

Freeman v. Pitts, 503 U.S. 467, 490, 112 S.Ct. 1430, 1445, 118 L.Ed.2d 108 (1992). Therefore, in addressing whether a remedial decree should be terminated, “the court’s end purpose must be to remedy the violation and, in addition, to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution.” *Id.* at 489. A court should restore authority to the local entity, at least in part, (1) when the entity has demonstrated “its good-faith commitment to the whole of the court’s decree and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance”; (2) when the entity has demonstrated “full and satisfactory compliance” with the portions of the decree that it is moving to terminate; and (3) when retention of judicial control is not necessary or practicable to ensure compliance with the remaining portions of the decree. *Id.* at 491. Obviously, if the governmental entity has demonstrated good-faith compliance with the decree as a whole, then termination of the entire decree is in order. *Board of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 249-50 (1991).²

The Court need not wait until defendants have achieved perfect compliance to terminate all or part of its remedial decree. The applicable legal standard is better understood as substantial compliance — that is, compliance that demonstrates the local government’s *good faith* and achieves fully the *goals* of the decree. *See Freeman, supra* at 491 (“A school system is better positioned to demonstrate its good-faith commitment to a constitutional course of action when its policies form a consistent pattern of lawful conduct directed to eliminating earlier

² Auburn notes that the legal standards for termination or modification of court-imposed remedial decrees are one and the same with the legal standards applied to the termination or modification of consent decrees. *See, e.g., City of Miami, supra*, at 1505 (“We find instructive the Supreme Court’s recent decisions as to the propriety of the termination of decrees in the school desegregation cases. . . . We find that the principles articulated in *Rufo* and *Dowell* are applicable to requests to modify or terminate [consent] decrees in employment discrimination class actions, like the one before us.”).

violations.”); *Dowell, supra* at 249-50 (“The District Court should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered.”). The Supreme Court has instructed the federal courts to “exercise [their] equitable powers to ensure that *when the objects of the decree have been attained, responsibility for discharging the State’s obligations is returned promptly to the State and its officials.*” *Frew v. Hawkins*, 540 U.S. 431, 442, 124 S. Ct. 899, 906 (2004) (emphasis added); *also see Johnson v. Florida*, 348 F.3d 1334, 1340 (11th Cir. 2003) (decree should be terminated when “the basic purposes of the decree have been fully achieved” and “there is no significant likelihood of recurring violations of federal law once the decree has been lifted”); *United States v. City of Miami*, 2 F.3d 1497, 1508 (11th Cir. 1993) (“Thus, on remand, the district court must determine whether the decree’s *basic purpose* of eliminating the effects of past discrimination has been achieved”) (emphasis added); *Consumer Advisory Bd. v. Glover*, 989 F.2d 65, 67 (1st Cir. 1993) (termination of an institutional reform consent decree is appropriate if “it has achieved its purpose”); *Patterson v. Newspaper & Mail Deliverers’ Union of New York & Vicinity*, 13 F.3d 33, 34 (2d Cir. 1993) (holding that the district court “was entitled to vacate the entire decree since its essential purpose had been achieved”).

The basic goal of any remedial decree is to remedy the underlying violation. *Freeman v. Pitts, supra*, at 489; *also see City of Miami, supra*, at 1508 (“the basic objective of the decree was to eliminate discrimination and the effects of past discrimination”). Remedying the violation requires not perfect, but “substantial” compliance. In *Wyatt v. Rogers*, 1998 WL 862920 (M.D. Ala. 1998), the court released four state mental health facilities from a 1986 consent decree after it found the facilities to be “in *substantial* compliance” with that decree. *Id.* at *3 (emphasis added). The court noted that it had terminated oversight of mental-illness

standards (known as *Wyatt* standards) mandated in the 1986 consent decree “when the mental health system as a whole demonstrated *sufficient compliance* with that standard,” and when institutions “satisf[ied] all (*or most*) of the *Wyatt* standards.” *Id.* at *1 (emphasis added). The district court used the terms “substantial compliance” and “sufficient compliance” even as it stated that the propriety of release depended upon “whether there ha[d] been *full and satisfactory compliance* with the decree” and “whether the state defendants ha[d] demonstrated their good-faith commitment to the whole of the court’s decree.” *Id.* at *2-3; *also see, e.g., People Who Care v. Rockford Bd. of Educ., School Dist. No. 205*, 171 F.3d 1083, 1091 (7th Cir. 1999) (Posner, J.) (“[C]ompliance does not mean eliminating every disparity . . . that might conceivably be attributed to past discrimination. Full compliance so defined would never be achieved.”); *Williams v. Montgomery County Sheriff’s Dep’t*, 99 F. Supp. 2d 1330, 1335-36 (M.D. Ala. 2000) (using the phrases “substantial” and “full and satisfactory” to define the Sheriff’s Department’s compliance with various consent decrees governing employment of females, and noting that this compliance satisfied the “objectives” of those decrees); *Jordan v. Wilson*, 951 F. Supp. 1571, 1582 (M.D. Ala. 1996) (equating the phrases “full compliance” and “full and satisfactory compliance” when reviewing appropriateness of continued judicial oversight of a police department’s promotion procedures).

Measuring compliance in terms of goals avoids the specter of decrees that “not only never die, they never fade away.” *United States v. City of Montgomery*, 775 F. Supp. 1450, 1460 (M.D. Ala. 1991) (quoting *United States v. Frazer*, 1976 WL 729, 14 Empl. Prac. Dec. (CCH) ¶ 7599 at 4929 (M.D. Ala. 1976)). Without such sensitivity, federal judicial oversight of state entities could be virtually interminable. *See Frew, supra*, 124 S. Ct. at 905 (“If not limited to reasonable and necessary implementations of federal law, remedies outlined in consent decrees

involving state officeholders . . . may lead to federal court oversight of state programs for long periods of time even absent an ongoing violation of federal law”); *Milliken v. Bradley*, 433 U.S. 267, 282 (1977) (“[F]ederal-court decrees must directly address and relate to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation. . . .”).

II

Auburn University’s Position

Auburn will respond to only some of the points raised by the objecting parties. Other points are more appropriately addressed by the State Defendants or other institutional defendants. In particular, Auburn defers to the State Defendants with respect to funding-related issues.

A. Objections by Alabama State University

Course and Program Duplication

Auburn urges the Court to allow expiration of the provisions of the remedial decree requiring certain mandatory and voluntary cross-enrollment programs between Auburn University at Montgomery (“AUM”) and ASU. Those and any other cooperative efforts should continue or be established, if at all, only on a voluntary basis. Cross-enrollment is not needed to create or maintain diversity at AUM, whose own enrollment exceeds 30 percent African-American, and has been only a relatively small contributor, compared to other initiatives such as new programs and diversity scholarships, in diversifying ASU’s student body.³ AUM is willing

³ The cross-enrollment agreement calls for a “truing up” between ASU and AUM of any financial imbalance that might arise from uneven use of the cross-enrollment opportunities. While the total number of cross-enrollees is relatively small, significantly more ASU students

to discuss continuation of the cross-enrollment program on a voluntary basis. Subject to equitable financial terms being agreed to, AUM sees no reason that the cross-enrollment program could not be continued. AUM contends, however, that further involvement by this Court is inconsistent with the Court's obligation to return control of higher education to the appropriate local authorities at the earliest practicable date. *See Freeman*, 503 U.S. at 490.

ASU's request that this Court terminate AUM's participation in Auburn University's doctoral (Ed.D.) program in Educational Leadership is baseless and should be rejected. ASU's objections not only mis-characterize the nature of Auburn's program, but also suggest erroneously that it "duplicates" ASU's new doctoral program in Educational Leadership, Policy and Law.

The Auburn University program in question has been around for many years, since well before this Court's remedial decree. The Graduate School at Auburn (main campus) admits all students to the program and Auburn (not AUM) issues all degrees earned in the program. Beginning in 2001, AUM became a participant in Auburn's program in order for the program to take advantage of both institutions' instructional resources.⁴ Involving AUM in this manner did not even require ACHE approval because the program remained at Auburn University. Certain courses are available at AUM, and are taught by AUM faculty, but no student in the program is required to take them at AUM. The Auburn-AUM arrangement is akin to the universally accepted practice of accepting transfer credits from another institution.

have taken courses at AUM than AUM students at ASU, and ASU is accordingly obligated to AUM for a substantial sum. Recovery by AUM of this sum will need to be addressed, and AUM is hopeful that this matter can be resolved between the two institutions.

⁴ Under the arrangement between Auburn and AUM, faculty from both institutions may sit on doctoral committees and direct dissertations within the Auburn (main campus) program.

The pre-existing Auburn Ed.D. program does not in any event “duplicate” the new ASU program. The Auburn program offers degrees in Administration and Supervision, Curriculum and Instruction, and Higher Education. The first two areas prepare candidates to be certified school leaders in a K-12 setting. The ASU program, leading to a degree in Educational Leadership, Policy and Law, has as its primary focus preparing candidates to work in governmental entities. The programs differ substantially not only in their overall design and purpose but in their respective courses of study, and the Auburn program cannot be shown to be impeding the enrollment of white students at ASU.

Finally, Auburn opposes ASU’s request for continuation of the provisions of the remedial decree that impose a general proscription on new program offerings at AUM that would “duplicate” existing ASU programs. AUM has no intention of proposing any new program that would duplicate an existing ASU program, but a prohibition to this effect need no longer be supervised or enforced by a federal court. The ACHE program approval process is perfectly adequate in this regard. *See Johnson*, 348 F.3d at 1340 (decree should be terminated if there is no significant likelihood of recurring violation).

B. Objections by Alabama A&M University

Agricultural Research

Alabama A&M’s request for further relief regarding agricultural research should be denied as unnecessary, and therefore beyond the Court’s remedial jurisdiction.

The 1995 decree permitted Alabama A&M University to compete each year for up to 10% of amounts available for research projects of the Alabama Agricultural Experiment Station (“AAES”). Annually, throughout the time in which the decree has been in effect, Alabama A&M University has received a portion of these funds, initially in a competitive process and

subsequently by an agreed formula negotiated through the Court Monitor. The following table reflects the portion of AAES funding to Alabama A&M University since the 1995 decree:

AAES Payments to Alabama A&M		
Fiscal Year 1996-97		
Total		\$ 498,782.00
Fiscal Year 1997-98		
Total		\$ 510,060.97
Fiscal Year 1998-99		
Total		\$ 1,572,633.51
Fiscal Year 1999-2000		
Total		\$ 896,929.04
Fiscal Year 2000-01		
Total		\$ 904,409.00
Fiscal Year 2001-02		
Total		\$ 915,467.20
Fiscal Year 2002-03		
Total		\$ 955,464.57
Fiscal Year 2003-04		
Total		\$ 963,228.03
Fiscal Year 2004-05		
Total		\$ 1,021,721.93

At the time of the 1995 decree, Alabama A&M University did not receive state funds to match or supplement federal agricultural research funding to 1890 land grant universities. Beginning with the 1998 Farm Bill, state matching funds for agricultural research were required for 1890 land grant institutions to receive federal agricultural research money; and Alabama

A&M University has received state matching funds for agricultural research each year since. Since 2002, matching funds have been appropriated through the Alabama Agricultural Land Grant Alliance (“AALGA”), which consists of Alabama A&M University, Auburn University, and Tuskegee University. The funding source is the Alabama Education Trust Fund. In addition to matching agricultural research funds to Alabama A&M and Tuskegee, each of the three institutions receives a separate amount, also for agricultural research. The following table reflects AALGA funding by the State of Alabama to these three institutions for the last several years:

AALGA Funding

	Alabama A&M State Match for Federal Funds		Tuskegee State Match for Federal Funds		AALGA Funds for State Research Divided Equally among AL A&M, AU, and TU
FY 2002	125,000.00		125,000.00		250000.00
FY 2003	562,351.00		562,351.00		500,000.00
FY 2004	562,351.00		562,351.00		500,000.00
FY 2005	762,351.00		762,351.00		500,000.00
FY 2006	2,201,555.00		2,201,555.00		1,596,891.00
5 year total	4,213,608.00		4,213,608.00		3,296,891.00

Thus, since the time of the 1995 decree, Alabama A&M University has gained through the political process state funding for agricultural research in amounts that did not exist at the time of the 1995 decree. This funding has increased to the point that it rivals or exceeds amounts

the 1995 decree allowed not as a guarantee, but as a potential, from AAES. Not only have Auburn University and AAES fully complied with the decree as to agricultural research funding for Alabama A&M, but in the meantime A&M's funding for this purpose outside of AAES has become as secure as public funding can be expected to be. Under the controlling legal standards discussed above and on these undisputed facts, it is appropriate for this element of the decree to end by its terms.

C. Objections by the United States

Auburn has no specific responses to the objections filed by the United States, and respectfully refers the Court to any response thereto filed by the State Defendants. Auburn does note, however, with respect to the United States' observations regarding employment practices at the historically white institutions, that it considers itself to be in substantial compliance with the Court's decree in this regard and contends that any vestiges of segregation respecting employment at Auburn have been eliminated. For further response, please see Auburn's response to the Knight-Sims Plaintiffs' objections, below.

D. Objections by the Knight-Sims Plaintiffs

Many of the points raised by the Knight-Sims Plaintiffs in their November 30, 2005 objections (filed in the form of a motion to extend the terms of certain provisions in the remedial decree) are more appropriately addressed by the State Defendants, to whom Auburn defers.

African-American Faculty and Administrative Employment

The private plaintiffs apparently continue to maintain that the predominantly white institutions should remain subject to the provisions of the remedial decree relating to African-American faculty and administrators. *See, e.g.*, paragraphs 12 and 13 of the Knight-

Sims motion. Auburn's position is that it is already in substantial compliance with the provisions of the remedial decree relating to recruiting, hiring and retaining African-American faculty and administrators, and that those decree provisions should be allowed to terminate.⁵ Auburn's position is that further involvement by this Court (in the form of numerical goals and timetables or otherwise) is not necessary and would not lead to any result that would not otherwise be achieved. In this regard, Auburn is well into the process of adopting a strategic diversity plan that will confirm and memorialize its ongoing commitment to diversity in the broadest sense. A university-wide planning process has resulted in a draft strategic diversity plan that makes specific recommendations, reflecting input from a broad cross-section of the university community, including African-American representatives. The lead person for implementation of the plan's recommendations will be the newly appointed Associate Provost for Diversity and Multi-cultural Affairs, Dr. Overtoun Jenda. Dr. Jenda, who is black, was identified through an internal search. His background includes academic service as Professor of Mathematics, as well as administrative service as Associate Dean for Minority Programs and Special Student projects in the College of Sciences and Mathematics. Dr. Jenda's predecessor in the diversity leadership position served at the assistant provost level, but the position has been elevated to the level of associate provost to reflect the high priority that the university assigns to this office and its work.

⁵ The Knight-Sims Plaintiffs' filed a contempt motion on March 8, 2005 relating ostensibly to Auburn's alleged failure to implement policies and procedures to increase hiring and retention of African-American faculty and administrators. That motion, which remains pending, is not only baseless in fact but is an inappropriate attempt to have this Court adjudicate the merits of individual personnel actions as part of this case. To the extent the contempt motion is intended to raise broader issues of diversity, including minority recruitment and hiring, it is subsumed by the current proceedings and should not be addressed separately.

III

Discovery Required

Auburn's position is that the 90-day period for discovery suggested by other parties should be adequate. At this point, Auburn anticipates seeking discovery from Alabama State University relating to ASU's objections that focus on proximate institution issues and possibly from Alabama A&M University relating to agricultural research funding.

Respectfully submitted this the 6th day of January, 2006.

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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 other counsel.

s/David R. Boyd
Of Counsel