Austin American-Statesman
statesman.com

HIGHER EDUCATION

Judge considers legality of UT's admission policy

Lawsuit seeks to bar university's use of race, ethnicity.

By Ralph K.M. Haurwitz
AMERICAN-STATESMAN STAFF
Tuesday, May 20, 2008

A federal judge in Austin expressed frustration Monday at the loftybut somewhat ill-defined legal principles that he must rely on in deciding a lawsuit challenging the consideration of race and ethnicity in undergraduate admissions at the University of Texas.

Those principles were articulated in 2003 by the U.S. Supreme Court in a 5-4 ruling in a case involving the University of Michigan. The high court held that it was acceptable to strive for a "critical mass" of underrepresented minority students because of the educational benefits of a diverse student body. But the court also said such efforts must be "narrowly tailored" after "good faith consideration" of race-neutral alternatives.

U.S. District Judge Sam Sparks asked lawyers for UT and two students challenging the admissions program to define some of those terms, but he didn't get the specificity he apparently was seeking.

"I feel like I'm out walking in a snowstorm barefoot," Sparks said during a hearing on the case.

The two students named as plaintiffs — Abigail Noel Fisher, a student at Stephen F. Austin High School in Sugar Land, and Rachel Multer Michalewicz, who attends Jack C. Hays High School in Buda — contend that they would have been accepted at UT for the fall semester but for consideration of race and ethnicity.

Both are white. They want the judge to issue a preliminary injunction requiring UT to evaluate their applications under race-neutral criteria and to admit them if they qualify.

Neither of the two qualified for automatic admission under a state law that guarantees entry to any public university in the state to any student ranking in the top 10 percent of his or her Texas high school graduating class.

As many as 7,200 freshmen are expected to enroll in the fall. UT projects that about 80 percent of them will have gained admission under the top 10 percent law. The rest will be selected on the basis of a review that includes race, ethnicity and other factors.

Of the 37,459 undergraduate students enrolled in fall 2007, 56 percent were white, 18 percent were Hispanic, 17 percent were Asian American and 4.6 percent were African American.

Bert Rein, a lawyer for the students suing UT, argued that the university has failed to demonstrate a compelling need to consider race and ethnicity. Its policy therefore violates his clients' constitutional and civil rights, he said.

Rein said the students' academic credentials would place them in the top half of the pool of blacks and Hispanics accepted outside the top 10 percent plan. Immediate redress is needed so that they can enroll in the fall, he said.

James Ho, the state's solicitor general, said the university's policy is precisely what the Supreme Court opinion contemplated: a nuanced, student-by-student analysis that stops short of quotas, set-asides and other outright racial-balancing tools.

He said the Supreme Court ruling favors such an approach over percentage plans such as the top 10 percent law.

UT's admission policies have been challenged before. A 1996 federal appeals court ruling involving UT's School of Law effectively banned affirmative action at public colleges and universities in Texas. State lawmakers enacted the top 10 percent law in 1997. After the 2003 Supreme Court ruling, UT again began using race and ethnicity as a factor in admissions.

Sparks, who presided at a trial in the earlier case, said he would rule soon on the latest challenge.

rhaurwitz@statesman.com; 445-3604