile and perhaps unrecognized form of discrimination against minorities. Because of a cultural background or the lack of equal educational training in the public schools and undergraduate work, the very nature and subject matter of the examinations can act to the detriment of a minority.\ldots\textsuperscript{...} In such cases, the courts can find some form of relief even though the resulting discrimination was not intentional or consciously done. If the evidence in this case were to show that the examinations given by Texas Tech University to the plaintiff in her courses of if the questions and subject matter of the G.R.E. tests were not fair to those minorities who might take such examinations and tests, the court could fashion the appropriate relief. But such is not shown by the evidence in the case.\ldots\textsuperscript{...}

It seems that the plaintiff is basing her complaint on the fact that she is, first, a Mexican American, and, second, that she was denied admission to the Master's degree program, and, therefore, she is entitled to relief without any further showing of facts indicating discrimination}
toward her or to the Mexican American as a class. The only evidence was that plaintiff was the only Mexican American in 1973-74 in the program and no Mexican American was in the program in 1974-75. Not only are these bare statistics meager, but also absent a showing of discrimination, the court cannot afford relief. 66

The court's reference to testing and examinations provides a final area of discussion as to the validity of racially neutral admissions policies having a discriminatory impact on Hispanic students.

Traditionally, standardized tests have been used and upheld as valid entrance requirements into postsecondary institutions. 67 These tests have served two purposes for colleges: 1) either to assess how much students could learn (generally referred to as "aptitude" tests); and 2) how much they actually have learned ("achievement" tests). As several studies have noted, their use in admissions decisions is widespread and given great weight in deciding who gets into postsecondary education institutions. 68 Increasingly, however, such tests are being challenged by minority students as being unlawful because of the racially disparate impact such test results have on access to education benefits. To understand the context in which they are challenged it is helpful to review the legal standards applicable to testing in the admissions process.

Generally, courts will presume the validity of tests for admissions when the tests have a rational connection to the legitimate objectives of the colleges or university. 69 Of course, the state's objective must be a legitimate one,
free of racial considerations. When it can be shown that the use of a test, albeit neutral on its face, adversely affects a class of persons based on racial or national origin factors, courts will subject the use of a test to "strict scrutiny" and will require state officials to demonstrate the compelling state interest for using such a test.

In 1971, the United States Supreme Court, in Griggs v. Duke Power Co. 70 held that requiring standardized intelligence tests as a condition of preemployment is unlawful under Title VII of the 1964 Civil Rights Act (which prohibits employment discrimination) when it can be shown that: 1) performance on the test was unrelated to job performance and 2) the test had the effect of operating to exclude black applicants at a significantly higher rate than which applicants.

In 1976, however, the Supreme Court held in Washington v. Davis 71 that the provisions under the equal protection clause of the Fourteenth Amendment are different than under the statutory context of Title VII. In Washington the court held that if an institution can rebut any inference of purposeful discrimination that might arise from a showing of disparate effect, an institution could assert its validity by showing a reasonable fit between the criteria used and the objectives of the state. These constitutional principles have been used to uphold the validity of
standardized tests despite the fact they had a discriminatory impact on minority students.\textsuperscript{72}

In contrast to the constitutional limitations under the Fourteenth Amendment, several cases have prohibited the use of standardized tests in educational settings under regulation implementing Title VI of the Civil Rights Act of 1964.\textsuperscript{73} In these cases, if the tests are constructed or employed in a fashion of having a discriminatory effect on Hispanic student then they will be enjoined. One of the first court cases to consider the validity of standardized tests under Title VI was \textit{Hobson v. Hansen}.\textsuperscript{74} \textit{Hobson} involved a charge that the use of I.Q. tests in Washington, D.C.'s public schools resulted in a discriminatory tracking system for black school children. The court found that the aptitude and achievement tests used by the schools did not properly measure the abilities of minority students and abolished their use. Subsequently, in \textit{Diana v. California State Board of Education},\textsuperscript{75} I.Q. tests were challenged on the basis of discriminating against Mexican American students. In \textit{Diana}, a consent decree was reached which set out certain principles in placing Spanish-speaking children in special education classes. In 1972, a similar decision was reached in \textit{Guadalupe Organization v. Tempe Elementary School District}.'\textsuperscript{76} In the same year in a case entitled \textit{Larry P. v. Riles}, black school children challenged their disproportionate placement in special education classes on the basis of I.Q. tests.\textsuperscript{77} In 1979, after a lengthy trial,
the trial court in Larry P. found that I.Q. tests used by
the state of California were racially and culturally biased
and these test had a disparate impact on black children
thereby violating Title VI and numerous other federal
statutes.

2. THE USE OF RACIAL CRITERIA IN ADMISSIONS
   DECISIONS TO ACHIEVE AFFIRMATIVE ACTION

   In recent years more and more colleges are voluntarily
adopting policies which seek to achieve a diversified
student body which reflects the society as a whole. Such
policies are being implemented within the broad discretion-
ary powers that have been accorded to colleges and where
previous discrimination is not an issue. These policies,
however, do present troublesome aspects for in some
instances it is clear that the colleges are utilizing
"racial" criteria to achieve a diversified student body.
Since the Fourteenth Amendment prohibits any state policy
which denies "to any person the equal protection of the
laws," the courts have been asked to determine how far
colleges and universities can go in using racial criteria to
eliminate societal discrimination against racial minorities
before such practices become invidious. Those cases,
generally referred to as "reverse discrimination" cases,
have been usually raised by a white student who contends
that "but for the adoption of preferential admission
policies to minority students" they would have been
admitted. It is to these cases we now turn.

-32-
The first case to reach the Supreme Court, DeFunis v. Odegaard 79 was ultimately dismissed as moot since Mr. DeFunis was ready to graduate from law school by the time the Court was ready to issue its decision. The case, however, did begin to generate the considerable public debate that was focusing on the permissibility of colleges taking race into account to achieve an integrated student body.

The public debate of how racial factors could be used in enrollment was finally and squarely addressed in 1978 in the case of Regents of the University of California v. Bakke. 80 Allan Bakke was a white male applicant who had been denied admission to the University of California, Davis medical school. He claimed that the admissions policies at the medical school were unlawful since it reserved 16 of its 100 seats in the first year class to "racial minority" students. No white student had ever been admitted under any of the 16 slots. He alleged such a policy was racially discriminatory since he would have been admitted except for the admission of these 16 students.

The Bakke decision failed to elicit a unanimous voice as in Brown. Six different opinion were generated, all of whom failed to agree on the weight and use of racial criteria in admissions decisions. Although there was no clear majority opinion, in retrospect, the Bakke case did decide three things. First, it ruled that in the absence of any finding of past discrimination, a university may not set
aside a fixed number of places for minority students from which non minority students cannot compete. Thus, the court ruled that the medical school admissions policy was illegal and Bakke should be admitted. Second, the Bakke court reaffirmed past decisions by stating that a person's racial or ethnic background cannot be the sole criteria for admission or rejection into a college or university. Third, a majority of the court agreed that at least in certain circumstances, race or national origin could be considered as one of several factors in admissions planning. While the Bakke decision left several unanswered questions, the following serves as a limited outline for what may be valid admissions practices after Bakke:

**Quotas and Goals**

Under Bakke no voluntary affirmative action policy is valid if it sets aside a fixed number or percentage of places for minority applicants. Such a policy would only be valid if the institution is willing to acknowledge that it previously engaged in unlawful discrimination or some formal finding of past discrimination has been made by the courts. Adoption of "goals" as compared to "quotas" would receive less suspicion if the goals were framed with flexibility and individuals are not insulated from comparison with all other applicants.

**Special Review Committees**

Higher education policies that leaves the appraisal of minority applicants to a special committee without true
comparison of the merits of all individual applicants will also have difficulty surviving judicial scrutiny. It may be possible for subcommittees to review or recommend minority applicants. However, after Bakke it seems likely that only an admissions policy which allows a full committee to review the judgements and opinions of any subcommittee will be sustained. The crucial test is whether two separate bodies are making comparisons of applicant pools.

Racial Criteria.

The use of racial factors in higher education admissions policies is justifiable if three factors are met:

1) There is a compelling state interest which justifies the use of racial criteria,

2) Racial considerations are used along with other criteria in judging an applicant's qualifications, and

3) There is some proof that the racial criteria is tied to meeting the compelling state interest.
Scope of the Admissions Policy.

Any affirmative action admission program or plan must be reasonably designed to achieve a clearly stated objective. In part, this incorporates the concerns cited in McDonald v. Hugness that admissions criteria must not be arbitrary. After Bakke, it seems likely that the courts will look at the temporal nature of the efforts as well as who is benefiting and who is being deprived, perhaps, of any benefits. Those programs that give equal opportunity to participation rather than preferred status in participation will have a better chance at survival. Likewise, those programs that have, as a goal, a diversified student body, will be viewed favorably viewed by the courts.

V

THE RIGHT TO SUPPORTIVE SERVICES

The question of equitable financial support and the provision of retention services is one of the more important issues facing Hispanic students in postsecondary education. Few cases have dealt with the question of what services or financial aid minority students are entitled to receive. The reason for this is that no court has found that supportive services, established to assist students in attending college or pursuing their educational goals, are rights in and of themselves. Thus, absent some "arbitrary or capricious" decision courts will respect the discretion colleges have in setting qualifications for financial aid,
awarding grades, dismissing students for scholastic deficiency or certifying someone for tutoring assistance. Keep in mind that such considerations do not include the "contractual" rights that Hispanic students may assert. Hispanic students could assert they have a right to financial aid if they met all of the conditions for eligibility set out in the college catalog. For this reason, a number of courts have reviewed the promises or guarantees of financial aid or supportive services which colleges have made to determine if such services have been distributed as promised. Moreover, courts will insist that any guidelines, which provide for such services, are reasonably and clearly drawn and fairly administered. In essence, the area of supportive services and financial aid, except for a few exceptions, is becoming one of contract law between the college and the student.

A few examples will illustrate the wide spectrum between the courts traditional reluctance to review academic matters and a growing tendency to review implied contractual agreements. At one end of the spectrum no court has ever proposed that a minority student, admitted under an affirmative action program, or otherwise, is entitled to special considerations as to his or her academic performance. It is taken for granted that each student must meet the same academic qualifications to graduate as everyone else. In a similar fashion it is highly unlikely that a court would propose that in order to serve a
compelling state interest, or to eliminate the vestiges of segregation, that a minority student who fails to meet academic standards may nonetheless graduate. Finally, absent some express guarantee, no school would be required to exhaust every possible means to assure academic success for minority students. At the other end of the spectrum, a growing number of court opinions have indicated they will side with students where colleges have misstated the academic requirements for a degree or supportive services promised by college publications are not available.

Within these two extremes, the rights of Hispanic students are most often linked to three issues. First, what contractual obligations may a Hispanic student assert against a college to provide supportive services. Second, to what extent can financial aid programs be awarded on the basis of race-conscious criteria. Finally, to what extent can states bar immigrant aliens (i.e., resident aliens) from being classified as in-state residents for purposes of tuition or limit their eligibility to financial aid programs. These three issues are discussed in turn.

A number of Hispanic students are admitted to colleges or universities under special programs which offer assistance in financial aid, tutoring and other supportive services. To the extent that such programs or services are specifically guaranteed in college brochures, Hispanic students may state a legitimate contractual right of entitlement. Such an issue was raised in Marquez v.
University of Washington, in which a student challenged his academic dismissal from law school, claiming he was a special admittee who was promised "a formal tutorial assistance program for minority students." The court acknowledged the contractual relationship between the student and the school and stated that the information contained in the brochures gave reasonable expectations to the student that tutoring would be provided. The Court, however, found that the literature in the brochures did not tie the school to any particular program or activity and there was no showing that supportive services were not offered. If anything, the Court found that the student had failed to take advantage of the opportunity to obtain academic assistance that was provided. The importance of the Court's decision, however, is the acknowledgment that Hispanic students do have, in certain instances, the right to obtain supportive services when a college or university makes such assurances through its catalogs or literature. The degree to which a particular program or activity will be required will depend on the statement made in the brochure.

A second area of concern is to the degree which the awarding of financial aid or other types of supportive services, can be linked to affirmative action admissions programs or doled out on the basis of racial criteria. As to the former, it is clear that a financial aid program which allocates money based on racial criteria alone will not be upheld. This was squarely addressed in Flanagan v.
President and Director of Georgetown College. In Planagan the court invalidated a financial aid program which allocated 60 per cent of its law school financial aid to minority students who comprised 11% of the student body. The court found that such a program was illegal under federal civil rights statutes since the school could not justify the unequal allotment of aid to non-minority students who had the same showing of financial need.

Despite the ruling in the Planagan case it could be argued that a financial aid program or supportive services program such as tutoring, which is race-conscious in design, may be upheld if found to be necessary to achieve some compelling state interest. In Planagan, school officials were unable to present evidence to the court that the allotments of financial aid had been designed to increase minority enrollment, nor necessary to implement any affirmative action program. Thus, there may be situations in which race conscious supportive services programs would be valid provided that campus participation in programs based on racial criteria is related to and necessary to meeting the goals of a valid student affirmative action plan.

Distinct from this issue is the viability of public colleges offering private services for financial aid or supportive services which expressly discriminate on the basis of race, color or national origin. The legality of having public colleges participate in race-conscious
scholarship or supportive service programs has not been raised in the courts.

A remaining controversy in the area of supportive services is the degree to which resident aliens, many of whom are Hispanic, may be excluded from public financial aid programs or be deemed non-residents of states and thus be charged out of state tuition. This was addressed in Nyquist v. Mauclet. In Nyquist the United States Supreme Court ruled that a state statutory provision which bars resident aliens from state financial assistance to higher education was violative of the federal constitution. The Court's opinion makes clear that discrimination against aliens can only be justified if necessary to achieve a legitimate and substantial state interest. An important facet of the Nyquist case is that states are prohibited from discriminating against resident aliens. Thus, it does not matter whether a public or private college is involved since it is the state program which is barred from treating resident aliens in a different manner. On the other hand, it is only resident immigrant aliens who are affected and states may limit aliens participation in two ways. First, colleges or universities may limit eligibility to only resident aliens or, second, may find that immigrant aliens are not eligible to be residents of the state under the state's common law principles and thus deny them eligibility.
As to the latter situation, the Nyquist opinion makes clear that it is unfair to discriminate against resident aliens on this basis since they are, in most instances, deemed residents of the state and obligated to pay their full share of taxes that support financial aid programs. However states could circumvent this holding and continue to exclude aliens from financial aid -- not because they are resident aliens -- but because they have been found to be non-residents of the state. Since Nyquist would allow such a discrimination, the rights of Hispanic students would certainly be affected where states choose to limit or exclude immigrant aliens (or other aliens) from becoming residents of the state for purposes of tuition or financial aid.

This type of issue arose in Toll v. Moreno. In Toll v. Moreno the United States Supreme Court invalidated a student residence regulation which precluded non immigrant aliens from establishing state residence. The Court held that a state policy of excluding classes of aliens from establishing in-state residency based solely on the alien's immigration status, was in conflict with the federal government's power to regulate immigration status. This was particularly true, the court found, where the federal government had allowed non immigrant aliens to establish domicile in the United States.

A more difficult issue is raised in the context of excluding undocumented aliens from in-state resident status.
In *Plyler v. Doe*, referred to previously, the Supreme Court made reference to this controversy by noting that "a state may not, however, accomplish what would otherwise be prohibited by the Equal Protection Clause, merely by defining a disfavored group (i.e., illegal alien) as non-resident...." 89 Presumably, then, courts would not tolerate situations where states use residency laws to masquerade discrimination against classes of aliens.

In sum, Hispanic students may be entitled to the full panoply of financial aid and support services under principles of contract law and such services may be targeted to racial minority students if necessary to fulfilling a compelling state interest. Moreover, states or public colleges and universities that limit or exclude aliens from participating in state run financial aid programs would be suspect and such exclusions could not be undertaken under the guise of limiting participation to "residents" of the state. In the latter circumstances, courts will examine whether definitions of in-state residency conform with common law practices of the state and do not run afoul of federal constitutional guarantees.
IV

FEDERAL PROGRAMS AND HISPANIC RIGHTS:
PROVIDING ACCESS AS A NATIONAL POLICY

The federal government now supplies nearly one-half of all public support towards higher education, and its programs, resources and policies play a significant role in providing an equal opportunity for Hispanic students seeking access to higher education. This responsibility is specifically noted in the Higher Education Act of 1965 which states: 90

"The Congress finds...that it is the responsibility of the federal government, consistent with the rights, duties, and privileges of the states and institutions of higher education, to promote...equality of access to postsecondary education without regard to age, race, sex, creed, handicap, national origin, geographic location, or economic status;

In promoting such access, the federal government has introduced a variety of programs and policies which have historically benefitted minority students in enjoying the benefits of higher education. Such programs include the provision of basic educational opportunity grants,91 grants to colleges to actively recruit Hispanic students, and the establishment of programs to provide student aid or supportive services.92 As noted in various reports, the increased federal responsibility to provide equality of opportunity for minority students played an important role in encouraging low income and minority students to enroll in college between 1965 and 1980.93
In addition to the provision of programs, resources, and grants, the federal responsibility in higher education also takes on enforcement activities with respect to civil rights laws applicable to higher education institutions. These enforcement activities have successfully used the "carrot" of federal funding to prompt college and universities to undertake a variety of activities or efforts to prevent the under representation of Hispanics in higher education. 94

By far the most important enforcement tool is Title VI of the 1964 Civil Rights Act which prohibits discrimination on the grounds of race, color or national origin in programs that receive federal funds and directs each federal agency or department to establish rules and procedures to oversee the enforcement of this prohibition. 95 A key issue for enforcement purposes is what program or colleges are considered recipients of federal funding and thus subject to meeting the compliance provisions of Title VI.

This final part then discusses very briefly the rights of Hispanic students with respect to the programs or services offered by the federal government and the right of Hispanic students to seek redress for claims of unlawful discrimination by colleges that receive federal funding.

A. THE RIGHT TO FEDERAL HIGHER EDUCATION PROGRAMS.

In 1965 Congress enacted a comprehensive scheme of legislation which included a variety of institutional and student assistance programs aimed to increase access for
minority students. 96 This legislation, now referred to as the Higher Education Act of 1965, has been amended and developed over the years. It continues, however, to provide significant resources to colleges and students in response to the need to provide equal educational opportunities.

The most significant federal programs for student access are the five major student assistance programs,97 and the so-called "TRIO" programs which are the special recruitment programs for students from disadvantaged backgrounds.98 These programs, designed to serve different student populations and purposes, have served as a major vehicle in providing access to Hispanic students.99

In general, Hispanic students have a right to the benefits of such programs if they meet the eligibility criteria for each program. The eligibility criteria, in many instances, are promulgated by various statutes, and are based on financial need. This is particularly true for the financial aid programs.100

Although Hispanic students may be eligible to receive financial aid, they are not entitled to such student aid as entitlement is considered under Workmen's Compensation or Social Security programs. Thus, the receipt of financial aid is conditioned upon the amount of money which Congress appropriates each year to these programs. If Congress appropriates, for example, $600 million dollars for Pell Grants then every eligible recipient receives a pro rata
reduced share even though they may be "entitled" to more money under the need based formulas.

In terms of actual distribution of student aid local colleges or universities receive, in most instances, lump sum payments from the Department of Education in anticipation of the number of students who will enroll needing financial assistance under these programs. In seeking financial aid from the colleges, Hispanic students have several rights. First, they have the right to obtain information from the college as to the types of federal financial aid programs that are available and the criteria the college or university uses in selecting financial aid recipients. Related to this, the student has the right to know how the college has determined financial need for its students and how much of that need has been met by the financial aid package that has been awarded. 101

The financial aid package which the college prepares for the student is the total amount of financial aid that a student receives and will generally include Federal and State aid such as grants, loans, work-study or other sources of aid that is combined in a "package" to meet the student's need. The college has the responsibility of using available federal resources to provide the best "package" for the student. In such cases, Hispanic students have the right to receive an equitable distribution of available grants or scholarships as any other eligible, needy students attending that college. 102
A related problem for Hispanic students is the conditions of citizenship or records to be filled out to qualify for eligible status. To determine the amount of "family contribution," income tax return forms are required to be submitted or best estimates of annual income with some independent financial verification. Such procedures can prove to be hardships for Hispanic students who may come from low income families that are not required to submit U.S. Income Tax returns. Finally, only citizens or permanent resident aliens (and certain classes of immigrants) are eligible for aid. Those aliens awaiting residence status or here without documentation have no right to federal student aid. While Congress has not excluded or limited eligibility, the Department of Education in its implementing regulations has stated that any student who desires to receive federal financial aid must be a U.S. citizen or "National" and if not a citizen be a permanent resident alien or provides evidence form the I.N. Service of intention to become a permanent resident or citizen.

B. FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORTS

The final, and perhaps most important role which government policies play in securing Hispanic rights to higher education is the promulgation of federal civil rights laws and their implementing administrative regulations which prohibit discrimination on the basis of race, color or national origin.
This extensive federal involvement in higher education is a source of continuing controversy and debate. Regardless, the Department of Education has seen fit to propose and adopt rules and regulations that have greatly clarified and strengthened the rights of Hispanic students to appropriate educational benefits.

Under these enforcement mechanisms, Hispanic students have the right to seek redress through the federal government if they believe they have been the victim of discriminatory activity. If the information received by the Department of Education indicates a possible violation by the college or university with the terms by which federal funds is received then the Department has the responsibility to secure compliance by "voluntary means." If such voluntary compliance cannot occur, then the Department of Education may cut-off the receipt of federal funds or refer the matter to the Justice Department to secure compliance without resorting to cut-off of federal funds.

Hispanic students also have the right to proceed under alternative avenues. Those students who feel that they have been aggrieved by an institution may avoid the initial step of filing an administrative complaint and choose to seek direct court relief against the college to correct the discriminatory practices.

Although a variety of enforcement provisions exist for prohibiting discrimination, the key civil rights statute is Title VI of the 1964 Civil Rights Act.
This statute, as stated previously, applies to institutions of higher education, both public and private which receive federal funding. Prior to 1983 two issues surrounded the enforcement of Title VI. First, what was the burden of proof needed to show a violation of Title VI, and second, to what extent could every program or activity of a college be subject to compliance with Title VI when it receives federal funds. Both issues were recently resolved in two different cases before the United States Supreme Court.

In Guardians Association v. Civil Service Commission of New York, 107 discussed supra, a majority of the Court held that a violation of Title VI required proof of discriminatory intent similar to the equal protection clause under the 14th Amendment. A different majority held, however, that proof of discriminatory effect suffices to establish liability when the suit is brought to enforce regulations issued pursuant to the statute rather than the statute itself.

Although civil rights advocate had argued that Title VI required simply a showing of discriminatory impact, Hispanic students may still seek remedies under Department of Education regulations by showing that college policies have a discriminatory impact and therefore violative of the regulations, not the statute. These regulations, issued pursuant to Title VI, require that recipients of federal
funding may not:

utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin. 108

The discriminatory impact versus discriminatory motive "burden of proof" test can be significant. In two recent cases, cited previously, federal courts have held that under Title VI, when minority students can show that tests used for education impact have a discriminatory purpose, the burden then shifts to school officials to show that the disproportionative impact, i.e., the tests themselves, were required by educational necessity. 109

The second issue surrounding Title VI concerned the extent to which a college could be brought within the purview of enforcement responsibilities when only one program or activity within a college received federal funds. This was addressed in Grove City v. Bell. 110 In Grove City the Supreme Court was asked to decide whether a private college, which accepts no direct federal assistance but enrolls students who receive federal grants that must be used for educational programs, is a recipient of federal financial assistance. If receiving federal financial assistance, the Court was also asked to decide whether the civil rights enforcement provisions dealing with sex discrimination (and similar to Title VI) apply to the entire college or only to the "program or activity" that receives the federal financial assistance.
A unanimous court agreed that indirect student aid is a sufficient form of federal financial assistance to subject a college to the civil rights enforcement provisions applicable to protection of sex discrimination. Since these provisions are the same as Title VI the same reasoning would apply in cases involving race or national origin. But under the law's "program specific" language, six members of the high court ruled that student aid only brings the financial aid program -- not the entire institution -- under the purview of federal civil rights laws. Under the court's interpretation, it is only the postsecondary programs or activities that get federal money which must conform to the civil rights policies promulgated pursuant to federal civil rights laws. This ruling, by analogy, would also apply to Title VI.

CONCLUSION

The rights of Hispanic students are shaped by many factors, but invariably the issues surrounding these discussion turn on one pivotal theme: the extent to which equitable access can be provided for Hispanic students so as to achieve an equal educational opportunity. While the Supreme Court's recent views on higher education and civil rights policies may reflect a limitation on the rights of Hispanic students in higher education, there is every reason to believe that the concern with, and protection of Hispanic rights in higher education will continue. Moreover, many
colleges and universities acknowledge the rights of Hispanic students to seek equitable access and will continue affirmative action policies and programs as long as access to higher education remains a viable, national goal.
FOOTNOTES

1. Thus, for example, a variety of cases have held that state constitutions are free from the control of state legislatures, administrative bodies or offices of the state. See, e.g. University of Utah v. Board of Examiners of State of Utah, 295 F.2d 348 (1956). In other cases, the colleges may simply gain such autonomy through judicial sanction of their customary exercises. See State ex rel. Curators of Missouri v. McReynolds, 193 S.W.2d 611 (1946). For a more in depth discussion see Horowitz, The Autonomy of the University of California under the State Constitution, 25 U.C.L.A. L.Rev. 23 (1977).


5. Dartmouth v. Woodward 17 U.S. 518 (1819)

6. Board of Curators, University of Mo. v. Horowitz, 435 U.S. 78 (1978); see also Epperson v. Arkansas 393 U.S. 97, at 104 (1968) where the court noted: "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint."


9. See supra, fn. 7.

10. 294 F.2d 150 (5th Cir. 1961), cert. denied 368 U.S. 930 (1961)

11. See e.g., Goldberg v. Regents of the University of California, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967);


See also Symposium Legal Aspects of Student-University Relationships, 45 Denv. L.J. 497 (1968).


14. Although decided in the context of elementary and secondary education, the Supreme Court ruled in Runyon v. McCrary, 427 U.S. 160 (1976) that private commercially operated schools could not deny admission to prospective students on the basis of race, citing 42 U.S.C. §1981 which provides that "all persons within the jurisdiction of the United States shall have (the same right) to make and enforce contracts.... as enjoyed by white citizens...." See Part IV for a discussion of the case.
15. For a summary of these cases see Chapter 11, The Contract Theory: The Student as Consumer, pp. 416-436, in Edwards, Nordin Higher Education and the Law, supra, fn. 4

16. 435 U.S. 78 (1978)


20. The Fourteenth Amendment states in relevant part:
"Section 1.
... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws...."

Under the Fourteenth Amendment, legislative and administrative classifications are strictly scrutinized "for their validity and will be held unconstitutional absent some compelling government justification if they distribute benefits or burdens in a manner inconsistent with fundamental rights. See Tribe, American Constitutional Law, Foundation Press. N.Y. 1978 at p. 1002-1011.

21. 411 U.S. 1 (1973)

22. In contrast to the finding in Rodriguez that education is not a fundamental right under the federal constitution, several state courts have found that education is a fundamental right under their respective state constitution. See, e.g. Serrano v. Priest 5 Cal. 3d 584, 487 F.2d 1241, 96 Cal. Rptr. 601 (1971).


25. 347 U.S. 483 (1954)
Cisneros v. Corpus Christi School District, 467 F.2d 142 (5th Cir. 1972) (en banc);
United States v. Texas Education Agency, 467 F.2d 848 (5th Cir. 1972) (en banc);
Mendez v. Westminster School District, 64 F.Supp. 544 (S.D. Cal. 1976); affirmed 161 F.2d 774 (9th Cir.
1977);
Gonzales v. Sheely, 96 F.Supp. 1004 (D.C. Ariz. 1951);
See also, Comment, Project Report: De Jure Segregation of Chicanos in Texas Schools, 7Harv. Civ. Rights


28. See supra fn. 26

The first Brown decision, known as Brown I, concerned the legality of separate educational facilities for black and white school children. The second decision, cited above, concerned the problems of appropriate relief.


31. 305 U.S. 337 (1937)

32. 339 U.S. 629 (1950);
See also Sipuel v. Board of Regents of University of Oklahoma, 332 U.S. 631 (1948) where the Court ordered the admission of a black female applicant to the University of Oklahoma Law School since the state had not yet established a separate law school for blacks.

34. See generally 82 Harv. L. Rev. 1759 (1969)

35. In Sanders v. Ellington, 288 F.Supp. 937 (M.D. Tenn. 1968) the State University in Tennessee had remained segregated despite the abolition of discriminatory admissions policies. The Court held that it was not enough to simply establish a "facially material" admissions policy. The college was required to take affirmative action to bring about integration in the state colleges.

36. In Washington v. Davis, 426 U.S. 229, 242 (1976) the Supreme Court ruled that to show a constitutional finding of discrimination under the Fourteenth Amendment racially discriminatory intent, not effect, must be shown.


38. Astin, Alexander. Equality of Access for Chicanos in Higher Education. In M. Perez, ed. Institute on Chicanos in Higher Education. Pasadena, California: National Association for Equal Educational Opportunities, 1977. In a series of articles, Alexander W. Astin, professor of higher education at the University of California, Los Angeles has looked at the hierachical nature of higher education systems and stated that low income and minority students tend to be disproportionately concentrated in bottom-level institutions. Astin has noted that Chicano students in particular are much more susceptible to inequities since they enroll in states with large community college systems that are part of a hierachal structure. See also Astin, Alexander, The Myth of Equal Access in Public Higher Education. Paper presented at Southern Education Foundation, Atlanta, July, 1975a.


41. Id.

42. See Wright v. Texas Southern University, 392 F.2d 728, (5th Cir. 1968); Arizona Board of Regents v. Wilson, 24 Ariz. App. 469, 539 P.2d 943 (1975).
   For a more detailed discussion of these obligations see generally:
   Gellhorn and Hornby Constitutional Limitations on Admissions Procedures and Standards,
   60 Va. L.Rev. 975 (1974); and D. Brock Hornby, Higher Education Admission Law Service, by

44. Steinberg v. Chicago Medical School 354 N. Ed. 2d 586 (Ill. App. Ct. 1976)


46. supra., fn. 42.

47. 252 F. 2d 372 (5th Cir. 1958); cert. denied 358 U.S. 819 (1958)


49. 330 F. Supp. 203 (S.D. N.Y. 1971) aff'd 458 F 2d. 1167 (2nd Cir. 172); see also Holmes v. Danner 191 F. Supp. 394 (M.D. 1961), where interviews were used in discriminatory fashion.

50. Two recent articles have explores the implied contractual theory. See, Nordin The Contract to Educate: Toward a More Workable Theory of teh State-University Relationship, 8 Journal of Coll. and Univ. Law, #2 pp. 141-181; and Jennings Breach of Contract Suits by Student Against Postsecondary Institutions: Can They Succeed; 7 Journal of Coll. and Univ. Law. # 3-4, PP. 191-221.

51. supra., fn. 43

52. Id. Private universities have additional constraints on using racially discriminatory criteria other than the contractual obligations. Private universities that receive federal funding are subject to federal enforcement policies applicable to civil rights laws. This is discussed in Part IV-B. In addition, the Supreme Court has upheld Internal Revenue Service rulings which revoke the tax exempt status of private schools that adopt racially discriminatory admissions policies. See, e.g., Bob Jones University v. United
States, ___ U.S. ___, 76 L.Ed 2d 157, (1983). Although such federal policies can not prohibit private universities from adopting discriminatory policies, they are designed to prevent such policies from going into effect through the inducements of receipt of federal funds or federal tax advantages.

53. 427 U.S. 160 (1976)

54. 536 F.2d 1071 (5th Cir. 1976) cert. denied 430 U.S. 987 (1977) In applying the statute, however, the court held that a law school's admission policy of reviewing the applications of all minority students whose undergraduate grades and test scores failed to gain them admission "vitiated the effects of any possible 'cultural bias' (against Mexican Americans) in the LSAT testing."

55. Id. at 1072.

56. Id. at 1072.


58. See, United States v. Sunflower County School District, 439 F.2d 839 (5th Cir. 1970); United States v. Tunica County School District, 421 F.2d 1236 (5th Cir. 1970) cert. denied, 398 U.S. 951 (1970). In Lemon v. Bossier Parish School Board, 444 F.2d 1400 (5th Cir. 1971), the Court precluded the adoption of standardized test scores for assigning students into several years after a school system had achieved a racially unitary operation. See, also Debra P. v. Turlington


60. Franklin v. Parker, 223 F. Supp. 724 (M.D. Ala. 1963), modified and aff'd per curiam, 331 F.2d 841 (5th Cir. 1964).

61. 288 F. Supp. 937 (M.D. Tenn. 1968)

62. But see Alabama State Teachers Association v. Alabama Public School and College Authority, 289 F. Supp. 784 (M.D. Ala. 1968), aff'd per curiam 393 U.S. 400 (1969) where a three judge court held that racially neutral admissions, coupled with minority faculty recruitment did satisfy the state's duty, even though vestiges of segregation still existed. But other cases have generally followed the Sanders court application, see

63. Stayed in part 453 F.2d 524 (5th Cir. 1971), decree by stipulation 468 F.2d 956 (5th Cir. 1972), affirming 317 F. Supp. 103 (M.D. Ala. 1970)

64. See also 43 C.F.R. 100 5(i) where the office of Civil Rights for the Department of Education has specifically noted:

[W]here a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its programs better known and more readily available to such group, and take other steps to provide that group with more adequate service.


66. supra, at 1053-1054.


70. 401 U.S. 424 (1971)

71. 426 U.S. 229 (1976)

72. Richardson v. McFadden, 540 F.2d 744 (4th Cir. 1976) 563 F.2d 1130 (4th Cir. 1977); cert. denied, 435 U.S. 968 (1978); Pettit v. Gingerich, 427 F. Supp. 282 (D. Md. 1077), aff'd 582 F.2d 869 (4th Cir. 1978); and
Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975), cert. denied 426 U.S. 940 (1976). In Parents in Action on Special Education v. Hannon, 506 F. Supp. 831 (N.D. Ill. 1980) the court upheld the use of tests but found that the test created no racial bias and therefore did not consider the legal standards that were applicable.

73. Found at 34 C.F.R. § 100, et. seq.

74. 269 F. Supp. 401 (D.D.C. 1967)

75. Civil No. C-70-37 RFP (N.D. Cal. Jan, 1970 and June 18, 1973

76. (No. 71-435 PHX (D. Ariz, Jan 24, 1972))

77. 343 F. Supp. 1036 (N. D. Cal. 1972), affirmed 502 F.2d 963 (9th Cir. 1974)

78. 495 F. Supp. 926 (N.D. Cal. 1979); Judge Peckham also found that the continued use of these tests, despite the knowledge by the state that there were numerous problems with the tests was evidence of international discrimination and therefore state defendants also violated the equal protection provisions of the Fourteenth Amendment. Judge Peckham's decision has been affirmed on appeal by a 2-1 decision, decided January 23, 1984; the court did not address the equal protection standards under the Fourteenth Amendment.

79. 416 U.S. 312 (1974)

80. 438 U.S. 265 (1979); The author wishes to acknowledge the numerous analyses that have been devoted to the Bakke decision. However, for the purposes of this text, I rely considerably on the analysis prepared by Peter D. Roos, of the Mexican American Legal Defense and Educational Fund in an unpublished memorandum.

81. Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir. 1976).

82. See, e.g., Connelly v. University of Vermont, 244 F. Supp. 156 (D. Vt. 1965);
Gasper v. Burton, 513 F.2d 843 (10th Cir. 1975)

83. In Behrend v. State, (379 N.E. 2d 617 (Court of Appeals, Ohio 1978)), the court found that the student could recover because of the school's failure to maintain its academic quality.

84. 648 P.2d 94 (Wash. App. 1982)

85. 417 F. Supp. 377 (D.C.C. 1976);
86. For a complete discussion of the merits and ramifications of the Flanagan decision see Joyner, Reverse Discrimination in Financial Aid for Higher Education: The Flanagan Case in Perspective, 6 J. of Law and Education 327 (1977)

87. 432 U.S. 1 (1977)

88. 458 U.S. 1 (1982)

89. supra, fn. 23, at p. 227 fn. 22 (need to clarify)

90. 20 U.S.C. § 1001

91. 20 U.S.C. 1070-1070a

92. 20 U.S.C. §1070d


95. supra, fn. 38; Current Department of Education regulations implementing Title VI are codified at 34 C.F.R. §§ 100.1-100.13 (1982)

96. For a complete discussion of the legislative history and purpose of the Act see 1965 U.S. Code Cong. and Adm. News, p. 4027

97. These are : 1) the Pell Grants (formerly called Basic Educational Opportunity Grants); 2) Supplemental Educational Opportunity Grants; 3) National Direct Student Loans; 4) Guaranteed Student Loans; and 5) College Work-study. (HAVE TO CORRECT CITE)

98. The "TRIO" programs are:
   1) Upward Bound (20 U.S.C. § 1070d-12);
   2) Special Services for Disadvantaged Students (20 U.S.C. § 1070d-1b); and
   3) Educational Opportunity Centers Program (20 U.S.C. § 1070d-1c

100. See, for example, 20 U.S.C. §1070a which sets out the income eligibility criteria for the basic educational opportunity grants. "Financial need" for student aid is defined by the Department of Education as the difference between a student's cost of education and what the student or his family can afford to pay. What the student or family can afford to pay is called "Family Contribution."

101. See 34 C.F.R. § 668.34


103. See 20 U.S.C. § 1091

104. See, e.g., 34 C.F.R. § 690.4.


106. *supra*.

107. *supra*.

108. These regulations are found at 34 C.F.R. §1003(b)(a), originally adopted as 45 C.F.R. §80.3(b)(2).

109. *Debra P. v. Turlington* 644 F.2d 397 (5th Cir. 1981); *Larry P. v. Riles* F.2d (9th Cir. 1984) decided 1/25/84, D.C. No. CV 71-2270, affirming 495 F. Supp. 926 (N.D. Cal. 1979); but see *P.A.S.E. v. Hannon* 506 F. Suppl. 831 (N.D. Ill. E.D. 1980);