

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JOHN F. KNIGHT, JR., et al.,)

Plaintiffs,)

v.)

THE STATE OF ALABAMA, et al.,)

Defendants,)

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

THE STATE OF ALABAMA, et al.,)

Defendants.)

CIVIL ACTION NO.

83-M-1676-S

**RESPONSE BY TROY UNIVERSITY SYSTEM TO
OBJECTIONS TO TERMINATION OF THE REMEDIAL DECREE**

The Troy University System (TUS) responds as follows
to the objections filed to the termination of the Remedial Decrees:

General Response

The objectors would have the Court prolong a case which has been ongoing through three decades. TUS submits that the Decrees should be allowed to expire, as contemplated by the August 1, 1995 Court Order. The reasons are:

First, the case has been used as the vehicle for a multitude of claims as well as for discovery requests (most recently the discovery requests accompanying the objections) which create needless expenditures of time and money which ultimately must be borne by the State's taxpayers.

Second, while anyone can assert that more remains to be done, no one has presented anything to show that prolonging the litigation would enable more to be accomplished. Board of Education of Oklahoma City Public Schools v. Dowell, 498 U.S. 237, 111 S.Ct. 630, 112 L.Ed.2d 715 (1991) ("The District Court should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and

whether the vestiges of past discrimination had been eliminated to the extent practicable.”).

Responses to Objections by Each Objector

I.

ALABAMA STATE UNIVERSITY (ASU)

Only ASU has filed objections with claims targeting Troy-Montgomery. Our threshold position is that ASU is not entitled to assert such claims because:

First, since both ASU and TUS are State institutions, “ASU has no standing to sue under either Section 1983 or Title VI.” Knight v. State of Alabama, 791 F.2d 1450 (11th Cir. 1986).

Second, ASU’s claims are in name only objections to the termination of the Remedial Decrees. They in reality are newly-raised claims.

Third, all of ASU’s claims rest on the 1991 Consent Decree with the United States, to which ASU was not and is not a party. Since ASU could have joined in the 1991 Decree but did not

do so, it should not be entitled to assert claims on any third-party beneficiary theory.

On the substantive level, and even assuming for analysis that ASU can assert the claims, they are baseless, as shown by the following:

A. PROGRAM DUPLICATION:

ASU requests the continuation of “the provisions of the consent decree between TSUM and the United States which restrict courses and programs offered by TSUM.” *ASU Objections at ¶56, p.22*. This request stems from the 1991 Consent Decree with the United States under which Troy-Montgomery gave up 23 academic programs. The magnitude of the error in ASU’s claim to continue this provision of the 1991 Consent Decree between TSUM and the United States is shown by the following:

1. To begin with, ASU is attempting to rewrite the terms of the 1991 Consent Decree. Reynolds v. Roberts, 202 F.3d 1303, 1312 (11th Cir. 2000) (“Long standing precedent evinces a strong public policy against judicial rewriting of consent

decrees.”). The Consent Decree with the United States explicitly provided for the discontinuance by Troy-Montgomery of 23 programs, not courses. Section IV of the Decree, beginning at page 14, could not have spelled it out any plainer:

“The defendant Troy State University agrees to the following with respect to Troy State University in Montgomery:

“A. The following programs currently offered at Troy State University in Montgomery shall be discontinued effective September 1, 1994. Troy State University in Montgomery (TSUM) shall not admit new students into the below listed programs effective October 1, 1990. Those students enrolled in the below listed degree programs (except item 1.(e)) prior to October 1, 1990,

shall have until September 1, 1994, to complete that course of study at TSUM.”

ASU’s claim must therefore be considered in the context of the 23 programs, not courses.

2. ASU presents no reason why this restriction established by the 1991 Consent Decree with the United States should continue. It is thus an argument without an anchor.

3. On the contrary, while the purpose of the 1991 discontinuance of programs was to enable ASU to pick up such programs or to offer such programs without competition, ASU has done nothing at all to take advantage of the valuable programs which Troy-Montgomery gave up nearly 15 years ago. The facts are that:

(a) The 12 programs which ASU was not offering in 1991, and is not offering today:

As of 1991, ASU did not offer 12 of the 23 programs, those being:

- (1) Educational Supervision (MS)
- (2) Educational Supervision (Ed.S.)
- (3) Elementary and Secondary Education Administration (MS)
- (4) Elementary and Secondary Education Administration (Ed.S.)
- (5) History Education (MS)
- (6) History Education (Ed.S.)
- (7) Criminal Justice – Corrections (BA/BS)
- (8) Corrections (BA/BS)
- (9) Criminal Justice Administration (MS)
- (10) Criminal Justice – Police Administration (BA/BS)
- (11) Law Enforcement Administration (BA/BS)
- (12) Criminal Justice – Criminal Investigation (BA/BS)

The 1991 Decree opened the door for ASU to institute those 12 programs which were well attended at Troy-Montgomery

and which ASU was not offering. But today, nearly 15 years later, ASU has not offered a single one of the 12 programs.

(b) The 7 programs which ASU offered in 1991

but not today:

Of the 23 programs given up by Troy-Montgomery in 1991, ASU was offering 7 of them as of 1991 but not today, those being:

- (1) Pre-Elementary Education (Ed.S.)
- (2) English Education (M.Ed.)
- (3) English Education (Ed.S.)
- (4) Mathematics Education (MS/M.Ed.)
- (5) Mathematics Education (Ed.S.)
- (6) Social Science Education (MS/M.Ed.)
- (7) Social Science Education (Ed.S.)

Troy-Montgomery's discontinuance of those programs in 1991 enabled ASU to offer them without any competition from

Troy-Montgomery. Instead, ASU has discontinued the programs so that today it offers none of them.

(c) The only 4 programs which ASU is offering:

The result is that ASU is today offering only 4 – 17% – of the 23 programs, all of them being programs which it offered in 1991 and none having been instituted in the years since 1991.

Those 4 programs are:

- (1) Pre-Elementary Education (MS/M.Ed.)
- (2) Biology (BA/BS)
- (3) Criminal Justice Studies (BA/BS)
- (4) Sociology (BA/BS)

4. The duration of the 1991 Consent Decree was to be for the four years between Court's approval of it on December 31, 1991 and December 31, 1995. Section IV on page 24 provided that:

“This decree shall become effective immediately upon the date of its final

approval by the Court and shall remain effective until December 31, 1995.

On December 31, 1995, this decree, in its entirety, shall terminate automatically and without further formality unless the United States, by motion filed not less than sixty (60) days preceding the expiration date of this decree, requests the Court to conduct a hearing on stated objections to defendants' compliance with the provisions of this decree."

The reasonable inference is that the United States was of the opinion that four years would be adequate to enable ASU to take advantage of the program discontinuance provision. Instead, the Decree has now remained in effect for 15 years, with ASU having utterly failed to take advantage of it.

5. In sum, it ill-behooves ASU to argue for a continuation of the 1991 program discontinuance provision. It is far past time for such provision to terminate.

B. CROSS-ENROLLMENT OF STUDENTS:

6. ASU correctly quotes the provision of the 1991 Consent Decree with the United States regarding a cross-enrollment plan. *ASU's Objections at p.20*, quoting ¶ 1 of Section IV on p.19 of the Decree.

7. ASU immediately goes from right to dead wrong by alleging that "TSUM nevertheless has failed and refused, and continues to fail and refuse, to develop and implement an effective cross-enrollment program with ASU" and by requesting that this provision of the 1991 program continue. *ASU's Objections, pp.21-22*.

8. Contrary to ASU's claim, the undeniable facts are that the only failure or refusal belongs to ASU, so much so that ASU owes Troy-Montgomery the sum of \$108,733 (as of the

present and continuing) for educating ASU students at Troy-Montgomery's expense, and with not one penny of the reimbursement which ASU owes Troy-Montgomery.

9. Pursuant to the cross-enrollment provision of the Decree, ASU and Troy-Montgomery entered into a mutual agreement entitled "A Plan for Voluntary Cross-Enrollment of Students Who Attend Troy State University Montgomery and Alabama State University." Such agreement includes the following provision:

"Both institutions will keep records of the number of students from the other institution who cross-enroll on their campuses and the number of credit hours generated by term and by academic year. No money for the cross-enrollment of students will be exchanged between institutions until and unless the number of cross-enrolled students

at one university exceeds the number so enrolled at the other university by 10 students within the academic year (defined to include the summer term). When a disparity of 10 students occurs, the institution receiving the disproportionate number of cross-enrolled students will receive tuition reimbursement from the other institution for all 10 or more students who make up the disparity. The rate of reimbursement will be based on the tuition schedule of the home institution.”

10. The number of students who have voluntary cross-enrolled in accordance with the agreement is as follows as of the present:

ASU students voluntarily cross-enrolling at Troy-Montgomery	272
Troy-Montgomery students voluntarily cross-enrolling at ASU	21

11. Accordingly, under the provision of the agreement governing tuition reimbursement between ASU and Troy-Montgomery when the number of cross-enrolled students in an academic year exceeds 10, ASU has incurred an indebtedness of \$108,733 to Troy-Montgomery, which it has failed and refused to pay and continues to fail and refuse to pay.

12. The irony of it is that ASU is asking the Court to continue a provision notwithstanding ASU being in serious and substantial default.

13. ASU is in error in attempting to fault Troy-Montgomery for the imbalance between ASU students voluntarily cross-enrolling at Troy-Montgomery (272) and Troy-Montgomery students cross-enrolling at ASU (21). In practical terms, ASU is displeased with so many of its students cross-enrolling at Troy-Montgomery. The accurate view of the situation, however, is that:

(a) The concept is voluntary and not mandatory

cross-enrollment:

ASU is disregarding the fact that the cross-enrollment provision of the 1991 Decree is premised on voluntarily cross-enrollment, as emphasized by the cross-enrollment agreement signed by ASU and Troy-Montgomery being entitled “A Plan for Voluntary Cross-Enrollment.” Just as ASU cannot order its students not to cross-enroll at Troy-Montgomery, so also Troy-Montgomery cannot order its students to cross-enroll at ASU.

(b) The racial composition of Troy-Montgomery’s

student enrolment:

Any effort by ASU to argue that Troy-Montgomery students are reluctant to cross-enroll at ASU for racial reasons would utterly fail. The relevant fact is that 56.1% of Troy-Montgomery’s student body is composed of African-American students, making it among the most highly integrated student

enrollments in the State. It follows that any effort to conjure up any race-reluctance idea would be futile.

(c) The explanations for the disparity:

The explanation for 272 ASU students having cross-enrolled at Troy-Montgomery compared to 21 Troy-Montgomery students being cross-enrolled at ASU is two-fold.

First, as the Court well knows, Troy-Montgomery educates non-traditional adult students, while ASU is educating traditional students in the 18-22 age group. Therefore, Troy-Montgomery's classes are at night and on weekends, times not conducive or acceptable to traditional college students.

Second, Troy-Montgomery has become the leader in Alabama in distance learning. In contrast, ASU has few distance learning courses. Obviously, Troy-Montgomery students enrolled in distance learning courses have no incentive to cross-enroll at ASU, and could not do so for the distance learning courses which ASU does not offer.

14. The sum of it is that ASU's contention regarding the cross-enrollment provision of the 1991 Decree is conspicuously devoid of merit as well as failing to acknowledge ASU's indebtedness to Troy-Montgomery.

C. JOINT GRADUATE DEGREE PROGRAMS:

15. ASU correctly quotes the provision of the 1991 Decree with the United States providing that two joint graduate degree programs were to be instituted and that "The programs shall be mutually agreed upon between ASU and the TSU System." *ASU's Objections at pp.21-22*, quoting ¶ L of Section IV on pp.19-20 of the Decree.

16. The key to resolution of ASU's argument that this provision of the 1991 Decree should continue is the provision that such joint graduate degree programs "shall be mutually agreed upon" The expected mutual agreement has never materialized despite repeated meetings and contacts.

17. There is no need, at least for purposes of this Response, to debate whether the failure of mutual agreement should be blamed on ASU or Troy-Montgomery. The critical point is that this provision of the 1991 Decree is no different than the concept behind the bargaining obligation of the National Labor Relations Act [§ 8(a)(5), 29 U.S.C. § 158(a)(5)] being to obligate the parties to attempt to arrive at agreement but in no way obligating them to agree, aka being able to lead horses to water but not being able to make them drink. H.K. Porter Co. v. NLRB, 397 U.S. 99, 90 S.Ct. 821, 25 L.Ed.2d 146 (1970) (opinion by Justice Black):

“The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement. But it was recognized from the

beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of the desirable settlement.”

18. In sum, the mutual agreement provided for by the joint graduate degree provision of the 1991 Decree has never come to pass, nor is there any reason to believe that a continuation of the provision would bring about any different outcome. The only sensible view is that this provision of the Decree started its voyage with a noble purpose but floundered on the shoals of mutual agreement.

D. ALLEGED BUT NON-EXISTENT EXPANSION OF COURSE

OFFERINGS IN ACCOUNTING:

19. ASU's last answer claims that "TSUM has also expanded its undergraduate course offerings in accounting"

ASU's Objections, p.23.

20. The initial answer is that there has never been any restriction, agreed to or ordered, on undergraduate course offerings in Accounting. It is another instance of ASU attempting to rewrite the 1991 Consent Decree to add a provision which does not exist. Reynolds v. Roberts, 202 F.3d at 1312.

21. The conclusive answer is that wholly aside from ASU attempting to invent a restriction which does not exist, ASU is misinformed. The fact is that Troy-Montgomery has not expanded its course offerings in Accounting.

II.

OBJECTORS OTHER THAN ASU

A. ALABAMA A&M:

22. Since Alabama A&M's objections do not target TUS, no occasion exists for any response to them other than to disagree that the Remedial Decrees should continue.

B. KNIGHT-SIMS PLAINTIFFS:

23. TUS disagrees with the objections by the Knight-Sims plaintiffs with respect to their past motions, such as their August 2003 motion seeking to require "goals and timetables." *Knight-Sims Plaintiffs' Objections*, ¶ 12 on p.5. Such motions have been resolved. Even if they had not been resolved, reasserting them in the form of objections is the antithesis of timely follow-up on any motion.

24. TUS disagrees with the premise, implicit in the objections, that the Remedial Decrees should continue.

25. There is no perceivable reason for their extended treatment of the property tax issue because such issue can easily be severed for separate treatment through the appeal process.

26. TUS disagrees with their reserving the right “to take a position on objections to termination of the Remedial Decrees that may be filed by other parties.” *Knight-Sims Plaintiffs’ Objections*, ¶ 15 on pp.11-12. The purpose of objections is to state specifically what they are, not to set the stage for a dog in the manger approach of reserving the right to aver them down the road. Alternatively, to the extent they may be allowed to do so, TUS reserves the right to respond to them at such time as they may be brought on stage.

C. UNITED STATES:

27. The objections by the United States object to the termination of the Remedial Decrees “to the extent that certain provisions of those orders remain unfinished” and averring that “some matters remain outstanding and should be addressed prior

to termination of this Court's jurisdiction." *United States Objections*, p.1. The practical problem is the total silence on what provisions "remain unfinished" and what may be the "some matters that should be addressed." All that can be said in response is to reserve the right to respond if, as, and when illumination may be forthcoming.

Discovery

D. DISCOVERY PROPOSED BY THE OBJECTORS:

28. The objections take divergent paths regarding discovery.

(a) On the reasonable side of life, Alabama A&M takes the position that it "does not anticipate significant discovery with respect to its objections," *Alabama A&M's Objections at p.8*, and the United States takes the position that discovery will not be necessary if there is a report on compliance by the Court Monitor and additional information from the institutions (although the latter is open-ended enough to be regarded as a potential problem).

(b) On the unreasonable side are the positions taken by ASU and the Knight-Sims plaintiffs. ASU asks for “Documents, information, and depositions from Troy University” and “any other discovery which ASU may deem appropriate,” which could hardly be more open-ended. The Knight-Sims plaintiffs take it to an even more unreasonable extreme by proposing discovery in the most minute details, including “For each student.”

29. Assuming the Court’s preference is for objections to discovery to be raised now rather than after it has been propounded, TUS (a) objects to ASU’s proposed discovery because it is open-ended in the extreme and (b) objects to the Knight-Sims plaintiffs’ proposed discovery because:

First, it would put the universities in the position of having to violate the Family Educational and Privacy Rights Act (the Buckley Amendment) prohibiting educational institutions from disclosing personal identifying information regarding students. 20

U.S.C. § 1232g. Being called upon to disclose information “for each student’ as proposed by the Knight-Sims plaintiffs would be directly contrary to the Act. It is equally obvious that the Federal Courts should not order parties to violate Federal law.

Second, discovery “For each student” would create undue burdens in time and expenses without offsetting benefits. Given the dimensions of the case, it has properly addressed the issue in the context of macro subjects and statistics such as the racial composition of faculty, staff, and students. No reason is given for moving into the micro minutiae of such a long list of detailed information “For each student.”

Third, the Knight-Sims plaintiffs are proposing a wide range of detailed information from the universities. That far exceeds the boundaries of reasonable discovery, especially in the context of this case in which they have available to them the information provided in the Annual Reports.

E. DISCOVERY BY TUS:

30. Since ASU has chosen to again declare war on Troy-Montgomery, it appears (at least as of now) that our discovery will likely be limited to ASU.

31. The subjects proposed to be addressed by discovery to ASU are the same as the subjects which ASU has brought into contention by its objections.

F. LIMITS ON THE SCOPE OF DISCOVERY:

32. TUS submits that the Court should set limits on discovery by any party to any other party and proposes the following limits:

(a) Depositions: Maximum of 2 depositions, each governed by the one day – 7 hour rule in accordance with FRCP 30(d)(2).

(b) Interrogatories: Maximum of 25 interrogatories, including all discrete sub-parts, in accordance with FRCP 33(a).

(c) Document production: Maximum of 25 requests for production, including all discrete sub-parts.

(d) Requests for admissions: Maximum of 25 requests for admissions, including all discrete sub-parts.

33. We agree with ASU and Alabama A&M that a time period of 90 days for discovery, commencing at such time as the Court authorizes discovery, should be adequate assuming the Court sets limits such as those proposed above in Paragraph 32.

This 6th day of January, 2006.

/s/William F. Gardner

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CERTIFICATE OF SERVICE

I hereby certify that January 6, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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