Federal Law and Scholarship Policy:
An Essay on the Office for Civil Rights,
Title VI, and Racial Restrictions

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Federal Law and Scholarship Policy: An Essay on the Office for Civil Rights, Title VI, and Racial Restrictions

Michael A. Olivas

In a politically adroit attempt to justify their decision to play in Arizona's Fiesta Bowl, officials of the University of Louisville announced their intention to dedicate their share of the proceeds to campus minority programs and scholarships. To counter the controversy over Arizona voters' rejection of a state holiday honoring Dr. Martin Luther King, Fiesta Bowl officials decided to donate $100,000 for minority scholarships at both Louisville and the University of Alabama. The only naysayer was the Louisville basketball coach, Denny Crum, who complained that the money should go to the athletic programs whose prowess had generated the money.\(^1\) Barring a tie in the game, it seemed as if everything would turn out satisfactorily.\(^2\)

However, Coach Crum may yet get the money. On December 4, Assistant Secretary for OCR, Michael Williams, wrote to the Executive Director of the Fiesta Bowl, indicating that the proposed Martin Luther King Jr. scholarship program would run afoul of Title
VI.³

A press release distributed on newswires the same day indicated that failure to reconstitute the program would violate Title VI and would "place schools at risk of losing all federal funding."⁴ Even though he acknowledged that Title VI and its regulations did not actually apply to the Fiesta Bowl, "universities that those students [recipients of the MLK scholarships] attend may not directly, or through contractual or other arrangements, assist the Fiesta Bowl in the award of those scholarships unless they are subject to a desegregation plan that mandates such scholarships."⁵ He went on to counsel Fiesta Bowl officials that they themselves could provide Louisville or Alabama students with race-exclusive scholarships or other financial aid, but the universities "could not receive or dispense such scholarships or otherwise assist the Fiesta Board sponsors unless subject to a desegregation plan that includes such scholarships."⁶

He advised them that they could reconstitute the scholarship
fund into one in which "race is considered a positive factor amongst similarly qualified individuals if the institution is one where there has been limited participation of a particular race" or they could recast the program into one that "utilizes race-neutral criteria." Finally, he indicated that one of his staff attorneys would contact the Fiesta Bowl officials "to provide you assistance in designing and implementing" the program.

This offer is one Fiesta Bowl officials should refuse. If it weren't so sad, observers would be laughing at the breathtaking irony of this situation. The rights of black students were secured in Alabama only after protracted litigation, the calling-out of the National Guard, public race-baiting by then-Governor George Wallace, and even after black plaintiffs had won, it required the 1963 Lucy case to hold the Dean of Admissions at the University of Alabama to a court order rendered in 1955: the order had required the University's Dean to admit blacks. When he resigned in 1961, his successor argued that the 1955 order did not bind him, and that he would not obey his predecessor's order. This disingenuity also
led southern states to argue, albeit unsuccessfully in most cases, that Brown v. Board of Education was limited to public elementary and secondary schools, since its facts arose in the K-12 setting. Faced with this history, how could any federal official seriously believe there has not been "limited participation of a particular race" in Alabama?

Since 1981, the federal government has sought to restore tax exempt status to Bob Jones University, vetoed the Civil Rights Restoration Act, and fraudulently backdated OCR responses to make it appear that the Department of Education had complied with court orders. Faced with massive financial aid fraud in the proprietary sector that preys upon minority students, wholesale resistance by states to comply with the minimal Adams requirements to reduce racial disparities, and unlawful delays in promulgating essential regulations, Assistant Secretary Williams has nothing better to do than read the sports pages?

His warning was not only meanspirited, but he got it wrong. Title VI does not prohibit race exclusive scholarships. The very
provisions he cited in his letter make it clear that schools may use racial criteria in distributing financial aid:

"In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination."\(^{16}\)

Secretary Williams allows in his letter that the institutions could award the aid as they planned if "they are subject to a desegregation plan that mandates such scholarships,"\(^ {17}\) apparently unaware that Judge John Pratt ordered the Department of Education to obtain desegregation plans from the states of Kentucky and Alabama in 1980.\(^ {18}\) The resulting plans incorporated financial aid to black students at white institutions, and vice versa.\(^ {19}\)

Even if there had been no Adams litigation, Title VI regulations on their face clearly allow such a remedial program:

"Even in the absence of such prior
discrimination, a recipient in administering
a program may take affirmative action to
overcome the effects of conditions which
resulted in limiting participation by persons
of a particular race, color, or national
origin."

Nearly every institution in the country administers a variety
of public and private financial aid programs, with a welter of
overlapping and crisscrossing purposes -- aid based upon
qualitative and quantitative criteria, donor preferences,
historical accident, and circumstance. The Fiesta Bowl funds
would be administered by the institutions along with those funds
earmarked for veterans, children of disabled firefighters, out of
state students, high SAT scorers, graceful seven-footers, alumni
children, and orphans from Bernalillo County. Title VI does not
prohibit such practices, and especially does not do so for public
colleges in Kentucky and Alabama. Moreover, OCR knows better.
Even when non-Adams states such as Tennessee decided, without
federal intervention, to merge white UT-Nashville and black Tennessee State so as to reduce racial isolation, the federal government sued unsuccessfully to keep the state from awarding scholarships and special programs to black students. 22 Fortunately, the 6th Circuit saw through the intervention and denied the federal government's request, but not before noting: "At the very time the state became convinced that its earlier efforts had failed to eliminate the vestiges of its past discriminatory practices, the Department of Justice was urging the court to pull back -- a truly ironic situation." 23 Of course, the Adams case was brought by black litigants in the first place because the federal government had so miserably failed in its duty to enforce Title VI.

At a time when black enrollment levels are stagnant and when Mexican American law students have actually declined in number, 24 it is "truly ironic" that OCR could send such a warning shot across college bows. My counsel would be for the two universities to invest the money in a fund for athletes who do not complete their
degrees within 4 or 5 years of enrolling. I would do this not because OCR thinks the proposed program is illegal. It isn't. I'd do it because it is the right thing to do. A mere 6 of 37 Louisville basketball players or scholarships who completed their athletic eligibility in the 1980's had earned their degrees within five years of enrolling; four of Coach Crum's 1990 recruits ran afoul of Proposition 48. And if I were OCR, I'd try and get my own house in order, fulfill my obligations in Adams enforcement, fire the staff that committed fraud in their investigations, investigate proprietary school fraud, and quit pestering the private sector that, in this instance, is doing something positive about helping minority students. Isn't this one of those thousand points of light the president has touted? Surely someone stole OCR stationery and is trying to make Michael Williams look foolish. I hope he finds the culprit and presses charges.

Part II

There is understandable confusion over the Office for Civil Rights (OCR) retreat from its original public comments, and many
fear the retractions are more confused than even the original statements. My own thoughts on the original policy change were published in the December 19, 1990 Chronicle of Higher Education editorial,26 where I wrote that the Office lacked the statutory or regulatory authority to announce or enforce such a change, that Assistant Secretary Williams misinterpreted Title VI and its regulations, and that he was wrong in the way he went about his mean-spirited attack. Instead of giving this important matter the serious consideration it deserved, he proclaimed policy by press release and press conferences, and refused to explain himself to Congress when he was given the opportunity.

He has now retreated, but his retreat has also scorched the earth. His December 18 press release announced a "six point plan" to quell the outpouring of embarrassing criticism:

"1. The Administration fully endorses voluntary affirmative action in higher education, and encourages educational opportunities for minority and disadvantaged students.

2. ED has decided that the Title VI regulations will be
enforced in such a way as to permit universities receiving federal funds to administer scholarships established and funded entirely by private persons or entities where the donor restricts eligibility for such scholarships to minority students. Under Title VI, however, private universities receiving federal funds may not fund race-exclusive scholarships with their own funds.

3. Race-exclusive scholarships funded by state and local governments are covered by the Supreme Court's decisions construing the Constitution and thus cannot be addressed administratively.

4. Given the evident confusion among the universities on the preceding point, ED will provide universities a four-year transition period in order to permit universities to review their programs under Title VI, and to assure that any students under scholarship, or being evaluated for scholarship, do not suffer. ED is eager to provide
technical assistance to any institution during this four-year period. Such technical assistance has already helped universities administer their scholarship programs in full compliance with Title VI.

5. During the four-year transition period, the Administration will not pursue a broad compliance review with respect to minority scholarships but will fulfill its statutory obligation to investigate any complaints received.

6. The Administration will encourage state legislatures, local governments, and private universities receiving federal funds to carefully review and analyze the legal restrictions on minority scholarship programs imposed by the courts, so that these entities may continue to the fullest extent possible to provide scholarship assistance to minorities and other persons in need."^{27}

It doesn't require a military strategist to recognize that OCR broke camp and retreated. In beating a hasty retreat to the sea,
however, Mr. Williams has slashed and burned all around him, and his six points of darkness cannot be the last word.

First, if he wants to change enforcement policy grounded in Title VI, let him do it lawfully, either by going to Congress and laying out his views or by posting his proposals to amend Title VI regulations and inviting comments. Other legislative options for him include changing trust law to accommodate his new views on the constitutionality of earmarked donations,28 or rewriting accounting principles to incorporate his novel view of what constitutes an institution's "own funds."29 The reauthorization of the Higher Education Act, currently underway, should give him the forum he requires. But let the law enforcement official of the government administer the law or get it changed by those with the portfolio to do so. OCR does not reveal how it will administer a "four-year transition period" for colleges to review their programs, or how their "evident confusion" will be clarified. Having broken the china, OCR now offers to help institutions patch it back up.

If OCR had wanted to sow confusion, it couldn't have done a
better job. I have received dozens of calls from financial aid officers, college presidents, reporters, and students -- all wanting to know if their programs were vulnerable. One law dean sorrowfully noted how a new initiative to honor a distinguished Black alumnus had been called into question, both by donors and by faculty. I received a call from an educator affiliated with Lou Rawls' UNCF, wanting assurance that their December telethon would not be jeopardized. "Love's a Hurting Thing," indeed.

My advice to all educators is that they stand tall on this issue. Nothing OCR has done has changed the legality of race-specific programs, or rewritten the validity of the tax deductions for donors. People can donate money for minority programs, and institutions can distribute that money and their own funds for minority programs. I encourage presidents to proclaim their intentions to do so, and with renewed efforts. It is essential that educators courageously reject any notion that they retreat on this issue. Foundations, corporations, legislators, and other donors should increase their contributions to the UNCF, the
National Hispanic Scholarship Fund, the LULAC National Scholarship Fund,\textsuperscript{31} and the variety of other deserving organizations and colleges that award scholarships to needy minority students. A mind is a terrible thing to waste, even at OCR's urging.\textsuperscript{32}
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2. In fact, some blacks in Louisville felt betrayed by the decision, and made their displeasure known. See Brodie and Mercer, *U of Louisville, Community Ponder Consequences of Decision to Accept Fiesta Bowl Invitation,* BLACK ISSUES IN HIGHER EDUC., Dec. 6, 1991, at 1.


4. DOE - I, supra note 3, at 2.

5. Williams, supra note 3, at 1.

6. Id. at 2.

7. Id. at 2.

8. Id. at 2.


10. Id. at _?


14. In a 1977 Congressional study, Report on Failure and Fraud in Civil Rights by the Department of Education, it was revealed that OCR staff had fraudulently backdated official responses to suggest that the Department had fully compiled with Judge John Pratt's orders in the Adams v. Richardson postsecondary desegregation cases. House Committee on Government Operations, 100th Cong., 1st Sess. See also, OCR Discloses Backdating of Documents In Its Civil Rights Investigations Educ. Daily, March 31, 1987, at 1-3; ED Ends Higher Ed Desegregation Requirements for Four Southern States, Educ. Daily, February 11, 1987, at 1, 8.


16. 34 C.F.R. Section 100.3 (b) 6 (i) (1964).

17. Williams, supra note 3, at 2. See also Marcus and Cooper, Officials Had Rejected Analysis Now Used in Bar on Race-Based Scholarships, Wash. Post, December 15, 1990, at A4 (reviewing "long-standing policy" by OCR of upholding minority scholarships and noting that University of Louisville awards 217 minority scholarships under voluntary desegregation agreement).


   Id. at 918-919 (listing Adams litigation)

19. Id. at 918-919 (listing Adams litigation)
20. 34 C.F.R. Section 100.3(b) 6(ii). (emphasis added)

21. A 1990 survey by the College Board (CB) indicates that 24% of all institutions award financial aid to minority students without reference to need, including half of all public four year colleges.

CB Press Release, 12/90 (on file with Journal).


24. Office of the Consultant, American Bar Association, Committee on Legal Education, Survey of Minority Group Students Enrolled in J.D. Programs in Approved Law Schools (mimeographed) 1989. Notwithstanding the larger percentage of minority students in the college and law school age cohorts, Black enrollments in law schools (including historically-black law schools) have remained constant or risen only slightly: in 1983, they were 5967; in 1985,6051; in 1987, 6028; in 1988, 6321. For Mexican Americans, the high water mark was 1755 in 1981, which declined to 1657 by 1988. For Puerto Ricans (in the 50 states and DC), their numbers fluctuated from 450 in 1988 to 412 in 1985 to 478 in 1988. There are more Cuban (and other Latinos) law students (2207 in 1988-89) than there are Mexican Americans and Puerto Ricans (2135), even though Cubans make up only 10% of the U.S. Latino population. See generally Olivas, Latino Faculty at the Border, Change Magazine, (May/June 1988), at 6-9.

25. Taylor, supra note 1, at 78.

26. Olivas, The Federal Attack on Minority Scholarships is Mean-Spirited and Legally Unwarranted,
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25. Taylor, supra note 1, at 78.

26. Olivas, The Federal Attack on Minority Scholarships is Mean-Spirited and Legally Unwarranted,
CHRON. OF HIGHER EDUC., December 19, 1990, at B1, B2. I have adapted this piece with permission. Part II is adapted, with permission, from BLACK ISSUES IN HIGHER EDUCATION, Jan. 31, 1991, at 49-50.


29. Id. See also BOOKMAN, Non Profit Organizations: UBIT, Property Tax, and Unfair Competition (1990) (review of tax and accounting procedures for colleges and other non-profit organizations).

30. Not surprisingly, Donna Shalala, Chancellor at the University of Wisconsin was in the lead on this issue. She made additional recruiting trips to Wisconsin public schools, and promised to continue UH financial aid policy. Discussion with Chancellor Shalala, December, 1990. See also Jaschik, Colleges Fear Debate on Minority Scholarships May Fuel Racial Tension, CHRON. OF HIGHER EDUC., Jan. 9, 1991, at A1, A32.

31. To make contributions to these organizations, write UNCF, 500 East 62nd St., NY, NY 100; NHSF, P. O. Box 728, Novato, CA 94948; LNEC, Suite 305, 777 N. Capitol St., NE, Washington, D.C. 20002.

32. By late Spring, 1991, incoming Secretary of Education Lamar Alexander had backed away from the Williams policy. Onley and Baumann, Minority Scholarship Decision 'Irrelevant,' Williams