

1. Have the defendants complied with the terms of the remedial decree; and
2. Has the remedial decree achieved its intended purpose?

These questions must be answered in light of the acknowledged governing law of *United States v. Fordice*, 505 U.S. 717 (1992). As expressed by the 11th Circuit Court of Appeals:

Where plaintiffs show that a current policy is traceable to past segregation, and defendants fail to demonstrate either (1) that the policy, in combination with other policies, has no segregative effects, or (2) that none of the full range of less segregative alternative remedies are practicable and educationally sound, *defendants must adopt the practicable and educationally sound alternatives that will bring about the greatest possible reduction in segregative effects. "If the State has not discharged [this remedial] duty, it remains in violation of the Fourteenth Amendment."*

Knight v. State of Alabama, 14 F.3d 1534, 1542 (11th Cir. 1994), citing *United States v. Fordice*, 505 U.S. at 727 (Emphasis Added).

B. This Court set forth our remedial duties. It established exactly what was needed by imposing "the most desegregative remedy that is educationally sound and practicable." *Knight*, 900 F.Supp. at 281. The question of compliance is simply "have the Defendants adopted the policy changes required by this Court." If so, our present policies no longer are "traceable to past segregation," the threshold requirement for identification of a vestige. *Fordice*, 505 U.S. 717 at 728. Nothing presented in any of the motions suggests a lack of compliance by the State Defendants.

C. The circumstances under which a remedial decree should be modified because it failed to achieve its intended purpose are addressed in cases such as *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968). This is not the time for parties to put together "wish

lists” of things they would like to have and hope they can get through this litigation. The focus should remain on the vestiges identified in the Court’s prior decrees. *United Shoe* authorizes additional relief to achieve the purposes of the original decree, not to address new and different concerns. There should be no “new” vestiges. Indeed, given that this Court “found all the relevant facts that there are to be found about higher education in Alabama,” *Knight* at 280, any “new” vestiges would have to be based on policies initiated after the 1995 decree, policies which, by definition, could not arise during, or be vestiges of, the period of *de jure* segregation.

D. So whether the question is “Did Defendants comply?” or whether the question is “Did the decree, though complied with, prove ineffective?” the focus should remain on the *policies* required to be remediated. Nothing in any of the motions suggests the policies required to be implemented are not, in fact, in place. Therefore, there is no basis for modifying the remedial decree to extend or alter any of its terms.

E. In the following sections, the State Defendants address the various specific requests made by the four parties opposing termination of the Remedial Decree. Where more than one party has requested a particular relief, it is discussed only once, for purposes of efficiency.

II. OBJECTIONS OF THE KNIGHT-SIMS PLAINTIFFS

A. Provisions Continuing Pursuant to Existing Orders

1. In paragraphs 4-7 of the Motion to Extend the Term of Certain Provisions in the Remedial Decree, the Knight-Sims Plaintiffs ask for continuation of the State’s obligation to contribute to the Trusts for Educational Excellence and to continue funding programs established under the Remedial Decree as required by present court orders. The State Defendants intend to continue these payments, under the present required terms, without the necessity of extension of the Remedial Decree. The State Defendants note, however, that the Knight-Sims Plaintiffs are

incorrect in asserting that enhanced funding for ASU's doctoral program in Educational Leadership, Policy and Law should continue through the 2010-11 school year. (Doc. 3385, ¶6) Funding for that program began with academic year 2002-03, although due to fiscal circumstances the payment was actually made in FY 2003-04. The delayed funding was negotiated with ASU, which received some accelerated funding in return. The funding presently required by the Court is due to end after funding the 2009-10 academic year.

2. In paragraph 8 of their Motion, the Knight-Sims Plaintiffs ask that students presently receiving Diversity Scholarships should continue to receive those scholarships for so long as they attend an HBU, up to a maximum of 7 years. It is important to note that whether those students are to continue to receive such scholarships is entirely within the discretion of ASU and AAMU. In fact, ASU and AAMU have tens of millions of dollars in their Trusts for Educational Excellence which could be used to fund such scholarships, if they felt it sufficiently important. The State Defendants, however, suspect that what the plaintiffs really seek is continued state funding for those scholarships. To this suggestion, the State Defendants object. At the time the Court established the Diversity Scholarship Programs, it was known to all that, if the programs were successful, there would be students on scholarship at the time state funding ceased. The concept was to establish the programs and to provide support for their early years. Whether the programs should extend beyond the years of state support, in present form or modified, would be left to institutional choice based upon their views of the importance of the programs in light of other institutional priorities. If a party felt that the terms for reimbursement were not sufficient to eradicate the vestiges of segregation sought to be addressed, that party should have appealed the decision or sought further relief from the Court 10 years ago.

B. Provisions That Should Continue Or Should Be Modified Pursuant To Pending Objections And Motions

1. In Paragraph 9 of their Motion, the Knight-Sims Plaintiffs point to a Joint Motion of the plaintiffs and the State Defendants upon which there has been no ruling. The State Defendants withdraw their support for the Motion and ask that the \$250,000 that has been deposited be returned to the state. The State Defendants do not believe that the recommendation of these consultants is needed to assist with, or to confirm, the eradication of the vestiges of segregation identified by the Court.

2. The February 13, 2002 document in which Plaintiffs identified provisions of the Remedial Decree that they claimed had not been complied with fully (Doc. 3008), referenced in Paragraph 10 of the Plaintiffs' Motion, raises issues relating to State Defendants in pp. 68-74. All those issues have been ruled upon by the Court and do not require extension of the Decree. To the extent, if any, that paragraph 40, p. 49, of said document complains that the State Defendants have failed to fulfill their obligations under the Remedial Decree, the State Defendants deny such implication. The State Defendants have done all the Court said was needed to eradicate the vestiges of segregation that existed in the missions of the HBUs. Having done so, the missions of those institutions today reflect the choices and decisions of the institutions themselves and are not vestiges of past discrimination. The State Defendants defer to the defendant institutions to respond with respect to other portions of Doc. 3008, as those portions are directed toward specific institutions.

3. In Paragraph 11 of their Motion, the Knight-Sims Plaintiffs observe that it could be necessary to amend the Remedial Decree should plaintiffs prevail in an appeal pending in the United States Court of Appeals for the Eleventh Circuit. This matter is entirely within the jurisdiction of the Court of Appeals, and there is no relief that this Court can order on that issue

at this time. The Remedial Decree need not be extended in anticipation of some future order by the 11th Circuit.

4. Paragraphs 12 and 13 of the Motion filed by the Knight-Sims plaintiffs involve defendant institutions, so the State Defendants defer to those institutions for response.

C. Provisions Which Should Be Amended To Remedy Additional Vestiges of Segregation Found By The Court

The issues raised in Paragraph 14 of the Knight-Sims Plaintiffs' Motion were addressed by this Court in the May 2004 hearing and this Court's subsequent ruling. The Court's order at the conclusion of that hearing is now on appeal to the Eleventh Circuit, and the Court does not have jurisdiction over that issue at this time. The Remedial Decree need not be extended in anticipation of some future order of the 11th Circuit.

III. "OBJECTIONS" OF A&M AND ASU THAT SEEK MODIFICATION OF THE REMEDIAL DECREE

A. The objections of Alabama State University and Alabama A&M University do not merely seek an extension of the Remedial Decree. Instead, they seek, among other forms of relief, additional funding either in the form of additional payments or in the form of extension of payments previously scheduled to expire. AAMU contends that the Remedial Decree has involved an "understandable underestimate of the costs of eliminating the vestiges of discrimination," and has asked for an additional \$16.6 million. (Doc. 3372, p. 4.) In addition, AAMU asks that portions of the Remedial Decree be extended for at least another five years. (Doc. 3372, pp. 4, 5, and 6.) Similarly, ASU seeks an indefinite continuation of the Remedial Decree, including indefinite extension of enhanced funding for various programs. ASU seeks, for example, continuation of enhanced funding for the Allied Health and Master of Accountancy program "beyond 07-08, and the Ed.D Program beyond 09-10 as well as continued enhanced

funding for the library (Doc. 3377, p. 9) and continuation of the diversity scholarship program for an additional ten years (Doc. 3377, p.14).

B. To the extent that the objections of AAMU and ASU involve either a request for additional funds or a request for an extension of payment of funds previously designated to expire on certain dates, those objections amount to a challenge to the propriety of the Remedial Decree itself rather than an objection to the termination of that decree. If the Remedial Decree failed to require sufficient funds, either through an error in the amount of funds to be awarded or through an error in the number of years for which certain funds should be awarded, the appropriate remedy would have been either through appeal or through modification of the Remedial Decree. Objection to expiration of the Decree, as written, should not be the vehicle of requests for new relief.

C. To the extent that ASU and AAM seek to modify the terms of the Remedial Decree, they lack standing to do so. This issue was addressed by the Court of Appeals in United States v. State of Alabama, 791 F.2d 1450, 1454-57 (11th Cir. 1986). There, the court dealt with the question whether ASU had standing to sue the State of Alabama under either Section 1983 or Title VI. The court held that ASU had no standing to sue or seek to enjoin the Alabama State Board of Education under Section 1983 and the Fourteenth Amendment or under Title VI. In so ruling, the court stated that “a line of Supreme Court cases stands generally for the proposition that creatures of the state have no standing to invoke certain constitutional provisions in opposition to the will of their creator.” *Id.* at 1454. The court reaffirmed this ruling in 1994, and denied attempts by ASU and AAU to file cross claims on behalf of their students and faculty. Knigh t v. State of Alabama, 14 F.3d 1534, 1554 (11th Cir. 1994). The standing issue, as resolved

by the Court of Appeals, is “the law of the case, as well as the law of this circuit . . .” *Id.* at 1554.

D. Even if ASU and AAMU had standing to challenge the provisions of the Remedial Decree, their motions fail to make the kind of showing required to modify the terms of the Decree. As stated in Board of Ed. of Oklahoma City v. Dowell, 498 U.S. 237, 249-50, 111 S. Ct. 630, 638 (1991), the test for modification of a remedial decree involves an analysis of whether the defendants have “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.” Dowell also held that a desegregation decree could not be modified absent a “grievous wrong evoked by new and unforeseen conditions.” *Id.* at 240, 111 S. Ct. 630 (quoting Dowell, 890 F. 2d at 1490).

E. This Court decided that the State of Alabama is in compliance with the Remedial Decree when it ordered that the State had “unbegrudgingly complied with the Court’s remedial decree, meeting all its obligations as ordered by the Court.” (Doc. 3294, p. 86, ¶ 16). Willing compliance with remedial orders supports a finding of good faith, one of the Dowell requirements. See Berry v. School Dist. of the City of Benton Harbor, 195 F. Supp. 2d 971, 990-93 (W.D. Mich. 2002). Furthermore, the passage of time makes it less likely that any racial imbalances that exist are tied to past segregative practices, thereby supporting the conclusion that vestiges of discrimination have been eliminated to the extent practicable. Berry, 195 F. Supp. 2d at 994. Similarly, the demonstration of good faith makes it all the more likely that current conditions do not have a causal relationship with past segregation. *Id.* at 993 quoting Freeman v. Pitts, 504 U.S. 467 (1992).

F. No showing has been made on behalf of ASU or AAMU that changes are necessary to eliminate illegal vestiges of past discrimination to the extent practicable. Certainly there is no showing of any “grievous wrong evoked by new and unforeseen conditions.” To the contrary, the motions of AAMU and ASU appear to be based primarily on the notion that the Court somehow misjudged the amount of funding necessary to eliminate vestiges of segregation; however, nothing is contained in these objections showing that the Remedial Decree was erroneous in this respect.

G. As the State Defendants have previously observed, the initial Remedial Decree awarded capital funds to AAMU and ASU based upon the prioritized “critical need,” as determined by ACHE based upon self-reported data from the institutions. See Knight v. State of Ala., 787 F. Supp. 1050, 1273-74 (N.D. Ala. 1991). At the time of the initial Remedial Decree, the court determined the amounts that were necessary to eliminate vestiges of discrimination in the capital funding process:

The Court . . . has found that the vestiges remaining as a result of the state’s prior discriminatory capital funding process can be eliminated in their entirety by the appropriation of the monies the court has indicated. It is not a step along the path but the entire journey.

Id., at 1372.

The court did not indicate that the amount of capital funding ordered was sufficient to satisfy all capital needs of ASU and AAMU, but it did indicate that the amounts awarded were the amounts necessary to eliminate the effects of the state’s prior discriminatory capital funding. As the State Defendants pointed out in their response to previous requests for additional capital funds, the amount ordered by the court in its Remedial Decree has become the “law of the case,” as the

Court of Appeals has observed, which cannot be circumvented under the guise of an objection to termination of the Remedial Decree as originally written.

H. ASU also objects to the language of the September 6, 1996, order in which the Court approved graduate diversity scholarships upon condition that “the funds available for graduate diversity scholarships should not exceed 35 percent of the scholarship funds annually available.” ASU filed, on August 9, 2004, a Motion For Clarification Of Order And Other Affirmative Relief challenging the State’s interpretation of the order as limiting reimbursement for graduate diversity scholarships to 35 percent of the diversity scholarships actually awarded for the scholarship year. As the State Defendants pointed out at the time the ASU motion was filed (Doc. 3286, attached), the 65%-35% split is in keeping with the agreement of the parties, including ASU, that minority scholarships awarded to qualified graduate students should not exceed 35 percent of all minority scholarships awarded in a given academic term. The compromise agreement of the parties that extended the Diversity Scholarship Program to include, on a limited basis, graduate students, should not be set aside for the reasons expressed by ASU. Further, this objection provides no basis for extending the Remedial Decree.

9. ASU seeks, at p. 14, ¶37, of its motion, diversity scholarships for “minority students enrolling in the Ph D. program in microbiology.” The State is already funding that program, and will do so for eight years. There is no need for the State to provide additional funding to the program by way of paying the tuition of those who attend it.

10. ASU’s Objections apparently seek perpetual funding for its new, Court-ordered programs. (Doc. 3377, pp. 5-9) Establishment of the programs, together with the unprecedented support provided by the State, was necessary to eradicate identified vestiges of segregation. Whether those programs continue to prosper when funded under normal processes is due to

current conditions and institutional and student decisions, all unrelated to the vestiges that have been eradicated. Whether the programs need additional funding, beyond that already ordered, is not a vestige of segregation to be eradicated by the Remedial Decree or its extension.

11. AAMU complains of discrepancies in faculty salaries (Doc. 3372, p. 7) but the discrepancies that may exist clearly are not vestiges of discrimination. First, it should be noted that the salary discrepancies of which AAMU now complains are *internal*, and are not alleged to exist as between faculty members at AAMU and those at HWUs. Internal faculty salaries are entirely within the control of AAMU. It is not appropriate to address such internal decisions through this Remedial Decree. Moreover, following a lengthy trial, this Court made findings as to which discrepancies in faculty salaries resulted from past segregation, and those have now been remedied. If there were or are other differences in salaries, they result from factors other than past discrimination, such as institutional decisions and market factors. If they existed at the time the Remedial Decree was entered and AAMU thought they were the result of segregative policies, evidence should have been presented at trial or AAMU should have appealed the Court's decision. If the salary discrepancies arose thereafter, they are not vestiges of *de jure* segregation.

In summary, the State Defendants contend that the contentions of ASU and AAMU do not support contentions that the Remedial Decree should be extended.

IV. OBJECTIONS OF THE UNITED STATES

The United States objects to termination of the Remedial Decree until all the programs and related funding are completed (Doc. 3374, p. 5) and also suggests that the Court Monitor should issue a report concerning progress and compliance with the Remedial Decree. The State's intent to satisfy its existing obligations has been previously confirmed, in II.A.1. of this Response. The

State Defendants object to suggestions of the need for additional monitoring or reports. Such would be time consuming and likely to result mainly in additional objections or requests. This case has been monitored through the period of remediation, and the suggestion that the time has now come for a new report seems strangely out of touch with the day-to-day realities of the case. Voluminous reports have been filed annually in the case, and those reports are available to the United States at the United States Courthouse in Birmingham. If those reports suggested non-compliance, in any respect, or failed to contain information sufficient to make that determination, timely objections should have been raised. Moreover, in view of the fact that the Court has already determined that the State of Alabama has “unbegrudgingly complied” with Remedial Decree, there should be no need for monitoring and additional reporting.

V. RESPONSE OF THE STATE DEFENDANTS TO PROPOSED DISCOVERY REQUESTS

The State Defendants contend that no discovery should be permitted at this stage. There are a decade of annual reports on file with the Court. Those reports were intended to allow all to assess compliance with and the effectiveness of the Remedial Decree. If a party thought those reports were insufficient for those purposes, it should have said so 10 years ago. A request for information beyond that already reported represents an effort to expand the decree, not to assess its effectiveness. If, however, the Court permits discovery, the State Defendants reserve their right to object to specific requests, as permitted by the Federal Rules of Civil Procedure.

Respectfully submitted,

/s/ Robert D. Hunter
Robert D. Hunter, Counsel for the
State Defendants

210 Inverness Center Drive
Birmingham, AL 35242
205-408-8078
205-991-9993 (fax)

CERTIFICATE OF SERVICE

I hereby certify that on 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:

Alice H. Martin, US Attorney

alice.martin@usdoj.gov

Edward S. Allen

ellen@balch.com

David R. Boyd

dboyd@balch.com

Larry E. Craven

lcraven@alsde.edu

William F. Gardner

wfg@cabaniss.com

Edgar R. Haden

ehaden@balch.com

Carl E. Johnson, Jr.

carljohnson@bishopcolvin.com

Michael G. Kendrick

Kendrick@evgwlaw.com

Robin G. Laurie

rlaurie@balch.com

R.M. Woodrow

RMWOODROWFDC@aol.com

Armand Derfner

aderfner@dawlegal.com

Solomon S. Seay, Jr.

lschanc@aol.com

James L. Mitchell

jmitchell@maynardcooper.com

Jean Walker Tucker

jwtucker@usouthal.edu

Edward M. George

egeorge@knology.net

Norma M. Lemley

nlemley@uasystem.ua.edu

Fournier J. Gale, III

bgale@maynardcooper.com

Thomas M. Lovett

tmlovet@una.edu

Candis A. McGowan

cmcgowan@saconattorneys.com

Demetrius C. Newton

Wilberforc@aol.com

Robert W. Reider

riederr@email.uah.edu

Braxton Schell, Jr.

wbschell@bellsouth.net

Reginald L. Sorrells

rsorrells@alsde.edu

William K. Thomas

skt@cabaniss.com

Sara L. Thompson

thompson sue@bellsouth.net

Susan J. Watterson

tax_lawyer@bellsouth.net

Joe R. Whatley, Jr.

jwhatley@whatleydrake.com

Fred D. Gray

fgray@glsmgn.com

Fourier J. Gale, III

bgale@maynardcooper.com

Edward A. Hosp

thosp@maynardcooper.com

C. A. Gonzalez

cag@gonazlez-law.com

Jeffery A. Foshee

jfoshee@knology.net

Robert W. Rieder, Jr.

Riederr@email.uah.edu

Gary C. Smith

Gary@UAB.EDU

Edward A. Hosp

thosp@maynardcooper.com

I hereby certify that copies of the foregoing document have been served upon the following counsel of record by placing the same in the United States Mail, properly addressed and First Class postage prepaid, on this the 6th day of January, 2006.

Jeremiah Glassman
US Department of Justice-Civil Rights Division
Patrick Henry Building, Suite 4300
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

/s/ Robert D. Hunter
OF COUNSEL