

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

<b>THE COALITION FOR EQUITY AND</b>	)	
<b>EXCELLENCE IN MARYLAND HIGHER</b>	)	
<b>EDUCATION, INC., et al.,</b>	)	Trial Date: June 27, 2011
	)	
<b>Plaintiffs,</b>	)	
	)	
<b>v.</b>	)	Civil No. 06-2773-CCB
	)	
<b>MARYLAND HIGHER EDUCATION</b>	)	
<b>COMMISSION, et al.,</b>	)	
	)	
<b>Defendants.</b>	)	

**PLAINTIFFS' STATEMENT OF THE CASE AND  
STATEMENT OF THE ISSUES TO BE CONSIDERED AT TRIAL**

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## I. Introduction

This case is about whether Maryland has satisfied its obligation to remove the vestiges of its former *de jure* system of racial segregation between black and white students in Maryland higher education. Maryland's obligation in this arena is governed by the seminal higher education desegregation case, *United States v. Fordice*, 505 U.S. 717 (1992), which held that states have an affirmative duty to dismantle the dual school system that its laws once mandated and that a state does not discharge its constitutional obligations until it eradicates policies and practices traceable to its prior *de jure* dual system that continue to foster segregation. As a starting point, both parties agree, and Defendants have already admitted, that Maryland previously operated a *de jure* system of racial segregation between black and white students, in which programs that were broadly similar were duplicated at Maryland's Historically Black Institutions ("HBIs")<sup>1</sup> and Traditionally White Institutions ("TWIs")<sup>2,3</sup>. Both parties also agree, and Defendants also admit, that as part of the *de jure* system there were disparities in funding provided by Maryland to its HBIs and TWIs.<sup>4</sup> As reflected in Maryland's own historic state reports, this *de jure* system provided "an enormous differential in favor of the white race"<sup>5</sup> which continued even after *Brown v. Board of Education*.<sup>6</sup> As part of the *de facto* dual system of racial segregation that emerged after *Brown*, Maryland continued to discriminate against its public HBIs with respect to program offerings, mission expansion, and funding. Maryland's failure to dismantle its

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<sup>1</sup> Maryland's four-year colleges and universities that serve largely black student bodies; all of these universities were found to serve black students in the era of *de jure* segregation. These include: Bowie State University, Coppin State University, Morgan State University, and University of Maryland - Eastern Shore.

<sup>2</sup> Maryland's four-year colleges and universities that serve mostly white student bodies; most of these universities were founded in the era of *de jure* segregation with attendance limited at that time to white students. These include: University of Maryland - College Park, University of Maryland - Baltimore County, University of Maryland - University College, Towson University, Salisbury University, University of Baltimore, and University of Maryland - Baltimore.

<sup>3</sup> Defendants' Answers to Plaintiffs First Requests for Admissions (Feb. 12, 2010).

<sup>4</sup> *Id.*

<sup>5</sup> *Report of the Commission on Higher Education of Negroes to the Governor and Legislature of Maryland* (Jan. 15, 1937) ("1937 Report"), CET\_00004158 - CET\_00004309 at CET-00004305.

<sup>6</sup> 347 U.S. 483 (1954).

former *de jure* system has resulted in vestiges of that system remaining decades after *Brown* -- a fact that even Defendant Maryland Secretary of Higher Education has acknowledged:

Q. Has Maryland's former *de jure* system of segregation been dismantled entirely?

MS. SHULTZ: Objection.

A. Has it been dismantled entirely ... I would say yes, with maybe a couple of exceptions.

BY MS. HARRIS:

Q. And what are those exceptions?

A. I think that funding the campus physical plants is probably one of the areas that we still have to work very hard on. And again, I think that when you look at -- and I have seen some of the projected capital construction projects and renovation projects, if we can get the resources to deal with those. And I would say that, in a formal sense that would be -- that would conclude it. Now, are there still some challenges in other ways? Yes.

Q. What are the challenges?

A. Well, I think that the [HBI Study] [P]anel identified, again, some things that we need to do to address the Doctoral programs, for example, at UMES and Morgan. And I think we need to talk about the issue of the added funding to try and compensate for the dual mission. And if we can provide the support in two or three of those areas, then I would unequivocally say that it has been done.

Q. Is it correct that you believe Maryland has eliminated vestiges in many areas, but not all areas?

MS. SHULTZ: Objection.

A. Yes.

BY MS. HARRIS:

Q. And those areas where it has not eliminated vestiges are funding and facilities.

A. Well, I think the facilities piece is probably the biggest challenge remaining.

Q. Is that yes?

A. Yes. The facilities.<sup>7</sup>

But, as evidenced by the deposition testimony and documents in this case, and as described in further detail herein, facilities are not the only area in which Maryland has fallen short. In 2004, counsel from the Office of the Maryland Attorney General warned Defendant Maryland Higher Education Commission (“MHEC”), the Maryland agency responsible for approving university programs and missions, that it was violating the civil rights laws and perpetuating segregation.<sup>8</sup> In addition, as recently as last year, Maryland was still working to address vestiges of the *de jure* system, as also admitted by MHEC’s Assistant Secretary of Planning and Academic Affairs, Mr. George Reid.

Q. Did the 2009 state plan focus on efforts to address Maryland’s obligation to remedy past discrimination?

A. Yes.

Q. Did the 2009 state plan focus on efforts to remove any vestiges of the *de jure* system that provided dual and unequal educational experiences to the state’s residents?

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<sup>7</sup> Mar. 5, 2010 James E. Lyons, Sr. Deposition Transcript at 265:20 - 267:17.

<sup>8</sup> Memorandum from Pace McConkie to John J. Oliver (Apr. 20, 2005) at 2 - 3 (“McConkie Memo”) (“Under these circumstances, approval of the proposed program would be a continuation of a policy and practice, at least in this instance, that is a vestige of the prior segregated system. Rather than eliminating a vestige of the dual system, the State would be maintaining a vestige.”), MSU-00003650-00003652 at MSU-00003651-MSU-00003652. This document is attached hereto as Exhibit A. To avoid burdening the Court, Plaintiffs have attached a few of the exhibits cited herein, but if so desired by the Court, Plaintiffs would be happy to provide all of the referenced documents and deposition testimony.

A. Yes.<sup>9</sup>

Due to Maryland's prior unsuccessful attempts to eliminate all vestiges of its prior *de jure* system, Plaintiffs are not confident that Defendants will succeed in expeditiously doing so. Accordingly, Plaintiffs have filed this lawsuit<sup>10</sup> with the aim of fulfilling the promise of Maryland's 1980-85 Desegregation Plan. There, Maryland said, "Students of any race who freely choose to attend a[n] [HBI] should have the opportunity for an education equal in quality to students who choose to attend a [TWI] with a similar mission. Enhancement of the [HBI]s to overcome past neglect is therefore critical."<sup>11</sup>

## II. Issues for Trial

There are three principal issues for the initial phase of the trial:

1. **Has Maryland satisfied its affirmative obligation to remove the vestiges of its *de jure* system of segregation as manifested in the form of unnecessary program duplication and program inequality?** Plaintiffs contend that the answer is no, and that as Maryland Attorney General's Office has pointed out with respect to the controversial decision to allow duplication of Morgan State's MBA program, Maryland employs the wrong standard in evaluating program duplication.

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<sup>9</sup> Mar. 4, 2010 George Reid Deposition Transcript at 85:20 - 86:5.

<sup>10</sup> As part of Plaintiffs' demonstration of Maryland's failure to eliminate vestiges of the prior *de jure* system of racial segregation, Plaintiffs intend to present evidence on Maryland's failure to comply with Commitments 3 (strengthening the recruitment and admissions of African-American students), 4 (strengthening the retention and graduation of African-American students), 5 (improving HBI campus climate and environment), 8 (avoiding unnecessary program duplication) and 9 (ensuring the HBIs and TWIs are comparable and competitive in all facets) from the 2000 Partnership Agreement that Maryland entered into with the U.S. Department of Education Office of Civil Rights. Plaintiffs do not intend to present evidence on the other commitments in this agreement.

<sup>11</sup> Maryland State Board for Higher Education, *A Plan to Assure Equal Postsecondary Educational Opportunity 1980 - 1985* (1980) ("1980 Plan"), MDED\_00024488 - MDED\_00024601 at MDED\_00024532.

2. **Has Maryland satisfied its affirmative obligation to remove the vestiges of its *de jure* system of segregation as manifested in the disparity in facilities between the HBIs and the TWIs?** Plaintiffs contend that the answer is no, as similarly concluded by the Panel on the Comparability and Competitiveness of Historically Black Institutions in Maryland<sup>12</sup> and conceded by the Defendant Maryland Secretary of Higher Education.
3. **Has Maryland satisfied its affirmative obligation to remove the vestiges of its *de jure* system of segregation as manifested by the current funding allocations and financial disparity between the HBIs and the TWIs?** Plaintiffs contend that the answer is no, for reasons that include the conclusions set forth in the HBI Study Panel Report and 2009 State Plan for Postsecondary Education (“2009 State Plan”).

### **III. Plaintiffs’ Statement of the Case**

For the Court’s convenience, Plaintiffs are setting forth in some detail how we arrived at this point— in 2010, addressing unresolved vestiges of the *de jure* period of racial segregation.

#### **A. The Path Not Taken**

There would be no need to focus on vestiges of discrimination in 2010 if, after the *Brown* decision in 1954, Maryland had moved quickly to end its dual system of education and undertaken aggressive steps to remove the vestiges of discrimination. But, it did not. Instead, for a long time, Maryland “doubled down” on its separate educational systems, creating a bigger hole out of which it had

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<sup>12</sup> The Panel on the Comparability and Competitiveness of Historically Black Institutions in Maryland, *Final Report to the Maryland Commission to Develop the Maryland Model for Funding Higher Education* (Nov. 11, 2008) (“HBI Study Panel Report”), MDED\_00115817 - MDED\_00115852, attached hereto as Exhibit B.



to dig its HBIs. For example, rather than accept the offer from Morgan State University<sup>13</sup> (an HBI) in 1969 to become Maryland's first truly multiracial university to accommodate the Baltimore region's growing demand for post-secondary education, Maryland spent millions of dollars to start an entirely new institution in Baltimore, the predominately white University of Maryland at Baltimore County ("UMBC"). In making the decision to develop UMBC, Maryland acted against the recommendation of its own higher education study commissions, the Pullen Commission, which had recommended that no new campuses be established in Baltimore because there were already too many in 1955.<sup>14</sup> Nevertheless, Maryland established UMBC as a research institution and proceeded to provide it with better funding, better facilities, and better academic programs than Morgan State, a pre-existing research institution in the same metropolitan area.

Throughout the 1970s, Maryland continued to invest heavily in its TWIs, fueling their growth and widening the gap with Maryland's HBIs. Specifically, Maryland appropriated over twice the amount of funding to Towson and UMBC -- both TWIs -- than it did to the HBIs in the Baltimore area. Maryland's infusions of financial support allowed UMBC and Towson to surpass Morgan State in growth.<sup>15</sup> Specifically, Towson grew from **a third** of Morgan's enrollment in 1953 to **three times** Morgan's enrollment in 2009.

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<sup>13</sup> Morgan State University was the first Maryland institution of higher learning open to black students when it was founded in 1867 as private Morgan College. 1937 Report at CET-00004169-70.

<sup>14</sup> Maryland Higher Education Council, *The Needs of Higher Education in Maryland: The Report of the Commission to Study the Needs of Higher Education in Maryland* (1955) ("1955 Report"), CET - 00002460 - CET - 00002779 at CET - 00004267.

<sup>15</sup> During this period, the State appropriated \$49 million for new facilities at Towson and \$46 million at UMBC, as compared with just \$19 million at Morgan, \$24 million at Bowie State, \$23 million at Coppin State, and \$9 million at UMES. Meanwhile, Towson's enrollment grew by 5,475 students during this period and UMBC's grew by 4,854, whereas Morgan's grew by just 1,807, Bowie's by 2,255, Coppin's by 2,145 and UME's by 308. (May 3, 2010 Conrad Report I at ¶ 22, Ex. 5.).

**B. Maryland Rejected State Merger Proposals to Avoid Program Duplication**

In 1975, the Rosenberg Commission, another commission on higher education convened by Maryland, recommended bringing all of the Baltimore Universities, including the newly created UMBC, into one super-university governed by Morgan State, so that Morgan State could be developed into a first rate urban-oriented, doctoral-granting university.<sup>16</sup> If this recommendation had been implemented, it would have eliminated the program duplication among the Baltimore institutions and attracted students of all races to Morgan State. The Rosenberg Commission similarly recommended merging the University of Maryland Eastern Shore (UMES), an HBI, and Salisbury University, a TWI, in part because the universities are less than 15 miles apart. Maryland did not accept either recommendation. Instead, on the Eastern Shore, Maryland invested more heavily in Salisbury than in UMES and, like Towson and Morgan State, Salisbury grew from being smaller than UMES in 1953 to being **twice** as large in 2009.<sup>17</sup>

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<sup>16</sup> See Governor's Study Commission on Structure and Governance of Education for Maryland, *Final Report of the Governor's Commission on Education* (1975) CET - 00004472 - CET - 00004557 at CET - 00004509-10.

<sup>17</sup> May 3, 2010 Conrad Report I at Ex. 4.

**C. Maryland's Protracted Negotiations with the Office for Civil Rights to Dismantle its Prior *De Jure* System (1969-1999)**

In 1969, fifteen years after *Brown* and at the same time that Maryland was funneling new programs and money into its TWIs at the expense of the growth of its HBIs, the Department of Education's Office for Civil Rights ("OCR") informed Maryland that it was one of 10 states that continued to operate a dual educational system.<sup>18</sup> Joann Boughman, an MHEC Commissioner and the Chair of MHEC's Education and Policy Committee, does not deny this history:

Q. So as of 1970, there was a system of racial segregation between black and white students in higher education in Maryland?

A. According to the previous document you showed me, OCR notified Maryland that it was one of ten states in 1969, and that Maryland submitted a desegregation plan in 1970 that was ruled insufficient. So according to the OCR definition, in fact, at that point in time Maryland was -- did have a segregated system.

Q. And do you have any reason to doubt the accuracy of those statements?

A. No.<sup>19</sup>

Three years later, OCR informed Maryland that its public higher education system did not comply with Title VI of the Civil Rights Act of 1964 (42 U.S.C. Section 2000d, *et seq.*) ("Title VI").<sup>20</sup> Shortly

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<sup>18</sup> Maryland Higher Education Commission, Office for Civil Rights Partnership Agreement, *Presentation to the Commission to Develop the Maryland Model for Funding Higher Education* (June 18, 2007), MDED\_00114962 - MDED\_00114978 at MDED-00114964, attached hereto as Exhibit C. OCR currently operates as a division of the Department of Education (DOE). However, for part of the history recounted above, OCR was an office within the Department of Health, Education, and Welfare (HEW) prior to the formation of the Department of Education under the Department of Education Organization Act, Pub.L. No. 96-88, 20 USCA §§ 3401-3520. That said, for the balance of Plaintiffs' statement, we will refer to OCR generally without drawing a distinction between its past incorporation within HEW and its present organization under DOE.

<sup>19</sup> Feb. 23, 2010 Joann Boughman Deposition Transcript at 56:1-13.

<sup>20</sup> 1980 Plan at 12, MDED\_00024506. *See also, Adams v. Richardson*, 351 F. Supp. 636, 637-38 (D.D.C. 1972) (noting that Maryland's proposed desegregation plan to [OCR] was unacceptable in light of the applicable federal regulations); *Mayor of Baltimore v. Matthews*, 562 F.2d 914, 919 n.1 (4th Cir. 1977) ("On December 15, 1975, [the] Acting Director of the [United States Department of Health, Education, and Welfare]'s Office for Civil Rights, [stated] in a letter addressed to [Maryland's governor] . . . the State was continuing to violate Title VI; and . . . he would recommend that administrative hearings be commenced.").

thereafter, OCR threatened to end federal funding of Maryland's public institutions because Maryland was not complying with Title VI. Maryland won an injunction to prevent the cessation of federal funding to its public institutions, but not because Maryland had complied with Title VI. Rather, the Court determined that OCR's standards of evaluation lacked certainty.<sup>21</sup> After obtaining the injunction, Maryland took no steps to end the unnecessary duplication of academic programs at its public HBIs and TWIs for the remainder of the 1970s. Consequently, the considerable gap between Maryland's HBIs and TWIs persisted during this period.

At the beginning of the 1980s, Maryland was again made aware of the disadvantaged position of its HBIs and its failure to fully desegregate its system of higher education. Consultants to the Desegregation Task Force of the State Board for Higher Education issued a report titled "Enhancement of Maryland's Historically Black Collegiate Institutions."<sup>22</sup> The report made several findings, among them were: (i) that financial shortcomings often forced the over-loading of HBI faculty without commensurate pay, in a situation that "seemed to be more serious and more pronounced at historically black institutions;"<sup>23</sup> (ii) "science facilities and equipment at *neighboring high schools* were superior to those at the historically black institutions;"<sup>24</sup> and (iii) Maryland's HBIs were generally inferior to geographically-proximate TWIs.<sup>25</sup> The next year, Maryland and OCR officials renewed discussions. Chief on their agenda was Maryland's development and adoption of a "Plan to Assure Equal Postsecondary Educational Opportunity" for the years 1980 through 1985.

After rounds of discussions, OCR accepted Maryland's plan in 1985, which then covered the

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<sup>21</sup> See *Mandel v. United States Dep't of Health, Education, & Welfare*, 411 F. Supp. 542, 544 (D. Md. 1976).

<sup>22</sup> Maryland State Board for Higher Education, *Enhancement of Maryland's Predominantly Black Collegiate Institutions: Consultants' Report to the Desegregation Task Force of the State Board for Higher Education* (Nov. 1981), CET - 00001319 - CET - 00001668 ("1981 Report").

<sup>23</sup> *Id.* at CET - 00001558.

<sup>24</sup> *Id.* at CET - 00001559 (emphasis added).

<sup>25</sup> *Id.*

years 1985-1989 (the “1985 Plan”). During Maryland’s implementation of the 1985 Plan, Maryland made modest improvements in its funding to the HBIs. At the 1985 Plan’s conclusion, Maryland submitted a final report to OCR documenting its compliance with Title VI. By that time, however, the landscape concerning Maryland’s civil rights obligations had changed with the Supreme Court’s decision in *Fordice*.

The holding in *Fordice* made clear that states with former *de jure* systems of racial segregation have an affirmative obligation to remove the vestiges of the prior *de jure* system to comply with the U.S. Constitution. Moreover, the Court identified widespread duplication of programs between HBIs and TWIs and limited missions of HBIs as clearly militating against desegregation. For racial desegregation to occur at HBIs (e.g., for HBIs to attract, recruit, and retain white students), HBIs must offer high-demand programs not offered at TWIs. In 1994, OCR issued Maryland a Notice of Application (the “Notice”) of the Supreme Court decision in *Fordice*. The Notice informed Maryland that the conclusions of Maryland’s expired desegregation plan were pending evaluation in light of *Fordice*.<sup>26</sup> Subsequently, MHEC issued another statewide plan for postsecondary education entitled “Educating for the 21<sup>st</sup> Century.” Although optimistically named, and despite the continuing disparities between Maryland’s TWIs and HBIs, the plan did not directly address the specific needs of HBIs or Maryland’s obligations under Title VI and *Fordice*.<sup>27</sup> Because of this failing, OCR initiated yet another round of negotiations with Maryland.

In 2000, 31 years after OCR first notified Maryland that it was not in compliance with federal

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<sup>26</sup> See Notice of Application of Supreme Court Decision, 59 Fed. Reg. 4271 (Jan. 31, 1994).

<sup>27</sup> For example, The University of Maryland at College Park stated in litigation, as recently as 1994, that there were “four present effects of past discrimination exist at the University,” including its poor reputation in the African-American community, the under-representation of Black students, low retention and graduation rates of Black students at the University, and a campus atmosphere perceived to be hostile to Black students. *Podberesky v. Kirwan*, 38 F.3d 147, 152s (4th Cir. 1994).

civil rights mandates, Maryland and OCR entered into a Partnership Agreement (the “Agreement”) designed to remove the vestiges of Maryland’s former *de jure* system of segregation. According to former OCR official Raymond Pierce, Maryland was considered an “open state.” This designation meant that Maryland still had vestiges of its prior *de jure* system of discrimination as late as 2000.

Q. -- what was its conclusion as to the -- whether Maryland had succeeded in eliminating all vestiges of *de jure* segregation?

A. By the time we finished reviewing Maryland, like all of them -- all of the so-called open states. Maryland -- remember, Maryland was considered an open state. “Open” because it had not been closed out like the other eight states by Secretary Bennett back in 1988. We found vestiges in all of them.<sup>28</sup>

Maryland officials involved with the execution of the Agreement acknowledge that the purpose of the Agreement was to ensure that Maryland had removed the vestiges of its prior system of *de jure* segregation. In particular, Mr. John J. Oliver, the former MHEC Chairman and signatory to the Agreement on MHEC’s behalf, testified as follows:

Q. Did MHEC understand at the time of the initiation of the Partnership Agreement that vestiges of segregation still existed in Maryland?

THE WITNESS: Yes.

Q. How do you know that?

A. We signed an agreement recognizing that there was a need reflected in these commitments to address the vestiges, which were in essence generally articulated in those nine commitments.

Q. Is it fair to say that by signing the Partnership Agreement, MHEC understood there to be vestiges of segregation?

A. Yes.<sup>29</sup>

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<sup>28</sup> Apr. 1, 2010 Raymond Pierce Deposition Transcript at 49:14-22.

<sup>29</sup> Mar. 19, 2010 John Oliver Deposition Transcript at 24:23 - 25:14.

**D. Maryland made Commitments in the Partnership Agreement with the Federal Government to Remove the Vestiges of its Prior *De Jure* System**

The Agreement set forth the commitments that Maryland and OCR envisioned would result in Maryland's full compliance with its obligations under federal law, particularly Title VI and *Fordice*. Under the Agreement, Maryland made two salient commitments consistent with the obligations of *Fordice*. The first commitment, memorialized in Commitment 8 of the Agreement, was to avoid unnecessary program duplication unless there was sound educational justification for the dual operation of broadly similar programs.<sup>30</sup> Dr. Clifton F. Conrad, a former consultant to the OCR and an expert for the plaintiffs in the *Fordice* decision, developed the phrase "unnecessary program duplication." He defines that phrase as (i) the existence of broadly similar academic programs (ii) that are not essential to the provision of general and specialized education in the core liberal arts and sciences (iii) at the undergraduate level (iv) at a TWI and a HBI that are geographically proximate to one another.<sup>31</sup> Commitment 8 was targeted at strengthening and making Maryland's HBIs more distinctive and attractive to Maryland students, as acknowledged by MHEC Commissioner Joann Boughman:

Q. What was the Partnership Agreement goals with respect to unnecessary program duplication?

A. The goals with respect to unnecessary program duplication were to allow the strengthening and distinctiveness of HBIs by maintaining unique programs in their repertoire that would not be duplicated in the immediate geographic region so that those unique programs could be draws for a variety of Marylanders to that unique program.<sup>32</sup>

The second commitment, as memorialized in Commitment 9 of the Agreement, was to ensure that Maryland's HBIs were "comparable and competitive with the TWIs in all facets of their operations and

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<sup>30</sup> Maryland Higher Education Commission, *Maryland's Report and The Partnership Agreement Between the State of Maryland and U.S. Department of Education, Office for Civil Rights*, Annapolis: 2000 ("Partnership Agreement"), MDED\_0041504 - MDED\_0041552 at MDED-00041539.

<sup>31</sup> June 15, 2010 Conrad Report II at 7.

<sup>32</sup> Feb. 23, 2010 Joann Boughman Deposition Transcript at 68:13-23.

programs, as soon as possible and before the expiration of this Agreement.”<sup>33</sup> The deadline for completion of both commitments was December 31, 2005, at which point Maryland was to notify OCR of its fulfillment of the commitments and OCR was to provide confirmation of Maryland’s compliance with federal law.

**E. Maryland Wrongly Informed OCR That It Had Eliminated All Vestiges of Discrimination**

In 2006, Maryland sent a letter to OCR prematurely claiming that it had complied with all of its commitments under the Agreement. Maryland attached as support for the letter the reports of two “blue ribbon committees,” identified as “Committee I” and “Committee II.” MHEC had charged Committee I with assessing compliance with, *inter alia*, Commitment 8 (Maryland’s avoidance of unnecessary program duplication)<sup>34</sup> and had charged Committee II with assessing Maryland’s progress made towards Commitment 9 (the comparability and competitiveness in all facets of Maryland’s HBIs and TWIs).<sup>35</sup> Mr. Oliver, former MHEC Chair and signatory to the Agreement on MHEC’s behalf, has subsequently testified that the letter falsely and incorrectly represented to OCR Maryland’s fulfillment of the Agreement.

Q. Mr. Oliver, is it true that in 2006, at the time of this letter, Maryland had no vestiges of a dual higher education system that once existed in the state?

MS. SHULTZ: Objection.

THE WITNESS: Absolutely not. That’s not true.

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<sup>33</sup> Partnership Agreement at MDED-00041541.

<sup>34</sup> Feb. 23, 2010 Joann Boughman Deposition Transcript at 94: 20 - 95:12.

<sup>35</sup> Mar. 8, 2010 Geoffrey Newman Deposition Transcript at 157:13-16.



Consistent with Mr. Oliver's testimony, the participants of Committee I have testified in deposition that the "Committee I Report" was generated by MHEC -- not Committee I -- in anticipation of OCR's review of MHEC's activities under the Agreement and was not an independent Committee I report.

Q. Why was Committee I created?

A. Specifically, to gather information about how, to what extent and in what ways we had addressed Commitments 1 through 8.

Q. Was this committee set up in preparation for the review by OCR of MHEC's activities with respect to the Partnership Agreement?

A. Yes.<sup>36</sup>

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Q. So the report that was sent to the Office of Civil Rights titled--

A. Didn't reflect Committee [I].

Q. -- titled a Committee [I] Report --

A. It didn't reflect --

Q. -- was not a Committee [I] report?

A. It was not.<sup>37</sup>

Moreover, participants on Committee I have testified that the report's assertion of compliance with Commitment 8 did not represent the unanimous position of the Committee.

Q. When did Committee I have a final report?

A. Committee I never had a final report. There was never a final report from Committee I. What there was time ran out for the specific work that Committee I was doing, the last meeting on November 10. By January 23, MHEC was presenting what was, in essence, the larger --the report that was going to be forwarded to OCR. Again, I said earlier, this was an MHEC report. So, there was never a point at which Committee I was asked to say or to vote or that they were polled that this is the report

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<sup>36</sup> Feb. 23, 2010 Joann Boughman Deposition Transcript at 95:23 - 96:6.

<sup>37</sup> Apr. 6, 2010 Anne Emery Deposition Transcript at 63:11-17.

of Committee I. That never happened. So, if you ask me, well, when did Committee I finish its report, it never did.<sup>38</sup>

Similarly, Geoffrey Newman, MHEC's Director of Finance and Policy, who was staffed to Committee II, testified in deposition that not only had Committee II identified areas where the HBIs had not reached parity with the TWIs, but that the report itself did not support the conclusion that the HBIs were comparable and competitive with TWIs in all facets as required by Commitment 9:

Q. Did Committee II determine that there were areas where HB[I]s had not reached parity with TWIs?

A. Yes.<sup>39</sup>

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Q. So, does the report's conclusion support that Maryland's HBIs were comparable in all facets with the TWIs?

MS. SHULTZ: Objection.

BY MS. HARRIS:

Q. You may answer.

A. No, it does not conclude that, but it also acknowledges that there are -- that some of the measures that were used to assess the institutions are characteristic measurements versus performance or outcome measurements.

Q. So, it does not support that?

A. Right.<sup>40</sup>

MHEC never shared the above history of the Committee reports and the views of its participants with OCR. In fact, when the current Chairman of MHEC was asked in deposition why he did not inform OCR of these facts, he testified that he had no relationship or responsibility to OCR. When he was

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<sup>38</sup> Apr. 5, 2010 Maurice Taylor Deposition Transcript at 56:20 - 57:10.

<sup>39</sup> Mar. 8, 2010 Geoffrey Newman Deposition Transcript at 158:25 - 159:3.

<sup>40</sup> *Id.* at 176:2 - 176:14.

asked if MHEC understood its reporting responsibilities to include providing such information, he implied that MHEC did not have an obligation to provide OCR with “complete information”:

Q. Why didn't you tell OCR that members of Committee I and Committee II did not agree with the conclusions of their respective reports?

A. I have no relationship with OCR nor do I have any responsibility to OCR.<sup>41</sup>

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Q Did MHEC understand its responsibilities concerning reporting to OCR to include making sure that OCR was provided with accurate and complete information?

A. You've asked a compound question there. I'll answer it. Accurate information, yes. MHEC recognized that it needed to provide accurate information to OCR. The second part of your question was complete information to OCR. That is a much more difficult question to answer in that there is really no definition of what constitutes complete information.<sup>42</sup>

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<sup>41</sup> Mar. 29, 2010 Kevin O'Keefe Deposition Transcript at 196:14 - 18.

<sup>42</sup> *Id.* at 199:23 - 200:9.

**F. Maryland Never Stopped Approving Unnecessarily Duplicative Programs**

MHEC is the lone Maryland agency responsible for authorizing university programs in Maryland and, accordingly, accepts the metaphor for its agency as the “traffic cop” for program approval.<sup>43</sup> In 2000, MHEC, along with Maryland, committed to avoid unnecessary program duplication in Maryland.<sup>44</sup> Despite this commitment, and Maryland’s obligations under federal civil rights law, MHEC has *never* considered whether proposed academic programs unnecessarily duplicate programs at existing Maryland public colleges and universities. This startling fact is one that Dr. Sue Blanshan, MHEC’s Director of Academic Affairs and 30(b)(6) witness on program duplication, repeatedly stressed in her deposition:

Q. And then my question is, has MHEC ever used unnecessarily duplicative or unnecessary program duplication in its analysis of program proposals?

A. I don’t believe so.<sup>45</sup>

Instead, MHEC has always used “unreasonable program duplication,” even during the term of the Agreement, when MHEC and Maryland had expressly committed to avoid *unnecessary* program duplication.

Q. Unnecessary program duplication is what MHEC addressed during the period of the Partnership Agreement; is that correct?

MS. BAINBRIDGE: Objection.

THE WITNESS: Even during the period of the Partnership Agreement, our program review regulations specified unreasonable.<sup>46</sup>

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<sup>43</sup> Feb. 23, 2010 Joann Boughman Deposition Transcript at 27:16 - 28:3.

<sup>44</sup> Mar. 18, 2010 Sue Blanshan Deposition Transcript at 59:19 - 60:3.

<sup>45</sup> *Id.* at 62:7 - 11.

<sup>46</sup> *Id.* at 79:24 - 80:5.

Q. So, is MHEC looking at unreasonable as well as unnecessary program duplication during the period of the Partnership Agreement?

MS. BAINBRIDGE: Objection.

BY MS. HARRIS:

Q. You may answer.

A. On the program review side, we would have been looking at unreasonable program duplication that could cause demonstrable harm.

Q. Not unnecessary program duplication?

MS. BAINBRIDGE: Objection.

THE WITNESS: Correct.<sup>47</sup>

MHEC's "unreasonable program duplication" incorporates the nebulous requirement of "demonstrable harm to another institution." Such a standard not only lowers the bar for justifying unnecessarily duplicative programs, but implies that there is no inherent harm in approving broadly similar, non-core, undergraduate level programs at geographically proximate institutions.

Q. What does the term unreasonable program duplication refer to?

MS. BAINBRIDGE: Objection.

BY MS. HARRIS:

Q. You may answer.

A. That's not something that we use in program review. Excuse me. We're on unreasonable.<sup>48</sup>

Q. Yes.

A. Okay. Sorry. Unreasonable program duplication is used in the context of unreasonable program duplication that can cause demonstrable harm to an institution. The tandem terms are really important in explaining unreasonable, so that program duplication in and of itself is not

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<sup>47</sup> *Id.* at 80:7 - 80:18.

<sup>48</sup> *Id.* at 62:12 - 63:6.

assessed in program review and analysis as a problem *per se*. But the connection to causing demonstrable harm to another institution is what makes duplication unreasonable.

As a result of MHEC's use of the wrong program assessment standard, MHEC has approved numerous programs at TWIs and HBIs that are unnecessarily duplicative.

**1. The Joint MBA Program at Towson University and the University of Baltimore is a Classic Example of Unnecessary Program Duplication**

A classic and recent example of MHEC employing the wrong legal standard and consequently approving unnecessary program duplication was MHEC's approval of the Towson and the University of Baltimore joint MBA program. This joint program unnecessarily duplicated an MBA program at nearby Morgan State - a position unanimously shared by Morgan State, OCR, the Office of the Maryland Attorney General, and MHEC's former Chair and signatory to the Agreement.

Morgan informed MHEC of its objection to the proposed, joint MBA Program at the University of Baltimore and Towson, arguing that if Morgan was given the requisite resources for faculty and student fellowships and stipends, "Morgan alone could absorb the projected enrollments in the proposed program."<sup>49</sup>

OCR echoed Morgan's sentiments and informed MHEC that approving the program did not comport with the requirement to avoid unnecessary program duplication under the Agreement, Title VI, and *Fordice*. OCR wrote:

We are writing to express our concern about the Maryland Higher Education Commission's (MHEC's) March 15, 2005 approval of the joint MBA program at the University of Baltimore and Towson University. Based on our review of the letter granting approval for this program and the related materials, we have serious questions about whether approval of the programs is consistent with Maryland's Commitments in its

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<sup>49</sup> Nov. 6, 2004 Letter from E. Richardson to the Maryland Higher Education Commission, MDED\_00101155 - MDED\_00101557 at MDED\_00101156.

Agreement with the Office for Civil Rights, specifically, those included in commitment #8, *Avoiding Unnecessary Duplication and Expansion of Mission and Program Uniqueness and Institutional Identity at the HB[II]s*. We are concerned that MHEC has misinterpreted the requirements of Title VI of the Civil Rights Act of 1964 and the U.S. Supreme Court's *Fordice* decision, as they relate to unnecessary program duplication during the desegregation of a formerly *de jure* system of higher education.<sup>50</sup>

Likewise, the Office of the Maryland Attorney General informed MHEC that it should not approve the joint MBA Program, that doing so would be against the advice of counsel, and that approving the program would constitute unnecessary program duplication under federal law:

Please be advised that the Secretary's decision of March 15th, while within his discretion to act, was made contrary to the advice and counsel rendered him by the Office of the Attorney General. Specifically, the Secretary was advised that approval of this academic program would leave the State in a vulnerable position, legally, with respect to the law governing unnecessary duplication of academic programs. . . . There is little question that the proposed MBA program, if approved, would constitute 'unnecessary program duplication' as that term of art is defined and articulated in federal law. The Secretary accepts this and makes no attempt to refute it. The analysis may also be considered lacking by virtue of its very limited effort to address the impact upon geographically proximate HBIs. Perhaps most alarming is a complete lack of analysis regarding the possibility of accomplishing legitimate educational objectives through less segregative means, particularly in light of existing programs at HBIs that are not at capacity... Under these circumstances, approval of the proposed program would be a continuation of a policy and practice, at least in this instance, that is a vestige of the prior segregated system. Rather than eliminating a vestige of the dual system, the State would be maintaining a vestige.<sup>51</sup>

Even the former Chair of MHEC, Mr. John J. Oliver, refused approval of the program during his tenure at MHEC and has since testified that MHEC's approval of the joint MBA Program after his tenure

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<sup>50</sup> Apr. 13, 2005 Letter from Wendella Fox, Director of the Philadelphia Office of OCR, to Calvin Burnett, Secretary of the Maryland Higher Education Commission, MDED\_00049074.

<sup>51</sup> McConkie Memo at 2-3. See also *Knight v. Alabama*, 14 F.3d 1534, 1541 (11th Cir. 1994) ("[W]here the state can show that there are no less segregative alternatives which are practicable and educationally sound, then it may permissibly maintain the vestigial practice or policy in place.").

ended was a violation of the Agreement and *Fordice* as well as a missed opportunity to create more integration in the student body at Morgan State.

Q. Mr. Oliver, why did you disagree with the Towson and UMBC joint MBA program?

A. Because I honestly thought that there was a legal obligation to try and forge a joint effort that would end up having a Morgan degree which existed in the Morgan business school before the Towson proposal arose, and thereby not, in my opinion, violate the stricture of *Fordice*.

Q. Is it fair to say that you believe the joint MBA program between Towson and UMBC duplicates Morgan's MBA program?

A. Yes.<sup>52</sup>

Mr. Oliver noted that the "segregated condition of the program at Morgan State University is particularly a concern."<sup>53</sup> Disturbingly, Mr. Oliver observed *a present-day trend* of program duplication by MHEC:

Q. As of 2010, what is your understanding regarding the status of Maryland's HBIs with respect to program duplication?

A. They have been duplicated and there seems to be a trend where such practices are continuing and, in my opinion, that's wrong.<sup>54</sup>

Similar testimony was provided by the former acting Secretary of MHEC, Dr. John J. Sabatini, who was involved in drafting the Agreement.<sup>55</sup>

Q. So after 2003 when you left [MHEC], based on your knowledge of programs that have been approved, there have been segregative effects?

MS. WATSON: Objection.

A. In my opinion, with respect to the Towson MBA and the UMUC online program, I would say yes.

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<sup>52</sup> Mar. 19, 2010 John J. Oliver Deposition Transcript at 104:19 - 105:1.

<sup>53</sup> Mar. 29, 2010 Kevin O'Keefe Deposition Transcript at 112:13 - 112:15.

<sup>54</sup> Mar. 19, 2010 John J. Oliver Deposition Transcript at 74:21 - 75:1.

<sup>55</sup> Mar. 26, 2010 John J. Sabatini Deposition Transcript at 29:11-12.



Q. Is it your understanding that those segregative effects would violate the *Fordice* decision by the United States Supreme Court?

A. Yes. In my opinion that's correct.<sup>56</sup>

MHEC's approval of unnecessarily duplicative programs is not a *de minimis* violation of federal civil rights law. As the Supreme Court recognized in *Fordice*, "[program] duplication represents a continuation of the 'separate but equal' treatment required by the prior dual system."<sup>57</sup> In Maryland, the practice of unnecessary program duplication undergirded the *de jure* segregated system between black and white students<sup>58</sup> and fostered racial segregation between these groups, a fact which is acknowledged by MHEC's former Chairman, Mr. John Oliver:

It is a practice that will perpetuate the separation or the lack of diversity, because when you duplicate, as the Supreme Court, I believe, reflects, you more or less promote separate and too often not equal. And the practical matter is that at least our experience shows when you do have duplication, the [w]hite students go to the [w]hite schools and the African Americans go to the [b]lack schools. And that duplicates your expense, which in this day and age, we can't afford to do that but for a lot of other reasons, we need to be promoting diversity, not discouraging it, which is a direct connection -- result of duplication.<sup>59</sup>

## **2. Unnecessary Program Duplication is Widespread in Maryland**

The MBA Program is but one of many examples of unnecessarily duplicative programs that MHEC has approved. Dr. Clifton F. Conrad, an expert for the plaintiffs in the *Fordice* decision and one of the nation's leading experts on desegregation, has analyzed whether there is unnecessary program duplication of academic programs between Maryland's HBIs and TWIs. Dr. Conrad provides the findings of his analysis in his second report, which evaluates program duplication between 2001 and

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<sup>56</sup> *Id.* at 117:20 - 118:8.

<sup>57</sup> *United States v. Fordice*, 505 U.S. 517 (1992).

<sup>58</sup> *Id.* at 738 ("It can hardly be denied that such duplication was part and parcel of the prior dual system of higher education - the whole notion of 'separate but equal' required duplicative programs in two sets of schools - and that the present unnecessary duplication is a continuation of that practice.").

<sup>59</sup> Mar. 19, 2010 John Oliver Deposition Transcript at 75:17 - 76:7.

2009, and his third report, which evaluates program duplication in Maryland for 2010. As set forth more fully in Dr. Conrad's third report, more than 50% of the HBI programs in Maryland are presently, unnecessarily duplicated by programs at public TWIs, when assessed statewide or in the Baltimore/College Park area.<sup>60</sup> Moreover, Dr. Conrad determined that as a result of the continued perpetuation of this dual system of higher education the percentage of white students at HBIs has steadily declined since 1991. As Dr. Conrad explained:

When Maryland's [H]BIs began offering graduate programs in the 1960s and 1970s, they were able to attract fairly substantial numbers of white graduate students to enroll in their institutions, demonstrating progress in desegregation of the [H]BI campuses. Notably, however, this trend has not been sustained over the past three decades. Although total enrollment of white graduate students at the [H]BIs expanded to a high of 1,254 in 1973, this number declined significantly thereafter and has never regained its 1973 level.<sup>61</sup> The 444 white graduate students enrolled at Morgan State in 1973 was the same number enrolled at all four [H]BIs combined in 2008.<sup>62</sup>

The re-segregation of Maryland's HBIs has, not surprisingly, resulted in their diminished quality. Specifically, Maryland's HBIs have more limited program offerings, more limited program quality, and more limited missions than their TWI counterparts. On these issues, Dr. Conrad has determined that there is "significant program inequality between TWIs and [H]BIs—both with respect to the number of program offerings across degree levels and the quality of programs, with the TWIs offering far more programs and programs of markedly higher quality."<sup>63</sup> He went on to note of the universities' missions that "TWIs in Maryland have distinctive institutional identities based on their program offerings;" whereas, "[H]BIs' missions are clearly not sufficiently inclusive to ensure comparable program

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<sup>60</sup> June 15, 2010 Conrad Report III at 12 (stating that there is a modest amount of program duplication between the UMES and Salisbury University on Maryland's Eastern Shore, in part due to the limited course offerings at UMES.)

<sup>61</sup> May 3, 2010 Conrad Report I at 63, Ex. 9.

<sup>62</sup> *Id.*

<sup>63</sup> June 15, 2010 Conrad Report III at ¶ 70.

development with the TWIs.”<sup>64</sup> When assessing the existence of the number of unique, high-demand, non-core programs,<sup>65</sup> which the Supreme Court in *Fordice* recognized as essential to promoting desegregation at HBIs,<sup>66</sup> Dr. Conrad found that Maryland’s HBIs have only **11** such programs, as compared with **122** at TWIs.<sup>67</sup> Dr. Conrad’s findings provide strong evidence of an unequal and dual educational system in existence in Maryland today.

**G. Maryland’s 2008 HBI Study Panel Determined that HBIs Are Not Comparable with the State’s TWIs**

In 2008, Maryland appointed a blue ribbon commission to study the condition of its HBIs as compared with its TWIs, the “Panel on the Comparability and Competitiveness of Historically Black Institutions in Maryland” (the “Panel”).<sup>68</sup> The Panel’s findings provide direct support for the Plaintiffs’ claims in this lawsuit; namely, that the conditions of Maryland’s HBIs are linked to Maryland’s prior discriminatory treatment of the HBIs:

[T]he panel has no doubt that its deliberations, findings, conclusions and recommendations -- like the current status of the HBIs -- will be closely linked to the continuing effects and vestiges of policies and practices supported by many decades of a dual system of public higher education in Maryland.<sup>69</sup>

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There are many indicators that suggest that substantial additional resources must be invested in HBIs to overcome the competitive disadvantages caused by prior discriminatory treatment: the lack of modern “state of the art” science and technology labs, the aging physical plants and lack of consistent funding for maintenance, the poor

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<sup>64</sup> *Id.* at ¶¶ 59-60.

<sup>65</sup> Dr. Conrad defines high-demand programs as those programs in which a disproportionately large number of students can be expected to choose as their major field of study and which have broad appeal to students. He defines unique programs as those programs that are not duplicated at a geographically proximate institution.

<sup>66</sup> *Fordice*, 507 U.S. at 738.

<sup>67</sup> June 15, 2010 Conrad Report III at ¶56.

<sup>68</sup> HBI Study Panel Report at MDED-00115819 (Interestingly, MHEC did not include in its mandate to the Panel an instruction to assess whether Maryland had complied with the federal law.)

<sup>69</sup> *Id.* at MDED-00115821.

retention and graduation rates of students as compared to TWIs, and the large number of low income and educationally underserved students in need of financial assistance.<sup>70</sup>

Moreover, the Panel concluded that there were actions that Maryland needed to take, as late as 2008, to provide the HBIs with adequate funding and facilities, due to the historic deficiencies that the HBIs had suffered:

HBIs need a different form and level of capacity because unlike the TWIs, the HBIs have a dual mission: (1) to carry out their regular collegiate programs and associated functions to the best of their abilities and (2) to provide strong programs in developmental education to ensure access and success to students, mostly from low-income families, who otherwise would not have an opportunity to pursue a bachelor's degree. The HBIs are not funded at appropriate levels to carry out both parts of this mission at once.<sup>71</sup>

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The Panel recognizes the state's substantial efforts to improve the facilities, physical space, and other institution-wide operation and administrative elements of the HBIs. However overall the facilities at the HBIs are not comparable to those of the TWIs. . . . our first hand-findings that the HBIs visibly lag behind the TWIs but also [ ] addressing this deficiency is crucial to achieving the goals of capacity and competitiveness of the HBIs in both undergraduate and graduate education.<sup>72</sup>

One of the Panel members, Dr. Franklyn Jenifer confirmed these findings:

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<sup>70</sup> The testimony of the President of Bowie State University, which is an HBI, demonstrates the need for modern science labs. Apr. 7, 2010 Deposition Testimony of Mickey Burnim at 73:8 - 74:10.

Q. Why does Bowie need a new natural sciences building?

A. The one that we currently use was constructed more than 30 years ago. It has inadequate office space for faculty. It has inadequate lab space for students. And it would not be feasible to renovate or modify that building in a way that we could expand its capacity. The labs in that building accommodate only 24 students at a time. And so when you think about a freshman class of 700 or 800 or a thousand, most of whom need to take a lab science, you can see that can lead to all kinds of scheduling problems for students, which can have implications for graduation rates over time. But it's also a building that is so woefully inadequate that high school students often come from schools where they have better facilities than that building represents. And so in an age where there is so much emphasis being placed on the STEM disciplines, science, technology, engineering, and mathematics, we need to have a facility that enhances our teaching and our faculty members' ability to do research in the STEM disciplines. So, that's why it is a very, very high priority for me, for the University.

<sup>71</sup> HBI Study Panel Report at MDED-00115829.

<sup>72</sup> *Id.* at MDED-00115845-46.

Q. Were you able to determine whether or not the HB[I]'s facilities were comparable to the TWIs facilities?

A. Yes.

Q. How do you think that the HBI facilities compared with the TWI facilities?

A. They were not comparable.<sup>73</sup>

Former MHEC Commissioner Ann O. Emery similarly stated that the facilities of the HBIs were visibly not comparable with those of the TWIs:

Q. Are the facilities at the HBIs comparable to the TWIs today?

A. No.

MS. SHULTZ: Objection.

THE WITNESS: Take a walk. I suggest you take somebody -- not a court reporter because she types words. You take somebody that can do the visual -- "the visual" -- and you can see the difference.<sup>74</sup>

The Panel also identified substantial deficiencies among the HBIs in the context of the institutional platform required to support quality programs that are comparable and competitive:

The current result of these longstanding past practices<sup>75</sup> is that there exists a substantial lack of comparability and capacity (as compared [to in state and out of state]) at both MSU and UMES. . . . What is most important at this juncture is for the Commission to remedy both the lack of comparability among the doctoral institutions and restructure the

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<sup>73</sup> Mar. 9, 2010 Dr. Franklin Jenifer Deposition Transcript at 46:25 - 47:3. Dr. Jenifer was a member of the HBI Study Panel.

<sup>74</sup> Apr. 6, 2010 Anne Emery Deposition Transcript at 51:2-10.

<sup>75</sup> See also 1937 Report ("The contrast between the amounts of money received by the two racial groups would show, if possible of computation, an enormous differential in favor of the white race."); A Report of a Survey by the American Council on Education with Recommendations of the Maryland Commission on Higher Education (1947) at 137, 253 ("It is difficult to understand why Maryland has neglected so disgracefully its land-grant institutions for Negroes....Some of the conditions in the physical plant at Princess Ann College are a disgrace to the state of Maryland."); June 30, 1950 Report and Recommendations of the Commission to Study the Question of Negro Higher Education to the Governor, the Legislative Counsel and the General Assembly of Maryland (the "1950 Report") at xi ("The continuous uphill struggle on the part of the Negro colleges to secure facilities on a par with white institutions [ ] cannot be overlooked in a survey of this kind."); 1981 Report at 36, MDED\_00025810 ("[T]hree notable deficiencies stand out among the Black institutions: 1. The deplorable condition of science laboratories. 2. The pronounced need for improved support for equipment maintenance and replacement. 3. The generally poor condition of the residential space.").

process that has caused the inequities and lack of competitiveness between the HBIs and the traditionally white doctoral institutions.<sup>76</sup>

Meaningfully, the HBI Study Panel Report noted that the identified deficiencies at Maryland's HBIs have left the HBIs unable to compete with the TWIs, particularly in maintaining comparable quality and in the recruitment and support of top faculty and students:

Whether intentional or not, the past treatment of the [HBIs] in this process in contrast to the treatment of other public institutions in the state has had the effect of substantially marginalizing the [HBIs] and their ability to develop and maintain comparable quality and competitiveness in the state's system of higher education.

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Quality doctoral universities required advanced library and information resources specific to the doctoral programs. To recruit and support top doctoral faculty and students in their programs and research, the overall university infrastructure needs to be modern, attractive and conducive to research and scholarship. The latest in university-wide technology and administrative support systems are critical. UMBC and UMCP have the institutional platform or foundation to support these qualities. MSU and UMES do not. UMBC and UMCP had the opportunity and support to develop the elements of quality [ ] doctoral programs. MSU and UMES have not had that opportunity and support to the same or sufficient degree.<sup>77</sup>

Just as Defendant Maryland Secretary of Higher Education has admitted that the conditions of the facilities at the HBIs are a vestige of Maryland's former *de jure* system of segregation, he has likewise admitted that the HBIs are not competitive with TWIs:

Q. Did the HBI Study Panel make a determination as to whether or not Maryland's HBIs and TWIs are competitive?

A. Yes.

Q. And what was the HBI Study Panel's conclusion?

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<sup>76</sup> HBI Study Panel Report at MDED-00115834.

<sup>77</sup> *Id.* at MDED - 00115840.

A. Well, they're generally not competitive.

Q. Do you agree with that conclusion?

A. Based on their -- based on this definition, yes I agree.<sup>78</sup>

The findings in the HBI Study Panel Report and the statements of current and existing representatives of MHEC leave no doubt that absent discrimination by Maryland, Maryland's HBIs would be competitive institutions with Maryland's TWIs.<sup>79</sup>

#### **H. The 2009 State Plan Provides the Latest Evidence of the Disadvantaged Position of Maryland HBIs**

Well after this lawsuit was filed, and as recently as last year, Maryland issued another State Plan containing findings supportive of the Plaintiffs' positions here. The 2009 State Plan, attached as Exhibit D, noted that the lack of infrastructure at Maryland's HBIs prevent them competing in the marketplace and effectively delivering administrative services:

Although not addressed by the . . . Panel, another key aspect of the institutional platform that must be enhanced at public HBIs is the capacity to deliver information technology (IT) services, including distance learning, as well as administrative support, comparable to the IT services at public TWIs. The lack of comparable IT services restricts the capacity of the HBIs to compete in certain markets and to be competitive in the delivery of effective administrative services."<sup>80</sup>

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<sup>78</sup> Mar. 5, 2010 James E. Lyons, Sr. Deposition Transcript at 226:3-16.

<sup>79</sup> See, e.g., HBI Study Panel Report at MDED\_00115838 ("[A]bsent its racial character and past treatment, there is every reason to believe that MSU would have been treated differently and would have developed the capacity to attain the status and quality that we describe in our specification of a quality doctoral institution.").

<sup>80</sup> 2009 Maryland State Plan for Postsecondary Education ("2009 State Plan") at 27. See also Apr. 7, 2010 Mickey Burnim Deposition Transcript at 81:8-24.

Q. Are the dormitories that Bowie State has adequate for its students?

A. No.

Q. How are they not adequate?

A. We don't have enough spaces, so we need more of them. Some of them are very old and need to be modernized. One of the things that we need to do is provide better computer connections in them, some

Consistent with these findings, the 2009 State Plan made clear the need for substantial additional resources given *by Maryland* to its HBIs in order to make them comparable and competitive with the public TWIs:

In summary, the investments of substantial additional resources by the State needed to ensure that its public HBIs are comparable and competitive to with its public TWIs refers to the sum total of resources needed to deliver on the HBI's dual missions of educating high-achieving students as well as others who may require supplemental support, i.e, students from low-income households and underrepresented minorities.<sup>81</sup>

The 2009 State Plan underscored the urgency with which Maryland should provide these resources to the HBIs when it recommended that Maryland "accelerate funding for public HBI capital priorities that build institutional capacity related to comparability and competitiveness."<sup>82</sup>

It is notable that MHEC has not disputed these findings and has gone so far as to endorse both the 2009 State Plan's findings and recommendations for resolution. Mr. Reid, MHEC's Assistant Secretary of Planning and Academic Affairs and 30(b)(6) witness for the 2009 State Plan, testified as follows:

Q. The panel also indicated -- well, withdrawn. The 2009 state plan also recognized the panel's recommendation that the State of Maryland needed to provide substantial additional resources to the HBIs. Isn't that correct?

A. Yes, it did.

Q. Okay. And so is it correct that at the time this report was issued MHEC stood by the statement that the state needed to provide additional resources?

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work on bathrooms, and what not. So, we are doing some of that in the summer as we go along, trying to modernize them. But some of them go back to the 1950s. They are just very old, some of them. Now, others, one is only five or six years old and another, eight or ten. And so, the stock varies a bit. But in general, we need more space and higher quality space.

<sup>81</sup> 2009 State Plan at 28.

<sup>82</sup> *Id.* at 30.



A. Yes. I think that the commission approved it and, therefore, it did.<sup>83</sup>

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Q. So as of 2009, MHEC's recommendation to the State of Maryland was that funding over and above what was already being given to HBIs was needed to promote a higher level of academic achievement for all students of public HBIs?

A. It's toward the goal of comparability and competitiveness, correct.<sup>84</sup>

**I. Maryland's HBIs Need Substantial Additional Funding to Overcome their Disadvantaged Position**

Maryland's historical discrimination in favor of its TWIs fueled their tremendous growth and allowed them to outpace the HBIs and to attract substantial private funding. As a result of the large enrollment gaps that have developed, Maryland's TWIs enjoy substantial economies of scale as compared with the HBIs, which leaves the HBIs with higher per student costs.<sup>85</sup> Maryland's present funding formula does not account for the long history of funding disparities that disfavored HBIs.<sup>86</sup> Nor does it take into account that HBIs have the dual mission of educating a higher proportion of students with remedial education and unmet financial aid needs. Maryland's HBI Study Panel and 2009 State Plan both concluded that the funding provided to HBIs is not sufficient to allow them to serve these missions. Moreover, Defendant Maryland Secretary of Higher Education and MHEC's Assistant Secretary for Planning & Academic Affairs have openly affirmed the HBI Study Panel Report's conclusions in this regard:

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<sup>83</sup> Mar. 4, 2010 George Reid Deposition Transcript at 100:15 - 101:4.

<sup>84</sup> *Id.* at 103:12 - 19.

<sup>85</sup> May 3, 2010 Dr. Robert K. Toutkoushian Report at 17.

<sup>86</sup> *Id.* at 16.

Q. The next paragraph states in the first sentence, 'The HBIs are not funded at appropriate levels to carry out both parts of this mission at once.' Do you question the accuracy of that statement?

A. No. I'm still speaking as myself.<sup>87</sup>

Q. Just so I'm clear, you are also of the belief that Maryland's HBIs have a dual mission.

A. Yes.

Q. And the funding setup provided to the HBIs is not adequate to allow them to meet both missions.

A. The funding formula doesn't take into account that you -- that the -- an HBI has a dual mission, yes.<sup>88</sup>

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Q. At several points throughout the 2009 State Plan there were references to the HBI Study Panel Report. Is it correct that MHEC believed that the content of the HBI [S]tudy [P]anel [R]eport was accurate?

A. Yes.<sup>89</sup>

**1. Maryland's Recent Efforts to Enhance HBIs are Not Sufficient to Eliminate the Vestiges Created by the Historical Disparities Between HBIs and TWIs.**

In light of Maryland's long history of discrimination against the HBIs, Maryland's professed efforts to enhance its HBIs are insufficient. Even if one accounts for enhancement funding recently provided to the HBIs, Plaintiffs' funding expert Dr. Robert Toutkoushian has determined that such funding is insufficient when considering the cumulative deficiency in Maryland's support for HBIs from 1990-2009<sup>90</sup> is: (i) \$527,076,700; if one accounts for the enrollment share and mission of these

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<sup>87</sup> Mar. 5, 2010 James E. Lyons, Sr., Deposition Transcript at 214:25 - 215:7.

<sup>88</sup> *Id.* at 223:4 - 13.

<sup>89</sup> Mar. 3, 2010 George Reid Deposition Transcript at 181:13-19.

<sup>90</sup> Dr. Toutkoushian focuses on the 1990-2009 timeframe as relevant for three reasons. First, in 1990, during a period of rapidly increasing enrollments at HBIs, Maryland replaced its enrollment-driven funding formula with a mission-based one that favored TWIs with more research-intensive missions. (Oct. 1, 2010 Toutkoushian Report at 23) Second, this period

institutions; and (ii) \$2,138,940,038 in total revenues, calculated as the sum of restricted revenues plus unrestricted revenues.

#### **IV. Conclusion**

The condition of the Maryland's HBIs was aptly described in a 2005 report from Maryland's Legislative Black Caucus based on input from the Presidents of Maryland's four HBIs. That report concluded that "the position of these four institutions threatens to deteriorate even further as certain TWIs are being targeted as growth institutions and any uniqueness in missions and programs between HBIs and TWIs is being systematically eroded."<sup>91</sup> Maryland must correct the deteriorated condition of its HBIs, or else these universities will remain segregated and the vestiges of Maryland's *de jure* dual system of higher education system will persist. Plaintiffs expect that this, in fact, is what the evidence at trial will show.

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immediately follows the 1985-1989 OCR agreement with the state, a period that was characterized by a spike in funding for Maryland's HBCUs. (*Id.*) Third, after Maryland designated UMCP as its flagship institution in 1988, the state operated under a mandate to "[p]rovide the College Park Campus with the level of operating funding and facilities necessary to place it among the upper echelon of its peer institutions." Md. Code. Educ., 10-209.

<sup>91</sup> Letter from Thelma Thompson to Rudolph Cane regarding Report on the Status of Efforts Under the Partnership Agreement Between the State of Maryland and the U.S. Department of Education, Office of Civil Rights (Mar. 28, 2005), CET\_00001159 - CET\_00001179 at CET-00001160.

Dated: October 4, 2010

Respectfully submitted,

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