



Winter 1982

## Human Rights Commission v. Board of Regents: Should a University Be Considered a Public Accommodation under the New Mexico Human Rights Act

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### Recommended Citation

Todd Heisey, *Human Rights Commission v. Board of Regents: Should a University Be Considered a Public Accommodation under the New Mexico Human Rights Act*, 12 N.M. L. Rev. 541 (1982).  
Available at: <https://digitalrepository.unm.edu/nmlr/vol12/iss1/18>

*HUMAN RIGHTS COMMISSION v. BOARD OF REGENTS:  
SHOULD A UNIVERSITY BE CONSIDERED A PUBLIC  
ACCOMMODATION UNDER THE NEW MEXICO HUMAN  
RIGHTS ACT?*

INTRODUCTION

In *Human Rights Commission of New Mexico v. Board of Regents of the University of New Mexico College of Nursing*,<sup>1</sup> the New Mexico Supreme Court held that the University of New Mexico, at least in administering its academic program, is not a "public accommodation" within the meaning of the New Mexico Human Rights Act,<sup>2</sup> and thus not subject to the jurisdiction of the state Human Rights Commission.<sup>3</sup> In so doing, it decided a question which had not been squarely addressed by an appellate court. This note will address the issue of whether a university should be deemed a public accommodation under the Human Rights Act, and will discuss the undesirability of finding that a university is not a public accommodation.

STATEMENT OF THE CASE

Patricia Tyler, a black student enrolled in the University of New Mexico College of Nursing, filed a complaint with the New Mexico Human Rights Commission<sup>4</sup> which charged that the University, in violation of the Human Rights Act's prohibition against discrimination in places of public accommodation,<sup>5</sup> unlawfully discriminated against her because of her race. The Commission conducted an evidentiary hearing and found that the University had discriminated against Tyler on the basis of race when Tyler was given a failing grade in a clinical course and was refused an opportunity to retake the course immediately.<sup>6</sup>

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1. 95 N.M. 576, 624 P.2d 518 (1981).

2. N.M. Stat. Ann. §§ 28-1-1 to -14 (1978). Hereinafter cited as the Human Rights Act.

3. See N.M. Stat. Ann. §§ 28-1-3 to -6 (1978). See also, note 6 *infra*.

4. Hereinafter referred to as the Commission.

5. N.M. Stat. Ann. § 28-1-7(F) (1978) provides:

[It is an unlawful discriminatory practice for:] "F. any person in any public accommodation to make a distinction, directly or indirectly, in offering or refusing to offer its services, facilities, accommodations or goods to any individual because of race, religion, color, national origin, ancestry, sex or physical or mental handicap."

6. 95 N.M. at 576, 624 P.2d at 518. The Commission is empowered to "adopt, promulgate, amend and repeal rules and regulations to eliminate discrimination in employment, public

The Commission found that the College of Nursing usually exercised great flexibility in permitting students to remedy deficiencies in academic performance when such deficiencies would impede progress through the program<sup>7</sup> but that the University had exhibited a very inflexible attitude toward Tyler because of her race.<sup>8</sup> For example, a white male student who failed the final exam in the same six-day course was permitted to retake the exam in an "unusual deviation from standard practice."<sup>9</sup> Tyler, however, who was suffering from Graves' disease,<sup>10</sup> was not permitted to retake the clinical portion of the course which she had failed.

The Commission also determined that the University was a public accommodation within the meaning of the Human Rights Act,<sup>11</sup> which was the determinative issue on appeal. The Commission issued an interim order which directed the University to reevaluate Tyler's skills in the failed clinical course.<sup>12</sup> If Tyler failed the reevaluation, she was to be given an immediate opportunity to retake the course at University expense.<sup>13</sup> Tyler was then to receive a "neutral, non-discriminatory objective evaluation"<sup>14</sup> of her performance in the course. The University appealed the decision of the Commission pursuant to that section of the Human Rights Act which provides that appeal is by trial de novo in the district court.<sup>15</sup>

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accommodations or the acquisition of housing accommodations and real property" and to "receive, investigate and issue orders, including cease and desist orders, concerning complaints alleging an unlawful discriminatory practice." N.M. Stat. Ann. § 28-1-4(A) and (B) (1978).

7. 95 N.M. at 576, 624 P.2d at 518.

8. *Id.*

9. Record, Human Rights Commission v. Board of Regents, 95 N.M. at 576, 624 P.2d 518 (1981) at 5 [hereinafter cited as Record] (On file at the University of New Mexico Law Library). This statement concerning "unusual deviation from standard practice" is inconsistent with the Commission's finding that the University usually exercised "great flexibility" in permitting students to remedy academic deficiencies. See text accompanying note 7 *supra*. The statement is contained in the Record, Findings of Fact, at 3.

10. Record at 5-6.

Graves' disease is an enlargement of the thyroid gland on the anterior part of the neck. Symptoms include increased pulse rate, involuntary quivering of the muscles, "anemia, emaciation, vomiting, pigmentation of the skin, slight fever, profuse sweating, irritability of temper, a change in disposition, and in some cases great mental depression." B. Maloy, Medical Dictionary for Lawyers (3d ed. 1960).

It is unclear from the Record whether Tyler was still suffering from Graves' disease at the time of the hearing before the Commission.

11. Record, Conclusions of Law, at 8.

12. 95 N.M. at 576, 624 P.2d at 518.

13. *Id.*

14. *Id.*

15. N.M. Stat. Ann. § 28-1-13 (1978) provides:

A. Any person aggrieved by an order of the commission may obtain a trial de novo in the district court of the county where the discriminatory practice occurred or where the respondent does business, by filing a notice of appeal within thirty days from the date of service of the commission's order. A copy of

The Commission filed a separate complaint in the District Court of Bernalillo County seeking enforcement of its interim order.<sup>16</sup> The University moved to dismiss the complaint on the ground that the University was not a "public accommodation" within the meaning of the Human Rights Act, and thus, the Commission was without jurisdiction to process Tyler's complaint.<sup>17</sup> The district court found for the University and dismissed the Commission's complaint for lack of jurisdiction.<sup>18</sup> The Commission appealed the decision to the supreme court.<sup>19</sup>

The sole issue addressed by the court on appeal was "whether the University of New Mexico, in administering its academic program, is a public accommodation within the definition of the New Mexico Human Rights Act."<sup>20</sup> The New Mexico statutes define "public accommodation" as "any establishment that provides or offers its services, facilities, accommodations or goods to the public, but does not include a bona fide private club or other place or establishment which is by its nature and use distinctly private."<sup>21</sup> The court held: "Based upon the facts of this case . . . the University of New Mexico is not a 'public accommodation' within the meaning of the New

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the notice of appeal shall be served personally or by certified mail, return receipt requested, at their last known address on all parties who appeared before the commission, and shall also be served at the commission office in Santa Fe. No order of the commission shall be superseded or stayed during the appeal unless the district court so directs after notice to the commission and a hearing.

B. If testimony at the hearing was transcribed, the commission shall, upon receipt of the notice of appeal, file so much of the transcript of the record as the parties requesting the transcript designate as necessary for the appeal with the district court.

C. Upon appeal, either party may request a jury. The jurisdiction of the district court is exclusive and its judgment is final, subject to further appeal to the supreme court.

16. The two actions were consolidated for trial. Record at 33.

17. The powers and duties of the Commission are set out in N.M. Stat. Ann. §28-1-4 (Supp. 1981).

18. 95 N.M. at 577, 624 P.2d at 519.

19. N.M. Stat. Ann. §28-1-13(C) (1978) provides that appeal from the district court is to the supreme court.

20. 95 N.M. at 577, 624 P.2d at 519. Although this is the only issue addressed by the court, several other issues were briefed and argued. These issues include whether application of the Commission's jurisdiction to the University would be unlawful interference with constitutional powers of the regents; whether historical principles of academic freedom support the regents' assertion of freedom from the jurisdiction of the Commission; whether the complaint should be dismissed because the real party in interest (Tyler) did not join the action in the district court; and whether the Commission's interim order is enforceable after an appeal has been taken prior to disposition of the matter in district court. See Brief in Chief and Reply Brief for Appellant, and Answer Brief for Appellee, Human Rights Commission v. Board of Regents, 95 N.M. at 576, 624 P.2d 518 (1981) (on file at the University of New Mexico Law Library).

21. N.M. Stat. Ann. §28-1-2(G) (1978).

Mexico Human Rights Act, . . . and is therefore not subject to the jurisdiction of the Human Rights Commission in this instance.”<sup>22</sup>

In deciding that the University was not a public accommodation within the meaning of the Human Rights Act, the court relied heavily on historical meanings and definitions of “public accommodation.”<sup>23</sup> The court noted that “public accommodation” historically applied only to innkeepers and public carriers, and did not apply to universities. The court stated that “[u]niversities are not public accommodations in the ordinary and usual sense of the words.”<sup>24</sup> In its reasoning the court also emphasized the fact that the statute which preceded the Human Rights Act<sup>25</sup> specifically enumerated places that were to be considered “public accommodations,” and did not include universities. The court stated, “We look to the previous act for guidance. . . ,” and also said “We do not feel that the Legislature, by including a general, inclusive clause in the Human Rights Act, intended to have all establishments that were historically excluded, automatically included as public accommodations subject to the Human Rights Act.”<sup>26</sup>

The court attempted to limit its holding by stating, “This opinion should be construed narrowly and is limited to the University’s man-

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22. 95 N.M. at 577, 624 P.2d at 519.

23. *Id.* at 577-78, 624 P.2d at 519-20.

24. *Id.* at 578, 624 P.2d at 520.

25. The previous statute, An Act Prohibiting Discrimination in Places of Public Accommodation, Resort and Amusement Because of Race, Color, Religion, Ancestry or National Origin and Providing Penalties, Laws of New Mexico 1955, ch. 192, §5, provided:

Section 5. PLACES OF PUBLIC ACCOMMODATION, RESORT OR AMUSEMENT DEFINED.—A place of public accommodation, resort or amusement within the meaning of this act shall be deemed to include inns, taverns, roadhouses, hotels, motels and tourist courts, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest, restaurants, eating houses and any place where food is sold for consumption on the premises, buffets, saloons, barrooms and any store, park or enclosure where spiritous or malt liquors are sold; ice cream parlors, confectionaries, soda fountains, and all stores where ice, ice cream, ice and fruit preparations or their derivatives, or where beverages of any kind are retailed for consumption on the premises; dispensaries, clinics, hospitals, bathhouses, theatres, motion picture houses, music halls, concert halls, circuses, race courses, skating rinks, amusement and recreation parks, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiard and pool parlors, swimming pools, public libraries, garages, all public conveyances operated on land, water or in the air was well as the stations and terminals thereof; public halls and public elevators of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants. Nothing herein contained shall be construed to include any institution, club or place of accommodation which is in its nature distinctly private, or to conflict with existing federal statutes relative to the sale of intoxicating liquors to Indians.

26. 95 N.M. at 578, 624 P.2d at 520.

ner and method of administering its academic program. We reserve the question of whether in a different set of circumstances the University would be a 'public accommodation' subject to the jurisdiction of the Human Rights Commission."<sup>27</sup> Despite this limitation, the opinion sets a dangerous precedent of narrowly construing the definition of "public accommodation."

## DISCUSSION

In deciding that a university is not a public accommodation within the meaning of the New Mexico Human Rights Act, the court failed to give proper weight to the strong public policy of eliminating discrimination wherever it occurs. Principles of statutory construction support a finding that the University is a public accommodation.<sup>28</sup> Interpretation of "public accommodation" in other jurisdictions lends support to finding that a university is a public accommodation.<sup>29</sup> Unless the court found that the University of New Mexico was a public accommodation, Patricia Tyler had no statutory cause

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27. 95 N.M. at 578, 624 P.2d at 520. The court thus indicated that it may have been concerned about academic freedom. If the court were concerned about academic freedom, it is puzzling that the opinion does not discuss that freedom in greater depth. The court intimated that if, in the future, it were called upon to decide if other facets of the University came under the Human Rights Act, such as admissions or access to extracurricular activities, it would decide that the University was a public accommodation. The reasons given for the holding, however—reliance on the former statute and on common law definitions, as well as the absence of any mention of academic freedom until the end of the opinion—would support an argument that the opinion created a general exemption for the University from the definition of a place of public accommodation. The narrowing of the holding at the end of the opinion is inconsistent with the broad language used throughout the rest of the opinion.

Concern about academic freedom should not have prevented the court from finding that the Human Rights Commission had jurisdiction over complaints of discrimination in educational facilities. Principles of academic freedom are a valid concern. The point at which they should be relevant, however, is after a law-enforcing body has been found to have jurisdiction. It is equally important that a person who feels discriminated against by an educational institution have a forum in which his grievances can be heard. In *Greenhill v. Bailey*, 519 F.2d 5 (8th Cir. 1975), the court held that it was improper for a court to review an educational institution's academic evaluation of its students unless it appears that the action taken was arbitrary and capricious. "Arbitrary and capricious" conduct was held to exist where the administrative action is "not supportable on any rational basis" or where it is "willful and reasoning action, without considerations and in disregard of the facts or circumstances of the case." 519 F.2d at 10, n. 12. In light of the Commission's findings that a white male who failed his final exam was permitted to retake the exam immediately in the same course in which Tyler received a failing grade for her clinical work, and that Patricia Tyler was ill during the course, it is likely that even the standard set forth in *Greenhill* would have been met. Patricia Tyler, however, had no opportunity for a speedy adjudication of her allegations. The New Mexico Supreme Court's holding provided her no remedy, because the Commission was deemed to have no jurisdiction over the University in this matter.

28. See text accompanying notes 41-65 *infra*.

29. See text accompanying notes 80-92 *infra*.

of action,<sup>30</sup> although she may have had a state constitutional claim under the equal protection clause.<sup>31</sup> Her possible causes of action under federal law had several drawbacks.<sup>32</sup> Furthermore, administrative remedies offer adjudicatory advantages which courts often cannot offer.<sup>33</sup>

#### A. *Types of Statutes Outlawing Discrimination in Places of Public Accommodation*

There are basically two types of statutes which bar discrimination in places of public accommodation.<sup>34</sup> One type specifically enumerates all places which are to be considered "public accommodations."<sup>35</sup> The public accommodations provision<sup>36</sup> of the Federal Civil Rights Act of 1964 is of this type. The other type defines "public accommodations" only in general terms and usually includes a clause excluding application to places which are "distinctly private."<sup>37</sup> The New Mexico Human Rights Act is of the latter

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30. At first glance, the Post-Secondary Educational Institution Act, N.M. Stat. Ann. §§21-23-1 to -14 (1978), would appear applicable, as it provides that it is a misdemeanor to "deny enrollment or make any distinction or classification of pupils in any post-secondary educational institution, under the jurisdiction of the board [of educational finance] on account of race, color or creed." N.M. Stat. Ann. §21-23-10(C) (1978). The Act, however, does not apply to "any post-secondary educational institution supported in whole or in part by state or local taxation." N.M. Stat. Ann. §21-23-4(A) (1978), and thus would not be applicable to state universities.

The Human Rights Commission is not totally silent on the matter of education. N.M. Stat. Ann. §28-1-4(F) (1978) provides that the Human Rights Commission may endeavor to eliminate prejudice and to further good will. The commission in cooperation with the state department and local boards of education shall encourage an educational program for all residents of the state, calculated to eliminate prejudice, its harmful effects and its incompatibility with principles of fair play, equality and justice.

The Post-Secondary Educational Institution Act and the section of the Human Rights Act quoted above, are not a directive to educational institutions. They demonstrate, however, that the legislature is concerned about the harmful effects of prejudice and discrimination in the educational process.

31. N.M. Const. art. 2, §18.

32. See text accompanying notes 66-73 *infra*.

33. See also, text accompanying notes 75-79 *infra* for a discussion of the advantages of administrative remedies.

34. Comment, *Public Accommodations in New Mexico: The Right to Refuse Service for Reasons Other Than Race or Religion*, 10 Nat. Res. J. 635, 638-39 (1970).

35. See, e.g., N.J. Stat. Ann. §§10:1-5; 10:5-51 (1976); Mass. Gen. Laws Ann. ch. 272 §9(A) (1970 and Supp. 1981); Nev. Rev. Stat. §651.050 (1979).

For a representative example of a specific enumeration statute, see New Mexico's former law prohibiting discrimination, at note 25, *supra*.

36. 42 U.S.C. §2000a (1974). See note 62 *infra*.

37. See, e.g., Ky. Rev. Stat. §344.130 (Repl. 1979); Or. Rev. Stat. §30.675 (1953); Utah Code Ann. §13-7-2 (Repl. 1981).

Twenty jurisdictions (including the District of Columbia) have public accommodation statutes which would generally be classified as the specific enumeration type. Twenty-two

type.<sup>38</sup> Before 1969, the year in which New Mexico adopted the Human Rights Act, the statute prohibiting discrimination in public accommodations listed with specificity the places which were to be considered public accommodations.<sup>39</sup>

Of the states which have enumerative statutes, several have included universities and other types of schools.<sup>40</sup> Thus, at least some states have explicitly mandated that colleges and universities are to be considered public accommodations and are within the jurisdiction of the state agency charged with administration of the state law against discrimination. These states' statutes demonstrate the acceptability of the proposition that educational institutions should be considered public accommodations.

*B. Principles of Statutory Interpretation Support a Finding that a University Is a Public Accommodation.*

Where ambiguity exists in a statute, resort may be had to construction and interpretation based upon statutory purpose.<sup>41</sup> In *Keller v. City of Albuquerque*,<sup>42</sup> the court noted that the general purpose of the Human Rights Act was "to eliminate and prevent discrimination on the basis of race, age, religion, color, national origin, ancestry or sex, and to promote good will."<sup>43</sup> Had the Court in *Human Rights Commission v. Board of Regents* been faithful to the purpose of the New Mexico Human Rights Act, it would have found that the University of New Mexico is a public accommodation. Reading the Human Rights Act with an eye toward effectuating its purpose, the conclusion is inescapable that educational institutions should be considered public accommodations. Finding that educational institutions are public accommodations under the Human Rights Act

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states have public accommodation statutes which would be classified as the general type. The other eight states apparently have no law prohibiting discrimination in places of public accommodation.

38. N.M. Stat. Ann. § 28-1-2(G) (1978).

39. See note 25 *supra*.

40. Colo. Rev. Stat. § 24-34-601 (Supp. 1980); Mich. Comp. Laws Ann. § 750.146 (1968 and Supp. 1981); N.J. Rev. Stat. §§ 10:1-5; 10:5-51 (1976); N.Y. Civil Rights Law § 40 (McKinney 1978); Pa. Stat. Ann. tit. 43 § 954 (1) (Purdon) (1964 and Supp. 1980); Wash. Rev. Code Ann. § 49.60.040 (1962 and Supp. 1980). In addition, two states have public accommodation statutes which do not specifically mention educational institutions, but which, by their language, encompass state universities. The relevant language of both Mo. Rev. Stat. § 314.020 (Supp. 1981) and Nev. Rev. Stat. § 20-133 (reissue of 1977) reads: "[Public accommodation includes] [a]ny public facility or any agency or subdivision thereof, or any public corporation, and any such facility supported in whole or in part by public funds." See also, Iowa Code Ann. § 601A.210 (1975).

41. *Keller v. City of Albuquerque*, 85 N.M. 134, 139, 509 P.2d 1329, 1334 (1973).

42. 85 N.M. 134, 509 P.2d 1329 (1973).

43. *Id.* at 139, 509 P.2d at 1334.

would be the most logical way to provide a remedy for discrimination by educational institutions, because no remedy is otherwise expressly provided in New Mexico. This would be consistent with the Act's purpose. As was stated in an early New Mexico case: "The spirit, as well as the letter of the statute, must be respected; and where the whole context of a law demonstrates a particular intent in the legislature to affect a certain object, some degree of implication may be called in to aid that intent."<sup>44</sup> The Human Rights Act is intended to eradicate discrimination in New Mexico,<sup>45</sup> and should be interpreted so as to accomplish that end. Remedial and humanitarian statutes, such as the Human Rights Act, are to be broadly construed, and exceptions to them narrowly construed.<sup>46</sup> It is also a principle of administrative law that interpretations of an uncertain statute by the administrative agency charged with administering the statute are persuasive and are not to be lightly overturned by the courts.<sup>47</sup> Had these principles been applied to *Human Rights Commission v. Board of Regents* they would support a finding that the University of New Mexico is a public accommodation.

In *State ex rel. Bird v. Apodaca*,<sup>48</sup> a case cited for a principle of statutory construction in *Human Rights Commission v. Board of Regents*, the state supreme court noted "that statutory words are to be used in their ordinary and usual sense unless the contrary is apparent."<sup>49</sup> That case, however, also stands for the proposition that the supreme court will presume that when the legislature enacts a new statute, it intends to change the law as it previously existed.<sup>50</sup> Thus, when the legislature replaced the statute which specifically enumerated places of public accommodation with a statute that provides a general definition,<sup>51</sup> the new definition should be construed to be different from the previous one. Given the increasing intolerance of discrimination in 1969 when the Human Rights Act was adopted, the statute should be read as more inclusive than the enumerative statute which it replaced. The definition of public accom-

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44. *Tafuya v. Garcia*, 1 N.M. 480, 483 (1871).

45. *Keller v. City of Albuquerque*, 85 N.M. 134, 509 P.2d 1329 (1973).

46. See *N.O.W. v. Little League Baseball, Inc.*, 127 N.J. Super. 522, \_\_\_\_\_, 318 A.2d 33, 37, *aff'd* 67 N.J. 320, 338 A.2d 198 (1974).

47. *Martinez v. Research Park, Inc.*, 75 N.M. 672, 410 P.2d 200 (1965). This case was overruled on other grounds in *Lakeview Investments, Inc. v. Alamogordo Lake Village, Inc.*, 86 N.M. 151, 520 P.2d 1096 (1974). The principle of administrative law for which *Martinez* stands, however, was unaffected.

48. 91 N.M. 279, 573 P.2d 213 (1977).

49. *Id.* at 283, 573 P.2d at 217.

50. "[W]hen the Legislature enacts a new statute we presume that it intended to change the law as it previously existed." *Id.* at 284, 573 P.2d at 218.

51. See note 25 *supra*.

modation, based upon public policy and these principles, should include educational institutions within its scope.

The view that legislative change of a public accommodations statute may be intended to broaden the statute is demonstrated by two California cases. In *Reed v. Hollywood Professional School*,<sup>52</sup> the Appellate Department of the Superior Court of Los Angeles County held that, where the legislature had specifically declared that a policy prohibiting discrimination in public accommodations did not include private schools, the public policy against racial discrimination did not apply to the school's refusal to admit a black woman.<sup>53</sup> In a second case, however, *In re Cox*,<sup>54</sup> the California Supreme Court, citing *Reed*, noted that "[i]n the late 1950's, . . . the Legislature became concerned that Courts of Appeal, narrowly defining the kinds of businesses that afforded public accommodation, were improperly curtailing the scope of the public accommodations provisions,"<sup>55</sup> and had broadened the definition of a public accommodation in the Unruh Civil Rights Act.<sup>56</sup> *In re Cox* illustrates the proposition that if a public accommodation statute is broadened, it is intended to be more comprehensive than it was previously. The *Cox* court, by citing only *Reed* for the proposition that California courts of appeal were improperly curtailing the scope of public accommodations, implicitly recognized the inclusion of schools as one goal that the California Legislature had in mind when it broadened the definition of a public accommodation.

The traditional common law prohibition against discrimination in places of public accommodation applied only to innkeepers and public carriers.<sup>57</sup> The common law's limited definition of "public accommodation," however, is inadequate to meet the anti-discrimination goals of modern American society. This inadequacy is evidenced by the passage of statutes prohibiting discrimination in

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52. 169 Cal. App. 2d Supp., 887, 338 P.2d 633 (1959).

53. Cf. *Gardner v. Vic Tanny Compton, Inc.*, 182 Cal. App. 2d 506, 6 Cal. Rptr. 490 (1960) (where the court held that a privately owned gymnasium was not a place of public accommodation or amusement).

54. 3 Cal. 3d 205, 474 P.2d 992, 90 Cal. Rptr. 24 (1970).

55. 3 Cal. 3d at 210, 474 P.2d at 997, 90 Cal. Rptr. at 29.

56. Cal. Civil Code § 51 (Supp. 1980) (West) provides that:

All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

This section shall not be construed to confer any right or privilege on a person which is conditioned or limited by law or which is applicable alike to persons of every sex, color, race, religion, ancestry, or national origin.

57. Avins, *What is a Place of "Public" Accommodation?*, 52 Marq. L. Rev. 1 (1968).

places of public accommodation in the large majority of states and by the Congress of the United States.<sup>58</sup> Several states have specifically defined educational institutions as public accommodations,<sup>59</sup> thus demonstrating that the concept is not foreign or unworkable. The New Mexico Supreme Court, noting that universities were not among the enumerated public accommodations under the federal Civil Rights Act of 1964,<sup>60</sup> stating that the federal Act "follows the traditional definition of public accommodation in listing those establishments subject to the Act."<sup>61</sup> This reasoning is incomplete, however, because the New Mexico court failed to recognize that many of the enumerated places of public accommodation under the federal Act were not included in the common law definition. For example, soda fountains, gasoline stations, and motion picture houses are all listed in the Act,<sup>62</sup> but were not included under the common law definition.

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58. Forty-two jurisdictions (including the District of Columbia) have statutory or constitutional provisions prohibiting discrimination in places of public accommodation.

59. See note 40 *supra*.

60. 42 U.S.C. § 2000a(b) (1976).

61. 95 N.M. at 578, 624 P.2d at 520.

62. 42 U.S.C. § 2000a(b) (1976) provides:

(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

No case was found which held that an educational institution was a public accommodation under 42 U.S.C. § 2000a(b) (1976). In *McLeod v. College of Artesia*, 312 F. Supp. 498 (D.N.M. 1970), the court touched on the relationship of a college to the meaning of a public accommodation in the context of the 1964 Civil Rights Act. There, the court held that evidence that the College of Artesia fed an army reserve unit once a month under contract and that the college theater was patronized by the general public was insufficient grounds on which the court could premise jurisdiction under the public accommodations section of the Civil Rights Act. There is no need, however, for educational institutions to be considered public accommodations under 42 U.S.C. § 2000a(b) (1976). Unlike New Mexico law, federal law provides other causes of action for those who have been discriminated against by an educational institution. See 42 U.S.C. § 3000c-6 (1976); 42 U.S.C. § 2000d (1976); 42 U.S.C. § 1983 (1976). See also, text accompanying notes 66-74 *infra*.

In 1963, the New Mexico attorney general construed the earlier statute defining public accommodations. The attorney general issued an opinion which concluded that duplexes and apartment buildings were not public accommodations.<sup>63</sup> He reasoned that because the statute specifically enumerated what were places of public accommodation, and duplexes and apartment buildings were not included, they did not fall under the Act. It would be illogical to maintain today that the owner of apartments is free to discriminate against anyone he chooses because apartments are not public accommodations.<sup>64</sup> If the court relies only on the specific enumeration of the former statute, it would lead, if such a case were presented, to other examples of that sort of illogical result.<sup>65</sup>

### *C. Causes of Action.*

Tyler's private causes of action under federal law were limited. She conceivably could have brought an equal protection claim under the federal constitution.<sup>66</sup> Under 42 U.S.C. §2000c-6 (1976), the attorney general may initiate and maintain an action where he receives a complaint in writing "signed by an individual, or his parent, to the effect that he has been denied admission to or not permitted to continue in attendance at a public college by reason of race, color, religion, sex or national origin." It appears, however, that no private right of action is provided by this statute.

Tyler may also have been able to state a cause of action under 42 U.S.C. §2000d (1976), which provides: "No person in the United States shall, on the ground of race, color, or national origin, be ex-

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63. [1963] Rep. of the Att'y. Gen. of N.M. 63-150, at 346.

64. See *Beech Grove Investment Co. v. Civil Rights Commission*, 380 Mich. 405, 157 N.W.2d 213 (1968), wherein it was held that the state Civil Rights Commission possessed jurisdiction to hear complaints of discrimination in the purchase and sale of private housing, despite the absence of legislation explicitly granting it the power to do so.

65. Although generally one cannot discriminate in housing, N.M. Stat. Ann. §28-1-7(G) (1978), under N.M. Stat. Ann. §28-1-9(C) (1978), the provisions of the Human Rights Act do not "apply to rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of the living quarters as his residence. . . ."

Although contained in the same section of the Human Rights Act (28-1-7), the prohibition against discrimination in housing is covered by a different subsection than the prohibition against discrimination in public accommodations. Were it not covered separately, prohibition of discrimination in housing would conceivably be covered by the broad language of the prohibition against discrimination in public accommodations.

66. A possible drawback to bringing an equal protection claim would be whether the necessity to prove the existence of a policy with *intent* to discriminate (rather than effect) was applicable. See *Washington v. Davis*, 426 U.S. 29 (1976). An additional problem with equal protection claims generally is that the various standards of review applied depend on the nature of the equal protection claim that is brought. See L. Tribe, *American Constitutional Law* §16 (1978).

cluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Jurisdictions are divided on whether section 2000d permits a private right of action. The Supreme Court, while never reaching the issue, has implied that a private right of action exists.<sup>67</sup> Several lower courts have held that a private right of action does exist under Section 2000d,<sup>68</sup> but that view is not unanimous.<sup>69</sup> Because neither the United States District Court for the district of New Mexico nor the Tenth Circuit has decided the issue, there is no certainty that section 2000d would have provided Tyler with a private right of action.<sup>70</sup>

It appears that Tyler would have had a claim under 42 U.S.C. §1983 (1976). Section 1983 provides that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 has been used frequently to alleviate discriminatory practices in educational institutions.<sup>71</sup> Tyler could have brought such a § 1983 action in state court.<sup>72</sup> Several factors may nevertheless have made a suit by Tyler under federal law impractical. Tyler conceivably did not have the time to await final adjudication of her case while it made its way through the cumbersome and often slow-working federal court system.<sup>73</sup> Financial considerations also may

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67. In *Cannon v. University of Chicago*, 441 U.S. 677 (1979), the Supreme Court closely analogized Title II to Title VI, which includes 42 U.S.C. § 2000d, in holding that Title IX provided a private right of action.

68. See, e.g., *Drayden v. Needville Independent School Dist.*, 642 F.2d 129 (5th Cir. 1981); *N.A.A.C.P. v. Medical Center, Inc.*, 599 F.2d 1247 (3d Cir. 1979); *Guardian's Ass'n of New York City Police Dep't., Inc. v. Civil Serv. Comm'n of New York*, 466 F. Supp. 1273 (S.D. N.Y. 1979), *rev'd on other grounds*, 633 F.2d 232 (2d Cir. 1980).

69. See *Clark v. Louisa County School Bd.*, 472 F. Supp. 321 (E.D. Va. 1979).

70. After *Cannon v. University of Chicago*, 441 U.S. 677 (1979), however, a court would have to be very inventive to avoid finding a private right of action under 42 U.S.C. § 2000d (1974).

71. See, e.g., *De La Cruz v. Tormey*, 582 F.2d 45 (9th Cir. 1978), *cert. denied*, 441 U.S. 965 (1979); *Meredith v. Fair*, 298 F.2d 696 (5th Cir. 1962); *Chase v. Twist*, 323 F. Supp. 749 (E.D. Ark. 1970).

72. See, e.g., *Maine v. Thiboutot*, 448 U.S. 1 (1980).

73. Disposition of civil cases in the United States District Court for the District of New Mexico averages seven months. Conversation with Jesse Casaus, Clerk of the United States District Court for the District of New Mexico, September 14, 1981. In comparison, the average time for final adjudication by the Commission is between three and five months. Conversation with Raymond Padilla, Civil Rights Specialist Supervisor for the Human Rights Commission.

have affected a decision not to pursue a federal cause of action.<sup>74</sup> A possible drawback to bringing a § 1983 action in state court would be that federal courts have much more experience in interpreting federal law than do state courts. Even if a federal cause of action would have been feasible and desirable, the fact remains that it would not be a *state* cause of action. It is important that the state take a strong stand against discrimination by providing a statutory cause of action to deter discrimination and to alleviate its effects.

An administrative remedy offers several advantages to a litigant which a court usually cannot provide. Administrative agency decisions are usually more expeditious than decisions by the courts.<sup>75</sup> They are often more convenient and less expensive.<sup>76</sup> Administrative agencies additionally offer expertise in a field which courts usually cannot match.<sup>77</sup> Additionally it is felt by some that judges may not administer reform-type laws in accordance with the spirit in which they were passed to the same extent as will an administrative agency.<sup>78</sup> Further, administrative adjudication offers a degree of informality which the courts cannot match, partially because the agencies often are not bound by endless procedural requirements.<sup>79</sup> These considerations in themselves may have made it desirable for the court to find that claims of discrimination in educational institutions could be heard by the Human Rights Commission.

The reasoning of the court in denying Tyler a cause of action under the Human Rights Act failed to take into consideration the strong public policy against discrimination. It also failed to consider the policy favoring administrative remedies in this kind of situation. By simply relying upon the common law definition of public accommodation and by refusing to acknowledge that the places covered by the current definition extend beyond those covered under the preceding law, the court refused to recognize these public policies.

#### *D. The Interpretation of "Public Accommodation" in Other Jurisdictions.*

No other jurisdiction has decided the question of whether a state university is a public accommodation when the state statute barring

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74. This factor would have been less significant if Tyler had prevailed because 42 U.S.C. § 1988 (1976) provides for reasonable attorney's fees to the prevailing party in civil rights actions.

75. See note 73 *supra*.

76. See K. Davis, *Administrative Law Text* (3d ed. 1972).

77. *Id.*

78. *Id.*

79. See 2 K. Davis, *Administrative Law Treatise*, § 10:2 (2d ed. 1979). Litigants often proceed *pro se* at administrative hearings, as did Tyler. Record, p. 3. The informality of an administrative hearing may be attractive to such a litigant who is unfamiliar and possibly uncomfortable with the formalities of judicial adjudication.

discrimination in public accommodations does not specifically define it as such. Most state cases which have dealt with the relationship of an educational institution to the public accommodations section of the relevant state anti-discrimination statute or the jurisdiction of the respective states' equivalent of the New Mexico Human Rights Board have been in jurisdictions which list educational institutions among the enumerated places of public accommodation.<sup>80</sup> In *Vantine v. City of Tulsa*,<sup>81</sup> however, the Court of Criminal Appeals of Oklahoma construed a statute somewhat similar to New Mexico's.<sup>82</sup> The court held that a preschool was a public accommodation within the meaning of the statute.<sup>83</sup> The statute provided:

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80. See, e.g., *McKaine v. Drake Business School, Inc.*, 176 N.Y.S. 33 (1919) (business school which advertised for students, and which denied admission to a black student, had the burden of proving it was within the "distinctly private" exception to the public accommodations statute); *Hinfey v. Matawan Regional Bd. of Educ.*, 77 N.J. 514, 391 A.2d 899 (1979) (public school curriculum is one of "advantages, facilities . . . or privileges" of a public school, and is within the law against discrimination); *Pennsylvania v. Brown*, 373 F.2d 771 (3d Cir. 1967). (Pennsylvania's Public Accommodations Act held inapplicable to admissions process at a private school. The court relied on *In re Girard College Trusteeship*, 391 Pa. 434, 138 A.2d 844 (1958), and *In re Girard's Estate*, 386 Pa. 548, 127 A.2d 287 (1956), in reaching this determination. These cases, however, did not directly hold that private schools were excluded under the Act.)

Most cases dealing with the relation of schools to the definition of public accommodation have been concerned with admissions to educational facilities rather than with issues related to administration of the academic program. A distinction between the two does not appear to be valid. Discrimination is repugnant whether it occurs in admissions to a school or in its treatment of students once they are admitted. The state statutes which include educational institutions as public accommodations do not make such a distinction. See, e.g., Colo. Rev. Stat. §24-34-601 (Supp. 1973); Wash. Rev. Code Ann. §49.60.040 (Supp. 1980). In *School District No. 11-J v. Howell*, 33 Colo. App. 57, 517 P.2d 422 (1973), it was held that a conclusion by the Civil Rights Commission (the equivalent of the New Mexico Human Rights Commission) that a school regulation of the length of males' hair was an unreasonable and burdensome requirement on the free exercise of the defendant Indian's religion, but was outside the scope of the statute giving the Commission power to prohibit discrimination in places of public accommodation, which includes schools. The court, however, based its holding on the fact that "[t]here was no finding of fact or conclusion of law by the Commission that the hair regulation discriminates against persons of a particular national origin or against persons of a particular creed. The Commission's only conclusion was that the hair regulation denies the defendant his First Amendment right to freely exercise his religion." 33 Colo. App. at \_\_\_\_, 517 P.2d at 423 (emphasis by the court). The implication is that if the Colorado Civil Rights Commission had found there was discrimination, as the Human Rights Commission found existed in *Patricia Tyler's* case, the Civil Rights Commission would have had jurisdiction. See also, *Pennsylvania Human Relations Comm'n v. Chester School Dist.*, 427 Pa. 157, 233 A.2d 290 (1967), where the Pennsylvania Supreme Court held that the Pennsylvania equivalent of the New Mexico Human Rights Commission had the power to order a school district to take immediate steps to desegregate its schools based on its power over public accommodations, which included schools under its enumerative statute.

81. 518 P.2d 317 (Okla. Crim. App. 1973).

82. Okla. Stat. tit. 25, §1401 (Supp. 1980).

83. A city public accommodation ordinance was also at issue in *Vantine*, but the court found that the city ordinance was not an enlargement of the state ordinance (as applied to the facts of the case), and thus used the state statute as the framework for finding that the preschool was a public accommodation within the meaning of the ordinance.

As used in this Act unless the context requires otherwise: (1) "place of public accommodation" includes any place, store or other establishment, either licensed or unlicensed, which supplies goods or services to the general public or which solicits or accepts the patronage or trade of the general public or which is supported directly or indirectly by government funds.<sup>84</sup>

The court noted that "listed places of public accommodation are merely illustrative of the accommodations the Legislature intended to be within the scope of the statute. Other accommodations, similar in nature to those enumerated, were also intended to be covered."<sup>85</sup> The *Vantine* court based its decision partially on the fact that the Oklahoma statute contained the word "includes," which New Mexico's statute does not contain.<sup>86</sup> The previous New Mexico specific enumeration statute, however, did contain the word "includes." The New Mexico court should have followed the lead of the Oklahoma court in construing the definition of public accommodation expansively to include an educational institution.

Various courts have found entities which are not educational institutions to be public accommodations within the meaning of statutes which did not specifically list the entity in question. For example, the New Jersey Supreme Court held that a day camp was essentially an educational-recreational accommodation, and was thus a place of public accommodation within the meaning of the state anti-discrimination law.<sup>87</sup> The Michigan Court of Appeals held that a health and exercise club was a public accommodation despite the fact that Michigan's enumerative statute did not list health and

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84. The statute further provides that:

(i) a private club is not a place of public accommodation, if its policies are determined by its members and its facilities or services are available only to its members and their bona fide guests;

(2) "Place of accommodation" does not include barber shops or beauty shops or privately-owned resort or amusement establishments or an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of the establishment as his residence.

Okla. Stat. tit. 25, § 1401 (Supp. 1980).

85. 518 P.2d at 319, quoting *Fraser v. Robin Dee Day Camp*, 44 N.J. 480, 485, 210 A.2d 208, 211 (1965).

Though the court in *Vantine* claimed that the statute in question was very similar to New Jersey's enumerative public accommodation statute, it appears that it is more accurately characterized as closer to the current New Mexico statute than to the New Jersey statute. N.J. Rev. Stat. § 10:5-5(1) (Supp. 1980), lists over forty entities as places of public accommodation.

86. Another difference between the Oklahoma and New Mexico statutes is the language in the Oklahoma statute specifically covering establishments which receive government funds.

87. *Fraser v. Robin Dee Day Camp*, 44 N.J. 480, 210 A.2d 208 (1965). N.J. Rev. Stat. § 10:5-5(1) (Supp. 1980), specifically lists certain types of educational and recreational facilities as public accommodations.

exercise clubs or gymnasiums.<sup>88</sup> In another case, the New Jersey court held that Little League Baseball, as an organization, is a public accommodation within the meaning of the state's enumerative public accommodation statute,<sup>89</sup> and thus could not preclude girls from trying out for Little League, even though the statute did not list Little League. The court noted that "[t]he [anti-discrimination] law is remedial and should be read with an approach sympathetic to its objectives."<sup>90</sup>

These cases illustrate that state courts have applied their respective public accommodations statutes liberally in the absence of a contrary legislative intent. The courts have included places which are not specifically enumerated in the statute defining public accommodations. Interestingly, most of the cases broadening the definition of public accommodation have been in states which have enumerative statutes.<sup>91</sup> A better argument can be made for not giving an expansive reading to enumerative public accommodation statutes than can be made for general statutes, because it can be argued that when the legislature specifically listed all places which were to be considered public accommodations, it did not mean for others to be included.<sup>92</sup> If the New Mexico court had read the Human Rights Act with an approach "sympathetic to its objectives,"<sup>93</sup> it would have found that the University of New Mexico is a public accommodation, and thus provided Patricia Tyler an opportunity for full, fair, and expeditious litigation of her grievance. The New Mexico court should have followed the lead of other states and given an expansive enough reading to encompass the University of New Mexico within the New Mexico public accommodations statute.

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88. *Vidrich v. Vic Tanny International, Inc.*, 102 Mich. App. 230, 301 N.W.2d 482 (1980).

89. *N.O.W. v. Little League Baseball, Inc.*, 127 N.J. Super. 522, 318 A.2d 33, *aff'd* 67 N.J. 320, 338 A.2d 198 (1974).

90. *Id.* at \_\_\_\_\_, 318 A.2d at 37.

A case with a somewhat different result than *N.O.W. v. Little League*, is *Schwenk v. Boy Scouts of America*, 275 Or. 327, 551 P.2d 465 (1976). The Oregon Supreme Court held that Oregon's general public accommodations statute did not apply to the Boy Scouts, at least to the extent of requiring the Scouts to accept membership applications from girls. The court, however, based its decision on an excerpt from legislative hearings on the public accommodations statute from which it inferred that the legislature did not intend the new statute to apply to the YMCA or the YWCA. The court found the YMCA indistinguishable from the Boy Scouts for purposes of the issue in the case.

91. See note 35 *supra*, and accompanying text.

92. Unless, of course, the statute, as New Mexico's previous statute did, contains the word "includes." See note 25 *supra*.

93. See text accompanying note 90 *supra*.

## CONCLUSION

After *Human Rights Commission v. Board of Regents*, a person such as Patricia Tyler has no state statutory cause of action for redress of discriminatory practices by a university in New Mexico. The strong public policy against discrimination dictates that when discrimination is alleged, every effort should be made to provide a remedy if discrimination is proved. Principles of statutory construction and the advantages of administrative adjudication, coupled with the need for an effective and prompt remedy, support the proposition that the court should have accepted the Human Rights Commission's finding that the University was a public accommodation. The reasonableness of this conclusion is demonstrated by the actions of states which have specifically included educational institutions within the meaning of their statutes defining public accommodations. Additional support for such a conclusion is found in the expansive reading of the definition of places of "public accommodation" by other state courts, and by the change in New Mexico's definition of "public accommodation" in 1969 from specific to general. The danger of the court's holding is that future interpretations of what is a public accommodation will be artificially constrained by outdated common law concepts, and by a mechanical adherence to the enumeration of places of public accommodation under the prior law. The modern policy of eliminating discrimination wherever it occurs would easily be frustrated.

Given that there was no other state statutory cause of action, the court should have applied a definition of public accommodation which was as broad as possible, short of going beyond what the legislature could reasonably have intended. Reasonableness should be determined, when the state statute is not clear, by reference to statutes of other cases, always keeping in mind the strong policy of eliminating discrimination. Had the court used this analysis, it undoubtedly would have found the University of New Mexico to be a public accommodation within the meaning of the Human Rights Act.

The New Mexico Supreme Court, in *Human Rights Commission of New Mexico v. Board of Regents of the University of New Mexico College of Nursing*, was invited to take a step forward in the fight against discrimination wherever it occurs. It was an invitation the court declined to accept.

TODD HEISEY