IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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

PLAINTIFFS' STATUS REPORT ON DISCOVERY AND DISPUTED ISSUES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

Pursuant to the Court's Order of September 2, 2010, Plaintiffs respectfully submit their position on discovery, the proper legal standard to be applied in this case, potential motions in limine, and potential summary judgment motions.

I. DISCOVERY

At the September 2, 2010 status conference between the parties, Defendants urged this Court that discovery had closed. Notwithstanding this position, on October 29, 2010, without explanation or excuse, Defendants filed a witness list with this Court that boldly included sixteen previously undisclosed witnesses and reserved the right to add additional undisclosed witnesses at an undetermined time between now and trial.[1] Even more disturbing, Defendants' list included certain witnesses only by generic title such as "Deans of the academic programs alleged by Plaintiffs to be illegal," rather than by name.[2]

As far as Plaintiffs are concerned, the factual record is settled. At this point, the parties should be finishing expert discovery, finalizing their exhibit lists,[3] and preparing for trial. Defendants will depose Plaintiffs' facilities expert on November 19, 2010, and Plaintiffs expect to depose Defendants' facilities expert in December, to the extent that Defendants choose to try to dispute the admissions of Defendant Secretary of Higher Education James Lyons and the findings of their own 2008 Panel on Comparability and Competitiveness of Historically Black

---

[1] *See* Defendants' Witness List; *see also* Defendants' Statement of the Case and Issues to be Considered at Trial at 5 ("Defendants' Statement of the Case") ("Defendants … may need to supplement the list closer to trial as availability and narrowing of the issues, *inter alia*, dictate.") (Dkt. No. 178). Defendants' previously undisclosed witnesses include: David Beard, Mark Beck, Raymond Blair, Takeia Bradley, Anthony Foster, Eloise Foster, Jonathan Gibraltar, Elliot Hirshman, Ray Hoy, Lonnie McNew, Stephanie Miller, Robert Parker, Benjamin Passmore, James Salt, Elizabeth Urbanski, and John Wolfe.

[2] Defendants' Witness List at 4.

[3] On November 9, 2010, counsel for Plaintiffs and Defendants conferred to discuss Defendants' Exhibit List. In particular, Plaintiffs informed Defendants that they did not have several categories of the documents that Defendants had identified and were unable to locate several more categories of documents based on Defendants' description on their Exhibit List. The parties are cooperating on the issue and Defendants have agreed to provide Plaintiffs with all documents identified on Defendants' Exhibit List (Dkt. No. 181).

Institutions in Maryland ("HBI Study Panel") that the Historically Black Institutions' ("HBIs")[4] facilities are inferior to and "visibly lag"[5] the Traditionally White Institutions' ("TWIs")[6] facilities, impeding the ability of HBIs to attract white students. Beyond these two expert depositions, discovery is over. Any fact witness not properly disclosed during the discovery period should not be allowed to testify.

II. MOTIONS

Plaintiffs intend to file a motion to strike Defendants' sixteen undisclosed witnesses as untimely and prejudicial and a motion for leave to depose any all trial witnesses. Plaintiffs also anticipate filing a *Daubert* motion with respect to Defendants' expert, Dr. William E. McHenry.[7] As Plaintiffs will set forth in fuller detail in their *Daubert* motion, this expert has neither degrees nor training in the field for which he was disclosed, nor has he applied reliable methods in reaching his opinions on the facts of this case. Finally, at this time, Plaintiffs do not intend to file a motion for partial or full summary judgment.

III. DISPUTED ISSUES

Plaintiffs provide the following recitation of critical disputed issues between the parties. Plaintiffs will not attempt to respond to every argument raised by Defendants in their Statement of the Case and reserve the right to offer additional responses at appropriate future points in this litigation.

---

[4] Maryland's four-year colleges and universities that serve largely black student bodies; all of these universities were founded to serve black students in the era of de jure segregation. These are Bowie State University, Coppin State University, Morgan State University, and University of Maryland - Eastern Shore.

[5] The Panel on 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") MDED-00115817-52, MDED - 00115846 (Dkt. No. 174-2).

[6] Maryland's four-year colleges and universities that have historically served 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 are: 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. Throughout Maryland's historical documents, including its *2009 Maryland State Plan for Postsecondary Education*, (Dkt. No. 174-4).

[7] *See* May 3, 2010 Defendants' Disclosure of Expert and Hybrid Fact/Expert Witnesses.

1. The Precedential Value of *Fordice*

Defendants attempt to diffuse their obligations under *United States v. Fordice*[8] by arguing that because of the passage of time, the *Fordice* Court's analytical framework dealing with program duplication is "incomplete at best, and arguably obsolete."[9] Defendants' argument that *Fordice* is simply too old to be applicable is neither factually nor legally compelling. The *Fordice* case was decided in 1992, making it much more recent than other significant and enduring Supreme Court cases, such as the 1967 *Loving v. Virginia*[10] case (laws that prohibit marriage between races are unconstitutional), the 1954 *Bolling v. Sharpe*[11] case (the companion case to *Brown*, which held that segregated schools in the District of Columbia violated the 5th Amendment), and the 1954 *Brown v. Board of Education of Topeka*[12] case (holding that segregated schools in the several states are unconstitutional in violation of the 14th Amendment). Despite the passage of time, *Fordice* -- like its predecessor *Brown* -- has not been repudiated nor limited by the Supreme Court and thereby remains legitimate and controlling precedent. Finally, despite Defendants' arguments to the contrary, Maryland's Attorney General expressly recognized Justice O'Connor's concurrence in *Fordice* as a "workable . . . standard"[13] for assessing Maryland's obligation to dismantle its former de jure system as recently as 2005. Surely, Defendants do not believe that the higher education landscape has adjusted so much in the past five years as to render *Fordice* "obsolete."[14]

---

[8] *United States v, Fordice*, 505 U.S. 717 (1992).
[9] Defendants' Statement of the Case and Issues to be Considered at Trial (Dkt. No. 178) at 14.
[10] 388 U.S. 1 (1967).
[11] 347 U.S. 497 (1954).
[12] 347 U.S. 483 (1954).
[13] 90 Md. Op. Att'y Gen. 153, 2005 WL 3024511 (Nov. 8, 2005) ("2005 Opinion of the Attorney General") ("You have asked for our analysis of the standards by which Maryland higher education officials can assess whether the State has complied with its constitutional and statutory obligations to dismantle the *de jure* racial segregation - that is, segregation imposed by law - that was long part of the State's public higher education system.")
[14] Along with their suggestion that the passage of eighteen years has exempted Maryland from the *Fordice* precedent, Defendants also make much of their progress in desegregating their TWIs and claim that they have tried in good faith to desegregate and enhance the HBIs. *See, e.g.*, Defendants' Statement of the Case at 3 (Dkt. No. 178).

2. The Steps of the *Fordice* Analysis

In addition to arguing that *Fordice* is outmoded, Defendants interpret *Fordice* in a way that substantially lessens their constitutional obligations. In Defendants' language, *Fordice* requires:

> a three-step analysis: (1) do any policies or practices currently exist that are traceable to the former segregated system of higher education; (2) if they do exist, do they continue to foster segregation; and (3) if they exist and are segregative, is it practicable or educationally sound to eliminate them. If at any point in the analysis the answer is 'no', the policy is allowed to stand and cannot be a basis for a Title VI violation.[15]

What Defendants do not acknowledge is that, under what they call step three, a policy or practice must be eliminated if there is a less segregative alternative that is practicable and educationally sound.

Justice O'Connor's concurrence in *Fordice*, which the Maryland Attorney General embraced, made clear that a policy or practice traceable to the de jure era cannot be maintained merely because there is some educational argument in its favor. Rather, noting the far-reaching harms caused by educational discrimination, Justice O'Connor described how courts should evaluate putative educational justifications for challenged policies in the light of less segregative alternative policies:

> [T]he courts below must carefully examine Mississippi's proffered justifications for maintaining a remnant of *de jure* segregation to ensure that such rationales do not merely mask the perpetuation of discriminatory practices. Where the State can

---

This argument misses the point in two ways. First, progress in desegregating the TWIs is irrelevant to Defendants' obligations with respect to the HBIs, whose student bodies range from 2% to 7% White. *See* 2005 Opinion of the Attorney General, 2005 WL 3024511 at *16 ("[I]t is possible for the State to have dismantled some aspects of prior segregation, and be discharged of any remedial obligation with respect to those factors, while remaining responsible for remedial measures in other areas.") Second, as the Attorney General noted, good faith is relevant when it comes to good faith compliance over a long period of time with a court order. *Id.* at *21. The evidence here will show that Maryland in fact has not complied with the Partnership Agreement and in bad faith withheld information from U.S. Department of Education Office of Civil Rights ("OCR"). There is no legal support for Maryland's suggestion that even if it has not removed the vestiges of discrimination, it is relieved of its responsibility by the passage of time.

[15] Defendants' Statement of the Case at 9 (Dkt. No. 178).

> accomplish legitimate educational objectives through less segregative means, the courts may infer lack of good faith; at the least it places a heavy burden upon the [State] to explain its preference for an apparently less effective method.[16]

The Eleventh Circuit articulated this principle as a guiding rule in *Knight v. Alabama*[17], the lower court opinion that offers the most comprehensive analytic framework as to how a trial court should apply *Fordice*.[18] Noting again the "heavy burden" that a state must carry to continue a policy or practice that is a vestige of its de jure segregated system and that continues to have a segregative effect, the court stated such a policy or practice could only stand "where the state can show that there are no less segregative alternatives which are practicable and educationally sound." [19]

Like Justice O'Connor and the *Knight* court, Maryland's Attorney General has stated that *Fordice* requires a determination of whether the "educational purposes of the policy or practice [can] be feasibly accomplished by less segregative means. . . . If they can, then the policy or practice is not consistent with the State's obligations under the Equal Protection Clause and Title VI."[20] The Attorney General described this inquiry as an explicit final step in the *Fordice* analysis, to follow consideration of whether the challenged policy or practice itself was supported by sound educational practices. [21]

Defendants' omission of this element glosses over their complete failure to consider less segregative alternatives when approving programs at the TWIs that duplicate those at the HBIs.

---

[16] *Fordice,* 505 U.S. at 744 (O'Connor, J., concurring).
[17] 14 F.3d 1534 (11th Cir. 1994).
[18] Because of its analytic clarity, *Knight v. Alabama,* 14 F.3d 1534 (11th Cir. 1994), along with the subsequent opinion of the District Court on remand, *Knight v. Alabama,* 900 F. Supp. 272 (N.D. Ala. 1995), are the most relevant and instructive opinions for the issues in this case. The Eleventh Circuit expressed great respect for the trial judge who would hear that remand, stating, "we express nothing but the deepest respect for the manner in which the court below has handled this case. Judge Murphy's management of this complex piece of institutional reform litigation has been extraordinary. His meticulous and scholarly opinion [then on appeal] is a model of judicial thoroughness." *Knight,* 14 F.3d at 1540.
[19] *Knight v. Alabama*, 14 F.3d 1534, 1541 (11th Cir. 1994).
[20] 2005 Opinion of the Attorney General, 2005 WL 3024511 at *2.
[21] *Id.*.

As pointed out in Plaintiffs' Statement of the Case, MHEC failed to consider this critical question when it allowed duplication of Morgan State University's MBA Program, prompting Assistant Attorney General Pace McConkie to write to the Chairman and Commissioners of MHEC that "perhaps most alarming is a complete lack of an 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."[22] Mr. McConkie further stated that the Secretary's decision to approve this duplication "was made contrary to the advice and counsel rendered him by the Office of the Attorney General."[23] The evidence at trial will show that Defendants, as a matter of practice, do not consider less segregative options in their program approval process.

Defendants attempt to run away from this memorandum and its conclusion that Maryland was in violation of *Fordice* and Title VI by making the strange argument that the author of this memorandum, Mr. McConkie, was, like the Defendants' lawyers in this case, an **Assistant** Attorney General and not the **elected** Attorney General of Maryland. Such a distinction is meaningless. Mr. McConkie's analysis has never been rescinded or repudiated. To the contrary, it is fully consistent with the 2005 Attorney General Opinion.[24]

3. Burdens of Proof Under *Fordice*

Critical to this case, *Fordice* established the burdens of proof for plaintiffs and defendants in a higher education desegregation case, as has been acknowledged by the *Knight* case in Alabama as well as in the *post-Fordice* case remanded to the Mississippi District Court.[25] As *Knight* explained, plaintiffs must first "show that a challenged contemporary policy is traceable

[22] Memorandum from Pace McConkie to John Oliver at 3 (Apr. 20, 2005).
[23] *Id.* at 2.
[24] *See* 2005 Attorney General Opinion, 2005 WL 3024511 at *7 ("Thus, the state has the burden of showing that its legitimate policies cannot be accomplished through less segregative means.").
[25] *Ayers v. Fordice*, 879 F. Supp 1419, 1476 (N.D. Miss. 1995).

to past segregation."[26] Then, quoting *Fordice,* the Eleventh Circuit stated, "'the burden of proof [then] falls upon the *State,* and not the aggrieved plaintiffs, to establish that it has dismantled its prior *de jure* segregated system.'"[27]

The State may carry its burden by showing either that "the challenged contemporary policy, though traceable to segregation, is not constitutionally objectionable because it does not today have segregative effects";[28] or, as noted above, "that there are no less segregative alternatives which are practicable and educationally sound…" If the State does not succeed with either of these defenses, it must adopt whatever practicable and educationally sound alternative "would achieve the greatest possible reduction in the identified segregative effects."[29] Referring to Justice O'Connor's concurrence, the *Knight* court stated that "the circumstances in which a State may maintain a policy or practice traceable to *de jure* segregation that has segregative effects are narrow."[30]

The Mississippi District Court that heard the remand of *Fordice* imposed the same burdens of proof. For example, the court stated, "This court has placed the burden on the defendants to negate the inference that a traceable practice currently fosters segregation, which in this context, means that the practice challenged does not impede further desegregation of the HBIs/HWIs."[31]

---

[26] *Knight,* 14 F.3d at 1541.
[27] *Id.,* quoting *Fordice,* 505 U.S. at 739 (emphasis in *Fordice).*
[28] *Id.*
[29] *Id.*
[30] *Id.,* quoting *Fordice,* 505 U.S. at 744 (O'Connor, J., concurring).
[31] *Ayers v. Fordice,* 879 F. Supp 1419, 1476 (N.D. Miss. 1995); s*ee also Ayers* Trial Transcripts, Volume 1 at 3-34, 83-85.

4. Equal Protection Claims Under *Fordice*

Defendants argue that "Plaintiffs appear to have abandoned their Equal Protection claims as they do not allege any intentional discrimination in their Statement of the Case."[32] Again, Defendants appear to be inventing their own version of *Fordice*. *Fordice* actually stated:

> [I]t is important to reiterate that we do not disturb the findings of no discriminatory purpose in the many instances in which the courts below made such conclusions. The private petitioners and the United States, however, need not show such discriminatory intent to establish a constitutional violation for the perpetuation of policies traceable to the prior *de jure* segregative regime which have continuing discriminatory effects.[33]

This case is about whether Maryland has dismantled its formerly de jure segregated higher education system as required under the Equal Protection Clause of the U.S. Constitution. No showing of current discriminatory intent is needed.

5. Defendants' Funding Obligations

Defendants are also wrong when they argue they have no "legal obligation" to enhance the HBIs. As the Attorney General informed Defendant MHEC in his 2005 opinion, "To the extent that enhancements are necessary to cure funding inequities traceable to *de jure* segregation, then they are *constitutionally required*."[34] As recently as 2008, Maryland's HBI Study Panel found that "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*. . .."[35] This report provides evidence that the inequalities between HBIs and TWIs are traceable to the prior *de jure* system and have the effect of making HBIs

[32] Defendants' Statement of the Case at 9, n.5.
[33] *Fordice,* 505 U.S. at 733, n.8.
[34] 2005 Attorney General Opinion, 2005 WL 3024511 at *21 (emphasis added).
[35] HBI Study Panel at 6 (emphasis added).

unattractive. Accordingly, Maryland has an affirmative obligation to enhance funding at the HBIs.[36]

Defendants also argue that their revisions to the funding process in Maryland and the lack of discussion of funding in *Fordice*[37] mean that there is no legal support for Maryland's obligation to provide enhanced funding to the HBIs. However, as noted by Maryland's Attorney General "[e]nhanced funding has been a common element of *post-Fordice* higher education desegregation remedies."[38] This is true even where the method of allocating funding has changed and where, by certain measures, HBIs have received more funding than TWIs in recent years. One such remedy was in the *Knight* case. There, the district court concluded that even though the HBIs had received more funding than the TWIs in recent years, "[s]uch funding has not yet put the HBIs in the place they would have been but for their black heritage and the *de jure* system."[39] This is the same conclusion reached by Maryland's HBI Study Panel and, accordingly, Maryland has a constitutional obligation to rectify the disparity.

6. The Significance of the Partnership Agreement and the "Comparative and Competitive" Standard

Defendants' position on the relevance of the 2000 Partnership Agreement is similarly at odds with the November 2005 Maryland Attorney General Opinion and ignores the fact that the

[36] *See Knight v. Alabama*, 787 F. Supp. 1030, 1281 (N.D. Ala. 1991)("Through a history of inadequate funding, Alabama's historically black institutions have not been in a position to improve their facilities to the level necessary to attract other race students in the face of strong competition for capital funding from the predominately white institutions in close geographical proximity.")

[37] In *Fordice*, the Supreme Court declined to decide whether Mississippi HBIs were entitled to enhanced funding, but said such funding enhancement could be a necessary remedy. The Court stated that it would not be appropriate to order funding simply to create "publicly funded, exclusively black enclaves by private choice," but that "[w]hether such an increase in funding is necessary to achieve a full dismantlement under the standards we have outlined, however, is a different question, and one that must be addressed on remand." *Fordice*, 505 U.S. at 743.

[38] 2005 Attorney General Opinion, 2005 WL 3024511 at *20.

[39] *Knight*, 900 F. Supp. at 308.

Partnership Agreement was crafted to rectify Maryland's long history of discrimination.[40] The Partnership Agreement was an express effort by the Department of Education Office of Civil Rights ("OCR") to bring about remedies to remove the vestiges of de jure discrimination in Maryland's higher education system in light of the *Fordice* standard. OCR's signature indicated that the Partnership Agreement committed the State to a course of action that would, finally, fully dismantle Maryland's de jure system, and Maryland's signature indicated that the State agreed these commitments were sound, practicable, and constructive ways to improve the admittedly inferior condition of its HBIs. In fact, as Plaintiffs noted in their Statement of the Case, Maryland's signatory to the Agreement and then-Chairman of MHEC understood that the Agreement was designed to remove vestiges of discrimination.[41]

Maryland's Attorney General found the Partnership Agreement very relevant to the question of whether Maryland has satisfied its duty to dismantle its de jure system of segregation. His November 2005 Opinion observed that the Partnership Commitments are "designed to enhance student choice or reduce the stigmatic racial identifiability of institutions."[42] These goals are exactly what remedies under *Fordice* are supposed to achieve. As the *Fordice* Court stated:

> Because the former *de jure* segregated system of public universities in Mississippi impeded *the free choice of prospective students*, the State in dismantling that system must take the necessary steps to ensure that this choice now is truly free…. [S]urely the State may not leave in place policies rooted in its prior officially segregated system that serve to maintain *the racial identifiability of its universities* if those policies can practicably be eliminated without eroding sound educational policies.[43]

[40] *See* Defendants' Statement of the Case at 2-3 ("For a number of years there continued to be, at best, benign neglect of the State's obligations to desegregate and, at worst, outright hostility and footdragging.") (Dkt. No. 178). This long history, chronicled in report after report, is relevant to, among other things, the analysis of traceability.
[41] Mar. 19, 2010 John Oliver Deposition Transcript at 24:23 - 25:14.
[42] 2005 Attorney General Opinion, 2005 WL 3024511 at * 20
[43] *Fordice*, 505 U.S. at 742-43 (emphasis added).

Thus, the Partnership Agreement set forth a practical and sound plan to enhance the HBIs so they could overcome Maryland's "shameful history" of discrimination[44] and attract students regardless of race, as required of a *Fordice* remedy.[45]

Given the significance of the Partnership Agreement, Defendants are wrong to argue that the obligation to raise the State's HBIs to a "comparable and competitive" level with the TWIs is irrelevant to this case. This phrase formed a touchstone concept in the Partnership Agreement's plan to dismantle Maryland's de jure segregated higher education system for reasons that are equally compelling today.

The legal argument behind enhancement of the HBIs to a "comparable and competitive" level is simple and tracks closely the rule of *Fordice:* vestiges of de jure discrimination, especially with regard to practices and policies related to programs, facilities and funding, have significantly disadvantaged the HBIs for decades; these vestiges have had the segregative effect of leaving the HBIs unattractive to white students in comparison with the TWIs; therefore, this segregative effect will only be remedied when the HBIs are made comparable and competitive with the TWIs so the HBIs can attract students of all races.[46]

While the particular phrase "comparable and competitive" was developed by Maryland and OCR in designing the Maryland remedies, the logic behind that phrase has driven post-

[44] Defendants' Statement of the Case at 2 (Dkt No. 178).

[45] *See* 2005 Attorney General Opinion at *15 (Purported sound educational justification "may not violate the terms of any applicable OCR agreement"); *Id*. at *18 (In the context of limitations on HBCU Institutional Missions, in assessing State's compliance under *Fordice*, "a court would also look to the State's compliance with its agreements with OCR with respect to institutional missions.").

[46] The necessity of raising the HBIs to a comparable and competitive level with the TWIs has become integral to Maryland's planning about how to satisfy its legal obligations, even if Maryland has not executed on its plans. *See, e.g.,* HBI Study Panel at 1 ("The Commission appointed the Panel on Historically Black Institutions to study the policy and funding issues regarding Maryland's HBIs, to define the terms comparable and competitive, and to identify the indicators or benchmarks that would compare Maryland's historically black institutions with the traditionally white institutions in the context of the state's Partnership Agreement with the United States Office of Civil Rights."); *2009 State Plan for Postsecondary Education* at 26 ("This goal of comparability and competitiveness was included in the 2004 Maryland State Plan for Postsecondary Education and was an integral part of the State's commitments in its 2000 Partnership Agreement with the Department of Education's Office for Civil Rights (OCR).")

Fordice remedies in many other cases. As described in the previous section and acknowledged by the Maryland Attorney General, enhanced funding has often been found necessary to make HBIs attractive in comparison with TWIs so that they can, in fact, compete for students of all races.

7. Proof of Traceability

Unlike Defendants, Plaintiffs are prepared to meet their burden of proof under the complete *Fordice* analysis. This includes Plaintiffs' burden to demonstrate the traceability of Maryland's current policies and practices, including program duplication and inequities in funding and facilities, to the former de jure system as required by *Fordice.* Contrary to Defendants' arguments, Plaintiffs are able to show traceability and, in fact, Defendants' own witnesses and documents provide some of Plaintiffs' best evidence. As far as program duplication is concerned, Maryland's Attorney General has already admitted traceability, stating, "There is no doubt that Maryland operated a de jure segregated public higher education program before 1969 when OCR found the State in violation of Title VI, and that some policies, such as program duplication at geographically proximate schools, are traceable to that era."[47] Similarly, with respect to funding and facilities, Maryland's HBI Study Panel found that, the HBIs need substantial additional resources to overcome "the competitive disadvantages *caused by prior discriminatory treatment*: the lack of modern 'state of the art' science and technology labs, the

[47] *See also* Memorandum from Pace J. McConkie to John J. Oliver (Apr. 20, 2005) at 2-3 (Dkt. No. 174-1), MSU0003650-52 (finding a violation of *Fordice* and acknowledging traceability). Defendants' attempt to evade liability for Maryland's extensive unnecessary program duplication also appears to rest on a denial of the holding of *Fordice.* Defendants argue that Maryland has the right to continue unnecessary program duplication because its "current process for approval of institutional programs . . .is not traceable to the era of segregation." Defendants' Statement of the Case at 15 (Dkt. No. 178). However, the Supreme Court in *Fordice* found that unnecessary program duplication was *itself* a policy or practice that is traceable to the de jure era: "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." *Fordice,* 505 U.S. at 738. In other words, program duplication was a policy integral to the de jure era, and its existence in the present made it a traceable policy.

aging physical plants and lack of consistent funding for maintenance…."[48] Plaintiffs are prepared to submit evidence concerning the traceability of these vestiges as well.

[48] HBI Study Panel Report at MDED-00115823 (emphasis added).

Dated: November 12, 2010

Respectfully submitted,

/s/
Michael D. Jones, Esq. (Bar No. 08634)
Karen N. Walker (Bar No.14181)
Henry Thompson (*pro hac vice*)
Savaria B. Harris (*pro hac vice*)
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200
Email: savaria.harris@kirkland.com

Aderson B. Francois, Esq. (Bar No. 17449)
Howard University School of Law
Civil Rights Clinic
2900 Van Ness Street, N.W.
Washington, D.C. 20008
Telephone: (202) 806-8065
Facsimile: (202) 806-8436
Email: afrancois@law.howard.edu

John C. Brittain (*pro hac vice*)
Attorney At Law
2513 Gadsby Place
Alexandria, VA 22311
Telephone: (832) 687-3007
Email: jbrittatty@comcast.net

Jon Greenbaum (*pro hac vice*)
Lawyers' Committee for Civil Rights Under Law
1401 New York Avenue, N.W., Suite 400
Washington, DC 20005
Telephone: (202) 662-8600
Facsimile: (877) 303-5039
Email: jgreenbaum@lawyerscommittee.org