

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

THE COALITION FOR EQUITY AND)
EXCELLENCE IN MARYLAND HIGHER)
EDUCATION, INC., et al.,)

Plaintiffs,)

v.)

MARYLAND HIGHER EDUCATION)
COMMISSION, et al.,)

Defendants.)

Civil No. 06-2773-CCB

PLAINTIFFS' PROPOSED FINDINGS OF FACT

AND

CONCLUSIONS OF LAW

TABLE OF CONTENTS

| | Page |
|--|-------------|
| OVERVIEW OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW | 1 |
| PROPOSED FINDINGS OF FACT | 73 |
| I. BACKGROUND | 73 |
| A. Parties..... | 73 |
| B. Structure of Maryland’s Higher Education System | 78 |
| C. Summary of School Histories | 90 |
| II. CHRONOLOGY..... | 100 |
| A. Maryland Acknowledges It Operated A <i>De Jure</i> Segregated System Of Higher Education Until 1969 | 100 |
| B. The Maryland System Prior To 1935: Maryland Largely Ignores HBIs As TWIs Develop As Part Of Public System..... | 102 |
| C. Maryland First Begins to Pay Some Attention to HBIs During Era of Legal Challenges to Racial Inequality to Higher Education..... | 106 |
| D. The Post- <i>Brown De jure</i> Years: HBIs Continue to be Ignored as the System Grows | 134 |
| E. OCR Enforcement in Maryland Begins, Ending the <i>De jure</i> Era..... | 144 |
| F. Maryland’s College Age Population Declines and the HBIs are Not Capable of Competing with the TWIs | 156 |
| G. The HBIs Suffer as OCR Withdraws and the State Restructures its Higher Education System..... | 163 |
| H. After Five Years Of Silence From OCR, Maryland And OCR Enter A Five-Year Partnership Agreement In 2000 | 170 |
| I. The Years Since The 2000 Partnership Agreement Confirm Maryland Has Not Yet Eliminated The Vestiges Of Discrimination From Its System Of Higher Education | 180 |
| J. The Current Infrastructure Of The Hbis Reveals The Cumulative Effect Of The State’s Policies And Practices | 202 |

TABLE OF CONTENTS

(cont'd)

| | Page |
|--|-------------|
| K. HBIs Today Continue To Serve Students With Lower Entering SAT Scores, Higher Remedial Needs, And Higher Financial Needs Which All Contribute To Lower Retention And Graduation Rates | 218 |
| III. MARYLAND’S REPORTS ESTABLISH THAT HBIS NEED TO BE ENHANCED SO THAT THEY CAN BE COMPARABLE AND COMPETITIVE TO TWIS AND PROVIDE A CHOICE TO STUDENTS OF ALL RACES | 221 |
| IV. MISSION | 228 |
| V. PROGRAM DUPLICATION & PROGRAM UNIQUENESS | 272 |
| A. Introduction..... | 272 |
| B. <i>De jure</i> Era Academic Programming Policies & Practices | 275 |
| C. Post- <i>Brown</i> Academic Programming Policies & Practices | 281 |
| D. Current Unnecessary Duplication, Unequal Program Development & Program Inequality..... | 298 |
| E. Unequal Program Development..... | 321 |
| VI. SEGREGATIVE EFFECTS | 334 |
| A. Increased Racial Segregation at the HBIs..... | 334 |
| B. Impact of Maryland’s Policies & Practices on Student Choice | 337 |
| C. Demographics Do Not Explain White Student Declines at HBIs..... | 338 |
| D. Racial Tensions Do Not Support White Declines at HBIs | 341 |
| VII. MARYLAND’S CURRENT POLICIES AND PRACTICES REGARDING OPERATING FUNDING ARE TRACEABLE TO THE <i>DE JURE</i> ERA AND RESULT IN SUBSTANTIAL RESOURCE DEFICIENCIES AT THE HISTORICALLY BLACK INSTITUTIONS..... | 342 |
| A. Institutions Use Operating Funding To Carry Out Their Missions. | 345 |
| B. Institutions Receive Revenues From A Variety Of Sources, Including State Appropriations, Tuition and Fees, and Grants and Contracts..... | 346 |
| C. Maryland Acknowledges That The HBIs Do Not Receive The Enhanced Level Of Resources Necessary To Fulfill Their Dual Mission..... | 348 |

TABLE OF CONTENTS

(cont'd)

| | Page |
|---|-------------|
| D. Maryland’s <i>De jure</i> Era Policies And Practices Provided Separate Institutions For African-Americans But Funded Them Unequally. | 358 |
| E. Maryland Has Documented The HBIs’ Need For Enhanced Funding To Overcome Historical Discrimination And Support The Dual Mission..... | 365 |
| F. The Different Iterations Of The Funding Guidelines All Contained A Mission-Based Component..... | 368 |
| G. HBIs Have Experienced Substantial Cumulative Funding Deficiencies Since 1984..... | 382 |
| H. Dr. Lichtman’s Analysis Presents A Misleading Picture Of The Finances Of Maryland’s HBIs. | 387 |
| I. Dr. Toutkoushian’s Cumulative Deficiency Calculations Do Not Account For Several Factors That Adversely Impact The Finances Of Maryland’s HBIs..... | 392 |
| J. Resource Limitations Have A Detrimental Effect On The Operations Of Maryland’s HBIs And Deprive Their Students Of Equal Educational Opportunity..... | 403 |
| K. Maryland Does Not Adequately Support UMES’s Land Grant Mission. | 404 |
| L. Funding Disparities Experienced By Maryland’s HBIs Lack Sound Educational Justification And Can Be Practicably Eliminated..... | 405 |
| VIII. SEGREGATIVE EFFECT..... | 409 |
| PROPOSED CONCLUSIONS OF LAW..... | 413 |
| I. MARYLAND’S AFFIRMATIVE OBLIGATION TO DISMANTLE VESTIGES OF DISCRIMINATION..... | 413 |
| II. BURDEN OF PROOF UNDER <i>FORDICE</i> | 420 |
| III. MARYLAND’S HISTORY OF POLICIES AND PRACTICES TRACEABLE TO THE <i>DE JURE</i> ERA..... | 424 |
| A. Maryland Maintains Traceable Policies and Practices of Assigning Limited Institutional Roles and Missions to its HBIs..... | 429 |

TABLE OF CONTENTS

(cont'd)

| | Page |
|--|-------------|
| B. Maryland Maintains Traceable Policies and Practices Related to Duplication of Programs and Failure to Place Unique, High Demand Programs at the HBIs..... | 437 |
| C. Maryland’s Funding Policies and Practices are Traceable and Maintain Structural Inequities..... | 443 |
| IV. MARYLAND HAS NOT DISPROVEN THAT ITS TRACEABLE POLICIES AND PRACTICES HAVE ONGOING SEGREGATIVE EFFECTS. | 452 |
| V. EDUCATIONALLY SOUND AND PRACTICABLE ALTERNATIVES WITH LESS SEGREGATIVE EFFECTS | 455 |
| VI. THERE IS NO SOUND EDUCATIONAL JUSTIFICATION FOR MARYLAND’S TRACEABLE POLICIES AND PRACTICES | 457 |
| A. Proximate Universities with Duplicative Programs Lacks Justification..... | 457 |
| B. The Partnership Agreement Outlines Measures Necessary to Desegregate | 458 |
| C. HBI Panel Confirmed No Sound Justification for Segregative Policies..... | 460 |
| D. 2009 State Plan Similarly Requires Removing Vestiges of Segregation | 464 |
| E. The Partnership Agreement, 2009 State Plan, and HBI Panel Report Echo Recommendations in Maryland’s Historic Reports to Enhance the HBIs..... | 466 |
| VII. REMEDY..... | 468 |
| A. Partnership Agreement Provides Plan for Removing Vestiges of Segregation | 468 |
| B. Remedies Articulated in the Partnership Agreement Would Benefit the USM..... | 469 |
| C. Expanded Missions & Programmatic Niches are Necessary at HBIs..... | 471 |
| D. Programmatic Remedies are Consistent with Scholarship on Desegregation | 474 |
| E. Transfers of Programs to HBIs Should Supplement Programmatic Remedy..... | 474 |
| F. Effective Public Relations is Necessary to Accompany Programmatic Change | 475 |
| CONCLUSION..... | 475 |

TABLE OF CONTENTS

(cont'd)

Page

TABLE OF AUTHORITIES

| | Page(s) |
|---|----------------|
| Cases | |
| <i>Adams v. Califano</i> , 430 F. Supp. 118 (1977) | passim |
| <i>Adams v. Richardson</i> , 356 F. Supp. 92 (D.D.C. 1973)..... | 147 |
| <i>Adams v. Richardson</i> , 480 F.2d 1159 (D.C. Cir. 1973)..... | 147 |
| <i>Alexander v. Sandoval</i> , 532 U.S. 275 (2001)..... | 416 |
| <i>Ayers v. Allain</i> , 674 F. Supp. 1523 (N.D. Miss. 1987)..... | 441, 442 |
| <i>Ayers v. Allain</i> , 893 F.2d 732 (5th Cir. 1990) | 421 |
| <i>Ayers v. Allain</i> , 914 F.2d 676 (5th Cir. 1990) | 435, 436, 440 |
| <i>Ayers v. Fordice</i> , 111 F.3d 1183 (5th Cir. 1997) | passim |
| <i>Brown v. Bd. of Educ.</i> , 347 U.S. 483 (1954)..... | 135, 416 |
| <i>Brown v. Bd. of Educ.</i> , 349 U.S. 294 (1955)..... | 416, 417, 441 |
| <i>Derolph v. Ohio</i> , 712 N.E.2d 125 (Ohio 1999) | 66 |
| <i>Green v. Cnty. Sch. Bd. of New Kent Cnty., Va.</i> , 391 U.S. 430 (1968)..... | 459 |
| <i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003)..... | 458 |
| <i>Knight v. Alabama</i> , 14 F.3d 1534 (11th Cir. 1994) | passim |

TABLE OF AUTHORITIES

(cont'd)

| | Page(s) |
|---|-------------------|
| <i>Knight v. Alabama</i> , 787 F. Supp. 1030 (N.D. Ala. 1991)..... | passim |
| <i>Knight v. Alabama</i> , 900 F. Supp. 272 (N.D. Ala. 1995)..... | passim |
| <i>Mandel v. U.S. Dep't of Health, Educ. & Welfare</i> , 411 F. Supp. 542 (D. Md. 1976)..... | 25, 150, 151 |
| <i>Missouri v. Jenkins</i> , 515 U.S. 70 (1995)..... | 427 |
| <i>Moseke v. Miller & Smith, Inc.</i> , 202 F. Supp. 2d 492 (E.D. Va. 2002) | 424 |
| <i>Osage Tribe of Indians of Okla. v. United States</i> , 96 Fed. Cl. 390 (Fed. Cl. 2010) | 66 |
| <i>Plessy v. Ferguson</i> , 163 U.S. 537 (1896)..... | 107 |
| <i>Spell v. McDaniel</i> , 824 F.2d 1380 (4th Cir. 1987) | 424 |
| <i>U.S. v. Louisiana</i> , 380 U.S. 145 (1965)..... | 300 |
| <i>United States v. Fordice</i> , 505 U.S. 717 (1992)..... | passim |
| <i>University of Maryland v. Murray</i> , 169 Md. 478 (1936) | 101, 108, 109 |
| Statutes | |
| Md Code Ann., Educ. § 12-106(a)(1)(iii)..... | passim |
| Md. Code Ann Educ. § 11-206.1(f) | 328 |
| Md. Code Ann Educ. § 12-105(2) | 376 |
| Md. Code Ann., Educ. § 10-101 | 166 |
| Md. Code Ann., Educ. § 10-202 | 79 |
| Md. Code Ann., Educ. § 10-203 | 18, 166, 375, 448 |

TABLE OF AUTHORITIES**(cont'd)**

| | Page(s) |
|---|----------------|
| Md. Code Ann., Educ. § 10-203(c)..... | 18, 81, 271 |
| Md. Code Ann., Educ. § 10-206..... | 80 |
| Md. Code Ann., Educ. § 10-207..... | 80, 434 |
| Md. Code Ann., Educ. § 10-207(4)..... | 261 |
| Md. Code Ann., Educ. § 10-207(5)..... | 378 |
| Md. Code Ann., Educ. § 10-207(a)..... | 166 |
| Md. Code Ann., Educ. § 10-208(7)..... | 376 |
| Md. Code Ann., Educ. § 10-208(g)..... | 96 |
| Md. Code Ann., Educ. § 10-208-09..... | 166 |
| Md. Code Ann., Educ. § 10-209(c)(2)..... | 18, 82, 435 |
| Md. Code Ann., Educ. § 11-102(a)..... | 79 |
| Md. Code Ann., Educ. § 11-104(a)(1)..... | 79 |
| Md. Code Ann., Educ. § 11-104(b)(1)..... | 78 |
| Md. Code Ann., Educ. § 11-104(b)(i)-(iii)..... | 79 |
| Md. Code Ann., Educ. § 11-104(b)(iv)-(v)..... | 79 |
| Md. Code Ann., Educ. § 11-105..... | 166 |
| Md. Code Ann., Educ. § 11-105(b)(2)(ii)..... | 78 |
| Md. Code Ann., Educ. § 11-105(b)(5)(i)..... | 167 |
| Md. Code Ann., Educ. § 11-105(d)(1)(ii)(4)..... | 78 |
| Md. Code Ann., Educ. § 11-105(f)..... | 78 |
| Md. Code Ann., Educ. § 11-105(h)(4)..... | 377 |
| Md. Code Ann., Educ. § 11-105(h)(5)..... | 377 |
| Md. Code Ann., Educ. § 11-105(i)(1)..... | 375 |

TABLE OF AUTHORITIES**(cont'd)**

| | Page(s) |
|--|-------------------|
| Md. Code Ann., Educ. § 11-105(i)(2)..... | 377 |
| Md. Code Ann., Educ. § 11-105(i)(3)..... | 86 |
| Md. Code Ann., Educ. § 11-105(i)(4)..... | 86, 377 |
| Md. Code Ann., Educ. § 11-105(i)(4)(iii)(2)..... | 377 |
| Md. Code Ann., Educ. § 11-105(iii)(2) | 86 |
| Md. Code Ann., Educ. § 11-105(u) | 87 |
| Md. Code Ann., Educ. § 11-202(a)..... | 87 |
| Md. Code Ann., Educ. § 11-206 | 166 |
| Md. Code Ann., Educ. § 11-206(b)(1)..... | 87 |
| Md. Code Ann., Educ. § 11-206(b)(2)..... | 87 |
| Md. Code Ann., Educ. § 11-206(b)(3)..... | 87 |
| Md. Code Ann., Educ. § 11-206(b)(6)..... | 87 |
| Md. Code Ann., Educ. § 11-206(e)(5)(iv) | 88 |
| Md. Code Ann., Educ. § 11-206.1(b) | 272, 328 |
| Md. Code Ann., Educ. § 11-206.1(b)(1)..... | 87 |
| Md. Code Ann., Educ. § 11-206.1(b)(3),(5)..... | 87 |
| Md. Code Ann., Educ. § 11-206.1(c)(2)..... | 87 |
| Md. Code Ann., Educ. § 11-206.1(e)..... | 88, 272, 318, 328 |
| Md. Code Ann., Educ. § 11-206.1(f)(5) | 88, 273 |
| Md. Code Ann., Educ. § 11-302 | 166 |
| Md. Code Ann., Educ. § 11-302(a)..... | 88, 261, 434 |
| Md. Code Ann., Educ. § 11-302(b)(1)..... | 88 |
| Md. Code Ann., Educ. § 11-302(b)(1)(iii)..... | 261 |

TABLE OF AUTHORITIES

(cont'd)

| | Page(s) |
|--|----------------|
| Md. Code Ann., Educ. § 11-302(b)(2)..... | 88, 261 |
| Md. Code Ann., Educ. § 11-302(c)(2)..... | 261 |
| Md. Code Ann., Educ. § 11-302(d)..... | 89, 261, 434 |
| Md. Code Ann., Educ. § 12-101(b)(5)..... | 166 |
| Md. Code Ann., Educ. § 12-105(a)(1)(i)..... | 18, 89 |
| Md. Code Ann., Educ. § 12-105(a)(1)(ii)..... | 376 |
| Md. Code Ann., Educ. § 12-105(a)(1)(iii)..... | 89, 376 |
| Md. Code Ann., Educ. § 12-105(a)(2)..... | 89 |
| Md. Code Ann., Educ. § 12-106(a)(1)(iii)1.B..... | 436 |
| Md. Code Ann., Educ. § 12-106(a)(1)(iii)1.D..... | 436 |
| Md. Code Ann., Educ. § 12-106(a)(1)(iii)2..... | 437 |
| Md. Code Ann., Educ. § 12-106(a)(1)(iii)4..... | 437 |
| Md. Code Ann., Educ. § 12-106(a)(1)(iii)5..... | 437 |
| Md. Code Ann., Educ. § 12-106(a)(2)..... | 167 |
| Md. Code Ann., Educ. § 12-106(d)..... | 87 |
| Md. Code Ann., Educ. § 14-101..... | 437 |
| Md. Code Ann., Educ. § 14-101(b)..... | 91, 260 |
| Md. Code Ann., Educ. § 14-401..... | 91, 260, 437 |
| Md. Code Ann., Educ. § 14-405(b)(1)..... | 376 |
| Md. Code Ann., Educ. § 14-405(b)(2)..... | 91, 376 |
| Other Authorities | |
| <i>“Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Higher Education”.</i> | |
| 43 Fed. Reg. 6658 (Feb. 15, 1978)..... | 151 |

TABLE OF AUTHORITIES

(cont'd)

Page(s)

Black's Law Dictionary

1172 (6th ed. 1991)..... 424

OVERVIEW OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. In 2005, as Maryland's Partnership Agreement with the Office of Civil Rights was coming to an end, the four Presidents of Maryland's Historically Black Institutions prepared a letter for the Maryland Black Caucus where they noted that Maryland's commitment to enhancing the HBIs' operating budgets was "weak", and that this "[made] it difficult for campuses to expand their missions." (PTX 13 at 9.) The HBI Presidents noted that their institutions' limited missions had restricted the HBIs ability to offer education in a diverse environment. They wrote: "Historically, HBIs have had relatively narrow missions and substantially fewer academic programs than majority campuses. This has limited their attractiveness to students of all races." (PTX 13 at 9.)

2. The Presidents went on to point out that the programmatic gap between the HBIs and TWIs had in fact widened during the period of the Partnership Agreement. The four HBI Presidents noted, "[t]he 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." (PTX 13 at 3.). Finally, they called for the appointment of an independent panel of experts to report on how their missions could be expanded and become more substantive. (PTX 13 at 14.)

3. The following year, in 2006, The Coalition for Excellence and Equity in Higher Education filed this lawsuit to force Maryland to dismantle the vestiges of its dual and unequal system of higher education, particularly: (1) the limited role and missions of Maryland's Historically Black Institutions (HBIs); (2) the underfunding of these institutions which both prevent them from carrying out their current missions and prevent them from expanding their role and missions to be attractive to students regardless of race; and (3) unnecessary program duplication which operates to render the HBIs more segregated now than they were in the 1970s.

(Oct. 13, 2006 Compl., *Coal. for Equity & Excellence in Md. Higher Educ. v. Elrich*, Case No. 24-C06-008137 (Md. Cir. Ct., Balt. City).) The Coalition alleged that the 2000 Partnership Agreement between Maryland and the Office of Civil Rights outlines the steps necessary to desegregate the HBIs and provide equal educational opportunities to their students, and further alleged that Maryland has failed to take these steps. (Oct. 13, 2006 Compl., *Coal. for Equity & Excellence in Md. Higher Educ. v. Elrich*, Case No. 24-C06-008137 (Md. Cir. Ct., Balt. City) at ¶¶ 70, 77.)

4. Two years after the Coalition filed suit, in 2008, Maryland appointed a blue ribbon panel to examine the level of funding necessary to achieve the desegregation goals of the Partnership Agreement. This was the Commission to Develop the Maryland Model for Funding Higher Education (“Bohanan Commission”). To assist in this effort, the Bohanan Commission appointed a panel of leading experts in higher education--the Panel on the Comparability and Competitiveness of Historically Black Institutions in Maryland (“HBI Panel”). Among its tasks was “[c]onsideration of the impact of state key policies; funding, program review, [and] mission.” (PTX 2 at 115.)

5. The HBI Panel conducted “[a]n examination of the programs, resources, and facilities at the TWIs and HBIs.” (PTX 2 at 115.) The HBI Panel “analyzed volumes of reports and analyses provided both by the institutions and various state agencies,” visited the campuses, and interviewed officials from the institutions. (PTX 2 at 122.) Additionally, “[t]he Panel took care that any conclusions drawn were based on data and reports that in most cases were confirmed by multiple sources, including universities and government agencies.” (PTX 2 at 122.)

6. Perhaps because this suit was pending at the time, Maryland asked the HBI Panel to walk a tightrope, to assess what it would take to comply with the Partnership Agreement, but to avoid drawing any direct conclusions as to whether Maryland in fact had failed to do so. The HBI Panel Report states:

The Commission's charge to the Panel was to avoid assessing compliance with the 2000-2005 Partnership Agreement. However, the Commission's charge also requests the Panel to conduct its study and analysis to determine comparability and competitiveness and their benchmarks and indicators "within the context of the state's Partnership Agreement with the U.S. Office of Civil Rights."

The Panel attempted to implement this carefully-drawn distinction by focusing on Commitment 9 of the Partnership Agreement, which contained two major elements[.]

(PTX 2 at 115.)

7. The two major elements in Commitment #9 were the specific enhancements, and the broader commitment of enhancing the HBIs to be able to compete with the TWIs:

The second component of Commitment 9 is concerned with the "broader goal of making certain that the HBIs are comparable and competitive with the state's TWIs in all facets of their operations and programs," including:

- The distinctiveness of the HBIs' programmatic missions.
- The uniqueness and mix of quality academic programs that are not unnecessarily duplicated at proximate TWIs.
- Operational funding consistent with the mix and degree level of academic programs, support for the development of research infrastructure, and support consistent with the academic profile of students.
- Lower student-faculty ratios appropriate to support their missions.
- The expanse, functionality and architectural quality of physical facilities;
- The appearance, attractiveness, and ambiance of the campus and surrounding public infrastructure; including roads, lighting, and public transportation.

- Funding to support students' quality of campus life.

(PTX 2 at 116.)

8. The HBI Panel rightly noted that this commitment, and specifically the term “comparable and competitive” could not be properly understood without first appreciating the “[c]ontext: [p]ast to [p]resent.” (PTX 2 at 117.) As noted by the Panel, “[i]n Maryland, that context is a long history of racial segregation and disparate treatment at both the public post-secondary and elementary/secondary levels of education and decades of attempts to implement fully a federally required desegregation plan designed to eliminate the effects and vestiges of the prior dual system of higher education.” (PTX 2 at 117.)

9. The Panel made clear that its finding and conclusions would describe what was necessary to desegregate the HBIs and provide equal educational opportunities for students at Maryland's HBIs:

As stated earlier, this panel's mandate does not include the responsibility to determine whether Maryland has met its legal obligations under federal law. However, the 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. The terms “competitiveness” and “comparability” are often used as terms of art in the federal government's evaluation of whether the state has remedied state-sanctioned racial discrimination in its public colleges and universities and eliminated where practicable the vestiges of that discrimination as required by both U.S. Supreme Court decisions in Brown V Board of Education and U.S. V Fordice and Title VI of the 1964 Civil Rights Act.

(PTX 2 at 117.)

10. The HBI Panel found that the process that Maryland uses to “set university missions, approve[] new programs, fund[] them through some model or process, and then hold[] universities accountable for results” 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." (PTX 2 at 129 (emphasis supplied).)

11. The HBI Panel concluded that Maryland's HBIs lag the TWIs in just about every aspect of their operations. It concluded: (1) they lack proper funding to support their "more challenging" missions which "historically and into the future" is a "dual mission" (PTX 2 at 120);¹ (2) they lack proper infrastructure, such as adequate libraries, science labs, equipment, teacher salaries, and facilities, especially at the graduate level; (3) they lack consistent funds for maintenance, and (4) they lack funds for financial aid and scholarships to prevent their students from dropping out of school in alarming numbers. (PTX 2 at 119.) Accordingly, the HBI Panel called upon Maryland to "restructure the process that has caused the inequities and lack of competitiveness between the HBIs and the traditionally white . . . institutions." (PTX 2 at 129-30.) The Panel concluded that restructuring Maryland's policies and practices would "place HBIs in the position they would have been, absent the perpetuation of discriminatory policies and practices, to compete effectively with other public institutions in the state." (PTX 2 at 119.)

12. As for the proper funding level to achieve the desegregation aims of the Partnership Agreement, the HBI Panel noted that the Bohanan Commission intended to recommend funding that would go beyond the traditional enrollment based metric of funding per full time equivalent student ("FTE") and take into account the cumulative underfunding of the HBIs:

The Commission's charge to the Panel portends its intent to pursue a more strategic approach to the enhancement of HBI programs and facilities to eliminate any vestiges and effects of prior discrimination and the disadvantages created by the cumulative shortfall of funding over many

¹ The HBI Panel concluded that "the mission of the HBIs in providing an undergraduate degree is substantially different and more challenging than that of the TWIs." (PTX 2 at 120.)

decades. The charge also portends an intent to adopt a strategic funding plan to acknowledge that shortfall and appropriate funds over time that will build the capacity of HBIs and make them comparable in terms of quality and resources to the state's public TWIs.

(PTX 2 at 118-19.)

13. The HBI Panel considered and rejected the traditional enrollment based per FTE funding (on which Maryland bases its defense) as a proper measure to compare HBI funding to TWI funding because the HBIs have more difficult missions. It noted that "on traditional capacity indicators such as funding per student and student faculty ratios, HBIs and TWIs are more similar than different," (PTX 2 at 45), but the HBIs need a different level of capacity than the TWIs:

[T]he mission of the HBIs in providing an undergraduate degree is substantially different and more challenging than that of the TWIs. HBIs historically and into the future have a dual mission. They are committed to the traditional mission of any institution of higher education to provide a quality educational experience and guide students to the attainment of an undergraduate degree.

(PTX 2 at 120 (emphasis added))

14. According to the HBI Panel:

The consequences of serving a higher percentage of students from low-income families include the following:

1. HBIs must expend a higher percentage of revenue toward student financial aid;
2. HBIs must charge lower tuition and fees because students cannot afford higher costs. Consequently, in FY 2007, the revenue from tuition and fees for HBIs is on the average \$1,500/FTE student less than that of TWIs (this analysis excludes UMUC and St. Mary's College because of their unique status);
3. The HBIs' graduation rates are less than that of the TWIs because of the challenges associated with graduating students from low-income families at the same rate as that of students from higher income families; and

4. HBIs must expend larger portions of their budgets toward developmental education and academic support than TWIs.

(PTX 2 at 125.)

15. The Bohanan Commission adopted the findings and conclusions of the HBI Panel Report and described the nature of the challenges facing the HBIs:

The magnitude of the challenges faced by [HBIs] is particularly great, especially at the undergraduate level and will require special attention and consideration if they are to be satisfactorily overcome. HBIs have a dual mission to provide regular collegiate programs and to provide strong developmental education for students, mostly from low-income families, who otherwise would not have an opportunity to pursue a bachelor's degree. Additionally, a disproportionate number of working students comprise the student body at HBIs. Today, entering SAT scores are lower by 200 points, and graduation rates are approximately 25 percentage points lower than at the State's traditionally white schools.

(PTX 2 at 30.)

16. Significantly, it then goes on to state that “[i]n the past, funding decisions for these historically black institutions have largely sought to recognize these needs through negotiations and judgmental decisions.” (PTX 2 at 30.)

17. To accomplish the desegregation goals of the Partnership Agreement, the Bohanan Commission called for significant additional funding for Maryland's HBIs in stark contrast to Maryland's litigation position that they are “better funded than all of the institutions within the system.” (1/3/12 AM Trial Tr. 86 (C. Thompson).) The Bohanan Commission called for: (1) increased funding under Maryland's funding guidelines—to 80% (PTX 2 at 10); (2) funding the remedial component of the HBI dual missions (preliminarily at \$1,400 per FTE) (PTX 2 at 11); (3) increased funding for financial aid across the board with an understanding that this would “disproportionately affect HBIs and their students” (PTX 2 at 46); (4) accelerated funding for their capital needs, including those related to the dual mission (PTX 2 at 48); (5)

funding the recommendations of the HBI panel related to infrastructure (PTX 2 at 47-48), and (6) funding for academic programs, where “[t]he specific programmatic and funding needs for each HBI should be developed based on a process similar to that proposed by the HBI Panel.” (PTX 2 at 46.)²

18. The HBI Panel called for the appointment of independent monitors to monitor Maryland’s progress in enhancing the HBIs, calling for:

[A] monitoring committee that will regularly report to MHEC and the Secretary of Higher Education. This committee should assess progress towards meeting the plan goals and provide for continuous follow-up beyond the completion of the plan to ensure all public institutions of higher education in the state are appropriately progressing within the state’s established framework to ensure quality institutional development.

(PTX 2 at 143.)

19. Maryland has agreed with and adopted as a part of its desegregation plan the findings and conclusions of the HBI Panel and Bohanan Commission.

Testimony of George Reid, MHEC’s Assistant Secretary and 30(b)(b)6 Witness

Q. At several points throughout the 2009 state plan there were references to the HBI Panel report.

Is it correct that MHEC believed that the content of the HBI Panel report was accurate?

A. Yes.

(1/18/12 PM Trial Tr. 81 (Reid).)

20. According to the 2009 Maryland State Plan for Postsecondary Education, a part of the plan “focuses on efforts to address Maryland’s obligation to remedy past discrimination and

² As explained by the Chancellor of the University System of Maryland, Dr. William Kirwan, the Bohanan Commission and the HBI Panel criticized Maryland for failing to fund programs at the HBIs. (1/24/12 PM Trial Tr. 11 (Kirwan).)

to remove any vestiges of the *de jure* system that provided dual and unequal educational experiences to the State's residents." (PTX 1 at 26.)

21. The 2009 Maryland State Plan for Higher Education recognized the HBI's dual mission, and contrary to Maryland's defense at trial, does not suggest that it is a voluntary mission:

As part of their dual missions, HBIs are **charged** with providing access to academically well-qualified students and also a significant percentage of under-prepared students. Responding to the needs of poor and under-prepared students, requires academic and support services tailored to their needs.

(PTX 1 at 56 (emphasis supplied).)

22. The State Plan makes clear that Maryland has set "access" to higher education as a state priority and that the HBIs through their dual mission carry out this access function. (PTX 1 at 30.) It observes that the HBI Panel "recommended enhanced funding to support the public HBIs' dual missions of educating the most qualified students, as well as those who were not adequately prepared to complete college-level work. **Supporting this effort is one means of expanding access in Maryland.**" (PTX 1 at 30.) (emphasis added)

23. Indeed, the 2009 State Plan recognizes that the the HBIs dual mission requires that they receive "[s]ubstantial additional resources" from the State to compete with the TWIs. It states:

Substantial additional resources are needed to ensure the State's public HBIs with their dual missions are comparable to Maryland's TWIs in their capacity to be competitive with respect to the following areas:

- Recruiting, retaining, and graduating an academically, racially, culturally, and ethnically diverse student body;
- Attracting and retaining quality faculty able to teach, conduct scholarly activities, and perform services consistent with each institution's mission;

- Generate external revenue by securing contracts and grants from Federal and State agencies that support instructional services and enhance institutional infrastructure and facilities; and
- Form partnerships with businesses and foundations that expand educational opportunities for students and that promote development in the communities proximate to the institutions.

(PTX 1 at 31.)

24. In terms of enhancing the institutional platform at the HBIs, the State Plan cites to the HBI Panel.

The HBI Panel notes that the “institutional platform” includes university-wide operational as well as facility capacity indicators. According to the HBI Panel, the institutional platform “must provide students, faculty, and administrative staff with an attractive, safe, and administratively effective environment in which to live and work.

(PTX 1 at 31.) “Strengthening the institutional platform is also a critical element in enhancing targeted doctoral programs at the public HBIs so that they achieve a very high level of excellence.” (PTX 1 at 31.)

25. The State Plan cites to another deficiency at the HBIs not directly addressed by the HBI Panel--their IT infrastructure.

Although not addressed by the HBI 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 delivered at public TWIs. The lack of comparable IT services restricts the capacity of HBIs to compete in certain markets for students and to be competitive in the delivery of effective and efficient administrative services.

(PTX 1 at 31.)

26. The State Plan recognizes the need to enhance regular academic programs at the HBIs and to fund the dual mission.

The majority of instructional resources at HBIs are used to educate students who meet the regular admissions criteria established by the institutions, and who are educated consistent with their respective missions. Therefore, funding for HBIs must include resources necessary to enhance instructional services for regularly admitted, academically prepared students regardless of race and/or socioeconomic status. This fact notwithstanding, HBIs also enroll a disproportionate share of low-income students who are not academically prepared to successfully matriculate in college, and adequate funding is also required to enhance the access and success rates of these students.

In summary, the investment of substantial additional resources by the State needed to ensure that its public HBIs are comparable and competitive with its public TWIs refers to the sum total of resources needed to deliver on the HBIs' 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.

(PTX 1 at 32.)

Maryland's Defenses

27. In its defense in this case, Maryland has not contended that it has fulfilled the obligations in the Partnership Agreement, nor has it presented a witness or report to claim that it has actually desegregated the HBIs. Indeed, Dr. William Kirwan, Chancellor of the University System of Maryland, has agreed that its HBIs lack diversity, as they have not been successful in recruiting nonblack students, whether white, Asian or Hispanic. (1/24/12 PM Trial Tr. 30 (Kirwan).) The lack of diversity at the HBIs is reflected in the below table.

HBI Enrollments By Race: Fall 2009

| Institution | African-American | White | Hispanic | Asian | Other |
|-------------|----------------------|---------------------|-------------------|-------------------|--------------------|
| Bowie | 4968/5617 (88.4%) | 234/5617 (4.2%) | 92/5617 (1.6%) | 99/5617 (1.8%) | 224/5617 (4%) |
| Coppin | 3353/3801 (88.2%) | 51/3801 (1.3%) | 16/3801 (0.4%) | 9/3801 (0.2%) | 372/3801 (9.8%) |
| Morgan | 6553/7226 (90.7%) | 201/7226 (2.8%) | 68/7226 (0.9%) | 70/7226 (1%) | 334/7226 (4.6%) |
| UMES | 3439/4433 (77.6%) | 591/4433 (13.3%) | 63/4433 (1.4%) | 63/4433 (1.4%) | 277/4433 (6.2%) |

PTX 755 at 16 (other includes students who are designated as Native American, Foreign, and Other).)

28. Moreover, Maryland has not suggested that there is a sound, educational basis for leaving the HBIs “as such”, and in the condition described in the HBI Panel Report. To the contrary, Maryland has agreed that diversity at the HBIs is just as important as at the TWIs. (1/24/12 PM Trial Tr. 30 (Kirwan).) Moreover, Maryland’s 2009 Report makes clear that it is educationally sound, practical, and good educational policy for the HBIs to be in a position to compete with the TWIs. It states:

The State of Maryland has identified as a *priority* for higher education the goal of providing the funding necessary to ensure that its four public HBIs—Bowie State University, Coppin State University, Morgan State University, and the University of Maryland Eastern Shore—are *comparable and competitive* with the State’s public TWIs.

(PTX 1 at 30) (emphasis added)

29. As will be discussed in more detail below, the phrase “comparable and competitive” has its origins in the attempts to remedy Maryland’s *de jure* era policy of “providing higher education facilities for Negroes which are inferior to those provided for

whites.” (PTX 18 at 108.) Report after report documented the deficiencies at the HBIs compared to the TWIs and noted that traditional enrollment based FTE funding would never allow the HBIs to expand their roles and missions as it is insufficient to allow them fulfill their current and historic dual mission. The Bohanan Commission and its HBI Panel were the most high profile and comprehensive report but it was neither the first, nor last. Here are a few examples:

- **Cox Task Force (1974):**
- Recommendation 1: A degree of conscientious funding -- beyond the conventional funding -- must be provided to allow the historically black colleges to further enhance their role and image, and to develop internal management systems to achieve greater efficiency in realizing institutional objectives.

(PTX 22 at 9.)

- We recommend that special attention and funding be given to financial aid and other student supportive service offices in these colleges Notably the problems contingent upon serving many students of a socioeconomic level who in some instances exhibit a need for considerable financial aid. Increased student financial aid should be made available by the state through these colleges.

(PTX 22 at 27.)

- **Enhancement of Maryland’s Predominately Black Collegiate Institutions Consultants’ Report to the Desegregation Task Force of the State Board for Higher Education (1981):** [N]ot only must a detailed analysis be made of the resources to support and upgrade existing programs at a level comparable to those at peer institutions, but note must be taken of the need for resources to purchase new equipment and maintain equipment [already] on hand. Additionally, special library needs, laboratory facilities, and the need for sophisticated learning centers in mathematics, sciences, and communication skills must be met. Enhancement will mean that in addition to the general funds support based on an enrollment-driven formula, provision for special funding must also be made. These special funds should be targeted to the amelioration of specific deficiencies discovered through institutional self-study and by outside technical assistance as was done in this Study.

(PTX 40 at 9.)

- **Achieving Eminence: University of Maryland System Plan for the Enhancement of the Historically Black Institutions (1992):** In developing enhancement plans, it became clear that the achievement of eminence for the historically Black institutions must address . . . “catch-up,” which includes funding of enrollment increases that over the years have had limited or no General Fund support, and areas of under-funding which include, for example, scholarships, student services, information technologies, libraries, and other institutional infrastructures.

(PTX 41 at 7.)

- **Report of the Independent Study Team on the Revitalization of Coppin State College (2011):** In addition to increased guidelines funding, Coppin needs “an infusion of operating funds to allow the College to recover from a century of constraints.”

(PTX 549 at 8.)

30. In sum, Maryland’s defense that the HBIs are better funded on a per FTE basis than the TWIs has already been discredited by its own documents, panels and commissions. In fact, a similar defense was rejected by Judge Murphy in *Knight v Alabama*:

The costs of education are not the same for all students. The better-prepared students are less expensive to teach, because they need fewer special services and fewer small classes. The HBU’s have a disproportionate number of the less well-prepared students, and thus they have additional costs per student that must be absorbed by their budgets. The HBU’s also have a disproportionate share of poorer students, who also impose additional costs on the institution.

Among the added costs are the expenses of hiring additional faculty in order to teach smaller classes, and additional administrative and professional staff needed to accommodate the demands for expanded academic and financial aid counseling.

Other considerations influence the financial picture. First, the economy of scale means that in general a large school can educate students more economically than can be done at a small school. Second, enrollment trends affect financing. A school with a declining enrollment does not decrease its costs proportionally, and thus a school with a declining enrollment will seem to be better financed than it really is. The opposite is true for a school with a growing enrollment, that is, it will seem to be

underfinanced. Both these considerations apply to the HBU's in Alabama, which are relatively small schools and which have been undergoing enrollment declines in recent years. This means, of course, that the HBU's will appear to be in a better financial position than they are in actuality.

Knight v. Alabama, 787 F. Supp. 1030, 1227-28 (N.D. Ala. 1991) (citations omitted).

31. Moreover, one of Maryland's other principal defenses, that the HBIs set their own missions and thus Maryland is relieved of its responsibilities to expand their roles and missions bumps into and is knocked down by the Attorney General's own published opinion. In 2005, the Attorney General advised MHEC that in terms of whether the State had satisfied its obligations under *Fordice* "a court would also look to the State's compliance with its agreements with OCR with respect to institutional missions." (PTX 698 at 25.)

32. Expansion of the HBIs missions is critical because, as Defendants' Statement of the Case acknowledges a school's mission "affects the kinds of programs it offers, the funding it receives, the buildings it constructs, and the students it attracts." (Oct. 29, 2010 Defs.' Statement of the Case and Issues to be Considered at Trial (Docket No. 178) at 13.) Indeed, that is why the Partnership Agreement has several commitments regarding the HBIs mission.

The Partnership Agreement

33. In 2000, Maryland's Higher Education Commission ("MHEC"), the agency charged with desegregating Maryland's former *de jure* system of higher education, did not believe that Maryland had desegregated its system of higher education. (1/11/12 AM Trial Tr. 27-28 (Oliver).) As a result, when the Office of Civil Rights ("OCR") approached Maryland and gave it the choice of either a compliance review or a Partnership Agreement, Maryland chose the Partnership Agreement with OCR as a way to dismantle the vestiges of its *de jure* system. (1/11/12 PM Trial Tr. 79 (Sabatini).)

34. Maryland and OCR recognized that in order to desegregate the HBIs and provide equal educational opportunities to their students, Maryland needed to take certain affirmative steps to correct the deficiencies at the HBIs that prevent them from competing with Maryland's Traditionally White Institutions (TWIs).

At the October 25, 1999 meeting, it was agreed that the State of Maryland would engage in this review [of desegregation] through a partnership approach with OCR. During this meeting, OCR informed Maryland that, based upon its analysis, it would focus the review on the following issues:

1. Enhancing Maryland's four HBCUs in order to improve educational opportunities for African Americans students who attend them **and to increase their attractiveness to students of all races, especially white students, including addressing the problem of unnecessary academic program duplication among the HBCUs and geographically proximate TWIs.**"

(PTX 4 at 24) (emphasis added)

35. As a part of the Agreement, Maryland agreed "to assure that African Americans have equal access to public higher education in Maryland at the undergraduate, graduate and professional levels in **desegregated** institutions, including desegregated TWIs **and HBIs.**"

(PTX 4 at 30.) (emphasis added)

36. The objectives and strategies included "enhancing the missions of HBIs and their enrollment of non-African American students; strengthening the undergraduate and graduate programs at HBIs; developing high-demand academic programs at HBIs; avoiding unnecessary program duplication at geographically proximate HBIs and TWIs." (PTX 4 at 14.)

37. Maryland recognized that desegregating its HBIs would require funding beyond its then-current funding level: "Additionally, the Plan recognizes that sustaining a desegregated system will require additional State investments in HBIs as well as a commitment to programs that improve the educational opportunities for African American students." (PTX 4 at 14-15.)

38. Commitment # 8 focused on expanding the role and mission of the HBIs to allow them to compete for students regardless of race. It states:

8. Avoiding Unnecessary Program Duplication and Expansion of Mission and Program Uniqueness and Institutional Identity at the HBCUs

...

d) The State will take appropriate steps to ensure that new unique, high demand and other programs that are approved for HBCUs by operation of law or by MHEC, for the purpose of promoting their institutional competitiveness and ensuring that these institutions attract students regardless of race

(PTX 4 at 36-37)

39. Commitment #9 focused on bringing the HBIs up to the level of the TWIs with respect to their operations (i.e. infrastructure) and programs:

[T]he State commits to design measures which ensure that the HBCUs are comparable and competitive with the TWIs in all facets of their operations and programs, as soon as possible and before the expiration of this Agreement. These measures will be designed to ensure that these institutions provide equal opportunity for a quality education to all students who choose to attend them and to enable them to compete for and be attractive to students regardless of race.

(PTX 4 at 38.)

40. Contrary to Maryland's current argument that the Partnership Agreement is irrelevant, the Attorney General has advised MHEC that "[e]ach of these commitments appears designed to enhance student choice or reduce the stigmatic racial identifiability of institutions."

(PTX 698 at 27.) Student choice, of course, is a critical component of desegregation. Indeed, defendant's expert, Dr. Hossler, conceded that whether the HBIs are comparable and competitive with the TWIs is relevant to the issue of student choice. (2/6/12 PM Trial Tr. 53 (Hossler).)

This is why OCR rejected Maryland's argument, which it presents in this case as well, that the

fact that the HBIs attain a greater percentage of their proposed guidelines funding than the TWIs establishes that they are adequately funded. OCR responded: “[t]o the extent that this suggests a standard for evaluating HBI enhancements other than whether they will lead to comparability between Maryland’s HBIs and TWIs, we do not agree.” (PTX 6 at 2.) The focus on comparability stems from the well documented inadequacy in the HBIs infrastructure, as well as their more limited missions.

The Importance of Institutional Missions

41. The mission of a university “is what the university actually does . . . in terms of the major kind of activities associated with institutions, academic, the public service, their teaching, functions.” (2/8/12 PM Trial Tr. 3 (Allen).) It bears “some relationship to the mission statement” of the institution but goes beyond that to encompass “what happens on that campus on a day-to-day basis.” (2/8/12 PM Trial Tr. 3 (Allen).) Consistent with Defendants’ Statement of the Case, that mission drives funding, students, and facilities, Maryland Code requires that Maryland “[d]evelop a mission for each campus which builds upon the unique strength of the campus and embodies a diversity of programs[.]” Md. Code Ann., Educ. § 10-209(c)(2) . Under the Code, MHEC is responsible for protecting against “[m]ission creep”—an institution’s attempt to expand beyond its current mission. (PTX 866 at 19.) It also requires that the USM Board, in consultation with the institutions and Chancellor, shall “[e]stablish standards for funding based on differences in the size and mission of the constituent institutions.” Md. Code Ann., Educ. § 12-105(a)(1)(i). In addition, Md. Code Ann., Educ. § 10-203 provides that: “Funding proposals for public senior higher education institutions shall include: (1) Base funding in accordance with the role and mission of the institution, as approved by the Maryland Higher Education Commission.” Md. Code Ann., Educ. § 10-203(c). The reality of an institution’s

ability to fulfill its role and the mission statement is “very much determined by historical factors and also factors of the kinds of resources that are in place to allow implementation of that set of mission statements.” (2/8/12 PM Trial Tr. 3 (Allen).)

42. An institution’s mission and whether it is equipped to carry out that mission are important elements in student choice. (2/6/12 PM Trial Tr. 64 (Hossler).) Having a more expansive mission allows schools to attract higher achieving students, a more diverse student body, and students who can afford to pay higher tuition, an important source of revenues. (2/6/12 PM Trial Tr. 58 (Hossler); PTX 73 at 6.) On the other hand, having a more limited mission tends to limit both the HBIs’ ability to attract a diverse student body and their competitiveness for the funding necessary to strengthen their “weaker resource bases.” (PTX 13 at 3, 8-9.)

43. Broad missions and adequate supporting infrastructure allow institutions to enter partnerships with private industry that bring additional resources into the Universities. (1/12/12 AM Trial Tr. 44 (Robinson).) Much of the revenue-generating capacity of an institution comes from the investment the State makes in the infrastructure. (1/12/12 AM Trial Tr. 88 (Richardson).) For example, about \$1 billion of USM’s approximately \$4 billion budget is from research dollars that are not appropriated from the state. (1/31/12 AM Trial Tr. 7 (Vivona).) As

Judge Murphy noted in *Knight*:

State funds directly affect an institution’s ability to raise other funds. An institution that is better funded can pay higher faculty salaries, which attract professors and researchers who can get research grants from the federal and state governments as well as from private sources. These grants provide supplementary compensation for faculty, which puts the institution in a better market position for hiring strong faculty. These grants also allow an institution to bring in graduate research assistants, who further cut the school’s costs by taking on some of the teaching load.

Knight v. Alabama, 900 F. Supp. 272, 312 (N.D. Ala. 1995) .

44. Maryland's TWIs have distinctive institutional identities based on their program offerings, which have supported program development and expansion consistent with advancing their missions. (Conrad Demonstrative 103; PTX 856 at 29.) By contrast, the role and missions of Maryland's HBIs are more limited, as was the case during the *de jure* era - their program offerings are more narrow and they lack institutional identity. (1/18/12 AM Trial Tr. 47 (Allen).) Accordingly, the HBIs have smaller endowments and fund balances (cash on hand). (PTX 744; PTXs 1020-21.) And, as documented by Maryland's HBI Panel, their operations lag behind those of the TWIs and need substantial additional resources to overcome these disparities. (PTX 2 at 119.) Geoffrey Newman, MHEC's Director of Finance Policy and 30(b)(6) representative, agrees that there are many indicators that suggest that substantial additional resources must be invested in the HBIs to overcome the competitive disadvantages caused by prior discriminatory treatment:

Q: In fact, didn't you say that MHEC agrees that there are many indicators that suggest that substantial additional resources must be invested in the HBIs to overcome the competitive disadvantages caused by prior discriminatory treatment?

A: Yes. I stated that MHEC agreed that there are many indicators to suggest that considerable resources need to be invested in the HBIs.

Q: To overcome competitive disadvantages caused by prior discriminatory treatment, correct?

A: Yes, correct.

(2/1/12 AM Trial Tr. 48 (Newman).)

45. Moreover, notwithstanding Dr. Lichtman's FTE analysis, MHEC acknowledges in its 2009 State Plan that the HBIs need substantial additional resources to become competitive

with Maryland's TWIs in terms of "[r]ecruiting, retaining, and graduating an academically, racially, culturally, and ethnically diverse student body." (PTX 1 at 31.) A part of the HBIs competitive disadvantage is that they have more limited missions, as Maryland failed to expand their roles and missions as required by the Partnership Agreement. These limited roles and missions are traceable to the *de jure* era.

The Limited Mission of Maryland's HBIs' During The De Jure Era

46. During Maryland's *de jure* era of segregation, Maryland assigned its HBIs inferior missions, and provided them inadequate funding and infrastructures. As Maryland explained in its 1947 Marbury Commission Report, "[t]he State has consistently pursued a policy of providing higher education facilities for Negroes which are inferior to those provided for whites. The meager appropriations and the inferior accreditation status of the Negro colleges attest to this fact." (PTX 18 at 108.) (*See also* PTX 17 at 146 ("In the field of higher education, while the State has fostered white colleges for one hundred and fifty years it made its first grant to a Negro college in 1914 or twenty-two years ago. . . . 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.**") (emphasis added)

47. Although it was impossible to quantify the disparity in terms of dollars appropriated over the entire period, Maryland did quantify a disparity of as high as 20:1 for certain years:

The comparative liberality of the State over a period of time may be seen from Table No. XIII which presents the appropriations for current expenditures for ten years, 1927-1936. The total sum appropriated for this decade was \$11,693,794, of which \$10,919,616 was for white institutions and \$774,178 for Negro institutions. Negro higher education in these ten years received 6.6 per cent [sic] of the State appropriations. White institutions received in 1926-27 and in 1935-36, respectively, 21.1 and

10.9 times as much as Negro institutions. Over the ten year period white institutions received 14.1 times as much as Negro institutions or a disparity nearly three times as great as the population ratios.

(PTX 17 at 63, 66.)

48. This same report made the following observations regarding the underfunding of Maryland's HBIs from 1927-1936:

To engage for a moment in pure speculation, based upon the ten years 1927-1936 only: if Negro higher education had received State assistance [sic] in proportion to white higher education, the amounts would have been, over and above what it did receive, \$89,990 in 1935-36, and for the ten years 1927-36, \$1,456,499. If the democratic principle of equality of privilege be granted, it is therefore probably true to say that the State of Maryland is in arrears in 1936 with respect to its appropriations to the current expenditures of Negro higher education something like one and a half million dollars. *This is merely a ten year arrearage; to cover a longer period would add enormously to the figure.*

(PTX 17 at 63 (second emphasis added).)

49. Even compared to other *de jure* states, Maryland's 1937 report concluded that it underfunded its HBIs:

It will be seen that the money invested in Negro colleges in the seven comparable states is from 6.7 to 25.6 times as great in absolute amounts as in Maryland. Relative to the number of Negro inhabitants however the states named have from 5 to 64 times as great an amount. Per Negro inhabitant the State of Maryland has invested in its one state-owned Negro institution only twenty-five cents as compared with \$16.00 in Delaware, \$11.69 in West Virginia, and \$4.52 in Tennessee.

(PTX 17 at 119 (emphasis omitted).)

50. In terms of the quality of *de jure* era construction, Maryland acknowledges that "there was little concern demonstrated for providing more than minimal accommodations for Black students." (PTX 40 at 38.) As for the physical plants, another report observes:

It is obvious that the white institutions have educational plants very much superior to those of the Negro institutions. This is evident either by

comparison of the aggregate plant inventories, not forgetting the racial ratio, or by comparison of analogous pairs.

(PTX 17 at 61.) (*See also* PTX 826 at 15 (noting “[t]he continuous uphill struggle on the part of the Negro colleges to secure facilities on a par with white institutions”).) During the *de jure* era, teachers at the HBIs were paid less than teachers at the TWIs:

It will be noted immediately in this tabulation that the salaries at Princess Anne College and Morgan State College are extremely low. Average salaries in these two institutions are less than beginning elementary or secondary school teachers are paid in many public school systems. It is clear that here is an outstanding instance in which the State of Maryland is not affording Negro students opportunities for education that are equivalent to those offered to white students.

(PTX 18 at 204 (table omitted).)³

51. In addition to having lower paid faculty, the libraries at the HBIs were extremely weak. (*See, e.g.*, PTX 18 at 249 (“Coppin Teachers College has practically no library at all when judged by college standards The Princess Anne College library is extremely limited for an institution which has responsibilities for the widely varied fields of study that must be represented in a land-grant college.”).) Moreover, this underfunding constrained growth at the HBIs. (*See* PTX 17 at 72 (“From these figures we may reasonably conclude that the enrollment of white state-aided institutions is very much more stimulated by the aid given than is the case with the Negro institutions. We may also conclude that the enrollment in the Negro institutions would be very considerably greater if State aid to Negro students were on a par with that offered white students.”).)

³ In the brief Maryland filed in *Pearson v. Murray*, Maryland sought to justify this disparity by arguing that it did not affect the quality of education at the HBIs because “[a] Negro teacher having the same qualifications as a white teacher ‘would not slight the members of his own group because he was not paid as much as the white teacher.’” (PTX 773 at 11.)

52. While having a specific policy of providing inadequate support for its HBIs, Maryland acknowledged that HBIs actually needed more support from the state than the TWIs because students at the HBIs could not pay as much tuition and needed more financial aid than students at the TWIs. (*See* PTX 17 at 68 (“It will be granted that, generally speaking, Negro college students come from economic environments much less likely to provide them with funds for higher education than is the case with white students. In other words, Negro students really need more assistance from public funds than white students.”).)

53. The depth of Maryland’s neglect of its land grant institutions for black students, Princess Anne, was so severe that in 1945, Maryland’s Marbury Commission noted: “It is difficult to understand why Maryland has neglected so disgracefully its land-grant institutions for Negroes.” (PTX 18 at 155.) “Some of the conditions in the physical plant at Princes Anne College are a disgrace to the State of Maryland.” (PTX 18 at 271.) Much as it does today, Maryland attempted to defend segregation by pointing out that on a “per student” basis the small and ill-equipped Princess Anne was far better funded than the larger College Park. (PTX 773 at 42) (attached as Exhibit C.)

54. In 1947, Maryland’s report recommended that it end the discrimination in terms of faculty salaries at the HBIs fund the HBIs and fund them, whatever the per FTE comparisons were, sufficient to allow them to have the same quality of programs at the TWIs:

The state budget [should] provide such annual appropriations for institutions for the higher education of Negroes that the activities being conducted at those institutions may be maintained on a basis equal in quality to those maintained in comparable state institutions for white students.

(PTX 18 at 381.) Maryland, however, ignored this recommendation.

55. During the *de jure* era, Maryland made no provisions at all for African Americans for graduate study, but rather provided paltry scholarships for blacks to study out of state:

The Maryland out-of-state scholarship program cannot be regarded as a permanent solution to the problem of providing equal educational opportunity for the Negro in Maryland. It is at best a temporary measure to more or less atone for the exclusion of Negro students from facilities available only to white students at the University of Maryland. As a result, Negro students are granted scholarships to go as far away as Michigan, California and even Mexico City. Certainly, a program which allows such practice is, in many respects, lacking all semblance of logical and practical planning.

(PTX 826 at 31.)

Maryland Solidifies Its Dual System before Ending It

56. In 1969, OCR approached Maryland because Maryland continued to operate a *de jure* system of higher education.⁴ Rather than comply, Maryland chose to fight, resulting in years of litigation with OCR, involving OCR's threat to cut off its federal funding. *See Mandel v. U.S. Dep't of Health, Educ. & Welfare*, 411 F. Supp. 542, 544 (D. Md. 1976). Moreover, during the period 1964-1974, Maryland took steps that essentially doubled down on its dual system, to cement the more limited roles of the HBIs. It rejected Morgan's request to be established as the first biracial university in the state.

57. Maryland later chose to start an entirely new institution, UMBC. (PTX 69 ¶ 41.) It ignored the recommendation of the Pullen Commission that no new schools be built in Baltimore because there were too many already and established UMBC, rather than invest in Morgan. (PTX 19 at 108; PTX 268 at 4.) "[UMBC] was created to provide undergraduate and

⁴ Maryland was one of the earliest slave states. Although it did not join the Confederacy, Maryland developed stringent rules to separate the races. In their Statement of the Case defendants acknowledge "that Maryland has a shameful history of operating its system of public higher education in a segregated manner, fostering one system of colleges and universities for white students and one for black students." (Oct. 29, 2010 Defs.' Statement of the Case and Issues to be Considered at Trial (Docket No. 178) at 3.)

graduate programs in large measure that could not exclusively, but in large measure they could feed into the University of Maryland Baltimore” (1/23/12 PM Trial Tr. 57 (Kirwan).) Maryland invested more heavily in Towson than in the HBIs Morgan, Bowie, and Coppin, allowing Towson to grow from having a little more than one-third as many students as Morgan in 1953 to nearly twice as many students in 1974—8,887 as compared with 4,686. (PTX 19 at 26; PTX 735.) Maryland also made significant investments in Salisbury during this period, and, as a result of that investment, Salisbury grew from being smaller than UMES in 1953 to being almost twice as large as UMES in 1974. (PTX 69 at 77.) A 2005 opinion from Maryland’s office of the Attorney General notes that “[t]here is no doubt that Maryland operated *de jure* segregated public higher education programs 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 area.” (PTX 698 at 19.) This was 15 years after *Brown v Board of Education*.

The Cumulative Damage Done to the HBIs As a Result of Limited Missions and Underfunding

58. As it must, Maryland has admitted that “there were disparities in funding provided by the State of Maryland to Maryland’s HBIs and TWIs during *de jure* racial segregation.” (Feb. 12, 2010 Defs.’ Answers to Pls.’ First Req. for Admis. at No. 3.) As Judge Murphy noted in *Knight*, underfunding is cumulative, and has a profound effect on an institution: “Inequality in funding over a number of years cannot be made up overnight. The funding level over a period of years affects a school’s mission, program, facilities, and reputation, all of which can then change only very slowly.” *Knight v. Alabama*, 900 F. Supp. 272, 311 (N.D. Ala. 1995). As Judge Murphy explained, underfunding in one year becomes “embedded” in an institution. 900 F. Supp. at 311. (See also 1/18/12 AM Trial Tr. 79 (Allen) (“The citation out of the *Knight*

case makes that point, that literally what could be a small discrepancy in year one, by year 25 is larger, by year 50 is larger still, by year 100 is overwhelming.”.)

Maryland Documents the Need to Provide Equal Educational Opportunities at The HBIs

59. It was not until 1980, ten years after OCR forced Maryland to address its *de jure* era policy of providing inferior funding, facilities and programs at the HBIs, that Maryland acknowledged the need to enhance the HBIs to allow them to fully participate in a unitary system of higher education. Maryland’s 1980 Desegregation Plan stated:

Students of any race who freely choose to attend a historically black institution should have the opportunity for an education equal in quality to students who choose to attend a historically white institution with a similar mission. Enhancement of the historically black institutions to overcome past neglect is therefore critical.

(PTX 263 at 45.)

60. After acknowledging the need to enhance the HBIs to overcome past neglect and allow them to provide equal educational opportunities to students as the TWIs, Maryland set out to document the deficiencies at the HBIs compared to the TWIs . Maryland’s 1981 Consultant’s Report to the Desegregation Task Force recognized the need to expand the role and mission of its HBIs:

In this Study, therefore, enhancement is defined as the sum total of all actions taken by the state (a) to strengthen the role and mission of the historically black institutions; (b) to provide regular and special fiscal and other resources at a level consistent with that provided for historically white institutions with similar role and mission

(PTX 40 at 9.)

61. The Report compared the academic programs and infrastructure at the HBIs to the TWIs:

The overall purpose of the Enhancement Study was to determine what financial resources need to be allocated to the historically black

institutions in order to permit them to offer academic programs of equal quality to historically white institutions.

For the purpose of the enhancement study, the University of Maryland, Baltimore County (UMBC) and Towson State University were considered as criterion institutions against which the historically black institutions were compared. Morgan State University and UMES were compared with UMBC; Coppin State College and Bowie State College were compared with Towson State.

(PTX 40 at 10.)

Maryland Documents Deficiencies at the HBIs

62. Maryland's 1981 Report documented "deplorable" conditions at the HBIs:

From evaluation of the overall quality and condition of facilities and equipment, three 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.

(PTX 40 at 37.)

63. The report also noted the deficiencies in the libraries of the four HBIs and made a number of detailed comparisons between the HBIs and TWIs. A few of these comparisons are presented here to provide better context for Maryland's acknowledgement that desegregating the HBIs would require that they be comparable and competitive with the HBIs in all aspects of their operations, as called for in the Partnership Agreement. Maryland's 1981 Report notes:

- "Limited resources affect the ability of Bowie and Coppin State Colleges to offer quality teacher education programs on a parity with those at Towson State University." (PTX 40 at 99.)
- "Bowie and Coppin have inadequate equipment for science education." (PTX 40 at 99.)

- “There is no way that Coppin can offer any student a comparable education in either art or theatre to Towson at this time.” (PTX 40 at 129.)
- “The faculty at Coppin is capable and dedicated, but the facilities can not support the program.” (PTX 40 at 129.)
- “The meager facilities for language do not compare to those at Towson, and since Coppin’s students are drawn from areas with little language training and background, the need for facilities, tapes, playback equipment, etc. is very strong.” (PTX 40 at 129.)
- “The physical facilities in humanities at Coppin do not compare favorably with those at Towson, either in scale or in quality. The facilities and equipment at nearby high schools are reported to be superior to those at Coppin.” (PTX 40 at 137.)
- “A frequently-made observation was that science facilities and equipment at neighboring high schools were superior to those at the historically black institutions.” (PTX 40 at 246.)

64. In comparing Morgan to UMBC, Maryland’s 1981 report notes:

The request by the music department for an opaque projector has been denied for each of the last seven years. This is essential equipment for the projection of music examples in all classes, for majors and non-majors. In Fine Arts there is no electric typewriter, only 1 tape recorder in entire department. Individual faculty do not have typewriters or ready access to any. There is a limited number of projectors and inadequate funds for repair of equipment (if a bulb burns out, faculty member may replace from own pocket at a cost of up to \$23). The contrast in the availability of day-to-day equipment is strong with UMBC and again strikes hard at faculty morale in the daily round of teaching.

(PTX 40 at 149.)

Any student who visited the neat, trim, well-kept, well-supplied, clean, freshly painted, well-lit classrooms, halls, studios and seminar rooms at UMBC or Towson and then compared them with Morgan would immediately choose the former regardless of the quality of the program.

(PTX 40 at 150.)

The mission [at Morgan] should be in place as an historically black institution that could be a prototype for public, black universities. This mission is not being accomplished. Sciences, which should be strong, are unfortunately weak and getting weaker.

(PTX 40 at 218-19.)

65. At UMES the Report notes:

Since 1968 the library has been intermittently without air conditioning, and since the Spring, 1980, it has been totally without air conditioning. This is obviously detrimental to both users as well as materials; and this deficiency should be corrected without delay.

(PTX 40 at 60.)

66. “As with Morgan State University, science space at UMES is clearly a problem as well as the constant lack of maintenance support staff and funds.” (PTX 40 at 219.)

67. More broadly, the 1981 Report noted that the HBIs were built to accommodate their limited mission of teacher’s colleges and were not adequate to carry out a more research oriented mission:

That priority be given to expansion and improvement of the science and laboratory facilities on the Bowie, Coppin, Morgan and UMES campuses.

Within the classifications of academic facilities, the inadequacies in life and physical science laboratories stand out as the greatest current need. These facilities, designed and constructed primarily for teacher education, are simply not adequate or appropriate for proper instruction and research in modern techniques.

(PTX 40 at 50.) The report also documented the lack of adequate funds for maintenance as a critical problem. (PTX 40 at 50-51.)

68. While noting that “[a]dequate funding is a *sine qua non* for excellence in higher education” (PTX 40 at 244), the report concluded with the observation that:

If the recommendations of this Study are implemented, the State’s historically black institutions will be put in a position to be competitive with comparable institutions and will be assured of the continued capability to serve all of the citizens of the State, regardless of creed or color.

(PTX 40 at 246.) But, the recommendations were not followed and the HBIs could not compete with the TWIs, so remained segregated.

Though Constructed For Blacks with “Minimal Care” As to Quality and Inferior Missions, Maryland Commits To Making HBIs Attractive to Students of All Races

69. Four years later, in 1985, Maryland entered a desegregation agreement with OCR. Among other things, Maryland made a “strong commitment” to make HBIs attractive to students of all races. (PTX 305 at 15.) Maryland committed to accomplishing this objective by improving the academic programs at the HBIs: “The state believes that the single most important action it can take to enhance the TBI’s is to ensure that these recently-implemented programs be of the highest possible quality. A reputation for high quality offerings will contribute significantly to the long-term attractiveness of these campuses.” (PTX 305 at 22-23.) But Maryland did not significantly enhance the academic programs at the HBIs. It promised to provide 25 new academic programs over a four year period, but only provided 13. (PTX 44 at 14.) As a result, the HBIs remained segregated.

Maryland Recognizes Need To Provide HBIs With “Catch-up” Funding Due To Decades of Underfunding

70. Seven years later, in 1992, Maryland’s Report on Achieving Eminence noted that “The steps to achieve eminence are particularly challenging for the historically Black institutions-- Coppin State College, Bowie State University and the University of Maryland Eastern shore -- which historically have been under-funded.” (PTX 41 at 7.) That same year, echoing the kinds of concerns that Judge Murphy noted in *Knight*, Maryland acknowledged the need to provide “catch-up” funding at the HBIs rather than simply comparing per FTE appropriations:

In developing enhancement plans, it became clear that the achievement of eminence for the historically Black institutions must address . . . “catch-up,” which includes funding of enrollment increases that over the years have had limited or no General Fund support, and areas of under-funding which include, for example, scholarships, student services, information technologies, libraries, and other institutional infrastructures.

(PTX 41 at 7.)

Rather Than Provide “Catch-up” Funding, Maryland Went Backwards--It Revised Its Funding Formula To The Disadvantage of Its HBIs

71. During the 1990s, enrollment at Maryland’s HBIs increased approximately 50%, far greater than at the TWIs. (PTX 835 at 6). But Maryland made two related changes in its policies and practices that prevented this enrollment growth from being properly supported with state resources. First, in 1988, Maryland designated UMCP as its flagship institution and began to provide it with increased funding, to the detriment of the HBIs. (2/8/12 AM Trial Tr. 5-6 (Toutkoushian); PTX 855 at 28); Md Code Ann., Educ. § 12-106(a)(1)(iii). This designation was largely arbitrary because “the state designation as a flagship institution is not tied to a specific unique attribute of College Park. The label could be applied to other institutions as well if the state had chosen to do so.” (2/8/12 AM Trial Tr. 5-6 (Toutkoushian).)

72. Second, in 1990, Maryland adopted a funding guideline that de-emphasized enrollment growth. (1/11/12 AM Trial Tr. 77-78 (Vollmer).) This change gave Maryland “flexibility to divert more resources towards the University of Maryland College Park.” (1/17/12 PM Trial Tr. 105-06 (Toutkoushian).)⁵ During the 1990s, Maryland’s HBIs “would have benefited substantially” from a funding guideline that considered enrollments because of their increasing enrollments during that period. (1/17/12 PM Trial Tr. 37-38 (Toutkoushian).)

⁵ It is therefore ironic that Maryland argues that money provided to UMCP should be excluded from any funding comparisons between HBIs and TWIs.

73. As a consequence of these policies and practices, between 1988 and 2000, Maryland's HBIs had smaller growth in the measure that Maryland likes to cite--state funding per FTE student--than the TWIs, and for UMES the per-student funding actually decreased. (PTX 1010.) Maryland's failure to provide adequate state appropriations to HBIs during the 1990s had an "enormous" detrimental impact on their ability to attract non-Black students. (1/12/12 AM Trial Tr. 91-92 (Richardson).)

Maryland's 1998 Larson Commission

74. In 1998, Maryland's Larson Commission examined the funding and allocation of State support since the establishment of USM. It concluded that the HBIs were among the disadvantaged:

This examination revealed that funding for one group of institutions has been enhanced relative to the group average. This group includes St. Mary's College, Salisbury State, Towson, UMB, UMCP, and UMBC. Among these gainers, however, only St. Mary's and UMCP exceed the group average, with UMCP receiving the largest proportional increases over the period. State support for a second group of institutions has decreased relative to the group average. This group includes Bowie State, Coppin State, Morgan State, and UMES. Funding for Frostburg State University remained unchanged relative to the group average.

(PTX 563 at 103.)

75. The Larson Commission also noted that as a part of Maryland's desegregation obligations, MHEC should provide "special initiative funding for academic programs at [HBIs]." (PTX 563 at 40-41.) This would eventually become a part of the 2000 Partnership Agreement—a commitment which Maryland failed to keep.

76. In sum, the unfunded growth in the 1990s compounded the century of underfunding from the *de jure* era. It was exactly the opposite of the "catch-up funding" that was

referenced in Maryland's 1991 report.⁶ As a result, the HBIs remained segregated and their students did not receive an equal educational opportunity as compared to students at the TWIs.

OCR Re-Engages With Maryland To Desegregate The HBIs

77. Thirty years after OCR first approached Maryland in 1969 about its dual and unequal system, and seven years after the Supreme Court decided the *Fordice* decision, in 1999 OCR approached Maryland again because it did not believe that Maryland had dismantled its *de jure* segregation system of higher education. (1/11/12 AM Trial Tr. 27-28 (Oliver).) For its part, MHEC did not believe that Maryland had fully dismantled its *de jure* system of higher education, so rather than be subject to a compliance review by the Office of Civil Rights, Maryland chose to enter into a partnership with OCR designed to dismantle the vestiges of its *de jure* system. (1/11/12 PM Trial Tr. 77-79 (Sabatini); 1/11/12 AM Trial Tr. 35 (Oliver).)

78. According to the HBI Panel, the Partnership Agreement is part of "Maryland's attempt[] to resolve its compliance status under federal civil rights law through the submission of a series of desegregation or consent plans." (PTX 2 at 117.) An internal MHEC report provides MHEC's understanding of the significance of the Partnership Agreement:

In December 2000, the State of Maryland entered into a partnership agreement with the United States Department of Education, Office for Civil Rights (OCR) to eliminate the vestiges of segregation in Maryland's public colleges and universities. This agreement makes specific commitments to enhance the State's four historically black institutions (HBIs): Bowie State University, Coppin State University, the University of Maryland Eastern Shore, and Morgan State University. This agreement establishes a set of priorities designed to enhance the State's HBIs. These priorities include: enhancing admissions management, student financial aid administration, and institutional development programs; ensuring that funding is consistent with the mix and degree level of academic programs; ensuring that funding supports the development of research

⁶ At trial, Maryland pointed out the 1991 Report was a draft. Even so, its recognition of the need to provide "catch-up funding" is consistent with other reports.

infrastructure and enhances students' quality of campus life; improving the physical characteristics of the campus environments; improving the quality and adequacy of facilities necessary to support the missions and programs of the institutions; and improving the infrastructure, appearance and security of the HBIs.

(PTX 627 at 3.)

Maryland's 2000 State Plan Acknowledged That the Partnership Agreement Was A Part of Its Desegregation Obligations

79. Maryland's State Plan noted that:

Because of its history of *de jure* racial segregation, Maryland has an obligation under both federal law and court decisions to remedy past discrimination and remove its vestiges. The State is working with the U.S. Office of Civil Rights to develop a partnership agreement that will further equal educational opportunity in Maryland postsecondary education.

(PTX 293 at 41.)

80. The Plan further noted that Maryland not desegregated the HBIs and that doing so would require additional resources:

Additionally, the State recognizes its fiscal responsibilities to achieve and sustain a desegregated system of higher education consistent with Title VI of the Civil Rights Act of 1964 and as mandated by the 1992 U.S. Supreme Court decision in *U.S. v. Fordice*. Achieving and sustaining a desegregated system will require additional State investments in historically black colleges and universities as well as a commitment to programs that improve the educational opportunities for African-American students.

(PTX 293 at 30.)

The 2000 Partnership Agreement Includes A Focus on Desegregation And Equal Educational Opportunity at the HBIs

81. Under the Partnership Agreement, MHEC "is specifically responsible for developing a program of desegregation and equal educational opportunity, including an enhancement plan for HBIs." (PTX 4 at 8.) Commitment #9 in particular commits Maryland to enhancing the following items, among others:

- the distinctiveness of the HBCU's programmatic missions
- the uniqueness and mix of quality academic programs that are not unnecessarily duplicated at proximate TWIs
- operational funding consistent with the mix and degree of academic programs, support for the development of research infrastructure, and support consistent with the academic profile of students.

(PTX 4 at 38.)

82. . In the Partnership Agreement Maryland focused on policies and practices traceable to the *de jure* era that continue to have segregative effects and agreed “to assure that African Americans have equal access to public higher education in Maryland at the undergraduate, graduate and professional levels in *desegregated* institutions, including desegregated TWIs and HBIs.” (PTX 4 at 30) (emphasis added)

83. Indeed, a key component of the Partnership Agreement was to remedy Maryland's specifically articulated policy of providing inferior missions, infrastructure, and funding to its HBIs. MHEC recognized that in order to make HBIs attractive to students regardless of race, and to provide equal educational opportunity to its existing students, Maryland needed to: (1) expand the HBIs academic missions by providing and funding unique, high demand programs, (2) avoid unnecessary program duplication, and (3) fund HBIs to remedy the kinds of disparities documented in Maryland's 1981 Report and other historical documents (*See* PTX 4 at 25, 38 (requiring Maryland to make the HBIs comparable and competitive to TWIs in “all facets of their operations”).)

84. Maryland has admitted that, as of 2000 at least, the missions of the HBIs were traceable to the *de jure* era:

In accordance with the “Partnership Agreement,” the Maryland Higher Education Commission (MHEC or “the Commission”) has an obligation

to remedy all policies and practices in the Maryland Higher Education System traceable to a prior system of segregated education. This was embodied in Commitment 8. There are two aspects of this commitment:

- (1) avoidance of unnecessary program duplication among geographically proximate Historically Black Institutions (HBIs) and Traditionally White Institutions (TWIs); and
- (2) expansion of mission and program uniqueness and institutional identity at the HBIs.

(PTX 8 at 73.)

Maryland Has Not Expanded the Missions of its HBIs Nor Avoided Unnecessary Program Duplication

85. Even after Maryland entered the Partnership Agreement, it admits that it did not change its policy of requiring that the HBIs fund new programs from already constrained operating budgets. (1/24/12 PM Trial Tr. 11 (Kirwan).) As a result, from 2000 to date, the role and mission of Maryland's HBIs was not substantially expanded.

86. During the period of the Partnership Agreement: Maryland introduced **57** new, non-duplicated programs at the HBIs as compared with **137** new programs at the TWIs. (PTX 70 at 98.) Moreover, 24 of the programs introduced at the TWIs were high-demand; whereas, only 4 of the programs introduced at the HBIs were high-demand. (PTX 70 at 101.) In total, the number of unique high demand programs at the TWIs is 122 versus 11 at the HBIs. (PTX 71 at 14, 114.)

87. In addition, Dr. Conrad analyzed the continued existence of unnecessary program duplication in Maryland between 2001 and 2010. (PTX 69, 70.) Defendants have acknowledged that program duplication between Maryland's TWIs and HBIs was part and parcel of Maryland's *de jure* era. (Feb. 12, 2010 Defs.' Answers to Pls.' First Req. for Admis. No. 2.) Dr. Conrad analyzed unnecessary program duplication in Maryland as of 2010 and found that Maryland had

more unnecessary program duplication at the bachelor's level in his statewide and Baltimore/College Park comparison groups than Mississippi had (40 percent) in 1994 in *Fordice*. (1/10/12 AM Trial Tr. 83-84 (Conrad).) Maryland also had *more unnecessary program duplication* at the doctoral level in his statewide analysis and approximately the same amount of unnecessary program duplication in the Baltimore/College Park comparison groups than Mississippi had (25 percent) in 1994. (1/10/12 AM Trial Tr. 83-84 (Conrad)); *Ayers v. Fordice*, 111 F.3d 1183, 1218 (5th Cir. 1997).

88. Moreover, as noted by Dr. Allen, there is no sound educational justification for this unnecessary program duplication. (1/18/12 AM Trial Tr. 63 (Allen)).

The Year After Maryland Entered the Partnership Agreement, OCR Rejected Maryland's Argument that Percentage of Guideline Funding Attainment Is A Relevant Measure

89. A part of Maryland's defense in this case is that under its funding guidelines, the HBIs attain a greater percentage of their funding guidelines goals than the TWIs. (1/3/12 AM Trial Tr. 107-09.) In 2001, OCR rejected this argument because Maryland's funding did not close the gap between the two sets of institutions, but rather widened the gap:

OPERATING FUNDS: ... Our analysis of that information [funding data] found that the funding actually approved for Maryland TWIs represents increases for the *TWIs as a whole that were substantially greater than the increases in funding approved for Maryland's HBCUs*. Indeed, rather than enhancing the position of the HBCUs in relation to the state's other public four year institutions, these funding decisions are likely to move Maryland further away from the goal of comparability.

(PTX 6 at 2.) (emphasis added)

90. OCR rejected Maryland's claims that a higher funding guideline attainment for HBIs suggested compliance with the terms of the Partnership Agreement and noted that "to the

extent that this suggests a standard for evaluating HBI enhancements other than whether they will lead to comparability between Maryland's HBIs and TWIs, we do not agree." (PTX 6 at 2.)⁷

In 2005, The HBI Presidents Express Concern About Inadequate Funding and Limited Missions at the HBIs

91. The Court heard the testimony from the four Presidents of Maryland's HBIs, testifying pursuant to subpoena, but in the 2005 letter they authored for the Maryland Legislative Black Caucus the Presidents discussed that the number of programs offered during the Partnership Agreement had widened the gap between the HBIs and TWIs:

During the first three years of the Plan, HBIs received approval to offer only 21 new academic programs (10 bachelors, 5 masters, and 6 doctorates). The other public campuses in the state received approval to offer 103 (32 bachelor's, 64 master's, and 7 doctorates). With majority campuses already having broader academic missions than HBIs, this level of new program widened the gap between them and HBIs.

(PTX 13 at 9.)

92. The HBI Presidents also complained about unnecessary program, noting: "[T]he position of these four institutions threatens to deteriorate even further as certain TWIs are being targeted as growth institutions and any uniqueness in mission and programs between HBIs and TWIs is being systematically eroded." (PTX 13 at 3.) Plaintiffs' expert Dr. Clifton Conrad has confirmed the concerns of the HBI Presidents, that unnecessary program duplication is widespread in Maryland and that the HBIs have more limited roles and missions than the TWIs.

⁷ As President Lyndon Johnson noted in his commencement speech at Howard University in 1965, "you cannot take a person, who, for years, has been hobbled by chains and liberate him, bring him to the starting line of a race, and they say you are free to compete with all the others and justly believe you have been fair." June 4, 1965, President Lyndon B. Johnson's Commencement Address at Howard University: "To Fulfill These Rights," available at <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp>.

93. Finally, the HBI Presidents called for the appointment of an independent panel of experts to help determine how they could expand their roles and missions with Maryland's system of higher education. They requested to have the experts determine:

How the missions of HBIs can be expanded and made more substantive.
How to ensure that when new academic, research, and service programs supporting the expanded missions are developed at HBIs they will be adequately funded rather than requiring support to be re-allocated from existing operations. What measures are necessary to ensure mission and academic program[s]

(PTX 13 at 14.)

In 2006, Chancellor Dr. Kirwan Testifies Before the Maryland Legislature That HBIs “Deserve Special Scrutiny In Terms of Adequacy of Funding”

94. The HBI Presidents' letter was provided to the Maryland Black Caucus in an effort to seek their assistance in providing expanded missions and funding at the HBIs. (PTX 13 at 1.) In the context of this effort, the Chancellor of the University System of Maryland, Dr. Kirwan testified before the Maryland Legislature in 2006 and essentially acknowledged that Maryland underfunds the HBIs: “There is no question that we have not done right over time by Historically Black Institutions and they deserve special scrutiny and attention in terms of adequacy of funding.” (1/24/12 PM Trial Tr. 68 (Kirwan).)

In 2008, An Independent Panel of Leading Experts Examined Maryland's Polices and Practices With Respect to the Funding and Mission Assignments

95. The HBI Panel was appointed by the larger Bohanan Commission, which included “senators, delegates, cabinet secretaries, college presidents, higher education association presidents and executive directors, members of the business community and members of the public.” (PTX 2 at 114.) The Bohanan Commission was charged “with reviewing options and making recommendations relating to the *appropriate level of funding* for

the state's historically black institutions (HBIs) to ensure that they are comparable and competitive with other public institutions." (PTX 2 at 114.) Comparable and competitive refers to enhancing the infrastructure and academic programs at the HBIs to the level of allowing them to be realistic options for students making the choice of which college to attend.

96. The Bohanan Commission's summary of the HBI Panel's analysis shows that funding-related policies and practices that focus on "per FTE" funding will tend to underfund the HBIs because they have a more difficult mission than the TWIs, in fact a dual mission,⁸ a mission which leaves them with students who bring in less tuition revenues and require more financial aid and remedial services.

97. Moreover, in its analysis of the finances of Maryland's HBIs, the HBI Panel (like Plaintiffs' expert Dr. Toutkoushian) not only considered state appropriations, but it also accounted for tuition, financial aid, fund raising/endowment, grants and contracts, and research as part of the total resources available to an institution. (PTX 272.) Both the HBI Panel and Bohanan Commission concluded that the HBIs were significantly underfunded. (PTX 2 at 45, 124.)

Underfunding Affects Retention and Graduation Rates

98. One of the many areas in which this underfunding affects the HBIs is their retention and graduation rates. (1/3/12 PM Trial Tr. 78 (Wilson); 1/12/12 AM Trial Tr. 77 (Richardson); 1/5/12 PM Trial Tr. 32-36 (Burnim).) At Coppin, for example, the HBI with the poorest student body, the graduation rate is a mere 17%. At nearby Towson, the graduation rate

⁸ "[T]he mission of the HBIs in providing an undergraduate degree is substantially different and more challenging than that of TWIs. HBIs historically and into the future have a dual mission. They are committed to the traditional mission of any institution of higher education to provide a quality educational experience and guide students to the attainment of an undergraduate degree." (PTX 2 at 120.)

for African Americans was 75.9%. At all of the HBIs the graduation rates are substantially lower than the graduation rates at the TWIs, even when comparing African Americans at both sets of institutions.

Plaintiffs' Exhibit 732

Retention and Graduation Rates for University System of Maryland Colleges and Universities

| Retention Rates for University System of Maryland Colleges and Universities | | | Graduation Rates for University System of Maryland Colleges and Universities | | |
|---|-------------------------|------------------------------|--|------------------------|-----------------------------|
| School | 2nd year retention rate | 2nd year retention rate - AA | School | 6-year graduation rate | 6-year graduation rate - AA |
| UMCP | 93.00% | 90.70% | Towson | 75.10% | 75.90% |
| Towson | 83.00% | 87.60% | UMCP | 82.70% | 70.80% |
| UMBC | 85.20% | 87.10% | UMBC | 67.90% | 65.60% |
| Salisbury | 79.90% | 78.30% | Salisbury | 72.30% | 64.60% |
| Frostburg | 71.90% | 72.40% | Frostburg | 60.40% | 53.90% |
| Bowie* | 70.80% | 71.00% | Bowie* | 43.20% | 43.40% |
| UMES* | 68.60% | 69.60% | UMES* | 37.80% | 39.00% |
| Morgan* | 68.30% | 68.50% | Morgan* | 34.80% | 35.40% |
| Coppin* | 61.80% | 61.00% | Coppin* | 17.50% | 17.40% |

| Key: |
|----------|
| * - HBCU |

(PTX 732.)

99. MHEC has agreed that the low graduation and retention rates at the HBIs are attributable to financial issues.

Q. I'm asking: Does MHEC stand by the statement that substantial additional resources are needed to ensure the state's HBIs are comparable to the state's TWIs on the point of recruitment, retention and graduation?

A. Yes. Probably, yes, that's correct.

(1/18/12 PM Trial Tr. 77 (Reid).)

Underfunding Affects Infrastructure at HBIs

100. The HBI Panel specifically focused on the two HBIs with doctoral research missions, UMES and Morgan, and concluded that they lacked proper infrastructure for quality programs, in contrast to UMBC and UMCP:

The current result of these longstanding past practices is that there exists a substantial lack of comparability and capacity (as compared generally with

quality doctoral granting institutions both in and outside of the state, taking scale and composition into account) at both MSU and UMES (whose status as a doctoral granting institution is somewhat different from that of MSU). The substantial lack of comparability, and therefore the inability to be competitive, exists both in terms of the institutional platform upon which doctoral programs must be built and sustained, and with respect to the quality and nature of the specific doctoral programs offered by these two HBIs.

(PTX 2 at 129.)

101. After examining the libraries at Morgan and UMES in comparison to the libraries at the TWI doctoral research institutions, the HBI Panel noted:

Quality doctoral universities require 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 described above that are hallmarks of quality doctoral programs. MSU and UMES have not had that opportunity and support to the same or sufficient degree.

(PTX 2 at 136) *See also* Testimony of Dr. Kaiser (UMES' science labs are comparable to those that you would find at a high school. (1/17/12 AM Trial Tr. 54-55 (Kaiser).); "[UMES' library] was undersized. It was cramped . . . not appropriate to an aspiring doctoral/research university." (1/17/12 AM Trial Tr. 55 (Kaiser)); (1/12/12 AM Trial Tr. 44 (Robinson) (Limited infrastructure at Morgan and UMES results in the loss of opportunities to both access billions of dollars in research and development funding and to expose students to the private sector.).)

102. Tellingly, the HBI Panel, which Maryland conceded were "leading experts in higher education," did not assess the libraries in the same manner that Maryland's historian expert Dr. Lichtman did -- library holdings per FTE. In fact, Dr. Lichtman did not cite to any

scholarly publication or other authoritative source for judging the adequacy of libraries based on a calculation of number of library holdings divided by the number of students. As noted by Dr. Allen, this measure is misleading and sheds no light on the adequacy of a library. (2/8/12 PM Trial Tr. 20-21 (Allen).)

103. By Dr. Lichtman's per FTE measure, UMES' library far surpasses the average TWI library, 76 books per FTE at UMES compared to 52 for the average TWI. (DTX 405 at 63.) The same is true for Morgan's library. Morgan's library, whose insufficiency several witnesses described, is comparable to the average TWI library on a per FTE basis-- 50 to 52. (DTX 405 at 64.)

104. Looking at the underlying numbers tells a very different story than the library holdings per FTE. While UMES has a high per FTE holdings (76 versus 52 for the average TWI), the number of actual library holdings for this aspiring doctoral research university is a mere 211, 876, in contrast to the TWI doctoral research universities UMBC (1,020,138 volumes) and UMCP (3,716, 860 volumes). UMES' library is even smaller than the non-doctoral research TWIs in Maryland.

105. Morgan does not fare much better; its library holdings are only 387, 687 volumes, just about one-third the size of UMBC. According to Dr. Conrad, the library holdings at the HBIs "are some of the smallest numbers I have ever seen." (1/10/12 AM Trial Tr. 88-90 (Conrad).)

Third Expert Report of Dr. Conrad

| SIZE OF LIBRARY COLLECTION ⁵⁷ | |
|---|-------------------------------|
| | Number of Books ⁵⁸ |
| University of Maryland-College Park | 3,716,860 |
| University of Maryland- Baltimore County | 1,020,138 |
| University of Maryland-Baltimore | 735,951 |
| Towson University | 587,811 |
| Morgan State University | 378,687 |
| Bowie State University | 277,407 |
| Salisbury University | 271,328 |
| University of Maryland-Eastern Shore | 211,876 |
| University of Baltimore | 181,108 |
| Coppin State University | 86,160 |
| University of Maryland-University College | 2,118 |

Coalition, et al. v. MHEC, et al
Civil No. CCB-06-2773

Source: PTX 71 at 251

25

(PTX 71 at 251.)

106. But not even these numbers tell the full story as to how underdeveloped the HBIs libraries are, because they do not reflect the HBIs inability to afford online databases. (*Compare* (1/4/12 AM Trial Tr. 27-29 (Wilson) (Morgan can not afford databases that cost hundreds of thousands of dollars)) with (1/24/12 AM Trial Tr. 41-42 (Gibraltar) (Frostburg pays a lot of money to secure access to databases because absence of online databases would hurt students.))⁹

⁹ Tellingly, Maryland presented no testimony about the holdings in the HBI libraries other than Dr. Lichtman’s per FTE analysis.

107. While the HBI Panel did not specifically address the libraries of the HBIs other than UMES and Morgan, Maryland's other Panels and Commissions have documented their inadequacies.

108. While under Dr. Lichman's holdings per FTE, Coppin, for example, exceeds the average TWI holding. (DTX 405 at 62.) In terms of actual volumes of books, Coppin has a mere 86,160 volumes compared to nearby Towson's 735,951 volumes. (PTX 71 at 251.) Indeed, Coppin's library is substantially smaller than the libraries of any of the traditional TWIs. In fact, Maryland's 2001 Coppin Revitalization Study made these observations about its library holdings:

With the continued rising costs of resources and services, the library has not been able to maintain a relevant and current book collection. As new programs are implemented, an aggressive acquisitions program must be developed to select books that will support both the new and existing academic offerings. Limited resources have led to a decrease in the number of print and electronic journals, periodicals, and serial holdings available. In some instances, students travel to other libraries to access learning materials required for class preparation.

(PTX 549 at 30.) The report continues:

As the College undergoes revitalization and additional students are recruited, the instructional equipment and learning resources of the library will need to be increased. The existing library is technologically deficient and has few of the amenities of modern libraries, such as electronic classrooms for innovative self-instruction. Its furnishings are sparse and its décor is less than inviting.

(PTX 549 at 30.)

109. Whatever the per FTE holdings, the inadequacy of the HBIs libraries and other infrastructure is well documented and traceable to the *de jure* era. (See PTX 40 at 69.) ("In conclusion, the libraries of the four historically black institutions are in need of new, expanded

financial support, consistent funding, managerial freedom for the directors, increased staffing and travel/continuing education funds, and upgraded equipment.”); (“Coppin Teachers College has practically no library at all when judged by college standards; it rates slightly higher in the table than the Princess Anne College library because of the relatively narrow curriculum at Coppin Teachers College as contrasted with the broad fields of subject matter which Princess Anne College attempts to cover. The Princess Anne College library is extremely limited for an institution which has responsibilities for the widely varied fields of study that must be represented in a land-grant college.” (PTX 18 at 249).)

Maryland Agrees With The Findings of The HBI Panel As To Inadequate Infrastructure At The HBIs

110. Notwithstanding its various per FTE litigation defenses, Maryland has specifically agreed with and adopted the conclusions of the HBI Panel as to the inadequacies of the HBI infrastructures. The 2009 State Plan for Higher Education states:

The Report of the Panel on the Comparability and Competitiveness of Historically Black Institutions in Maryland, which is included in the Final Report of the Funding Commission, identifies a number of challenges to ensuring that the State’s four public HBIs are comparable to and competitive with TWIs. Among the challenges cited by the HBI Panel that the State must address to meet the needs facing its HBIs are the following:

- Lack of state-of-the art science and technology laboratories;
- Aging physical plants and lack of consistent funding for maintenance;
- Poor retention and graduation rates as compared to TWIs; and
- A large number of low-income and educationally underserved students in need of financial assistance and other support services.

(PTX 1 at 57.)

111. “The Panel also indicated that the State will need to provide “substantial additional resources” to create a comparable institutional platform to support doctoral and graduate education at the HBIs, in particular at Morgan State University and the University of Maryland Eastern Shore.” (PTX 1 at 57.)

112. This is because, as noted by the HBI Panel, “clearly, substantial deficiencies exists among the HBIs, especially those with doctoral programs.” (PTX 2 at 142.)¹⁰

The HBI Panel Concludes That HBI Facilities Lag The TWIs and That the Inadequate HBI Facilities Prevent Them From Fulfilling Their Missions

113. Maryland’s historian expert, Dr. Lichtman, did not visit the campuses at all to make comparisons, but relied on another measure that is size dependent, space deficiencies per FTE. Here is what the Bohanan Commission had to say about this measures:

Although space deficits are an important aspect of capital needs, an analysis of the quality of existing space is necessary for a full understanding of the issue. While some institutions might have small deficits or even surpluses of certain types of space, this does not reflect the quality of existing space. For instance, an institution may have a surplus of space, but the quality of that space may render it unusable.

(PTX 2 at 61.)

114. The HBI Panel actually visited the campuses, noting: “Through on-site visits and available data analysis, the Panel attempted to assess comparability of facilities and related

¹⁰ Again noting that per FTE spending is partly a function of the smaller size of the HBIs, the HBI Panel noted that although building up the infrastructure of UMES and Morgan would be expensive, the costs per student would decrease at the institutions grew:

In addition, it is understood that programs are more expensive the smaller the graduate program enrollment. To make any program fiscally rational requires the development of a “critical mass” of doctoral students and faculty in cognate fields. Therefore, as MSU achieves greater enrollment density in related graduate fields, the cost per graduate degree awarded will go down and the program will become more cost efficient.

(PTX 2 at 140.)

spaces of the HBIs in relation to selected TWIs.” (PTX 2 at 122.) Its conclusion was consistent with the testimony of Dr. Kaiser and Plaintiffs’ other witnesses, that the facilities at the HBIs “visibly lag” those at the TWIs: It acknowledged what Maryland presented as a defense at trial, that Maryland has made substantial capital investment at the HBIs in recent years and that all institutions have facilities challenges, but the HBI Panel noted that the HBIs are worse than the TWIs:

The Panel recognizes the state’s substantial efforts to improve the facilities, physical space, and other institution-wide operational and administrative elements of the HBIs. However, overall the facilities at the HBIs are not comparable to those of the TWIs.

The Panel also acknowledges that the capital/facilities challenge extends throughout postsecondary education. All institutions have unmet capital needs. However, the Panel wishes to make a special case for addressing the needs of the HBIs both as a priority and as expeditiously as possible. We recommend this not only out of our first-hand findings that the HBIs visibly lag behind the TWIs but also because addressing this deficiency is crucial to achieving the goals of capacity and competitiveness of the HBIs in both undergraduate and graduate education.

(PTX 2 at 140.)

115. The HBI Panel noted that improved facilities are important to improving the retention and graduation rates:

In concrete terms, to raise undergraduate graduation rates to levels competitive with the TWIs, the HBIs must find ways to improve substantially the levels of teaching and learning currently associated with the preparation and academic levels of student[s] enrolled in their institutions. Accordingly, their campuses must be made attractive and safe not only as a means of attracting well-prepared students but also for students who by necessity will be spending more of their time there than ever before. Students, faculty and staff need an attractive, safe and administratively effective environment in which to live and work. This includes an appropriate number of well-equipped and trained public safety officers; adequate and safe student housing; accessible management and student services offices with sufficient numbers of trained staff; and adequate study and academic counseling space where students, faculty and

academic advisors and tutors can meet and work long hours. For students to receive the additional help and instruction needed to graduate, they need a place that makes such academic services directly and effectively accessible.

(PTX 2 at 140-41.)

Maryland Has Agreed That Enhancing The Facilities Of The HBIs is Important to Allowing Them To Compete With the TWIs

116. Maryland's 2009 State Plan contains specific references to the facilities' needs at HBIs that relate to Maryland's desegregation responsibilities. It calls for the following approach to capital funding at HBIs:

Accelerate funding for public HBI capital priorities that build institutional capacity related to comparability and competitiveness.

Implementation Measures/Strategies

Increase in funding in the annual capital budget for HBI capital projects

(PTX 1 at 34.)

117. Moreover, when Maryland promulgated the 2009 State Plan recognizing the need to enhance the facilities at the HBIs, the per FTE capital expenditures that Dr. Lichman discussed were well known to Maryland, the HBI Panel, and the Bohanan Commission. Just as with the HBI funding and library holdings, the per FTE capital expenditures does not capture the insufficiencies at the HBIs or the wide gap between the two sets of institutions.

118. Indeed, in 2010 then MHEC Secretary Dr. James Lyons, who of course was fully familiar with the conditions at both sets of institutions, admitted that Maryland has not fully dismantled its *de jure* system in terms of funding the physical plants at the HBIs, funding the dual mission and HBI facilities:

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 panel 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.

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

(3/5/10 Lyons Dep. Tr. 265-66.)

119. Tellingly, Maryland chose not to call Dr. Lyons to testify.

HBI's Lack Proper IT Infrastructure In Comparison to TWIs

120. Going beyond the findings of the HBI Panel, Maryland's 2009 State Plan noted that "[t]he lack of comparable IT services restricts the capacity of HBIs to compete in certain markets for students and to be competitive in the delivery of effective and efficient administrative services." (PTX 1 at 31.)

121. The lack of proper IT infrastructure directly affects the HBIs ability to fulfill their academic missions. As noted by Chancellor Kirwan, the "old model of delivery, where teacher talks is outmoded . . . this generation is wired." (1/23/12 PM Trial Tr. 65-66 (Kirwan).) Without adequate IT infrastructure, Maryland's HBIs struggle to reach this wired generation.

Day to Day Implications of Limited Missions Inadequate Funding and Infrastructure at Maryland's HBIs

122. The inadequate libraries, science labs, facilities and other infrastructure noted by the HBI Panel and Maryland State Plan has a real life effect on students at the HBIs and unquestionably affect student choice. Beginning with Dr. Wilson, President of Morgan State, the Court heard from numerous witnesses who described the real life consequences of underfunding.

Morgan State

123. Consistent with the observation in the 2009 State Plan, Dr. Wilson described Morgan's technology infrastructure as "very, very poor", which makes it difficult for the institution to compete with TWIs in the state that have better-developed infrastructures. (1/4/12 AM Trial Tr. 33-35 (Wilson).) In fact, Dr. Wilson described the condition of IT infrastructure at Morgan as "shocking." (1/4/12 AM Trial Tr. 33 (Wilson).) The importance of IT infrastructure for a doctoral research institution was captured by the HBI Panel, which noted: "[q]uality doctoral

programs also depend on the latest in university-wide technology and administrative support systems to manage their research and grants and the connections between the researchers on campus and the external scientific and business communities.” (PTX 3 at 30.)

124. As for the library, whatever the per FTE holdings, both faculty and students have to go to TWIs like Johns Hopkins, Towson, or UMBC to do basic research because of the inadequacy of Morgan’s library, and because Morgan lacks the funds for online databases. (1/4/12 AM Trial Tr. 28-29 (Wilson).) As for the science labs, consistent with the findings of the HBI panel, Morgan’s science labs also lack basic equipment, such as working microscopes. (1/4/12 AM Trial Tr. 70 (Wilson).) This is unheard of for a doctoral research institutions. (1/17/12 AM Trial Tr. 76 (Kaiser).)

125. As for the overall facilities, a student visit to Morgan begins at the Montebello complex, a former state psychiatric hospital that was donated to Morgan. Noted Dr. Wilson, “[Montebello] is one of the most dilapidated buildings that I have seen on a college campus.” Morgan has to regularly take money from its operating budget to make repairs at Montebello. (1/4/12 AM Trial Tr. 6-9 (Wilson).)

126. In Dr. Wilson’s view of Morgan’s Jenkins Building, “it is just unthinkable that we would have our students and our faculty in a [building] where, when it rains, we literally have to put trash cans all over the place to collect the water, where there is mold and mildew and [it is] smelly.” (1/4/12 AM Trial Tr. 12 (Wilson).) Morgan’s science complex:

[I]s a hodgepodge facility. It’s a make-do facility. It is a facility that was not designed with the way, with the way faculty members conduct research in the sciences now. And so because that facility was so old, and then you kind of attach something else to it, it does not really meet the standard of a world-class university science complex that you would see at institutions in the state of Maryland and outside of the state.

(1/4/12 AM Trial Tr. 21-22 (Wilson).) As described by Dr. Wilson, the factors mentioned in the 2008 HBI Panel Report such as lack of state of the art labs, lack of consistent funds for maintenance, and financial aid still apply today. (1/4/12 AM Trial Tr. 21-22 (Wilson).)

127. As for the lack of equipment, Dr. Wilson testified that the new communications building lacks necessary equipment, which costs about \$14 million dollars. (1/4/12 AM Trial Tr. 71 (Wilson).) Without this equipment, radio stations have indicated that they will no longer take Morgan interns. (1/4/12 AM Trial Tr. 61 (Wilson).) Morgan offers a class in film editing, but lacks the equipment to allow students to do film editing. (1/4/12 AM Trial Tr. 62 (Wilson).) Without this equipment, students are not equipped to go to work at jobs at ABC, NBC, ESPN, or other communications positions. (1/4/12 AM Trial Tr. 62 (Wilson).)

128. As the HBI Panel Report noted, many of Morgan's programs are not quality programs. (PTX 2 at 129.) As described by Dr. Wilson, some of the new programs are a "house of cards." because they lack appropriate faculty and resources. (1/4/12 AM Trial Tr. 83 (Wilson).) Thirty eight percent of its faculty is contractual faculty, which is unacceptable for research institution, because they cannot be principal investigators on research grants from federal agencies, such as NSF, National Science Foundation, NIH and other federal agencies and do not provide the kind of academic support that full time faculty do.¹¹ (1/4/12 AM Trial Tr. 18-20 (Wilson).) As a result, Morgan's full-time faculty have a much heavier teaching load than is the case at true research institutions, which limits their ability to conduct research. (1/3/12 PM Trial Tr. 79-80 (Wilson).) (*See also* PTX 2 at 134 (Morgan's faculty "should have teaching loads consistent with the need to afford them time to conduct research."))

¹¹ By contrast, the percentage of contractual faculty at UMCP is 15.3% and at UMBC 13.6%. (PTX 835 at 20.)

129. Morgan's attractiveness to talented faculty members is further diminished because it does not have enough funding for graduate assistants and laboratory start-up funds, which, in turn, makes Morgan less-competitive for students who want to study with these professors. (1/4/12 AM Trial Tr. 14-16 (Wilson).)

130. Dr. Wilson's description is consistent with the conclusion of the HBI Panel Report about the doctoral programs at Morgan: "However, fifteen such programs have been approved since that time and their development has certainly not been within the same trajectory as found in most quality doctoral universities with which we are familiar." (PTX 2 at 132.)

131. Former graduate student Muriel Thompson described not having dedicated space for her doctoral program in community college leadership, requiring the class to roam from location to location. If there was no place to meet, the class could not be held. (1/3/12 PM Trial Tr. 18 (M. Thompson).) Her experience was entirely consistent with the HBI Panel Report on the importance of adequate facilities to graduate programs, which concluded:

The physical environment of a campus, including its facilities and infrastructure such as landscaping, utilities, and data/telecommunications systems, contributes substantially to quality graduate education. To recruit and support top doctoral faculty and students in their programs and research activities, the overall university infrastructure needs to be modern, attractive, safe and conducive to research and scholarship. This is particularly true in doctoral programs in which faculty and their students spend so much time together on campus.

(PTX 2 at 141.)

132. In addition, there were insufficient numbers of faculty members to support the program, and she had to do most of her research at Towson or College Park. (1/3/12 PM Trial Tr. 25-27 (M. Thompson).)

133. In 2009, Maryland's State Plan concluded that the HBIs needed "substantial additional resources" "to attract, retain and graduate an academically, racially, and culturally and ethnically diverse student body." According to Dr. Wilson, the same is true of Morgan today. (1/4/10 AM Trial Tr. 31 (Wilson).) Like the other HBIs, Morgan cannot compete for highest performing students because of financial aid burden. (1/3/12 PM 68-69 (Wilson).) Morgan's students do not benefit from diversity as students do at the TWIs. Maryland has attributed this lack of diversity in part to lack of resources. In 2008, for example, Morgan had a white graduate student population of 11% compared to 43% in 1970. (PTX 184 at 11.) It has been similarly unsuccessful in attracting Asian or Hispanic students. (PTX 755 at 16.) As eloquently put by the irrepressible Dr. Heidelberg, the situation at Morgan is "egregious," with respect to technology, equipment, library, and facilities. (1/9/12 PM Trial Tr. 94 (Heidelberg)). Or as put by Dr. Kaiser, "research facilities for a research university really don't exist." (1/17/12 AM Trial Tr. 52 (Kaiser).)

Bowie State

134. Bowie's 2002 Facilities Master Plan, which was completed in 2004, makes the following observations about the state of the campus:

Despite recent campus additions of the Center for Learning and Technology and the Computer Science Building, most of BSU's remaining facilities and infrastructure do not meet the educational administrative, student support, physical education, athletics, or recreational requirements typically associated with living and learning in the 21st century and found at other institutions-both within the State of Maryland and its peers.

A substantial number of the remaining campus buildings, especially those supporting the academic mission and student life and development, are inadequate and aged, and many of them have inflexible structures and floor plan which preclude cost-effective renovations.

Classroom space is inadequate to support discipline needs. Office space in older buildings is overcrowded, undersized, and inadequate.

Study and library facilities are worn and appear insufficient to meet the long-term campus needs.

(PTX 346 at 52.)

135. Most of these conditions are still true today. Dr. Mickey Burnim, the president of Bowie State University, observes that to find a leaky roof on the Bowie campus, “[y]ou could pretty much close your eyes and point in any direction.” (1/5/12 PM Trial Tr. 55 (Burnim).) But Bowie faces more pressing concerns than leaking roofs. Its ability to expand its high-demand nursing program is limited by space constraints. (1/5/12 PM Trial Tr. 54 (Burnim).) As for its library, as with the other HBIs, Bowie’s students often have to travel to UMCP to conduct research both because Bowie’s library has inadequate space and because Bowie does not have “funding for the support of acquisitions and the maintenance of [its] periodicals. (1/5/12 PM Trial Tr. 52 (Burnim).)

136. Dr. Kaiser found that only five of the 29 capital projects recommended in the master plan had received any appropriations through 2010. (PTX 660 at 37, 64-78.)

137. The science building is so inadequate and ill equipped that when recruiting high achieving science students, the school would prefer to steer them clear of the science building. (1/5/12 PM Trial Tr. 51-52 (Burnim). Dr. Kaiser describes Bowie’s science labs as looking like a “1970’s high school.” The cabinets had doors hanging off them, and there were too few fume hoods. (1/17/2012 AM Trial Tr. 45-46 (Kaiser).)

UMES

138. Although Chancellor Kirwan described UMES as “a research university” with the “same array of degree programs that College Park has” (1/23/12 PM Trial Tr. 60 (Kirwan)) that

does not match the facts on the ground as found by the HBI Panel, and adopted by Maryland's 2009 State Plan. This putative research university has a library collection that is about 1/10th the size of the UMCP and 1/5th the size of UMBC, the two TWI doctoral research institutions. With its inadequate infrastructure, it is not surprising that the COO of the USM system, Dr. Vivona would testify that UMES is "not at all a research intensive institution." (1/31/12 AM Trial Tr. 45 (Vivona).) Indeed, this is the conclusion reached by the HBI Panel, which noted that UMES is a long way from having the resources to be what Maryland claims it is, a research university:

With regard to the HBI study, UMES does not have a comparable institution within the state because of its land-grant mission. It cannot be compared to UMCP because UMCP is a major research university with very high research activity. For undergraduate education, the Panel used the state's public institutions classified as mater's-level [sic] colleges and universities, under the Carnegie Commission descriptions, for comparative purposes. For the research doctoral programs at UMES, a comparison should be made with similar doctoral programs offered at UMCP or other appropriate out-of-state universities. The aim is to ensure that UMES has the resources it needs (faculty, staff, funding, facilities, etc.) to offer high quality doctoral programs that are comparable and competitive with similar doctoral programs at other institutions.

(PTX 2 at 139.)

139. Maryland has never provided UMES with the resources necessary to match its federal land grant funding. In fact, it currently makes available less than 30% of the necessary matching funds. (1/5/12 PM Trial Tr. 10-11 (Neufville); 1/4/2012 PM Trial Tr. 42-43 (T. Thompson).) On the other hand, Maryland provides approximately seven dollars in matching funds for every dollar of federal land grant funding received by UMCP. (1/5/2012 PM Trial Tr. 11 (Neufville); PTX 875 at 3 Fig. 2.) In 2011, the Education Policy Committee of the USM Board of Regents acknowledged that Maryland does not provide sufficient funds to UMES to create the federal match. (PTX 875 at 4.)

Coppin

140. Coppin warrants a more extensive discussion to place in context its relatively high per FTE funding (second only to UMCP on Dr. Lichtman's chart (DTX 405 at 28)) and how far it has to go to be in a position to appeal to students regardless of race and provide equal educational opportunity to its students.

141. Because Coppin was arguably the most neglected of the HBIs, the Partnership Agreement called for a Coppin Revitalization Study. That study found severe deficiencies in Coppin's infrastructure-- even compared to Maryland's other neglected HBIs:

The College's infrastructure - water, sewer, electrical, security, communications, and fire protection - systems are antiquated and in need of replacement and/or modernization. Classroom, office, research, library, and physical-education space are severely deficient, a problem that will worsen with expected enrollment increases.

(PTX 549 at 12.)

142. The Study concluded that in addition to substantial facilities improvement, Coppin needed "an infusion of operating funds to [make up for] a century of constraints." (PTX 549 at 8.) Not only did Maryland not provide the "infusion of operating funds" to fund Coppin's "especially expensive" mission (PTX 549 at 8) but it did not provide all of the capital funds called for in the 2001 study.

143. Ten years later, the 2011 Coppin Revitalization Commission acknowledged the recent investments in Coppin but concluded:

Despite the recent campus additions of the HHSB and PEC, most of CSU's remaining facilities do not meet the educational, administrative, and student related support needs typically associated with living and learning in the 21st century and found at other institutions-both within the State of Maryland and within its peers. Coppin will continue to request funds to construct and renovate the buildings as recommended in the Study Team report.

(PTX 810 at 55.)

144. The Commission pointed out that additional substantial investments in Coppin's infrastructure were necessary to allow Coppin to fulfill its mission:

Coppin State University can fulfill its important mission only if the funding needed to complete the recommendations as summarized in Table VI-4 is quickly attended to; the Office of Capital Planning at CSU played a remarkable role in the systematic development of the institution. The overriding strategic goal of the institution is to continue development of facilities and its infrastructure as set forth in the September 2001, "*Report of the Independent Study Team on the Revitalization of Coppin State College.*"

(PTX 810 at 59.)

145. The 2011 Revitalization Study directly addressed Coppin's high per FTE funding and attributed it to Coppin's small size:

The operation of a university campus involves certain fixed costs regardless of the enrollment of the institution. The high cost per FTE for Coppin shown in Appendix V-I, Chart 2, is reflective of the campus being built out, as a consequence of the capital plan in Imperative VI, for a larger enrollment than Coppin has yet to achieve.

(PTX 810 at 52.)

146. Despite a high per FTE funding (like Princess Anne during the *de jure* era) the Revitalization Study concluded that Coppin was dramatically underfunded under Maryland's funding guidelines, and recommended that in light of its mission Coppin's be funded using "aspirational peers" (as is the case with UMBC and College Park). (PTX 810 at 83.)

147. In further discussing the constraints due to inadequate funding, the Commission noted that Coppin had developed through "non-state funds" an award winning IT system (which seemed to take credit for at trial) but it lacked the operating funds to keep it operational:

During the past 10 years, Coppin, through donations and federal grants, has used a total of \$13.3 million in non-state funds toward the

implementation of its award-winning IT program and to develop a state-of-the-art IT system.

Currently, Coppin's voice and data are connected to the world through one path. In the current day and age where we all depend on being connected, this is a high risk. Coppin needs an additional voice and data connection to serve the campus. It is better to utilize a different service provider point of presence and a different internet service provider. This can be accomplished with a one-time capital cost of \$355,000 and an ongoing cost of \$48,000.

Coppin will also need an additional \$200,000 to fund the implementation of online courses/programs (detailed recommendation 4) and an estimated increase in its operating budget of \$1,000,000 to cover the cost of supporting all the newly implemented IT at Coppin.

(PTX 810 at 10-11.)

148. The Commission pointed out that Coppin even lacks the funds necessary to operate its new facilities and that as a result of the cost burdens associated with the new facilities Coppin is effectively operating at the funding levels it had in the 1990s:

Coppin's state support was significantly increased in FY 2007 to address recommendations of the 2001 Study Team. However, in subsequent years, Coppin had to redirect funds to cover the operating costs of new facilities because the State's funding was not sufficient to cover these additional costs. Consequently, the General Fund Operating Support, excluding costs to operate new facilities, in constant dollars was reduced to the level of FY 1990.

(PTX 810 at 11.)

149. As described by Dr Avery, Coppin lacks the funds to keep the new buildings clean, to equip them, or provide faculty for "what should be going on inside the buildings." (1/9/12 PM Trial Tr. 33-34 (Avery).) Moreover, without the "infusion of operating funds" or being funded according to "aspirational peers", Coppin lacks the funds to provide its students financial aid to remain in school. (1/9/12 AM Trial Tr. 101 (Avery).) As noted earlier, Coppin,

the HBI with the poorest student body has a the graduation rate of a mere 17%. At nearby Towson, the graduation rate for African Americans was 75.9%.

The Bohanan Commission's Recommendation for Funding The HBIs

150. Consistent with the testimony of the four HBI Presidents, the Bohanan Commission described “[t]he magnitude of the challenges faced by the HBIs is particularly great, especially at the undergraduate level, and will require special attention and consideration if they are to be satisfactorily overcome.” (PTX 2 at 11.) As noted earlier, the Commission recommended a multifaceted approach to funding the HBIs that would take into account four crucial components that are not recognized in a simple per FTE comparison: (1) historical underfunding, (2) lack of adequate infrastructure, such as libraries, labs, IT, teacher salaries, etc, (3) a more difficult and expensive dual mission, with a remedial and financial aid component, and (4) accelerating capital appropriations to build out the facilities at the HBIs.

151. As for capital funding, the Commission noted:

The commission acknowledges the capital improvement needs throughout higher education and specifically at HBIs, even with the State’s investment of approximately \$2 billion since 1999 for capital projects at public higher education institutions, including \$624 million at the four HBIs. Once HBIs have developed the recommended undergraduate and doctoral plans, HBIs should review their capital priorities and ensure that they are aligned with the undergraduate needs and the institutional platform and targeted doctoral program needs. The State should accelerate funding for the HBI capital priorities, particularly those that build institutional capacity related to comparability and competitiveness.

The commission also recommends appointing a committee to annually report to MHEC, the Governor, and the General Assembly on the progress of the State and HBIs on meeting the goals to ensure comparability and competitiveness.

(PTX 2 at 48.)

152. In sum, the Bohanan Commission and HBI Panel recognized that while the HBIs receive more funding per FTE than the TWIs, as has been true for much of their histories, because Maryland did not fund the HBIs dual mission, and did not fund them sufficiently to have adequate infrastructures, Maryland's funding of its HBIs produced "inequities" that "substantially marginalized" the HBIs, prevented them from fulfilling their dual mission, and prevented them from expanding their missions to compete with the TWIs for students regardless of race.

Maryland's Reliance on Peer Institutional Funding Model Operates to the Disadvantage of the HBIs

153. As the only HBI outside of the USM, Morgan has regularly protested the funding guidelines. Maryland's funding guideline for determining levels of operating funding for institutions of higher education works by (1) identifying a set of comparator institutions for each public institution in Maryland; (2) calculating a target percentile of appropriations and tuition/fees for each set of comparators; (3) calculating the expected tuition revenue for each public institution in Maryland; (4) subtracting the total in Step 3 from the total in Step 2; and (5) funding a designated portion of the target appropriations for each institution. (PTX 324 at 12.) MHEC uses a statistical methodology called a "cluster analysis" to identify peer institutions for the funding guidelines based on similarities in institutional missions, among other things. (1/17/12 PM Trial Tr. 31-33 (Toutkoushian).) According to Dr. Toutkoushian, "[t]he mission is where you would get the connection between what's going on now at the HBIs in terms of funding and what's happened historically, because the mission will influence the amount of revenues that they receive and also their competitiveness for other types of revenues from donations, research grants, and other things." (1/17/12 PM Trial Tr. 77-78 (Toutkoushian).)

154. The funding guideline “was created and initially was used in many ways to determine allocations.” (1/31/12 AM Trial Tr. 13-14 (Vivona).) Today, at minimum, MHEC, the governor, and the general assembly use the funding guidelines as a benchmark for their operating funding-related decisions. (2/1/12 AM Trial Tr. 22 (Newman).) Rather than actively promoting the enhancement of the HBIs, Maryland’s funding policy for the last decade has been to maintain current levels of service. (1/31/12 AM Trial Tr. 6 (Vivona).) According to Maryland’s 1999 Larson Report, “Maryland is unusual in the attention and importance given to the use of peer comparisons as the basis for determining funding needs and levels.” (PTX 563 at 104.)

Dr. Toutkoushian’s Partial Quantification of the HBI Funding Deficiencies

155. Plaintiffs’ expert Dr. Toutkoushian did not attempt to quantify what Maryland’s 2009 State Plan calls the “substantial additional resources” that the HBIs need to be comparable and competitive with the TWIs. (PTX 1 at 31.) Nor did he attempt to quantify what MHEC’s 30(b)(6) witness Dr. Newman described as the substantial additional resources that the HBIs need to overcome competitive disadvantages caused by prior discrimination. (2/1/12 AM Trial Tr. 48 (Newman).) He did not have the data to quantify the funding deficiencies from the hundred-year period before 1984. The data only began in 1984.

156. Even with this limited data, and recognizing, as the Bohanan Commission did, that per-FTE comparisons between the HBIs and TWIs understates the funding disparities between the two sets of institutions, Dr. Toutkoushian nevertheless documented the substantial funding deficiencies for the period 1984-2010.

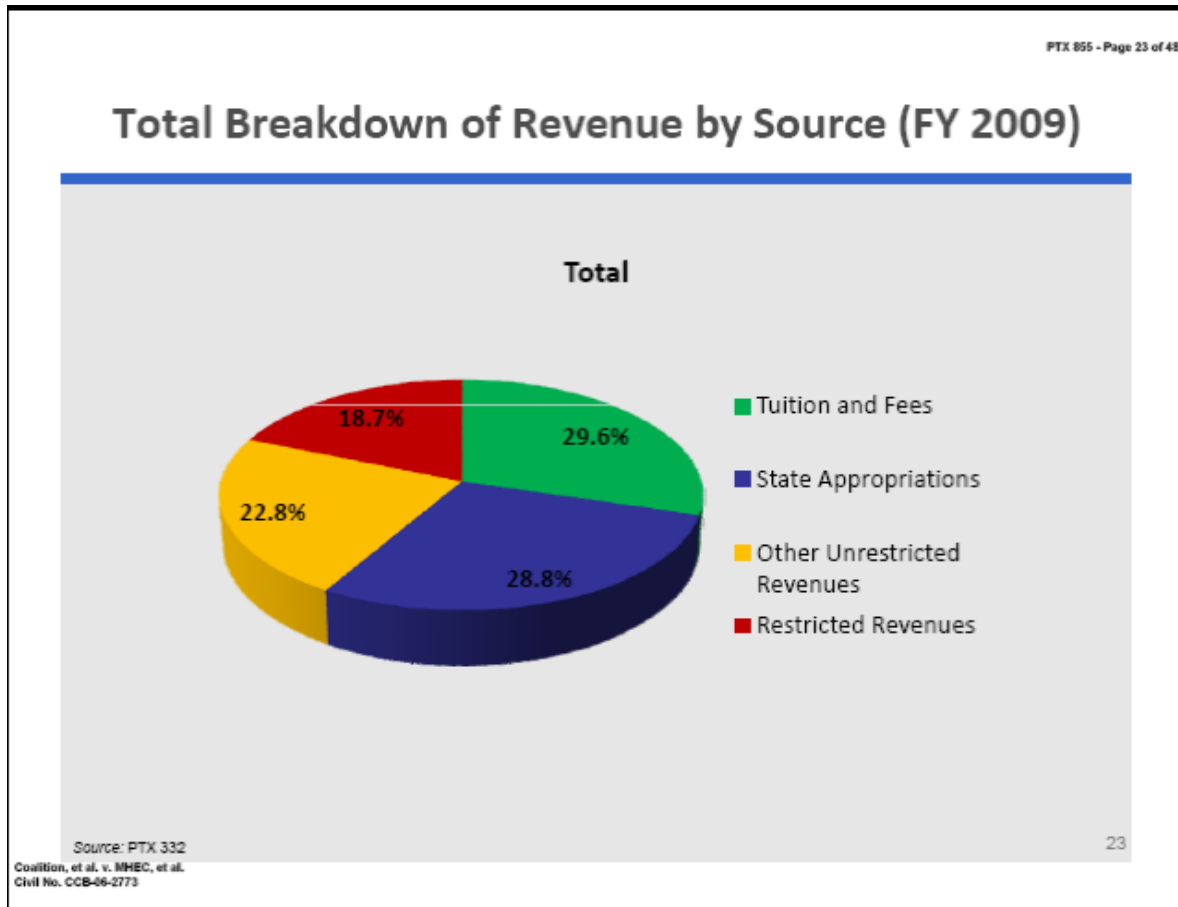
157. Dr. Toutkoushian included UMCP in his deficiency calculations because it is neither a substantive nor a statistical outlier.¹² UMCP's designation as a "flagship" institution was not based on any unique characteristic of the institution and could have been applied to another institution. (2/8/12 AM Trial Tr. 5-6 (Toutkoushian).) Moreover, neither the Partnership Agreement nor the HBI Panel excluded UMCP from comparisons with the HBIs. (PTX 4 at 5 (identifying UMCP as a TWI); (PTX 2 at 133-35 (including UMCP in comparisons with UMBC, Morgan, and UMES regarding quality of doctoral programs).)¹³ Moreover, neither the court in *Fordice* nor the Court in *Knight* excluded the flagships from their analyses. *See United States v. Fordice*, 505 U.S. 717, 739-40 (1992) ; *Knight v. Alabama*, 14 F.3d 1534, 1544 (11th Cir. 1994)); *Knight v. Alabama*, 900 F. Supp. 272, 307 (N.D. Ala. 1995).

158. Like the Bohanan Commission, Dr. Toutkoushian considered tuition and fees as a part of the institutions revenues. Indeed, the HBI Panel in assessing funding capacity, considered General Fund revenues, tuition and fees, total revenues, and endowments. (PTX 2 at 145.) Considering state appropriations in isolation, as Maryland insists should be done, would be misleading because "there are two primary components that are available to educate students, and you have to put them together. One is state support. But the other is tuition and fees. And

¹² Defendants' expert Dr. Lichtman did not perform a standard deviation analysis to support his contention that UMCP is a statistical outlier. *See Osage Tribe of Indians of Okla. v. United States*, 96 Fed. Cl. 390 (Fed. Cl. 2010) (court found that expert's analysis lacked foundation where expert failed to conduct a formal statistical analysis and expert's outlier analysis was directed at undermining data points that supported larger recovery for plaintiffs); *Derolph v. Ohio*, 712 N.E.2d 125, 186 (Ohio 1999) (court determined that expert analysis regarding base cost of adequate education was arbitrary because expert "did not select outliers per se," but instead excluded only "unusual" districts) (citation omitted).

¹³ Also, while UMCP's funding per FTE is higher than most of the other institutions, when one considers the funding of the University of Maryland at Baltimore and UMUC, two institutions that both experts identify as outliers, UMCP's funding is much lower than the former and much higher than the latter. (2/8/12 AM Trial Tr. 7-9 (Toutkoushian).) In FY 2010, University of Maryland-Baltimore and University of Maryland-University College, the institutions that both Dr. Toutkoushian and Dr. Lichtman excluded as outliers, received \$28,973 and \$1,447, **respectively, in state funding. UMCP received \$13,200, which was only \$1,203 per FTE student more than Coppin received.** (PTX 1020-1021.)

that’s [] the funding that you have available to educate your students.” (1/11/12 AM Trial Tr. 76-77 (Vollmer).) For FY 2009, tuition and fees actually accounted for a larger proportion of the total revenues of Maryland’s institutions of higher education than did state appropriations.



159. Dr. Toutkoushian’s analysis indicates that from 1984-2010 the HBIs experienced a cumulative deficiency of \$910,993,554, based on the proportion of state appropriations, enhancements, and tuition and fee revenue that one would expect them to receive as a function of their enrollments and the Bohanan Commission’s methodology for accounting for the costs associated with the remedial component of the HBIs’ access mission. (PTX 1029 at 20.) If one

does not account for the partial cost of subsidizing the dual mission, then the cumulative deficiency becomes \$792,769,359. (PTX 1029 at 20.)¹⁴

160. Based on Dr. Toutkoushian's analysis, the HBIs received \$136,046,241 less in state appropriations and enhancements from 1984-2010, than one would expect based on their enrollments and the Bohanan Commission's estimate of the funding necessary to subsidize their remediation costs. (PTX 1029 at 20.) Accounting for economies of scale, and for the financial aid component of the HBIs dual missions, would make the deficiencies even greater.

161. As noted at the outset, the most appropriate analysis is to include tuition and fees, but even that analysis understates the extent to which Maryland's current policies underfunds the HBIs, leaving them with disheartening retention and graduation rates, inadequate libraries and science labs, underpaid faculty, and an overall deficient infrastructure.

The Limited Endowments and Cash Balances At the HBIs Are A Result of Cumulative Underfunding

162. As Judge Murphy noted in *Knight*, small endowments at the HBIs are a result of cumulative underfunding. Maryland's HBIs lack "sufficient revenues to develop the infrastructure and the human capital structure to be competitive for external funding and also to be competitive for donations, you need to have a certain infrastructure in place to be successful at running fundraising campaigns." (1/17/12 PM Trial Tr. 42-43 (Kaiser).) The HBIs on average have significantly smaller endowments than the TWIs:

¹⁴ The evidence at trial showed that the \$1400 per student requiring remedicaioth understates the cost of the HBI dual or access mission. (1/12/12 PM Trial Tr. 43 (Richardson).) Morgan has calculated the "cost of access," which should be added to this amount to account for shortfalls in tuition and state appropriations, as approximately \$2,856 per student. (PTX 835 at 10.)

Plaintiffs' Exhibit 744
Table 7C: Ranking of Institutions on Endowment, 2008-09

| Institution Name | Endowment 2008-09 | Rank | Enrollments 2008 | Endowment per FTE | Rank |
|---|----------------------|------|---------------------|----------------------|------|
| St. Mary's College of Maryland | \$26,331,677 | 6 | 2,095.0 | \$12,568.82 | 1 |
| University of Maryland-College Park | \$335,939,668 | 1 | 30,728.0 | \$10,932.69 | 2 |
| University of Baltimore | \$32,864,779 | 3 | 3,985.0 | \$8,247.12 | 3 |
| University of Maryland-Baltimore Cty | \$43,531,633 | 2 | 9,749.0 | \$4,465.24 | 4 |
| Salisbury University | \$28,277,337 | 5 | 7,219.0 | \$3,917.07 | 5 |
| University of Maryland-Eastern Shore | \$14,225,901 | 7 | 3,821.0 | \$3,723.08 | 6 |
| Frostburg State University | \$12,284,572 | 8 | 4,434.0 | \$2,770.54 | 7 |
| Coppin State University | \$6,354,467 | 9 | 3,175.0 | \$2,001.41 | 8 |
| Towson University | \$31,403,431 | 4 | 17,275.0 | \$1,817.85 | 9 |
| Bowie State University | \$3,712,128 | 10 | 4,496.0 | \$825.65 | 10 |
| Morgan State University | \$1,345,835 | 11 | 6,287.0 | \$214.07 | 11 |
| | | | | | |
| H B I Average = | \$6,409,583 | | HBI Average = | \$1,691 | |
| TW I Average = | \$72,947,585 | | TWI Average = | \$6,388 | |

(PTX 744.)¹⁵

163. In fact in 2008-2009, UMBC, the school that Maryland formed to avoid expanding Morgan, had an endowment that was larger than the total endowment of **all** of Maryland's HBIs. (PTX 744.) Similar patterns present themselves when one examines the ending fund balances for Maryland's institutions of higher education, which are essentially the bank accounts available to individual institutions. Although Coppin has the second highest per FTE funding in the state due to its small size, it has by far the lowest fund balance—just over a million dollars.

¹⁵ Some of the TWIs have foundations with significant assets. For example, the University of Baltimore's foundation has over \$66 million. (1/30/12 AM Trial Tr. 47-48 (Bogomolny).)

Ending Balance, 2010 Actual

| Ending Balance, 2010 Actual | | |
|--|------------------------|------------------|
| School | \$ | Rank |
| UMCP | \$ 265,544,927 | 1 |
| Towson | \$ 49,157,410 | 2 |
| Salisbury | \$ 46,464,792 | 3 |
| UMBC | \$ 26,317,256 | 4 |
| <i>Bowie*</i> | <i>\$ 15,508,235</i> | <i>5</i> |
| <i>Morgan*</i> | <i>\$ 10,111,056</i> | <i>6</i> |
| UB | \$ 10,349,121 | 7 |
| <i>UMES*</i> | <i>\$ 7,063,868</i> | <i>8</i> |
| Frostburg | \$ 4,650,765 | 9 |
| <i>Coppin*</i> | <i>\$ 1,443,611</i> | <i>10</i> |
| | <i>Mean \$</i> | <i>Mean Rank</i> |
| <i>HBI*</i> | <i>\$ 8,531,692.50</i> | <i>7</i> |
| TWI | \$ 67,080,711.83 | 4.33 |
| Source: MD FY 2012 Proposed Operating Budget | | |

| |
|-------------|
| Key: |
| * - HBI |

(PTX 1020 at 79; PTX 1021 at 23, 33, 45, 55, 66, 77, 86, 96, 116.)

The Role of Maryland's HBIs Is Largely Limited To Educating African Americans As Was the Case During the *De jure* Era

164. With inadequate libraries, science labs, IT infrastructure, endowments, fund balances, underpaid faculty, facilities that “visibly lag” the TWIs, lack of funds to support higher graduation and retention rates, Maryland’s HBIs simply cannot compete with its TWIs. Indeed, the TWIs rightly do not view the HBIs as recruitment peers. (1/25/2012 PM Trial Tr. 54

(Dudley-Eshbach) (noting that the president of Salisbury does not consider HBIs to be recruiting peers).)

165. What then is the role of Maryland's HBIs in a putatively unitary system of higher education? Educating African Americans, many of whom could not gain direct admissions to the TWIs, which are becoming increasingly selective. (1/25/12 PM Trial Tr. 43-44 (Dudley-Eshbach); 1/24/12 AM Trial Tr. 33-35 (Gibralter).) As described by Chancellor Kirwan, the operative mission of the HBIs, as it was during the *de jure* era, is the education of black students.

Q. Do you see that it says that there are 105 Historically Black Colleges and Universities in the nation –

A. Yes.

Q. – which were founded prior to 1964. And it goes on to say, whose principal mission was, and is, the education of black Americans. Do you see that?

A. I do.

Q. Now, in terms of operationally, that's essentially the operational mission of Maryland's HBIs, isn't it, in terms of what we call the facts on the ground?

A. Yes, sir.

(1/24/12 PM Trial Tr. 39-40 (Kirwan).)

166. As further explained by Dr. Kirwan, Maryland's statute designates Morgan as having an "urban" mission which includes "access mission and addressing urban problems," such as providing a vehicle to higher education for students with substantial remedial and financial needs. (1/24/12 PM Trial Tr. 38-39 (Kirwan).) According to Dr. Kirwan, this is similar to Coppin's mission, which is "radically different" from the nearby TWI Towson but is

'very urban focused,' responding to the needs of West Baltimore." (1/23/2012 PM Trial Tr. 56 (Kirwan).) (1/24/2012 PM Trial Tr. 39-40 (Kirwan).)

167. Because of limited roles and missions, underfunding, and unnecessary program duplication, Maryland's HBIs have not been successful in attracting non-black students, whether white, Asian, or Hispanic. This deprives their students of opportunities to learn in a diverse environment, which Maryland concedes is important. (1/24/2012 PM Trial Tr. 30 (Kirwan)). Initially, Maryland blamed the lack of diversity at the HBIs on their "marketing approach". (5/11/11 Hr'g Tr. 23). It now blames it on changing demographics, though its own witnesses undercut this explanation.

CONCLUSION

168. As is more fully documented in the following pages, Maryland has not dismantled its *de jure* system of segregation and has no real defenses to this case. The HBIs limited missions are traceable to the *de jure* era, have segregative effects, and are without sound educational justification. Expanding their missions will require financial resources for programs, infrastructure, and facilities. That this is educationally sound and practical is evidenced by the fact that Maryland committed to doing so, first in the Partnership Agreement and again in the 2009 State Plan. Moreover, as noted by Dr. Toutkoushian and the Bohanan Commission, Maryland can afford to make substantial additional investments in higher education because compared to other states with its wealth it significantly underfunds higher education. (1/17/12 PM Trial Tr. 80-81 (Toutkoushian).) The Bohanan Commission observed that "[a]lthough Maryland ranks second in median family income and, on a per capita basis, fourth among the 50 states in personal income, it ranks twenty-first in higher education appropriations per capita,

thirty-fourth in the fraction of state personal income devoted to higher education, and nineteenth in higher education appropriations per undergraduate FTEs.” (PTX 2 at 35.)

169. Maryland’s policy of not fully funding the HBIs’ dual mission and not funding the HBIs sufficiently to build out their infrastructure are similarly traceable to the *de jure* era, have segregative effects, and are not supported by educationally sound policies. That eliminating these policies and practices is educationally sound and practical is evidenced by the fact that Maryland committed to doing so both in the Partnership Agreement and the 2009 State Plan. Moreover, as noted by the Bohanan Commission, the current economic downturn is no justification for not making substantial additional investments in higher education as “the economy is certain to improve” over time, and a downturn is precisely when the State should make additional investments in higher education, especially for poorer students. (PTX 2 at 11.) In any case, there is no “recession exception” to the equal protection clause.

170. Finally, Maryland’s policy and practice of allowing unnecessary program duplication between HBIs and TWIs is traceable to the *de jure* era, has segregative effects, and is not supported by sound educational justification. That eliminating this policies is educationally sound and practical is evidenced by the fact that Maryland committed to doing so in the Partnership Agreement. Simply put, Maryland has no real defenses, since at just about every turn, its defenses bump into and are knocked down by its own documents, Panels, Commissions or witnesses.

PROPOSED FINDINGS OF FACT

I. BACKGROUND

A. Parties

Plaintiffs

1. “The Coalition [for Equity and Excellence in Maryland Higher Education, Inc.] is an organization that was founded in 2006 to promote and support equity and comparability between Maryland HBIs and TWIs.” (1/17/12 Trial Tr. at 100 (Burton).) It is a non-stock Maryland corporation with a primary place of business in Baltimore, Maryland. The Coalition’s mission, as stated in its articles of incorporation, is to “ensure equity and excellence in higher education.” The Coalition engages in community organizing and awareness campaigns on higher education issues, providing services and support to state-funded historically black colleges and universities (“HBIs” or “HBCUs”). It investigates disparities between Maryland’s HBCUs and its traditionally white institutions (“TWIs”) by conducting research, compiling data, and performing analysis of funding equities in Maryland higher education. Members of the Coalition include, but are not limited to, prospective, current, and former students of the public HBIs in Maryland. All members of the Coalition assert that they are impacted by the Defendants’ discrimination with respect to higher education. (Fourth Amended Complaint at 3-5.)

2. Plaintiffs also include individual students and alumni of three of Maryland’s four historically black colleges and universities: Bowie State University (“Bowie” or “BSU”), Coppin State University (“Coppin” or “CSU”), University of Maryland Eastern Shore (“UMES,” “Eastern Shore,” or “Princess Anne”), and Morgan State University (“Morgan”).

3. Plaintiff Muriel Thompson is currently a doctoral candidate at Morgan State University. Ms. Thompson earned her Bachelor of Arts in early childhood education from the University of District of Columbia in 1988, where she was awarded her Master's in clinical psychology in 1995. (1/3/12 PM Trial Tr. 4 (M. Thompson).) Ms. Thompson was awarded a post-graduate certificate in organizational leadership in leadership development and organizational behavior from Johns Hopkins University in 1996. (1/3/12 PM Trial Tr. 4-5 (M. Thompson).) She later earned a Master's in business administration from the University of Phoenix. (1/3/12 PM Trial Tr. 5 (M. Thompson).) Ms. Thompson enrolled in the community college leadership doctoral program at Morgan State University in 2005, and expects to complete that program in May of 2012. (1/3/12 PM Trial Tr. 5 (M. Thompson).) Over the past seven years as a doctoral student at Morgan, Ms. Thompson has also visited the campuses of University of Maryland College Park and Towson State University. (1/3/12 PM Trial Tr. 25-26 (M. Thompson).) Her professional experiences included a position as an adjunct professor at Towson State University. (1/3/12/ PM Trial Tr. 35-36 (M. Thompson).) These combined educational and professional experiences allowed Ms. Thompson the opportunity to experience and observe firsthand the educational opportunities available to students at Morgan State University, University of Maryland College Park, and Towson State University. (1/3/12/ PM Trial Tr. 35-36 (M. Thompson).)

4. Plaintiff David Burton is an alumnus of Morgan State University and founder of the Coalition. Mr. Burton graduated from Morgan State College in 1967 before receiving his Master's from the University of Pennsylvania in 1969. (1/17/12 AM Trial Tr. 94 (Burton).) Through his own educational and professional experiences, and as an active alumnus of Morgan, he became aware of differences in the educational opportunities available to students at Morgan

in comparison to those attending more prominent TWIs around the country. (1/17/12 AM Trial Tr. 98-100 (Burton).) As a result, Mr. Burton established the Coalition in 2006 to promote and support equity and comparability between Maryland's HBIs and TWIs. (1/17/12 AM Trial Tr. 100 (Burton).)

5. Plaintiff Chris Heidelberg is an alumnus of Morgan State University, who spent over ten years as a student in Maryland's public higher education system. Dr. Heidelberg received his Bachelor of Arts in telecommunications, a Master's in telecommunications management, and a Ph.D. in higher education from Morgan State University, where he was an undergraduate student from 1983 to 1987 and a graduate student from 2001 through 2008. He is currently an affiliated professor at Loyola University of Maryland and a public affairs specialist for the federal government. (1/9/12 PM Trial Tr. 59 (Heidelberg).) As a student, a professor, and a practitioner, Dr. Heidelberg has had ongoing occasions to visit and lecture at a number of Maryland's HBIs and TWIs, including Morgan State University, University of Maryland College Park, University of Maryland Baltimore County, University of Baltimore, and Towson State University. (1/9/12 PM Trial Tr. 60 (Heidelberg).)

6. Plaintiff Anthony Robinson is an alumnus of Morgan State University, where he received a Bachelor of Science in 1970. He graduated from American University College of Law in 1973. (1/12/12 AM Trial Tr. 28 (Robinson).) Mr. Robinson is now the President and Chief Executive Officer of the Minority Business Enterprise Legal Defense & Education Fund ("MBELDEF"), which was founded to eliminate economic inequality by dismantling barriers to small and minority business success. (1/12/12 AM Trial Tr. 28-29 (Robinson).) In that capacity, Mr. Robinson has had the opportunity to explore the nexus between academia, industry, and the billions of dollars of federal money available for research and development. (1/12/12 AM Trial

Tr. 30 (Robinson).) Through his efforts to create opportunities for minority businesses in this arena, Mr. Robinson has assessed the institutional capacity of institutions of higher learning in Maryland to take advantage of the business opportunities presented by new technology and the federal funding available to provide the technical support necessary to develop those technologies. (1/12/12 AM Trial Tr. 31 (Robinson).) He has specific experience attempting to create such opportunities at Morgan State University and the University of Maryland Eastern Shore. (1/12/12 AM Trial Tr. 32-33 (Robinson).)

7. Plaintiff Kelly Thompson is an alumna of Coppin State University. Ms. Thompson began her education at Frostburg State University, a TWI, then transferred to Coppin, an HBI, after her Freshman year. She received her Bachelor of Science in Social Work from Coppin in 2007. She is also a graduate of the University of Maryland, Baltimore, where she obtained a Masters Degree in Social Work.

8. Plaintiff Damien Montgomery filed suit as a student at one of Maryland's HBIs, Bowie State University.

9. Plaintiff Rahsaan Simon attended one of Maryland's HBIs, Morgan State University, and received his Bachelor Degree from Morgan in 2009.

10. Plaintiff Jomari Smith is the son of Muriel Thompson, and was at one time a potential candidate for a Maryland HBI. (1/3/12 PM Trial Tr. 33 (M. Thompson).)

Defendants

11. Defendant State of Maryland ("Maryland") was added as a Defendant by court order on September 15, 2010. September 15, 2010 Court Order. (Dkt. #164) Plaintiffs had moved the court for permission to add Maryland as a defendant and the defendants did not object to adding Maryland as a defendant. Plaintiffs' Memorandum in Support of Motion for Leave to

file Fourth Amended Complaint at 1 (Dkt. #124); Defendants' Memorandum in Support of Opposition to Plaintiffs' Motion for Leave to File Fourth Amended Complaint at 1. (Dkt. #130).

12. Maryland Higher Education Commission ("MHEC" or "the Commission") is an agency and instrumentality of, and created by, Defendant State of Maryland. As such, MHEC's responsibilities include: a) [To] "ensure that the State Plan for Higher Education complies with the State's equal educational opportunity obligations under State and federal law, including Title VI of the Civil Rights Act," Md. Code Ann., Educ. § 11-105(b)(2)(ii); b) [To] "assure that courses and programs offered are within the scope of the approved missions of the regional higher education centers," Md. Code Ann., Educ. § 11-105(d)(1)(ii)(4); and c) developing a program for "desegregation and equal educational opportunities, " including the enhancement of HBIs, and report to the Governor on the state's compliance with such desegregation and equal education opportunity plans. *See* Md. Code Ann., Educ. § 11-105(f).

13. Defendant Kevin M. O'Keefe ("Chairman O'Keefe") is the Chairman of MHEC and is sued in his official capacity.

14. Defendant Danette Gerald Howard ("Secretary Howard") is the Interim Secretary of MHEC and is sued in her official capacity. (1/23/12 AM Trial Tr. 16 (Howard)). The Secretary of Higher Education must select and direct the staff of MHEC and ensure implementation of MHEC policies and decisions. Md. Code Ann., Educ. § 11-104(b)(1). The Secretary of Higher Education must "evaluate and report annually to the Governor" and "perform other duties assigned by the Governor." Md. Code Ann., State Gov't § 9-1406(h)(1).

15. Plaintiffs seek relief which will require significant changes to the mission designations, programmatic components, and funding of Maryland's public senior higher

education institutions so that students of all races can choose to attend HBIs and receive an education equivalent to that at a TWI.

B. Structure of Maryland's Higher Education System

16. The present structure of the Maryland system of higher education is set forth in the Maryland Education Code. The last major reorganization of the Maryland system of higher education occurred in 1988.

17. The Maryland Charter for Higher Education ("the Charter") is located at Subtitle 2 of Title 10 of the Maryland Code. Md. Code Ann., Educ. § 10-202.

18. The Commission "consists of 12 members appointed by the Governor with the advice and consent of the Senate." Md. Code Ann., Educ. § 11-102(a). The Secretary of the Higher Education ("MHEC Secretary") is appointed by the Governor with the advice and consent of the Maryland Senate. Md. Code Ann., Educ. § 11-104(a)(1). The Secretary serves as a member of the Governor's Executive Council and serves at the pleasure of the Commission. Md. Code Ann., Educ. § 11-104(b)(iv)-(v). Among other things, "the Secretary shall: 1) "[S]elect, organize, and direct the staff of the Commission"; 2) "[P]erform the duties the Commission assigns"; 3) "[S]ee that the policies and decisions of the Commission are carried out." Md. Code Ann., Educ. § 11-104(b)(i)-(iii).

19. The Charter assigns a number of responsibilities to MHEC, including:

- Advise the Governor and General Assembly on statewide higher education policy;
- Conduct statewide planning for higher education;
- Coordinate and arbitrate among different segments of higher education in the State;

- Review, negotiate as necessary, and grant final approval of mission statements for each public institution of higher education and each regional higher education center that requests or receives State funding;
- Assess the adequacy of operating and capital funding for public higher education and establish operating funding guidelines based on comparison with peer institutions and on other relevant criteria;
- Establish and maintain a higher education information system for planning, coordination, and evaluation purposes;
- Coordinate the State's program of performance accountability reporting for public institutions of higher education; and
- Administer statewide programs of student financial assistance for higher education.

Md. Code Ann., Educ. § 10-207.

20. The Charter specifies that the Governor and General Assembly shall, among other things, “establish broad policy regarding higher education” and “provide for the adequate financing of public higher education.” Md. Code Ann., Educ. § 10-206.

21. With respect to funding, the Charter states that “Funding proposals for public senior higher education institutions shall include”:

- (1) Base funding in accordance with the role and mission of the institution, as approved by the Maryland Higher Education Commission;
- (2) Special initiative funding:
 - (i) For academic programs at historically African American colleges and universities; and...

- (3) Capital funding to support construction, operation, and maintenance of a physical plant that is consistent with each institution's mission.

Md. Code Ann., Educ. § 10-203(c).

22. The Maryland Education Code defines the “public senior higher education institution[s]” as Morgan State University (“Morgan”); St. Mary’s College of Maryland (“St. Mary’s”); and the constituent universities of the University System of Maryland (“USM”), which consist of the University of Maryland, Baltimore (“UMB”); University of Maryland Baltimore County (“UMBC”); University of Maryland, College Park (“UMCP” or “College Park”); University of Maryland Eastern Shore (“UMES,” “Eastern Shore,” or “Princess Anne”); University of Maryland University College (“UMUC”); Bowie State University (“Bowie”); Coppin State University (“Coppin”); Frostburg State University (“Frostburg”); Salisbury University (“Salisbury”); Towson University (“Towson”); and the University of Baltimore (“UB”). Md. Code Ann., Educ. § 10-101, 12-101(b)(5).

23. Maryland has identified Bowie, Coppin, Morgan, and UMES as its HBIs, and UMCP, UMB, UB, Frostburg, Salisbury, Towson, and St. Mary’s as its TWIs (PTX 4 at 5.)

24. The Commission oversees six segments of higher education: the eleven institutions of the University System of Maryland; Morgan State University; St. Mary’s College of Maryland; community colleges; independent colleges and universities; and private career schools. (1/23/12 AM Trial Tr. 20-21 (Howard).)

25. Morgan State University has a Board of Regents, and St. Mary’s College of Maryland has a Board of Trustees. Md. Code Ann., Educ. § 14-102(a); 14-402(a). There is a Board of Regents for the University System of Maryland. The constituent universities within USM do not have their own boards of regents. Md. Code Ann., Educ. § 12-102(b).

26. The Charter sets forth the following responsibilities for the governing boards:
 1. Set education policy and adopt mission statements;
 2. Establish goals that are consistent with the roles and missions approved for the institutions;
 3. Select presidents;
 4. Establish guidelines for admission standards that are consistent with the roles and missions approved for the institutions;
 5. Set guidelines for tuition and mandatory fees;
 6. Evaluate and approve short-range and long-range plans; and
 7. Evaluate and approve institutional budget submissions.

Md. Code Ann., Educ. § 10-208.

27. The Charter sets forth requirements for the University System of Maryland. One of those requirements is to “[d]evelop a mission for each campus which builds upon the unique strength of the campus and embodies a diversity of programs.” Md. Code Ann., Educ. § 10-209(c)(2). The Charter also provides that the USM Board of Regents “shall appoint a Chancellor who shall be the Chief Executive Officer of the University System of Maryland and the Chief of Staff for the Board.” Md. Code Ann., Educ. § 10-209(d)(1). William “Brit” Kirwan has been the Chancellor of USM since 2002. (1/23/12 PM Trial Tr. 25 (Kirwan).) Among other things, the Charter provides that the Chancellor shall advise the Board of Regents on system wide policy; conduct system wide planning; coordinate and arbitrate among the institutions and centers of the University; assist the institutions in achieving performance goals; and provide technical assistance such as legal and financial services. Md. Code Ann., Educ. § 10-209(d)(2).

28. The Charter specifically identifies three campuses as having a unique role with distinct funding requirements. The Charter provides that USM shall “[m]aintain and enhance the College Park campus as the State’s flagship campus with programs and faculty nationally and internationally recognized for excellence in research and the advancement of knowledge.” The Charter also states the USM shall “provide 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 Ann., Educ. § 10-209(f). In addition, the Charter states that

the University System of Maryland shall maintain and enhance a coordinated Higher Education Center for Research and Graduate and Professional Study, in the Baltimore area. Based on their joint graduate and research programs, the University of Maryland, Baltimore and the University of Maryland Baltimore County shall be considered a single research institution for the purposes of determining peer institutions. Funding guidelines for the professional schools of the University of Maryland, Baltimore shall be based on peer comparisons separately established for each school.

Md. Code Ann., Educ. § 10-209(g).

29. Title 11 of the Education Code further elaborates on the responsibilities of the Commission set forth in the Charter and discussed above. One general responsibility is that “[t]he Commission shall coordinate the overall growth and development of postsecondary education in the State.” Md. Code Ann., Educ. § 11-105(b)(1).

30. In addition,

the Commission shall develop and periodically update...the State Plan for Higher Education, that shall identify: 1. The present and future needs for postsecondary education and research throughout the State; 2. The present and future capabilities of the different institutions and segments of postsecondary education in the State; and 3. The long-range and short-range objectives and priorities for postsecondary education and methods and guidelines for achieving and maintaining them.

Md. Code Ann., Educ. § 11-105(b)(2)(i).

31. The Commission shall ensure that the State Plan for Higher Education complies with the State's equal educational opportunity obligations under State and federal law, including Title VI of the Civil Rights Act." Md. Code Ann., Educ. § 11-105(b)(2)(ii).

32. The Commission shall submit to the Governor and General Assembly a quadrennial review of the State Plan. Md. Code Ann., Educ. § 11-105(b)(3)(i).

33. In the year following the quadrennial review of the State Plan, the Commission "shall review, negotiate as necessary, and approve the appropriate role, function, and mission of each public institution of postsecondary education in the State." Md. Code Ann., Educ. § 11-105(b)(4).

34. With respect to the College Park campus of the University of Maryland, the Commission shall direct the Board of Regents of the University of Maryland to develop and implement a plan for the enhancement of that campus as the State's flagship campus with programs and faculty nationally and internationally recognized for excellence in research and the advancement of knowledge. Md. Code Ann., Educ. § 11-105(b)(5)(i).

35. "With respect to the constituent institutions of the University System of Maryland in the Baltimore region, the Commission shall direct the Board of Regents of the University of Maryland to maintain and enhance a coordinated Higher Education Center for Research and Graduate and Professional Study in the Baltimore area." Md. Code Ann., Educ. § 11-105(b)(5)(ii).

36. "With respect to Morgan State University, the Commission shall direct the Board of Regents of Morgan State University to develop and implement a plan for the enhancement of that institution as the State's public urban university with the appropriate programs, faculty, and facilities." Md. Code Ann., Educ. § 11-105(b)(5)(iii).

37. “The Commission may distribute strategic incentive funds to an institution of higher education or a regional higher education center to encourage attainment of the goals and priorities set forth in the State Plan for Higher Education.” Md. Code Ann., Educ. § 11-105(b)(8). With respect to “desegregation and equal educational opportunities,” the Commission is responsible for:

- (i) Developing a program of desegregation and equal educational opportunity, including developing an enhancement plan, for historically African American colleges and universities;
- (ii) Monitoring the progress made under, and assuring compliance with, the goals, measures, and commitments contained in the desegregation and equal education opportunity plan;
- (iii) Making recommendations concerning needed resources for achieving the goals and objectives under this subsection;
- (iv) Requiring reports from each governing board concerning progress toward equal opportunity in all activities and programs under its jurisdiction; and
- (v) Reporting to the Governor and...the General Assembly regarding the progress of compliance with desegregation and equal education opportunity plans.

Md. Code Ann., Educ. § 11-105(f)(1).

38. The Commission has a number of responsibilities related to the funding of and budgeting for higher education institutions. The Commission develops “guidelines to assess the adequacy of operating and capital funding based on comparisons with institutions designated as peer institutions and other appropriate factors” in consultation with the segments of higher education. Md. Code Ann., Educ. § 11-105(h)(4). It also makes recommendations “on the appropriate level of funding for higher education” in consultation with the Department of Management and Budget. Md. Code Ann., Educ. § 11-105(h)(5).

39. Each year, the governing boards of USM, Morgan State University, and St. Mary's College submit their annual operating budget requests and proposals for capital projects to the Commission. The USM requests and proposals are broken down by institution. Md. Code Ann., Educ. § 11-105(i)(1).

40. The Commission, in consultation with the Department of Management and Budget, presents to the Governor and the General Assembly

a consolidated operating and capital budget for higher education that includes the operating and capital budget requests of the governing boards and institutions... the operating budget request of the Commission, a report on the current funding of the adopted sets of peer institutions, and recommendations regarding the funding of higher education.

Md. Code Ann., Educ. § 11-105(i)(2).

41. In submitting recommendations to the Governor and the General Assembly, "the Commission shall comment on the overall level of funding for higher education in order to achieve the goals established in the State Plan for Higher Education, and may comment regarding funding priorities among segments of higher education and, within public senior higher education, among institutions." Md. Code Ann., Educ. § 11-105(i)(4). The Commission "may not recommend against a budget item approved by the Board of Regents [of USM or Morgan State] unless the item is clearly inconsistent with the State Plan for Higher Education." Md. Code Ann., Educ. § 11-105(iii)(2).

42. The Commission, in cooperation with the Department of Budget and Management, shall: "[r]eview proposals for capital projects and improvements proposed by the public institutions of higher education in this State...and [d]evelop and submit to the Governor and the General Assembly recommendations as to these projects...." Md. Code Ann., Educ. § 11-105(i)(3).

43. The Commission has rulemaking authority: “The Commission may adopt any rule or regulation necessary to carry out its powers or duties.” Md. Code Ann., Educ. § 11-105(u).

44. Institutions of postsecondary education cannot operate without a certificate of approval from the Commission. Md. Code Ann., Educ. § 11-202(a).

45. Institutions of higher education can propose new programs in one of two ways. First, the governing board can propose a new program or the modification of an existing program. Md. Code Ann., Educ. § 11-206(b)(1). The Commission shall review each proposal to determine whether to approve it. Md. Code Ann., Educ. § 11-206(b)(2). If the Commission does not act within 60 days of submission, the program is deemed approved. Md. Code Ann., Educ. § 11-206(b)(3). If the Commission rejects a proposal, it must provide a written reason for the disapproval and the submitting governing body may submit a revised proposal. Md. Code Ann., Educ. § 11-206(b)(6).

46. Second, the president of a public institution may propose to establish a new program provided the program is consistent with its mission statement and can be implemented with its existing resources. Md. Code Ann., Educ. § 11-206.1(b)(1). The president must notify the institution’s governing board and the Commission of its proposal, and the Commission is then required to notify all institutions of higher education in the state. Md. Code Ann., Educ. § 11-206.1(b)(3),(5). The governing board for the institution seeking program approval shall ensure the proposal is consistent with the institution’s approved mission statement; meets a regional or statewide need consistent with the State Plan for Education; and can be implemented with the existing program resources of the institution. Md. Code Ann., Educ. § 11-206.1(c)(2). The Code specifically provides that the USM board has approval authority over program requests made by a president of a USM institution. Md. Code Ann., Educ. § 12-106(d).

47. Within 30 days of receiving notice of a proposed program, the Commission or any institution may file an objection to the implementation of that program based on one or more of four criteria:

1. Inconsistency of the proposed program with the institution's approved mission for a public institution of higher education and the mission statement published in the official catalog of a nonpublic institution of higher education;
2. Not meeting a regional or statewide need consistent with the Maryland State Plan for Postsecondary Education;
3. Unreasonable program duplication which would cause demonstrable harm to another institution; or
4. Violation of the State's equal educational opportunity obligations under State and federal law.

Md. Code Ann., Educ. § 11-206.1(e). If attempts to resolve the objection are unsuccessful, "the Commission shall make a final determination on approval of the new program." Md. Code Ann., Educ. § 11-206.1(f)(5).

48. The Commission has the authority to eliminate a program that unreasonably duplicates a program at another institution. Md. Code Ann., Educ. § 11-206(e)(5)(iv).

49. "The president of each public institution of higher education is responsible for developing a mission statement" and "shall submit the mission statement to the institution's governing board" for approval. Md. Code Ann., Educ. § 11-302(a). In the case of USM, the statement shall be shared with the Chancellor prior to sharing it with the Board of Regents and the Chancellor shall make recommendations. Md. Code Ann., Educ. § 11-302(b)(2). The governing board may adopt the mission statement as submitted or with amendments or may require the president to revise the mission statement. Once approved, the governing board shall submit the statement to the Commission. Md. Code Ann., Educ. § 11-302(b)(1). The

Commission shall review the mission statement and can return the mission statement with objections if it determines it is inconsistent with the State Plan. Md. Code Ann., Educ. § 11-302(d).

50. The USM Board, in consultation with the institutions and Chancellor, shall “[e]stablish standards for funding based on differences in the size and mission of the constituent institutions.” Md. Code Ann., Educ. § 12-105(a)(1)(i). The Board also shall “[r]eview, modify, as necessary, and approve consolidated budget requests for appropriations for the University System of Maryland with respect to: (1) [t]he operating budget; and (2) [t]he capital budget.” Md. Code Ann., Educ. § 12-105(a)(2). The Board then submits these requests to the Commission, as well as directly to the Governor and General Assembly. Md. Code Ann., Educ. § 12-105(a)(1)(iii). After the budget is submitted, the President of College Park has the opportunity to meet with the Governor to discuss how the requests for appropriations impact the mission of College Park and recommend that the Governor approve or enhance the requests. Md. Code Ann., Educ. § 12-105(a)(1)(iii).

51. The Code directs the USM Chancellor to develop an overall plan which incorporates the following priorities:

1. A. Enhance the mission of the University of Maryland, College Park as the State’s flagship campus with programs and faculty nationally and internationally recognized for excellence in research and the advancement of knowledge;
- B. Admit to the campus freshmen who have academic profiles that suggest exceptional ability;
- C. Provide access to the upper division undergraduate level of the campus for students who have excelled in completing lower division study; and

- D. Provide the campus with the level of operating funding and facilities necessary to place it among the upper echelon of its peer institutions;
2. Maintain and enhance an academic health center and a coordinated Higher Education Center for Research and Graduate and Professional Study in the Baltimore area, comprised of the University of Maryland, Baltimore and the University of Maryland Baltimore County, with a focus on science and technology;
3. Enhance and support high quality undergraduate, teacher preparation, and masters programs at the regional comprehensive institutions, recognizing and supporting the unique mission of each of these institutions;
4. Support Towson University as the largest comprehensive institution;
5. Enhance the historically African American institutions and recognize the role of the University of Maryland Eastern Shore as the State's 1890 land grant institution;
6. Encourage and enhance, including the use of technology, regional higher education centers, such as the Shady Grove Center in Montgomery County, as points of collaboration and access for underserved areas of the State; and
7. Recognize and promote the unique potential of the University of Maryland University College to be a national and global leader in the new international marketplace of electronic and continuing education.

Md. Code Ann., Educ. § 12-106(a)(1)(iii).

52. The Education Code provides for the following regarding Morgan State:
 1. Has the responsibility, with other educational institutions, for providing higher education research and graduate study in the Baltimore area;
 2. Is the State's public urban university with a mission of instruction, research, and service;
 3. Offers baccalaureate and graduate degrees in the arts and sciences;
 4. Emphasizes an education addressing urban concerns; and

5. Offers the professional and graduate programs approved by its Board of Regents and the Maryland Higher Education Commission.

Md. Code Ann., Educ. § 14-101(b).

53. The Education Code identifies St. Mary's College of Maryland as "a public honors college." Md. Code Ann., Educ. § 14-401. It further provides that St. Mary's has a predetermined appropriation amount that since the 1994 appropriation is adjusted annually based on inflation. Md. Code Ann., Educ. § 14-405(b)(2).

C. Summary of School Histories

Bowie State University

54. Bowie was established as a private school in about 1867 for the training of African American elementary school teachers in Baltimore. It became a state-owned school in 1908 and was "operated altogether on the elementary and high school levels." (PTX 18 at 93.) At the time of state purchase, the school was relocated to "a 187 acre tract in Prince George's County and by 1914 it was known as the Maryland Normal and Industrial School at Bowie." (PTX 763 at 6.) The school gradually progressed, offering a 2-year normal course in 1925, discontinuing all high school work in 1928, and graduating its first 3-year class in 1935. In 1938, Bowie became a four year teacher's college granting a B.S. in education. (PTX 18 at 93.)

55. Later, in 1951, with the approval of the State Board of Education, its governing body, Bowie State expanded its program to train teachers for junior high schools. Ten years later, permission was granted to institute a teacher-training program for secondary education. In 1963, a liberal arts program was started and the name [of the school] was changed to Bowie State College. (PTX763 at 6.) It wasn't until 1970 that Bowie "was authorized to grant its first graduate degree, the Master of Education." (PTX 763 at 7.) "On July 1, 1988, Bowie State

College officially became Bowie State University... [and] became one of the constituent institutions of the newly formed University System of Maryland.” (PTX 763 at 7.)

56. Bowie is presently recognized as a “regional comprehensive university of the University of System Maryland.” (PTX 763 at 5.) The Carnegie Foundation for the Advancement of Teaching lists the school, which enrolled 4,525 full time equivalent (FTE) students in FY 2010, as a “Doctoral/Research Universit[y].” (PTX 327 at 1; PTX 718.)

Coppin State University

57. Coppin was originally formed by the Baltimore City School Board in 1900 to train African American elementary school teachers. It was operated as a part of the Colored High School in Baltimore until 1909 and was later renamed in honor of a former slave who became the first African American woman to receive a college degree in the United States. In 1938, Coppin became a 4-year school offering a B.S. in education and was named Coppin Teachers College. (PTX 826 at 33.) In 1950, the Weglin Commission recommended that Coppin become a state-owned institution. (PTX 826 at 36-37.) It “grew into a comprehensive college in 1970, and in 1988 joined the University System of Maryland.” (PTX 763 at 13.)

58. Today, Coppin “is a comprehensive, urban, institution offering programs in liberal arts, sciences, and professional disciplines.” (PTX 763 at 13.) Coppin is recognized as a Carnegie “Master’s – Smaller Program[]” university. (PTX 718.) Coppin’s FY 2010 full time equivalent (FTE) student enrollment was 3,007. (PTX 327 at 1.)

Morgan State University

59. Morgan is “designated by legislative statute as Maryland’s Public Urban University.” (PTX 763 at 98.) It was established in 1866 as a private institution to “train negro students for the ministry in the Methodist Episcopal Church.” (PTX 17 at 21.) By 1890, it was

renamed “to honor a donor, Dr. Lyttleton F. Morgan, and at that time it began offering more courses of college level.” (PTX 18 at 88.)

60. The 1937 Soper Commission report recommended “the acquisition of Morgan College by the state as a nucleus for further development and believe[d] that the interests of the negro will thus be best served as the least public expense.” (PTX 17 at 20.) Following that recommendation, Maryland purchased Morgan College for \$225,000 and it “officially became a state institution by act of the General Assembly, approved May 3, 1939.” (PTX 18 at 88.) By the time it was acquired by Maryland, Morgan was “the only institution in the state training students to teach in Negro secondary institutions.” Morgan continued to grow its curricular offerings and, at the time of the Weglin Commission report in 1950, was the only traditionally black college offering a “typical four-year liberal arts course with opportunities for students to major in biology, chemistry, economics, English, French, health and physical education, history, home economics, mathematics, music, sociology, and Spanish, as well as in education and music education.” (PTX 826 at 47-48.)

61. Although as far back as 1937, Soper discussed the need to provide graduate education at one of the state’s historically black colleges, the call for “as any courses leading to the master’s degree as possible” to be instituted at Morgan in specific was made in 1950 by the Weglin Commission. (PTX 17 at 108, PTS 826 at 51.) In spite of those recommendations, Morgan did not start offering graduate programs until the late 60s, when UMBC was being built. (PTX 268 at 17.) In 1975, Morgan was given the authority to confer doctorate degrees but only had one program until the mid-1990s. (PTX 39 at 40.) As of FY 2010, Morgan enrolled 6,444 full time equivalent (FTE) students. (PTX 327 at 1.) Today, Morgan is “designated by

legislative statute as Maryland's Public Urban University" and carries the Carnegie classification of a "Doctoral/Research Universit[y]." (PTX 718.)

University of Maryland Eastern Shore (Princess Anne)

62. The University of Maryland Eastern Shore (UMES), located on the Eastern Shore of Maryland, is the "State's Historically Black 1890 Land-Grant Institution." (PTX 763 at 66.) The school was established in 1886 as a branch of Morgan College at which it was "a sort of high school or academy." (PTX 17 at 18.) In 1892, as a result of the Morrill Act, the school became Maryland's land-grant institution for African Americans, under which Maryland provided it with 1/5th of its total federal land-grant funding. (PTX 17 at 18.) The state did not make any grant to Princess Anne until 1914. *Id.* In order to fully comply with the Morrill Act and as a result of pressure from the federal government, "administrative control of Princess Anne was transferred to the University of Maryland, and it became known as the Eastern Branch of the University of Maryland" in 1919. (PTX 17 at 18.) The state did not own the property of the school until 1935, when the state passed legislation paying Morgan for the land. (PTX 17 at 18-19.)

63. "From the time that the state acquired control in 1919,"

the school was offering work from the eighth to the twelfth grades inclusive, that is to say, it was engaged nominally at least in high school work. In 1927 grades eight to ten were abandoned, and two years of college work were added with the emphasis on agriculture, home economics, etc. In 1929 all high school work was discontinued and the efforts of the institution were centered on a junior college program. In 1935 the course was extended to four years and the award of a degree in agriculture and mechanic arts became possible.

(PTX 17 at 19.)

64. In 1937, when studied by the Soper Commission, the Commission found that examination of the school's history "show[ed] with striking force the failure of the state to provide a state institution for higher education of Negroes in any way comparable with what has been done for white students in the same field." (PTX 17 at 19.) The Commission's report held that "Princess Anne Academy had far better be abandoned altogether than continue its present pretense as a college." (PTX 17 at 18.) The Soper Commission went on to recommend that if the school was "to be retained as an educational institution, that it be conducted as a high school with special emphasis upon vocational training." (PTX 17 at 9.) In 1947, the Marbury Commission noted that Princess Anne had been treated as "an unwanted stepchild." (PTX 18 at 154-155; PTX 826 at 42.) By the time of the Weglin Commission's report in 1950, Princess Anne had become known as the "Maryland State College at Princess Anne" and proposed a "possible solution[] of the Princess Anne problem" the possibility "[t]hat the College be abandoned completely as an educational institution." (PTX 826 at 39, 44.) By 1974, Princess Anne's name had once again been changed to the University of Maryland at Eastern Shore (UMES). (PTX 22 at 37.)

65. UMES has offered graduate programs at the master's level since 1982. (PTX 184 at 10.) Its request to "expand[] its offerings of the research Ph.D" was rejected by Maryland in 1999. (PTX 254 at 108.) While UMES now offers programs at the doctoral level (three applied, two first-professional, and two "offered jointly with other Maryland public universities"), the 2008 HBI Panel concluded that UMES' graduate programs showed a "substantial lack of comparability, and therefore the inability to be competitive" in comparison with Maryland's other graduate schools. (PTX 3 at 18-19.) This is reflected in the fact that the Carnegie

Foundation classifies UMES as a “Master’s – Smaller Programs” school. (PTX 718.) UMES enrolled 3,821 full time equivalent (FTE) students in FY 2010. (PTX 327 at 1.)

University of Maryland at College Park

66. The University of Maryland at College Park (UMCP) is the result of a merger in 1920 of the old University of Maryland in Baltimore and the Maryland State College, located in College Park. The Maryland State College was a private institution chartered originally in 1856 as the Maryland Agricultural College. Following the Land Grant Act of 1862, it was designated as the state’s land-grant college and became partially a state institution. The school was taken over entirely by the state in 1914. The old University of Maryland, which gave its name to the new institution at the time of the merger, was itself a combination of some ten original institutions which, at various times since the founding of Baltimore College in 1804, had merged after starting out as independent units. (PTX 18 at 84-85.)

67. As of 1947, UMCP had “the following instructional units”:

- a) College of Agriculture
- b) College of Arts and Sciences
- c) College of Business and Public Administration
- d) College of Education
- e) College of Engineering
- f) College of Home Economics
- g) College of Military Science and Tactics, Physical Education and Recreation
- h) Graduate School
- i) Agricultural Experiment Station
- j) Agricultural and Home Economics Extension Service
- k) Summer Session

(PTX 18 at 85.)

68. In 1988, Maryland was statutorily designated the University of Maryland at College Park as the state’s “flagship” institution. Md. Code Ann., Educ. § 10-208(g). UMCP’s FY 2010 full time equivalent (FTE) student enrollment was 31,000, continuing its long history of having largest student population of any of Maryland’s higher educational institutions. (PTX

327 at 1-2.) Today, UMCP is a “Carnegie Doctoral/Research University-Extensive Institution.” (PTX 763 at 61.)

University of Maryland at Baltimore

69. The University of Maryland at Baltimore (UMB) takes its origins from a group of professional programs and schools dating back as far as 1769, when the Medical Society of Baltimore was organized. (PTX 17 at 136.) The school’s subsequent development is as follows:

The School of Medicine of the University of Maryland originated from a private class begun by Dr. Davidge in 1802 and became ‘the College of Medicine of Maryland’ in 1807. [Citation omitted.] In 1812 the faculty of the Medical College was empowered by the Legislature to annex the Faculties of Law, Theology, and Arts and Sciences, which were to be known by the name of the University of Maryland. [Citation omitted.] It was not until 1822, however, that instruction began in the field of law. This was discontinued apparently in 1842 and not resumed until the reorganization of the department in 1869. [Citation omitted.] The first dental lectures in America were delivered, we are told, in this University in 1837. [Citation omitted.] The Baltimore College of Dental Surgery was founded in 1839. [Citation omitted.] The Maryland College of Pharmacy was organized in 1840.

Id.

70. As of 1947, UMB had “the following instructional units”:

- a) School of Dentistry
- b) School of Law
- c) School of Medicine
- d) School of Pharmacy
- e) University Hospital
- f) School of Nursing
- g) College of Education (Baltimore Division)
- h) Maryland State Board of Agriculture

(PTX 18 at 85.)

71. “The graduate schools of the UMBC and the University of Maryland, Baltimore (UMB), combined in 1985, comprise the University of Maryland Graduate School, Baltimore

(UMGSB) as one of the University System of Maryland's (USM) two principal centers for research and doctoral level training." (PTX 763 at 55.) This is evidenced by UMB's current Carnegie Classification, which "is 'Doctoral/Research Intensive.'" (PTX 763 at 47.) In FY 2010, UMB enrolled 6,060 full time equivalent (FTE) students. (PTX 327 at 1.)

University of Maryland at Baltimore County

72. The University of Maryland at Baltimore County (UMBC) was dedicated in Catonsville, Maryland in 1966. (PTX 267 at 3.) UMBC's mission statement identifies it as an honors university. (PTX 763 at 55.) In 1985, UMBC's graduate school was combined with that of UMB to form the "University of Maryland Graduate School, Baltimore (UMGSB)" to create one of the University System of Maryland's "principal centers for research and doctoral level training." (PTX 763 at 55.) The Carnegie Foundation classifies the University of Maryland at Baltimore County as a "Research – Very High Activity/High Activity" institution. (PTX 718.) UMBC's FY 2010 full time equivalent (FTE) student enrollment was 10,155. (PTX 327 at 1.)

University of Baltimore

73. The University of Baltimore (UB) was operated as a private institution of higher education focusing primarily on business and legal studies until 1975, when it "join[ed] the public sector of Maryland higher education...after encountering severe financial difficulties in response to the developing public sector in Baltimore." (PTX 267 at 7.) Out of fear that "establishment of the University of Baltimore as a public college may have a negative impact on Morgan and Coppin in terms of overlapping enrollment, curriculum and funding," and "[i]n order to prevent damage to the Community College of Baltimore, U of B [was] authorized to offer education at only the junior and senior and advanced degree levels." (PTX 22 at 24; PTX 267 at 7.) The University of Baltimore began offering Doctoral degrees in 1998 and the same

year it also began to admit sophomores. (PTX 267 at 10; 1/30/12 AM Trial Tr. at 57 (Bogomolny).) UB began to offer a full four-year undergraduate curriculum in 2007, at which time it began admitting freshman students as approved by the Maryland Higher Education Commission in 2006. (1/30/12 AM Trial Tr. at 17, 60 (Bogomolny).) The Carnegie Foundation currently classifies the University of Baltimore, which enrolled 4,293 full time equivalent (FTE) students in FY 2010, as a “Master’s – Larger Program[.]” (PTX 327 at 1; PTX 718.)

Towson State University

74. Towson was created by the Maryland State Legislature in 1865 and is the oldest of Maryland’s former teacher colleges. (PTX 18 at 95.) In 1915, Towson moved from its founding location in Baltimore City to its current location in Towson. (PTX 763 at 34.) The General Assembly passed legislation approving Towson to offering a 4-year program leading to a B.S. in education in 1934 and a junior college curriculum in 1946. (PTX 17 at 79; PTX 18 at 95.) By 1959, Towson was offering a Master’s degree in education. (PTX 20 at 46, 49.) The school began to offer four-year liberal arts degrees by 1960. (PTX 21 at 32.) These “programmatically development[s] led to [the school] becoming Towson State College in 1963.” (PTX 763 at 34.) “The move to a more diverse academic portfolio including health professions, business, technology were interwoven into the transition to Towson State University in 1976 and Towson University in 1997.” *Id.*

75. Towson is statutorily designated as the state’s largest comprehensive university. Md. Code Ann., Educ. § 12-106(a)(1)(iii). Towson characterizes itself as “the State’s Metropolitan University” and enrolled 17,500 full time equivalent (FTE) students in 2010 (PTX 763 at 34; PTX 327 at 1.) “By Carnegie Classification, Towson University is a Masters (Comprehensive) University I.” (PTX 763 at 36.)

Frostburg State University

76. Frostburg State was founded in 1902 by the General Assembly. (PTX 18 at 94.) In 1934, Frostburg was approved by the General Assembly to begin offering a four-year B.S. degree in Education. Frostburg served primarily as a 2-year school to students to become elementary school teachers until 1934, when the Legislature approved it to offer a four-year B.S. in Education. (PTX 17 at 79.) A year later, Frostburg began offering a junior college program for non-teachers. (PTX 18 at 94.) By 1959, Frostburg was offering master's degrees in Education. (PTX 20 at 48.) Frostburg began to offer a four-year liberal arts degree by 1960. (PTX 21 at 32.)

77. The Carnegie Foundation classifies Frostburg, which enrolled 4,614 full time equivalent (FTE) students as of FY 2010, as a "Master's – Larger Programs" school. (PTX 327 at 1; PTX 718.)

Salisbury State University

78. Salisbury State was authorized for establishment by the Maryland General Assembly in 1922. (PTX 18 at 94.) The school was officially "[f]ounded in 1925 as a college for the preparation of teachers." (PTX 763 at 26.) In its early years, Salisbury primarily served as a 2-year teachers college and was approved by the legislature to offer a four-year B.S. in education in 1934. (PTX 17 at 79.) Salisbury began offering a "junior college program in general education" in 1935. (PTX 18 at 95.) Salisbury began offering a four-year liberal arts degree by 1960. (PTX 21 at 32.)

79. The Carnegie Foundation classifies Salisbury as a "Master's – Larger Programs" institution. (PTX 718.) As of FY 2010, Salisbury enrolled 7,364 full time equivalent (FTE) students. (PTX 327 at 1.)

St. Mary's College of Maryland

80. St. Mary's College was chartered in 1840 and served as "an institution for the education of women. It was an academy until 1925, when the first two years of college work were added to the curriculum. Gradually the freshman and sophomore years of high school were dropped." (PTX 18 at 90.) The State of Maryland gained control of St. Mary's by 1941 and by 1947, the school had developed into "a four-year junior college, covering the work of grade eleven through fourteen." (PTX 18 at 90.) St. Mary's did not become a four-year college until 1967. (PTX 763 at 103.) St. Mary's College has a statutory designation as the state's honors college. (PTX 763 at 102.)

81. St. Mary's, which enrolled 2,050 full time equivalent (FTE) students as of FY 2010, is classified by the Carnegie foundation as a "Bac/A&S: Baccalaureate Colleges – Arts & Sciences" institution. (PTX 327 at 1; PTX 567, 569.)

II. CHRONOLOGY

A. Maryland Acknowledges It Operated A *De Jure* Segregated System Of Higher Education Until 1969

82. In the *de jure* era, Maryland had a policy of educating blacks and whites in separate institutions except where legal decisions required otherwise. *University of Maryland v. Murray*, 169 Md. 478, 480 (1936) (also known as *Pearson v. Murray*); (PTX 773 at 5-7 (Ex. C.); PTX 826 at 20) Beginning in 1935, private institutions in Maryland such as Johns Hopkins University, Loyola College, and St. John's College, Annapolis had started admitting African American students while the public TWIs remained segregated. (PTX 268 at 4-5.)

83. In Maryland, the *de jure* era of segregation extends through 1969, when OCR put the state on notice that it remained in violation of federal law. A 2005 opinion from Maryland's

Office of the Attorney General notes that “there is no doubt that Maryland operated a *de jure* segregated public higher education system 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.” (PTX 689 at 19.) Indeed, Dr. Joseph Popovich, who was accepted in this case as a hybrid expert in institutional planning and research in the Maryland Public Higher Education System, stated that, as late as the 1960s, the HBIs were “valued primarily for their ability to keep UMCP and the white teachers colleges segregated.” (PTX 268 at 4-5.)

84. The details surrounding Maryland’s history of segregated higher education unfold in a series of state commissioned reports dating back to the *de jure* era and continuing to the present. These documents provide the state’s own narrative describing and examining the evolution of Maryland’s system of higher education. Many of these reports resulted from ad hoc commissions that were formed to investigate particular issues in higher education. The commissions are commonly referred to and identified by the name of their chairs and typically issued reports making findings and recommendations despite having no authority to implement them. While some reports focus specifically on racial issues related to Maryland’s system of higher education, others contain information on different matters pertinent to this case. These reports are especially valuable because they provide the state’s own contemporary assessments of its higher education system. (PTX 39 at 2, 8; 1/5/12 AM Trial Tr. 30-32 (Popovich).)

85. In 1950, the state-created Weglin Commission summarized the interrelatedness between higher education for blacks and whites and the inequality between the TWIs and HBIs in the *de jure* era:

It would hardly be feasible to attempt a complete separation of Negro higher education in Maryland from the higher education of white students in the state. The development of colleges for white students in the state has directly influenced the manner of establishment and growth of Negro institutions. The continuous uphill struggle on the part of the Negro colleges to secure facilities on a par with white institutions is a factor which cannot be overlooked in a survey of this kind. For this reason the Commission has made a study of those phases of higher education for white students which have important bearing on the Negro higher educational picture.

(PTX 826 at 15.)

B. The Maryland System Prior To 1935: Maryland Largely Ignores HBIs As TWIs Develop As Part Of Public System

86. Until the mid-1930s, when, as discussed below, the state was under increased legal pressure to provide equal education to African Americans, the state largely neglected higher education of African Americans. As discussed in the following paragraphs in this section, in 1934, there were five state-owned TWIs: UMB, UMCP, Towson, Salisbury, and Frostburg. There was one state-owned HBI (Bowie) which only educated teachers for primary and secondary education and did not offer bachelor's degrees.

87. For much of its early history, Maryland's system of higher education was largely private, but both its public and private institutions of higher education denied access to black students. As the Soper Commission stated: "[T]he advantages before emancipation in Maryland are all in favor of the white race. There were no colleges, professional or fine arts schools specifically for colored students, nor is there evidence that the white institutions enrolled Negroes." (PTX 17 at 135.)

88. By legislative act, Maryland began providing private support to white colleges in 1784. (PTX 17 at 136.)

89. The first state institution of higher education was a professional school open only to white students, the School of Medicine of the University of Maryland in 1807. By 1812, the faculty of the Medical College was empowered to annex the faculties of law, theology, and arts and sciences, which ultimately formed the University of Maryland. (PTX 17 at 136.)

90. Following the passage of the Morrill Act in 1862, the state designated the Maryland Agricultural College, a private institution in College Park that was established in 1856, as the state's land grant college. It subsequently became a partially public institution. In 1914, College Park became fully state-owned and it subsequently became part of the University of Maryland in 1920. (PTX 18 at 84-85.)

91. Maryland established a dual system of normal schools, whose purpose was to train elementary school teachers. (PTX 17 at 79.) The Maryland General Assembly created three normal schools: Towson in 1865, Frostburg in 1902, and Salisbury in 1922. (PTX 18 at 94-95.) In 1934, the General Assembly "extended the course in the white public schools to four years leading to the degree of Bachelor of Education, thus constituting them teachers' colleges." (PTX 17 at 79.)

92. During the *de jure* era, "there was little concern demonstrated for providing more than minimal accommodations for Black students." (PTX 40 at 38.)

93. As of 1934, public higher education for black students was way behind and the only state-owned institution was Bowie Normal School. Unlike the white normal schools that were created by the state, Bowie had begun as a private school in Baltimore in 1867. The school was moved to Bowie in 1908 when the state took control it, making it the first HBI in Maryland to be supported by state funds. Until 1925, Bowie only provided elementary and high school

education when a two -year normal course was instituted. It discontinued high school work in 1928. (PTX 18 at 93.)

94. The other three HBIs were not state-owned as of 1934. Morgan began as the Centenary Bible Institute in Baltimore in 1867 and established a branch at Princess Anne “to provide secondary and industrial education for the Negro population of eastern Maryland.” (PTX 18 at 88). The school’s name changed to Morgan College in 1890. As a private institution, Morgan was awarded no aid from Maryland until 1919 when it “received a state grant of \$1,000” for an unidentified reason. (PTX 18 at 88-89.) As of 1934, Morgan was the only undergraduate liberal arts college for African Americans and “the only college in the state training teachers for the Negro secondary schools.” (PTX 18 at 89.)

95. As mentioned above, Princess Anne was established as a branch of Morgan in 1886. Four years later in 1890, Congress passed the second Morrill Act to ensure that states provided land-grant education to African Americans.

96. The Act expressly denied federal funding to institutions of higher education ‘where a distinction of race or color is made in the admission of students.’ At the same time, it stated that ‘the establishment and maintenance of such colleges separately for white and colored students shall be held to be a compliance with the provisions of [this Act] if the funds be...equitably divided.’ (PTX 69 at10.)

97. As described below, the Soper Commission report detailed the fact that Princess Anne was named the state’s 1890 land grant institution so that Maryland could receive land grant funds and that the state failed to meet its obligations under federal law for the next forty-five years until it bought Princess Anne in 1935:

In 1892, the State found itself unable to participate in the distribution of federal funds for education in agriculture and mechanic arts under the Morrill Act, without making some provision for Negroes. Work in this field was then begun under a contract between Morgan College and Maryland Agricultural College, the predecessor of the University of Maryland, whereby Morgan College undertook to do for the State at Princess Anne similar work on behalf of Negroes to that carried on by land grant colleges in the south. As the result, the State was able to share in the annual distribution of the federal fund and the monies allotted to it were divided four-fifths to the Maryland Agricultural College for White students and one-fifth to Morgan College for colored students at Princess Anne.

It was not until 1914 that the State made any grant to Princess Anne. In 1915 the Federal Government objected that the arrangement did not comply with the Morrill Act because the scholastic level of Princess Anne Academy was too low, and also because the institution being under the control of Morgan College, could not be regarded as an instrumentality of the state entitled to share in the fund. Finally, in order to satisfy the demands of the Federal Government, a contract was executed by the University of Maryland and Morgan College in 1919 by which the administrative control of Princess Anne was transferred to the University of Maryland, and it became known as the Eastern Branch of the University of Maryland. The property was not transferred or paid for by the State, but it was understood between the University of Maryland and Morgan College that if at any time the arrangement should be found unsatisfactory to either party, the state would purchase the property at a price to be agreed upon or fixed by arbitration. In 1928, further objections were raised by the Federal officials, and shortly thereafter, Morgan College asked for payment under the contract, but without success; and continued to renew its demands in this respect until the passage of the Act of 1935, Ch. 548 above referred to, by which the State appropriated \$100,000 to be paid to the College in annual installments of \$25,000.

(PTX 17 at 18-19.)

98. As of 1934, Princess Anne provided a junior college education. It served as a high school from grades eight through twelve exclusively until 1927 when it dropped grades eight through ten and added two years of college work. In 1929, it dropped grades eleven and twelve. (PTX 17 at 18-19.) Coppin Normal School began with the formation of a trainee class in Baltimore City in 1901. In 1902, this class became the normal high school and training

school. In 1909, the colored high school was separated from the colored training school. In 1928, it became Coppin Normal School. (PTX 17 at 142.) As late as 1950, Coppin was “part of the public school system of Baltimore” whose “purpose [was] the preparation of teachers for the Negro elementary schools in the city.” (PTX 826 at 33.)

C. Maryland First Begins to Pay Some Attention to HBIs During Era of Legal Challenges to Racial Inequality to Higher Education

1. Maryland High Court Finds Violation of Separate but Equal in *Murray Case*

99. In 1896, racial segregation was legitimized by the U.S. Supreme Court in *Plessy v. Ferguson*, 163 U.S. 537 (1896), which held that it was constitutional so long as educational facilities provided for black citizens were “separate but equal” to those provided for white citizens. In 1935, Maryland was sued under the Equal Protection Clause for failing to provide equal educational facilities to African Americans. A significant part of the states’ defense was a separate but equal defense; Maryland argued that it provided “substantially equal opportunities at collegiate levels.” From 1935 until the 1954 decision in *Brown v. Board of Education*, 347 U.S. 483, which found that found separate but equal was unconstitutional, the state made some effort to offer greater educational opportunities for African American students, including taking over ownership of Morgan, Princess Anne, and Coppin. Nonetheless, the state-formed commissions that analyzed the issue comparison the TWIs and HBIs – the Soper (1937), Murphy (1947), and Weglin (1950) commissions – found substantial and continued inequality in terms of both educational opportunities and facilities.

100. In 1935, Charles Murray, an African American with a degree from Amherst College in Massachusetts was denied entry into the University of Maryland Law School solely on the basis of the color of his skin. He sued Maryland in state court alleging that, in denying

him admittance to the University of Maryland Law School, the state had violated the Equal Protection Clause of the 14th amendment. In 1935, the trial court issued a writ of mandamus compelling Maryland to admit Mr. Murray to Maryland's law school. *University of Maryland v. Murray*, 169 Md. 478, 480 (1936); (PTX 773 at 5-7) (Ex. C.)

101. The state appealed the decision to the Maryland Court of Appeals. Maryland's brief stated that "[t]he Policy of This State is to Separate the Races...[i]n private and public educational institutions, at scholastic, collegiate, and professional levels." (PTX 773 at 5) (Ex. C.); *see also Murray*, 169 Md. at 480. Maryland contended that it afforded "Its Colored Citizens Substantially Equal Facilities for Public Education," including "substantially equal opportunities at collegiate levels: at Princess Anne Academy, at Morgan College; and by scholarships" to out-of-state schools. (PTX 773 at 40-41) (Ex. C.) In making its argument regarding the equality of facilities provided to African American higher education students, Maryland pointed out that Princess Anne received more funding per student (\$468) than the two white University of Maryland schools (\$88 and \$80). (PTX 773 at 42) (Ex. C.) The state also contended that African Americans received equal treatment even though Maryland had no public law school which admitted African Americans as it offered them scholarships to attend law school in other states. *Id.* The Court of Appeals unanimously found that, in denying Mr. Murray admission to its law school, the University of Maryland had violated the Fourteenth Amendment. *Murray*, 169 Md. at 480, 489.

2. Soper, Marbury, and Weglin Commissions Document Inequality in Separate System as Maryland Takes Ownership Over HBIs Princess Anne, Morgan, and Coppin

102. In 1935, Maryland took some steps to bring HBIs into public system as the *Murray* case was being litigated. As noted above, the state bought Princess Anne in 1935, and

that year, Princess Anne became a degree-granting institution with four-year curriculums in agriculture, mechanic arts, and home economics. (PTX 17 at 19.)

103. Additionally, in 1935, the Maryland Legislature authorized an “appropriation in the State budget for a study of the interest and needs in higher education for Negroes, in Maryland, including Morgan College.” The resulting study, officially entitled the “*Report of the Commission on Higher Education of Negroes to the Governor and Legislature of Maryland*” and unofficially called the Soper Commission report, was issued on January 15, 1937. (PTX 17 at 1, 10-11.)

104. In reference to *Murray*, the Soper Commission observed:

A crisis has arisen in the field of higher education for Negroes in Maryland which the State is called upon to meet. The cause is that the State has failed to make adequate provision for Negroes in this branch of education, and the situation has recently been brought to a head by an assertion of rights by individual members of the race, which has met the approval of the courts.

(PTX 17 at 10.)

105. The Soper Commission’s conclusion was that Maryland had long shortchanged HBIs compared to TWIs:

The policy of State aid to education has benefitted the white schools on all levels very much more than the Negro schools. . . .

In the field of higher education, while the State has fostered white colleges for one hundred and fifty years it made its first grant to a Negro college in 1914 or twenty-two years ago. The State organized and supported a white teacher training institution in 1866, seventy years ago. It has aided a Negro Normal School only since 1911 - twenty-five years.

The State of Maryland came into actual ownership of a State University for white students in 1918, since which time it has formally adopted a policy of state provision for white under-graduate, graduate and professional education. It was not until 1935 that provision was made for Negro graduate and professional education through state aid limited to a \$10,000 scholarship appropriation. In the same year the State provided its

own college for Negroes by the purchase of Princess Anne Academy from Morgan College seventeen years after the acquisition of the corresponding white institution.

It is thus clear that the white population has had the advantage of generous state support for its higher education many years in advance of the Negro population. The contrast between the amounts of money received by the two racial groups would show, it possible of computation [sic], an enormous differential in favor of the white race.

Certainly the record shows that the State of Maryland has been generous to its white citizens. If the historic shift of state policy throughout more than two centuries in the direction of democratic and just support of education is significant then it cannot be long until the Negro citizens shall share as generously in educational opportunities as anyone.

(PTX 17 at 145-46.)

106. The Commission made comparisons between the HBIs and TWIs in terms of financial support and programmatic development. With regard to financial support, the Commission found that the HBIs had been under-supported in comparison to the state's TWIs.

107. For example, as of 1937, the state had invested in white institutions "\$10,333,184 and in Negro institutions, \$421,758" by formal action. (PTX 17 at 59.)

108. However, as illustrated by the chart below, the total state and private investments in Maryland institutions of higher education by 1937 amounted to \$58,840,169 for white institutions and \$1,624,026 for negro institutions:

Capital Investment in Maryland State-owned and State-aided
Institutions of Higher Education

| Institutions | Buildings & Equipment | Land | Other, Including Endowment | Total |
|------------------------------|-----------------------|------------------|----------------------------|-------------------|
| Univ. of Md. College Park | 3,250,639 | 395,657 | 645,080 | 4,291,106 |
| Baltimore | 2,048,450 | | 650,500 | 2,698,950 |
| Frostburg Tea. College | 378,060 | 38,682 | | 416,742 |
| Towson Tea. College | 1,364,567 | 112,492 | | 1,477,059 |
| Salisbury Tea. College | 781,541 | 17,516 | | 799,057 |
| Johns Hopkins | 13,283,423 | 626,247 | 30,865,465 | 44,775,135 |
| Washington College | 506,820 | 38,184 | 35,849 | 580,853 |
| St. John's College | 725,445 | 233,277 | 211,451 | 1,170,173 |
| Western Md. College | 1,436,004 | 127,810 | 900,288 | 2,464,102 |
| Blue Ridge College | 112,000 | 8,000 | 45,722 | 165,722 |
| Total White | 23,886,949 | 1,597,865 | 33,345,365 | 58,840,169 |
| Princess Anne College | 70,120 | 9,050 | | 79,170 |
| Bowie Normal School | 205,938 | 11,650 | | 217,588 |
| Coppin Normal School | 282,923 | | | 282,923 |
| Morgan College | 913,298 | 85,000 | 47,047 | 1,045,345 |
| Total Negro | 1,472,279 | 105,700 | 47,047 | 1,624,026 |

(PTX 17 at 60.)

109. The Commission also found that Maryland had the highest value of property per capita that was subject to general tax in the eight states it surveyed that were found to be comparable. (PTX 17 at 114.) However, according to the Commission, each of the other seven states had invested 6.7 to 25.6 times as much in their black land-grant institutions in absolute numbers, and 5 to 64 times as much per African American resident. *Id.* In addition, the Soper Commission found that Maryland supported its state-owned land grant college to a lesser degree than seven other southern and border states it surveyed. (PTX 17 at 119.)

110. Regarding capital investment, the Soper Commission found a similar disparity:

We call particular attention to Table XXVIII in which the capital resources of Negro public colleges in these states are compared with those of Maryland in proportion to the investment per Negro inhabitant. From this it appears that the largest investment per Negro inhabitant is \$16 in Delaware and the smallest is 36¢ in Maryland. North Carolina, which is the nearest in its percentage in investment to that of Maryland has three times Maryland's investment.

TABLE NO. XXVIII²

| <u>Capital Resources Negro Public Colleges in States Comparable to Maryland</u> | | | | | | |
|---|-------------|----------------------------|--------------|--------------|-----------------------------|--------------------------|
| | <u>Land</u> | <u>Bldgs. & Equip.</u> | <u>Other</u> | <u>Total</u> | <u>Per Negro Inhabitant</u> | <u>Ratio to Maryland</u> |
| Delaware State College | 67,438 | 445,875 | 7,984 | 521,297 | 16.00 | 64 |
| Kentucky Indust. Coll. | 34,200 | 659,097 | - | 693,297 | 3.07 | 12+ |
| Missouri Lincoln U. | 87,000 | 781,354 | - | 868,354 | 3.43 | 14 |
| No. Carolina A. & T. Coll. | 179,186 | 944,741 | - | 1,123,927 | 1.22 | 5 |
| Tennessee A. & T. | 141,902 | 1,860,596 | - | 2,022,498 | 4.52 | 18 |
| Virginia State College | 109,625 | 1,171,608 | 59,720 | 1,301,464 | 2.00 | 8 |
| W. Virginia State College | 50,894 | 1,290,051 | - | 1,340,953 | 11.69 | 46 |
| MARYLAND (Princess Anne) | 9,050 | 69,907 | - | 78,057* | .25 | |

(PTX 17 at 15, 119.)

111. In terms of annual state appropriations for operating expenditures, the Commission found that Princess Anne received 1/7 the average of the schools in the other states.

(PTX 17 at 120.)

112. The minimal investment in Maryland's HBIs led to visible differences between the campuses. According to the Soper Commission, "[i]t is obvious that the white institutions

have educational plants very much superior to those of the Negro institutions. This is evident either by comparison of the aggregate plant inventories, not forgetting the racial ratio, or by comparison of analogous pairs.” (PTX 17 at 61.)

113. For example, the Commission described Bowie’s educational plant as follows:

Most noticeable is the deficiency in [Bowie’s] physical equipment, which this year has led the State Board of Education to recommend that funds be included in a general bond issue for substantial construction work for items of most immediate necessity in the total sum of \$154,977, including a girls’ dormitory, dining room and kitchen, addition to boys’ dormitory, and academic wing to administration building; and the additional sum of \$9,500 for the construction of a sewage system to meet the requirements of the State Board of Health. The State Board of Education also recommends for construction at an early date, an additional girls’ dormitory and a practice school wing at a total additional cost of \$105,611. These needs have long been known to the State authorities and requests for their fulfillment have been overlooked or denied; for example, the present dormitory for girls, which was built to take care of 44 students, now houses 85 students and 10 teachers, and it is necessary to put four girls in a room of nine by eleven feet. The present dining room and kitchen are too small for the enrollment. The present boys’ dormitory consists of one large room for all of the male students, the academic wing is greatly needed particularly as the present plan is to advance to a four years’ college status. Particular emphasis should be placed upon the need for a new sewage system. The present one was condemned by the State Board of Health as inadequate and unsanitary five years ago, but no steps to alter the situation have been taken.

(PTX 17 at 23.)

114. Regarding program development, the Soper Commission found that the HBIs had fewer programs than the TWIs and that the programs they did have were duplicative of programs at other HBIs. The general findings included:

1. That several institutions of both the white and Negro groups are undertaking to perform the same cluster of functions.
2. That the University of Maryland (white) exercises all of the educational functions found in any of the white institutions.

3. That the corresponding Negro institutions, Princess Anne, [sic] can lay claim at most to but three of the twelve functions.
4. That Morgan College exercises but seven of the twelve functions.
5. That the Commission on Higher Education for Negroes is attempting to enter every one of the twelve fields through its scholarship awards whether or not any of those opportunities are already available to Negroes within the State.
6. That aside from the scholarship provisions that several important functions of higher education are entirely missing in the entire set-up of Negro institutions.
7. The tentative conclusion at this point is that very possibly functional gaps in Negro higher education are due to the independent operation of the five systems of control.

(PTX 17 at 56.)

115. In terms of teacher education, the Soper Commission reported that the HBIs were inferior to the TWIs:

1. It is clear in this study of the teacher education facilities in Maryland that the training provisions for both elementary and high school white teachers are superior to that afforded the colored teachers.
2. The State provides funds for white teacher training much more generously than for the colored.
3. The courses offered are much more numerous and extensive in scope.
4. Practice teaching facilities are not greatly different.
5. White elementary teachers have very accessible opportunities to secure a Bachelor of Science degree in education. There is, as yet, no opportunity in the State for Negro elementary teachers to get a full college training in education.
6. White high school teachers have opportunities in five state supported institutions to earn a bachelor's degree. Colored teachers have but one.

7. White teachers who desire to do graduate work leading to a master's or doctor's degree may do so in two State-aided institutions. Morgan College is chartered to give graduate degrees and has, in the past, awarded several Master's degrees but it is agreed that it is not equipped to do first-rate graduate work.

(PTX 17 at 86-87.)

116. With respect to the land-grant schools, the Soper Commission found that:

The most obvious difference is between Princess Anne Academy and the University of Maryland, both land-grant colleges. Princess Anne offers a very meager curriculum in agriculture compared with the University of Maryland. In addition, the Negro land-grant college offers few courses in industrial arts as compared with a bewildering array of courses in industrial subjects and engineering at the white land-grant college. Morgan College does not supply the deficiency except to some extent in agricultural theory.

(PTX 17 at 88.)

117. More generally, the Soper Commission was unsparing in its evaluation of the state's treatment of Princess Anne and the conditions at the school to the that point it recommended total closure of the institution:

Princess Anne Academy had far better be abandoned altogether than continue its present pretense as a college. It is not now a four year college worthy of the name, and indeed it has never been a junior college of sufficiently high standard to serve its students effectively or to represent the state. Little of property value would be lost to the State if it were closed. We do not mean to say that the principal and faculty of the school have not made an earnest effort to carry on, or that they are without qualifications for teaching positions. But the truth is, [sic] that the school has been denied the means with which to do the work.

(PTX 17 at 18.)

On the academic side, the curriculum has always been weak because of lack of adequate library and deficiencies in instruction in modern languages, but more especially in laboratory work in the sciences. On the side of agriculture and mechanic arts, there has always been a deficiency in shops, equipment and soil testing facilities. Inadequate salaries have made it impossible to secure a strong teaching staff. The general result has been that the students, when leaving and entering other institutions of

learning, have been unable to secure the standing to which they were supposed to be entitled at Princess Anne.

(PTX 17 at 20.)

118. The Soper Commission noted the absence of graduate study at the HBIs and the need to rectify that issue:

An objectively minded student of Negro education in Maryland cannot fail to be impressed by the almost entire absence of essentially important facilities for Negro graduate study. The field of Negro need, which should by all means be thoroughly explored the use of thorough going research techniques, is enormous.

The Commission continued that, "it would seem to be imperative that steps should be taken, as soon as possible, to man the faculty and equip the libraries and laboratories of a Negro college for [college] work." (PTX 17 at 108.)

119. As a complicating factor, the Soper Commission acknowledged the advantages that economies of scale afforded College Park and, due to their comparatively diminutive size, denied the HBIs:

There is much less overhead and maintenance expense, in proportion, at the University of Maryland than in any of the other Colleges listed. This probably means that the much larger enrollment makes for very great economy in overhead.

(PTX 17 at 125.)

Notwithstanding the inadequacy of Princess Anne and the small annual expenditure, the cost per student to the State, due to the small number of students, was much greater than at the University of Maryland: At the University of Maryland, College Park, \$91, at Princess Anne \$434.

(PTX 17 at 14.)

120. In addition, the Soper Commission found that white students received better financial aid than African American students, thereby negatively impacting enrollment at the HBIs:

[W]e may reasonably conclude that the enrollment of white state-aided institutions is very much more stimulated by the aid given than is the case with the Negro institutions. We may also conclude that the enrollment in the Negro institutions would be very considerably greater if State aid to Negro students were on a par with that offered white students.

(PTX 17 at 72.)

121. The overall or “master” conclusions of the Soper Commission included that the state had underfunded and underinvested in the HBIs, the state had provided students at the HBIs with less financial aid, and the state needed to provide an equal education at the HBIs. As the report stated, “[t]he findings in the preceding sections may be summed up in the following master conclusions:”

1. Proportionately, Negro Higher Education in Maryland receives through institutional channels from the state treasury less than one-fourth as much as white Higher Education. This applies only to appropriations for current expenses; the situation relative to state investment in plant, land and equipment being still more adverse to the colored population.
2. Proportionately, state aid to individuals in the form of stipends, scholarship and reductions in fees is extended to about one-half the number of Negro students and represents less than one-half, on the average, in the amount provided each student.
3. The sum provided by the State, Baltimore City and the Federal Government amounts, in the aggregate, to a considerable sum, the maximum effectiveness of which is defeated to a considerable degree by the lack of an integrated system, or well-coordinated plan by either of which less overhead expense, less overlapping of courses, optimum class enrollments, and the like might well be achieved.
4. An equivalent of higher education for the colored population involves not only the equivalence of individual financial aid as (2) but also the equivalent provision of all the forms of education provided, in whole or in part, by the state for white students. These forms, usually referred to in this report as functions, should be made available to colored students where practicable within the state; otherwise by out-of-state scholarships valued by an authority with wide discretionary powers so that they express an approximate equivalence with similar opportunities for white students actually set-up within the state.

(PTX 17 at 37.)

122. The Soper Commission found that a large investment would have to be made in the HBIs in order for the state to satisfy the “equal” component of “separate but equal”: “equal treatment through segregation necessarily involves the outlay of large sums of money both in capital investment and annual maintenance in order to provide educational facilities for the colored race equivalent to those which the State has provided for the White.” (PTX 17 at 12.)

123. No public collegiate opportunities existed in Maryland for blacks. Rather than establish opportunities for higher education for blacks, some African Americans were instead sent out of state. For that reason, it was ultimately recommended that Maryland purchase Morgan, an option which represented the “least public expense” required to educate blacks. (PTX 39 at 14.)

124. Given the lack of baccalaureate-level liberal arts education for African Americans within the existing Maryland higher education system, the Soper Commission recommended that the state assume ownership over Morgan: “We recommend the establishment of a state college for Negroes around Morgan College as a nucleus if the State can acquire the same from its present owners upon reasonable terms; and if not there, at some other location in the State.” (PTX 17 at 9.)

125. In 1939, Maryland gained control of Morgan and incorporated it into its system of higher education. The following chart depicts the structure and various levels of higher education in Maryland following state acquisition of Morgan:

**Structure in 1939 following
Purchase of Morgan by MD**

Institutions Offering Baccalaureates other than Education -

| | | |
|-----------------------------|--|---------------------------------|
| Private Campuses | U of MD •College Park •Baltimore •Princess Anne Coll | Morgan State College |
|-----------------------------|--|---------------------------------|

Campuses Not Offering Baccalaureate in Liberal Arts-

Teachers Colleges: Bowie, Coppin, Frostburg, Salisbury, Towson

State Jr College: St. Mary's Female Seminary

Local Jr. Colleges: Montgomery & Washington Counties

(PTX 39 at 15.)

3. Marbury Commission Details Inequality in Maryland System of Higher Education

126. The Marbury Commission (PTX 18) was formed in 1946 following enactment of a 1945 bill to create the Maryland Commission of Higher Education. With assistance from the American Council on Education in terms of data “collection, interpretation, and presentation of facts,” the Marbury Commission studied the status of the Maryland system of higher education and made recommendations to the governor and legislature on the state’s higher education policies. (PTX 18 at 3, 7-8.) The Marbury Commission’s report is entitled: “*Higher Education in Maryland: A Report of a Survey by the American Council on Education with Recommendations of the Maryland Commission on Higher Education.*”

127. The Marbury Commission found that the state had a policy of inequality between TWIs and HBIs: “The state has consistently pursued a policy of providing higher education facilities for Negroes which are inferior to those provided for whites. The meager appropriations and the inferior accreditation status of the Negro colleges attest to this fact.” (PTX 18 at 108.)

128. The Marbury Commission stated that Maryland had too many institutions for the size of its population and that the state’s policy of segregation was part of the problem:

The number of publicly supported and publicly controlled institutions with four-year programs in Maryland seems excessive for a state with less than two million population [sic] and a relatively small geographic area. The maintenance of separate institutions for Negro students complicates the situation in Maryland so that comparisons can be drawn only with other states which also follow the policy of segregating the races for educational purposes.

(PTX 18 at 336.)

129. The Marbury Commission also found that the state was not meeting its obligation to provide at HBIs an equal education when compared to TWIs and it made some recommendations concerning HBI enhancement:

It seems to us that the state's obligation to afford equal facilities requires the adoption of a policy of supporting institutions for the higher education of whites and of Negroes at the same financial level. Specifically, we make the following recommendations:

- (a) That any racial discrimination with respect to the salaries paid to the staff and faculty between institutions for white and Negro students should be eliminated and that the maintenance of nondiscriminatory salaries should have the special attention of the proper authorities of the state.
- (b) That the state budget provide such annual appropriations for institutions for the higher education of Negroes that the activities being conducted at those institutions may be maintained on a basis equal in quality to those maintained in comparable state institutions for white students.
- (c) That in order to bring Negro institutions to the level of white institutions, sufficient additional funds be immediately appropriated to Morgan State College and to the State Teachers College at Bowie to enable them to qualify for national accreditation status equivalent to that held by the comparable institutions for white students.
- (d) That specific provision be made for the land-grant college for Negroes to have an equitable share of the federal funds allocated to the state for agricultural extension and for research in agriculture and the mechanical arts."

(PTX 18 at 381.)

130. The Marbury Commission also discussed how the state was challenged in providing an equal education to African Americans under a segregated system because of the inequality between the HBIs and TWIs:

We are fully aware of the constitutional obligation upon the state to afford equal educational facilities to Negroes and whites alike – an obligation which seems to us to be inherent in a democracy. We are equally aware of the difficulties which lie in the way of complete fulfillment of this obligation so long as the principle of maintaining separate schools is carried through graduate and professional instruction.

(PTX 18 at 379.)

131. The Marbury Commission was critical of the state's policy of giving African American students, many of them graduate students, scholarships so that they could attend schools outside of Maryland's public system in order to participate in programs not offered by HBIs. The Commission recommended that the state provide programmatic enhancements to Morgan and Bowie, including a number of masters programs at Morgan, instead of giving black students scholarships to attend other schools:

Although the state maintains extensive facilities for the graduate and professional education of white persons, there is no provision for the equivalent training of Negroes in the state. In an attempt to alleviate this condition, the state has established a scholarship fund to enable Negro students to attend out-of-state institutions for graduate and professional training.

(PTX 18 at 78.)

The whole system of state scholarships needs to be carefully thought out from the state's point of view. An important question is the policy involved in making these public grants of public funds to institutions that have no control from state sources. The state must choose among four possible policies. First, it can continue the present plan, by which sums of money are wheedled out of the state by a limited number of privately controlled institutions, with scholarship grants as a sort of cover for getting money from the state to provide general operating funds in amounts that are not clearly stated.

(PTX 18 at 182.)

In view of the difference in the availability of curriculums at the University of Maryland and the Negro colleges, the small number of undergraduate awards is surprising. This condition points up one of the inherent evils of an out-of-state scholarship program.

(PTX 18 at 111.)

[In drafting legislation repealing all existing scholarship legislation] we recommend that specific provision be made for a fair and equitable allotment of scholarships to worthy Negro students for study at either Morgan State College or Bowie State Teachers College.

(PTX 18 at 386.)

As pointed out in the National Survey of the Higher Education of Negroes, "In view of the Supreme Court decision referred to above, the out-of-state scholarship program cannot be regarded as a permanent solution of the problem of providing equality of educational opportunity for Negroes in those States which require separate facilities for white persons and for Negroes." The decision must be made, then, as to whether the state is to continue, without modification, a program which is clearly unconstitutional.

(PTX 18 at 113.)

The Commission also recommends that as many courses leading to the master's degree as possible be instituted at Morgan State College, these to include the major fields of study, i.e., English, social sciences, etc., and ultimately the physical sciences. The Commission feels that, while neither Morgan State College nor Maryland State College is in a position to offer all the courses in any of the professional fields, they could offer specialized courses to prepare students for such work.

(PTX 826 at 25.)

132. As with the Soper Commission, the Marbury Commission also made several findings regarding economies of scale:

Even with the increases in enrollments that have occurred in the autumn of 1946, at least three of the four state teachers colleges will continue to have inordinately high expenditures per student because of their small enrollments.

(PTX 18 at 164.)

It is usually difficult to put more than 60 percent of the total expenditures into the actual instructional program of a small college because administration, plant operation and maintenance, and library services have certain minimal requirements which must be maintained regardless of the size of the institution. This situation merely emphasizes the inefficiency inherent in a small institution, to which attention has already been called.

(PTX 18 at 164-65.)

It will be noted that the institutions vary widely with respect to the total income for educational and general purposes per full-time student. At Morgan State College the amount is only \$304.41, while at Bowie State Teachers College it is \$832.34, and at St. John's College it is \$1,439.27. The reader will readily note that in general the institutions with small enrollments, particularly those with fewer than 300 students, all have relatively high incomes per student, whereas the larger institutions, such as Morgan College and the University of Maryland, have much smaller amounts of income per student.

(PTX 18 at 160-161.)

Previous investigations have shown that colleges with small enrollments are inordinately expensive per student, if a program of satisfactory quality is maintained.

(PTX 18 at 338.)

Although Princess Anne College spends more per student than the University of Maryland spends, it would need to spend three or four times as much as it now does in order to have anything like a comparable program for its small enrollment.

(PTX 18 at 165.)

133. The Marbury Commission also found that Maryland did not support its public institutions as well as other states but provided more support for its private institutions than other states. "The analysis of the data that have been presented thus far in this chapter all point to one general conclusion: Maryland has not been supporting higher education from public funds as generously as most of the other states." (PTX 18 at 155.)

On the basis of the total amount contributed by the state to the current support of educational programs of institutions of higher education, Maryland ranks thirty-fourth among the states. Maryland ranks thirty-sixth with respect to the amount contributed by the state to the support of publicly controlled institutions. Only four states exceed Maryland in the amount contributed by the state to institutions under private control.

(PTX 18 at 145.)

134. The Marbury Commission also made a number of findings that illustrated that the HBIs were not comparable to the TWIs or were inadequate in an absolute sense. These findings include that:

- None of [the HBIs] is equal in quality to the corresponding institution maintained for the white population.

(PTX 18 at 78.)

- Facilities for the graduate and professional education of Negroes are not available within the state in either public or private institutions (with the single exception of the law curriculum at the University of Maryland). Further, a number of undergraduate curriculums which are offered for white students at the University of Maryland are not offered in any of the institutions of higher education for Negroes.

(PTX 18 at 108.)

- It is appropriate to make comparisons from the preceding tables between the support of institutions for white students and those for Negroes in Maryland. In making such an analysis, care must be taken to compare only institutions that are somewhat alike in size and in scope of program. It will be noted, for example, that the College Park division of the University of Maryland spends more than twice as much per student as Morgan State College. While the University of Maryland has certain graduate and professional programs that are not provided at Morgan College and that are inherently expensive, the comparison is otherwise appropriate. The conclusion is not that the University of Maryland spends too much, but rather that too little is provided for Morgan State College.

(PTX 18 at 165.)

- The faculty at Bowie State Teachers College does not have the extent of preparation found in the three teachers colleges for white students. The Coppin Teachers College faculty also lacks the scholarly qualifications

found in the teaching staffs of the three state teachers colleges for white students.

(PTX 18 at 189.)

- Bowie is located approximately one mile from the nearest paved highway and can be reached only by a single-track unpaved road.

(PTX 18 at 277.)

- Coppin Teachers College had never employed a librarian until a week or two before the visit of the survey staff; consequently the table shows this institution spends nothing for library salaries.

(PTX 18 at 251.)

- The library at Bowie is especially weak.

(PTX 18 at 249.)

- The tabulation shows that the libraries at Princess Anne College, Coppin Teachers College, and St. Mary's Female Seminary have extremely weak collections of books. Coppin Teachers College has practically no library at all when judged by college standards; it rates slightly higher in the table than the Princess Anne College library because of the relatively narrow curriculum at Coppin Teachers College as contrasted with the broad fields of subject matter which Princess Anne College attempts to cover. The Princess Anne College library is extremely limited for an institution which has responsibilities for the widely varied fields of study that must be represented in a land-grant college.

(PTX 18 at 249.)

- 'The most urgent need at Morgan State College is for a new building for classrooms and administrative offices. The present dining hall is entirely too small and should be replaced by a much larger unit. The institution is practically without gymnasium facilities; it should have a new gymnasium and field house to be used for instruction in physical education and athletics.

(PTX 18 at 279.)

- It will be noted immediately in this tabulation that the salaries at Princess Anne College and Morgan State College are extremely low. Average salaries in these two institutions are less than beginning elementary or secondary school teachers are paid in many public school systems. It is

clear that here is an outstanding instance in which the State of Maryland is not affording Negro students opportunities for education that are equivalent to those offered to white students.

(PTX 18 at 204.)

135. Furthermore, like the Soper Commission, the Marbury Commission was extremely critical of Maryland's treatment of Princess Anne:

- The administrative arrangement whereby Princess Anne College became a branch of the University of Maryland came about entirely as an expedient solution to the problem of providing a state-owned land-grant college for Negroes.

(PTX 18 at 108.)

- The state has not taken seriously its responsibilities for the development of a land-grant college program for the Negro population. The history of the relationship of the state to Princess Anne College, the nominal land-grant college for Negroes, reveals that the state has consistently and at every point possible neglected its legal and moral obligation to provide adequate agricultural and mechanic arts education for the Negro population.

(PTX 18 at 108.)

- The tabulation reveals the pathetically meager development which has occurred at the land-grant college for Negroes in Maryland. As compared with other states, Maryland has fallen far short in developing an institution supported on a reasonable basis to attract a student enrollment of substantial size. The State of Missouri has 20 percent fewer Negroes in its population than Maryland has, yet it maintains a land grant college for Negroes that enrolled in 1941-42 more than six times as many students as Princess Anne College in Maryland, and the supporting income for its educational program was more than nine times the amount the Maryland land-grant college had in the same year. There are five states in the group that have smaller Negro populations than Maryland has, but every one of these states had a larger enrollment in its Negro land-grant college than Princess Anne College had, and each of the five also had a larger income for its land-grant college than Maryland had. It is difficult to understand why Maryland has neglected so disgracefully its land-grant college for Negroes.

(PTX 18 at 154-155.)

- Princess Anne College is shown to have a faculty with very limited scholarly preparation.

(PTX 18 at 189.)

- Some of the conditions in the physical plant at Princess Anne College are a disgrace to the State of Maryland.

(PTX 18 at 271.)

- The walks and drives at Princess Anne should be paved. At present the students must wade through mud and water during bad weather to get from one building to another

(PTX 18 at 272.)

- By all the measures presented in the table, Princess Anne College is shown to have a faculty with very limited scholarly preparation. Princess Anne College is a degree-granting institution offering a fairly diversified instructional program, yet it has on its staff not a single instructor with the highest academic degree, and more than one-fourth lack even the master's degree.

(PTX 18 at 189.)

136. At the time of the Marbury Commission report, no HBI other than Morgan held accreditation by an agency outside of Maryland. (PTX 18 at 90, 93, 94, 96.) The Marbury Commission discussed why this was problematic:

The significance of accreditation lies in the fact that the stamp of approval by an accrediting agency indicates recognition within the academic world outside the State of Maryland. Students who attend unaccredited institutions are likely to find universities in other states somewhat reluctant to accept their credits at full value on transfer. Licensing for the various professions is often denied in other states to those who have not had their preliminary preparation in accredited institutions.

(PTX 18 at 106.)

137. Marbury went on to describe how the University of Maryland College Park and Morgan were the only accredited public campuses in Maryland, and noted that Morgan offered faculty with strong credentials and had doubled its enrollment since 1939. The Commission was

“shocked” at funding differences between these two institutions, and noted that Maryland had not offered large funding increases for Morgan, had failed to fund twelve of its capital projects, failed to support salaries at the same level as those at the white teacher’s colleges. Maryland neglected to develop Morgan’s programs until the mid-1960s, and refrained from addressing the challenges experienced as a result of duplication of program and campuses and low-enrollment. (PTX 39 at 18.)

- Large funding increase for Morgan - No**
- Funding for 12 capital projects - No**
- Salaries at least equal to white teachers colleges - No**
- Development of graduate programs at Morgan - No until mid-1960s**
- Closure of four public campuses due to duplication & lack of need- No**

(PTX 39 at 18.)

138. The Marbury Commission made findings and recommendations regarding the structure of the higher education system. It found that the legislature had “final control” over the system:

The final control exercised by the State of Maryland over its institutions of higher education resides in the legislature...The responsibility for direct and continuing control of each of the Maryland institutions is lodged by the legislature in a constituted board; the plan for the appointment of the members of each board is determined by the legislature.

(PTX 18 at 118.)

139. At the time, there were several boards responsible for the various institutions: the Board of Regents of the University of Maryland had control over UMB, UMCP and Princess Anne; the State Board of Education and Trustees had oversight over Frostburg, Salisbury, Towson, and Bowie; Morgan had its own board; and Coppin’s board was the Baltimore Board of

School Commissioners. (PTX 18 at 120-21). Each board separately approached the Legislature for funding and the Murphy Commission found that this created competition:

In a real sense, because of their separate boards of control, the state institutions of higher education compete among themselves for supporting funds. Each institution or group of institutions goes independently before the State Budget Officer, the governor, and the legislature in making its request for appropriations. [These officers] cannot be expected to have sufficient wisdom to coordinate a complicated system of educational institutions...

(PTX 18 at 127.)

140. The Marbury Commission also raised the issue of how the system of governance hurt the HBIs regarding programming:

The fact that higher education in Maryland [is essentially controlled] by four completely independent boards means that there is no legal procedure for the coordination of the programs of the various institutions...Perhaps it could be argued that the University of Maryland and Princess Anne College have been coordinated through the single Board of Regents; but the coordination under the one board in this instance certainly has not been a benefit to the program in the College of Negroes, and there is little or no evidence of cooperative relationships between the two institutions or even of an interest in the welfare of Princess Anne College on the part of the Board of Regents.

(PTX 18 at 126-27.)

141. Their report explained that Maryland's system of "line item" budgeting was too restrictive on the institutions:

[For] all institutions with the exception of the University of Maryland, the legislature passes an appropriation act which is in the form of a 'line budget.' [A] great many details ... are specified, and the amount which may be expended for each item is specifically indicated. ... [The institutions themselves are limited] with respect to the use of the funds. Even the funds which originate within the institutions are subject to this detailed appropriation act and must be expended in accordance with it.

After considering the problem, the Commission went on to recommend that the state adopt "lump sum" budgeting. (PTX 18 at 119.)

142. Furthermore, it recommended that Maryland place all of the universities under the governance of one board. (PTX 18 at 127-129.) The Commission found it problematic that the boards controlling Bowie and Princess Anne did not have an African American member:

[N]either the University of Maryland Board of Regents nor the State Board of Education has on it any Negro members. A suggestion of Negro representation on controlling boards is one that might well be considered in drawing up plans for the coordination for the control of higher education in Maryland.

(PTX 18 at 131.)

4. Weglin Commission Finds Maryland System Separate But Unequal

143. Maryland's policy of maintaining its separate but equal policy in the face of legal challenges throughout the country to the "equal" component led the state to appoint a new Commission two years after the Marbury Commission report was issued. Members of Maryland's Senate passed a resolution in 1949 "requesting the Governor to appoint a 'Commission to study the question of Negro Higher Education in Maryland'" as it was "important...that the State determine...its policy as to higher education for Negroes, in view of the great expenditure of funds which will be necessary to provide adequate facilities for [their education]." (PTX 826 at 11.) Once the governor appointed members to the Commission, it was charged with "study[ing] the whole field of higher education for the Negroes and especially the relationship between Morgan State College and Princess Anne College." *Id.* In June of 1950, the Weglin Commission released its "*Report and Recommendations of the Commission to Study the Question of Negro Higher Education to the Governor, The Legislative Council, and The General Assembly of Maryland.*"

144. The introduction to the Weglin Commission report recognized the problems in Maryland's dual system, including its likely illegality and inefficiency::

To THE GOVERNOR AND LEGISLATIVE COUNCIL Sirs: We submit herewith a report on our study of Negro Higher Education in Maryland, the preparation of which was instituted by a Senate Resolution approved on April 1st, at the 1949 session of the State Legislature. This survey deals with the already existing problems in the education of Maryland's Negro youth as well as those which have been currently arising.

During the past ten years, court decisions have made it increasingly obvious that Maryland as well as its neighbors to the south must make critical decisions toward providing equal facilities for both white and Negro. As late as June 6th of this year, the Supreme Court of the United States has ruled against many phases of the segregated higher educational practices in several southern states. Since these rulings indirectly affect Maryland as well, the state must be prepared to meet its responsibilities squarely.

After more than on hundred years of gradual, though sometimes spasmodic expansion of Maryland's higher educational program, it is today relatively easy to theorize how much more efficiently this growth could have been conducted. It would be a comparatively simple matter to formulate a general plan or program to be followed by the state in order to meet its future obligations in the field of higher education, if all existing institutions and practices were eliminated and an entirely new system created. Unfortunately, our task was not so simple. The establishment of colleges and universities of diverse origin and purpose has given rise to a problem of quite a different nature. Accordingly, the Commission has endeavored to face realities and, while it recognizes the necessity of continuing programs which have proved of value, it has not hesitated to recommend decided changes and in some cases the elimination of practices which, in its opinion, are not in the best interests of the state. While the subjects referred to below are covered more thoroughly elsewhere in the report, we are listing specific recommendations to meet the needs of Maryland's higher education for Negroes.

(PTX 826 at 7.)

145. The Weglin Commission noted the inequality of the dual system:

It would hardly be feasible to attempt a complete separation of Negro higher education in Maryland from the higher education of white students in the state. The development of colleges for white students in the state has directly influenced the manner of establishment and growth of Negro institutions. The continuous uphill struggle on the part of the Negro colleges to secure facilities on a par with white institutions is a factor which cannot be overlooked in a survey of this kind. For this reason the Commission has made a study of those phases of higher education for

white students which have important bearing on the Negro higher educational picture.

(PTX 826 at 15.)

146. Later in the report, the Commission even more directly addressed the vulnerability of Maryland's system to legal challenge that it was not providing an equal education to African Americans:

One factor which must be taken into consideration is the effect of court decisions on Maryland's higher educational policy. In 1935, Donald G. Murray successfully instituted legal action against the University of Maryland and, as a result, Negro students are attending the University's School of Law. Murray based his claim on the fact that being sent out of state to pursue legal studies constituted a handicap and was not providing equal facilities in the state and, therefore, was not legal. More recently the McCready case (McCready vs. University of Maryland, 1950) has enabled Negro students to apply to the School of Nursing at the University. It is not unlikely that more suits will follow unless Negro students are admitted to the professional schools of the University of Maryland or equal facilities are provided for them within the state. While the recent court decisions are steadily simplifying this problem, it is by no means settled and the issue is more thoroughly discussed in a separate section of this report.

(PTX 826 at 15.)

147. The Weglin Commission found that the four HBIs in some respects "are below the standards of similar institutions in the state." (PTX 826 at 20-21.)

148. More particularly, the Commission found a substantial difference between the University of Maryland and any of the HBIs: "If Maryland were to attempt the duplication for the Negro of the facilities at the University of Maryland either at Morgan or at any other location in the state, the cost would amount to many millions of dollars..." (PTX 826 at 23.)

149. Like the Marbury Commission, the Weglin Commission criticized the state's treatment of Princess Anne: "[t]he position of Maryland State College at Princess Anne has been an anomalous one almost from its very inception and it has always been forced to play the role of

an unwanted step-child.” (PTX 826 at 42.) The Weglin Report went on to describe Princess Anne as follows:

The College is situated outside the town of Princess Anne in Somerset County on 308 acres of land, of which 200 acres are connected with the College’s agricultural program. Prior to the recent building program, an administration and classroom building, a gymnasium and a girls’ dormitory were the only acceptable features of the whole institution. In almost every other respect the physical plant at Princess Anne was woefully inadequate.

(PTX 826 at 41-42.)

150. Its lead recommendation for remedying these issues was for the state to enhance Morgan both in terms of finances and programs:

[The Commission recommends] [t]hat as many courses as possible leading to the master’s degree be instituted at Morgan State College, these to include such subjects as education, English, social sciences, and ultimately the physical sciences. In order to carry out this recommendation, it will be necessary to provide adequate staff and other facilities and sufficient funds should be promptly appropriated for these purposes.

(PTX 826 at 7-8.)

151. Also like the Marbury Commission, Weglin discussed the need for Maryland to develop a coordinated system of administration and the problems that the fractured system caused individual institutions:

152. Mention has been made earlier in this report with respect to the pressing need for a more highly or more uniformly coordinated approach to the administration of higher education in Maryland. The practice, whereby an institution receives public fund appropriations not necessarily on the basis of its needs, is not by any means restricted to Maryland. At the same time, such a condition leaves much to be desired, both from a practical and economic standpoint.

(PTX 826 at 54.)

153. The Weglin Commission's report included a table reflecting a relatively strong correlation between the size of the student body and the appropriations per student, with the schools with higher enrollments generally receiving less funds per student:

**1950 GENERAL FUND APPROPRIATION TO STATE INSTITUTIONS
OF HIGHER EDUCATION PER FULL TIME STUDENT***

| <i>Institution</i> | <i>Enrollment (1950)</i> | <i>General Fund Appropriation 1950</i> | <i>General Fund Appropriation per Full Time Student</i> |
|--------------------------|------------------------------|--|---|
| Princess Anne | 409 | \$429,768 | \$1,051 |
| Bowie State Teachers | 206 | 187,186 | 908 |
| Salisbury State Teachers | 330 | 226,977 | 687 |
| Towson State Teachers | 770 | 480,130 | 620 |
| Frostburg State Teachers | 350 | 215,462 | 610 |
| Morgan State College | 1,528 | 606,297 | 397 |
| University of Maryland | | Data not available | |

*Exclusive of part time and summer enrollments.

(PTX 826 at 43). Notably, as in 1937, Princess Anne received more funds per student than the TWIs and was in worse shape. Similarly, while Bowie received more funds per FTE than the state's TWIs, its condition was also inferior to those of its white counterparts.

154. For years, Coppin was not part of Maryland's system of higher education. From its inception in 1900, it offered a limited two-year curriculum for the preparation of teachers. The Coppin Teachers College essentially functioned as part of the public school system of Baltimore City, outside of state control and without accreditation of the American Association of Teachers Colleges or the Middle States Association of Colleges and Secondary Schools. (PTX 18 at 96.)

In June, 1949, the Board of School Commissioners of Baltimore City requested that the State Department of Education take over the preparation of teachers for the Negro elementary schools of Baltimore City and that the present facilities of Coppin Teachers College be used for much needed elementary school classroom space. In a meeting before this Commission, Dr. Thomas G. Pullen, Jr., State Superintendent of Education, agreed that the preparation of Negro elementary teachers for the schools of Baltimore City should be the responsibility of the State Department of Education.

(PTX 826 at 34.)

155. The Weglin Commission ultimately recommended that Coppin Teachers College be abandoned by Baltimore City and instead acquired by the state to fulfill its responsibility for training teachers for the Negro elementary schools of Baltimore City. (PTX 826 at 8.) Within a couple of years Coppin became a state teacher's college. (PTX 19 at 26, PTX 826 at 8, 11-12.)

D. The Post-*Brown De jure* Years: HBIs Continue to be Ignored as the System Grows

156. As discussed above, Maryland formed the Soper, Marbury, and Weglin Commissions, either largely or in part, to examine the question of what actions Maryland needed to take in order to make its separate system "equal." After the Supreme Court found separate but equal unconstitutional in 1954 with its ruling in the matter of *Brown v. Board of Education*, 347 U.S. 483 (1954), there was "very little attention" given to the HBIs until the *de jure* system ended in 1969 with the OCR letter. (PTX 39 at 21.; 1/5/12 AM Trial Tr. 62-63 (Popovich).) Even the state acknowledges that, after *Brown*, "for a number of years there continued to be at best benign neglect of the State's obligation to desegregate and at worst outright hostility and foot-dragging." Defendants' Statement of the Case. (Dkt. No. 178 at 2-3.) Maryland continued to operate largely separate colleges and universities for black and white students.

157. During this time, Maryland operated the University of Maryland as a comprehensive university for white students and two four-year liberal arts colleges — Morgan State College and the Princess Anne campus — for black students. The state also operated five teachers colleges, two for blacks (now Bowie State and Coppin State Universities) and three for whites (now Towson, Salisbury, and Frostburg State Universities). (PTX 69 at 5.) As reflected

by various Commission reports from this era, the state's primary focus was on how expand the system in the face of student demand. (PTX 39 at 21; 1/5/12 AM Trial Tr. 62-63 (Popovich).)

158. In 1955, Maryland issued the findings of the Pullen Commission (PTX 19), which was formed as a result of a:

...request for a co-operative study of the needs in higher education in Baltimore and environs was addressed to the State Superintendent of Schools and the Superintendent of Public Instruction in Baltimore City by the presidents of six nonpublic, nonprofit degree-granting colleges and universities in or near Baltimore City. (PTX 19 at 11.) Said request was subsequently submitted to the Governor of Maryland and called "for the appointment of a Commission to make a study of the needs of higher education in the metropolitan area of Baltimore." *Id.* The study was expanded to cover the entire state of Maryland and the Governor appointed a commission "to discover what additional needs (higher education) there are likely to be, whether they will probably be adequately met by existing institutions, and, if not, how they can best be met."

(PTX 19 at 11-12.) In 1955, the Pullen Commission released its findings in a report titled, "*The Needs of Higher Education in Maryland.*"

159. On the primary issue the Commission was asked to answer, the Pullen Commission specifically recommended that Maryland's schools continue to strengthen and improve existing programs in their existing locations:

The Commission at present sees no need for the extension of, or the establishment of branches of any existing institution in another part of the State. In the Baltimore metropolitan area, for example, it is believed that existing institutions of higher education, public and private, along with the community junior colleges that should be established, can for the foreseeable future absorb the expected influx of added students.

(PTX 19 at 108.)

160. The Pullen Commission report contains tables that allow for comparisons among the schools at around the time of the *Brown* decision. This survey confirmed the disparities in educational opportunities offered at comparable TWIs and HBIs. Of Maryland's five teachers

colleges, Bowie and Coppin were limited to providing teacher education. Yet Frostburg, Salisbury, and Towson all offered junior college level curriculum in addition to the teacher education programming. (PTX 19 at 32.) In addition, while Morgan State and Princess Anne both offered liberal arts education and teacher training, neither were authorized to offer graduate or professional programming like UMCP/UMB. (PTX 19 at 32.)

161. According to the Pullen Commission, total student enrollment in the aforementioned schools as of June 1953 was as follows:

| School | June 1953 Enrollment |
|----------------------|----------------------|
| UMCP/UMB | 16097 |
| Morgan | 2314 |
| Towson | 865 |
| Princess Anne | 431 |
| Frostburg | 378 |
| Bowie | 348 |
| Salisbury | 314 |
| Coppin | 206 |

(PTX 19 at 26). These numbers reflected that UMCP/UMB were already much bigger than the other schools. They also show that outside of UMCP/UMB, Morgan had a much larger enrollment than the other schools, including almost triple that of Towson who was next largest, and Princess Anne's enrollment was materially larger than Salisbury, numbers that would significantly change over the next two decades as the TWIs expanded at a far greater rate than the HBIs.

162. According to figures in the Pullen Commission report, the total estimated value of facilities at the white institutions was \$46.64 million, which stands in sharp contrast to the

estimated facilities value of \$16.4 million at the black institutions. (PTX 19 at 30; PTX 69 at 6-7.)

163. The Pullen Commission recognized that Maryland needed to anticipate and prepare for the anticipated increase in its college-age population in a more strategic way than it had in the past. As a result, it recommended:

That a permanent Advisory Commission on Higher Education in Maryland be established through appointment by the Governor of Maryland by and with the advice of the institutions of higher learning. This Commission should consist of nine persons: The Presidents of three State institutions, one of whom shall be the President of the University of Maryland; the presidents of four independent institutions, one of whom shall be the President of Johns Hopkins University; the Superintendent of Schools of Baltimore City; and the State Superintendent of Schools.

(PTX 19 at 126.)

164. Then, in 1960, a mere five years after the Pullen Commission report, two “dueling” Commissions, the Warfield and Frampton Commissions, issued reports on how the system should be expanded. (1/5/12 AM Trial Tr. 70-73 (Popovich).)

165. The General Assembly of Maryland passed a Joint Resolution resulting in the formation of a “Commission to study the expansion of the University of Maryland.” (PTX 379 at 4.) For that reason, the Governor appointed a commission to develop a plan for the expansion of the University of Maryland. In light of its “principles for decisions on university of expansion,” the Warfield Commission made its proposal for additional university centers, estimated the costs of such a program, and made its recommendations which it published in its February 1960 report, “*A Plan for Expanding the University of Maryland.*” (PTX 379 at 4-5.)

166. It is significant that the Warfield Commission did not simply recommend the expansion and formalization of the role of these institutions in Maryland’s University system –

this commitment was accompanied by a recommendation that the programming and curriculum at these schools be expanded, as well:

In studying various regions of the State and recommending the establishment of centers of the University of Maryland, the Commission has suggested that the State Teachers Colleges at Frostburg, Salisbury, and Towson be converted to University centers, *and their educational objectives broadened to include additional curricula.*

167. (PTX 379 at 18.)(emphasis added) The Warfield Commission also specifically recommended that Salisbury be designated the eastern shore branch of the University and that its curriculum be expanded despite the close proximity of Princess Anne. (PTX 268 at 5.) Its report stated that, having acquired a faculty devoted to the preparation of teachers for the elementary schools and initiated the offering of junior college courses, “[t]he Commission believes that the State Teachers College at Salisbury is ideally located for conversion to a center of the University of Maryland in order to aid in meeting the needs of this region.” (PTX 379 at 18.)

168. At the time that the report was issued, the State Board of Education oversaw the teachers colleges. As discussed above, under the Warfield Commission’s proposal, the white teachers colleges would have become part of the University of Maryland. Not surprisingly, and as a result of Warfield recommendations, the State Board of Education issued its own report in 1960: the Frampton Commission report.

Anticipating the nationwide onslaught of the postwar population wave against the institutions of higher learning, the State Board [] endeavored to formulate concrete proposals for the fullest utilization of all available educational facilities, so as to expand the opportunities for public higher education in the State of Maryland.

169. (PTX 20 at 5.) The Maryland State Board of Education, led by Jerome Frampton, submitted its report, which combined past and contemporaneous studies and proposals regarding

Maryland's higher education system, to the Governor and Maryland Legislature in May of 1960. *Id.* The report is titled, "*A Program for Progress in Higher Education in Maryland.*"

170. Among other things, the Frampton Commission noted how the Warfield Commission totally ignored the HBIs: "No plans are made in the Warfield Commission report for appropriate utilization of Morgan State College, Maryland State College, Coppin State Teachers College, and the State Teachers College at Bowie." (PTX 20 at 21.) Moreover, the Frampton Commission stated that Morgan State would have served as the Baltimore branch of the University of Maryland far more logically than Towson. *Id.* The Commission specifically recommended that students be permitted to enroll in third and fourth year college level curriculum leading to a bachelor's of arts and sciences, and that "this transition shall take place in each of the five institutions as rapidly as possible." (PTX 20 at 13.)

171. In 1962, another Commission, the Curlett Commission analyzed the issue of system growth: "In the Spring of 1961 the Maryland General Assembly adopted Resolution No. 26, authorizing Governor J. Millard Tawes to appoint a Commission for the Expansion of Public Higher Education in Maryland." (PTX 21 at 5.) Once appointed, the Curlett Commission was charged "with the task of formulating a plan of organization for the entire system of public higher education in Maryland." *Id.* The report, "*Public Higher Education in Maryland 1961-1975,*" contains "recommendations on the development of the public system of higher education over the next decade and a half." (PTX 21 at 6.)

172. The Curlett Commission recommended that the increased student demand could be handled by the existing institutions with some expansion of those institutions. (PTX 21 at 41-43.) It also recommended that Maryland create an Advisory Council for Higher Education and that Morgan become part of the State College system. (PTX 21 at 41-45.)

173. These Commission reports from 1960 and 1962 reflect the curricular development of the schools at that time. An Appendix to the Warfield report listed 15 areas of course work. Among the liberal arts schools, UMCP and UMB, which were listed together, had course work in every area but junior college curricula. In contrast, Morgan and Princess Anne had course work in only 4 areas each. In the teachers colleges, Towson offered graduate coursework and all three white teachers colleges offered coursework in elementary teacher education and junior college curricula. In contrast, Bowie and Coppin only offered coursework in elementary teacher education. (PTX 379 at 23.) By the fall of 1959, Frostburg also offered a master's degree. (PTX 20 at 45.) No HBI offered master's degrees even though, as discussed above, the Soper, Marbury, and Weglin Commissions had recommended it decades before. (PTX 20 at 44-45.)

174. In 1960, the three white teachers colleges, received approval to offer four year liberal arts degrees. In contrast, as of 1962, Coppin and Bowie only offered teaching degrees in elementary education. As the Curlette Commission found, "this retards the development of a liberal arts curriculum, a program that the Commission recommended for those schools." (PTX 21 at 32).

175. Along with the differences in curriculum, most of the enrollment growth in these years was at the TWIs as the following table shows:

| School | Enrollment June 1953 | Enrollment October 1959 | Difference |
|----------------------|-------------------------|-------------------------------|------------|
| UMCP/UMB | 16079 | 18906 | 2827 |
| Towson | 865 | 1515 | 650 |
| Frostburg | 378 | 846 | 468 |
| Coppin | 206 | 360 | 154 |
| Morgan | 2314 | 2429 | 115 |
| Salisbury | 314 | 431 | 117 |
| Princess Anne | 431 | 466 | 35 |
| Bowie | 348 | 352 | 4 |

(PTX 19 at 26; PTX 20 at 7.) The only TWI that had less enrollment growth than any HBI was Salisbury, and even in the case of Salisbury, it had grown more than its HBI counterpart on the Eastern Shore.

176. The University of Maryland achieved expansion in the Baltimore area with the creation of new campus – the University of Maryland at Baltimore County in 1966. According to Dr. Popovich (who has written on the process that led to the creation of UMBC), even though Morgan was well-suited to become the new University of Maryland school according to the Frampton Commission, that possibility was never seriously considered. (PTX 268 at 4.)

177. UMBC was not Maryland's last expansion in Baltimore. In 1973, the State Legislature passed legislation to make the University of Baltimore a Public institution. (PTX 267 at 6.) UB had been a private institution that was financially troubled but had supporters among legislators and public officials, according to Dr. Popovich. (PTX 268 at 2.) The impact of the University of Baltimore on the HBIs is discussed later in this document. The result is that there are 6 public institutions of higher learning within a twenty mile radius: Coppin, Morgan, Towson, UB, UMB, and UMBC. According to Dr. Popovich, the Baltimore Sun referred to the

large number of schools in Baltimore as the “mess in Baltimore.” (1/5/12 AM Trial Tr. 93-94 (Popovich).)

178. At the same time, the eastern shore continued to present unique challenges related to the co-location of two institutions in a relatively remote location and in close geographic proximity to one another. A 1970 consultant report to the Maryland Council for Higher Education recommended that Salisbury should change its function and be converted into a two-year community college, while UMES should remain a four-year institution which could be absorbed into the state college system. (PTX 409 at 14.) “It didn’t happen.” (1/5/12 AM Trial Tr. 101 (Popovich).)

179. The time period between 1964 and 1974, the first ten years after baby boomers first became college age, turned out to be a period of explosive growth within the Maryland higher education system. As the following table demonstrates, Maryland’s TWIs received far more capital investment support than the HBIs and their student population also grew at a much faster rate:

FTE Students and State Appropriations, 1964-1974

| FTE Students and State Appropriations, 1964-1974 | | | | |
|--|-----------|-----------|------------------|--------------------------|
| School | 1964 FTES | 1974 FTES | Increase in FTES | Appropriations 1964-1974 |
| Towson | 3,412 | 8,887 | 5,475 | \$ 49,169,200.00 |
| UMBC | NA | 4,854 | 4,854 | \$ 46,067,000.00 |
| Frostburg | 1,768 | 2,815 | 1,047 | \$ 26,339,800.00 |
| Bowie* | 520 | 2,255 | 1,735 | \$ 24,370,600.00 |
| Coppin* | 431 | 2,145 | 1,714 | \$ 22,520,920.00 |
| Morgan* | 2,879 | 4,686 | 1,807 | \$ 19,131,400.00 |
| Salisbury | 624 | 2,127 | 1,503 | \$ 15,032,000.00 |
| UMES* | 632 | 940 | 308 | \$ 9,355,700.00 |

(PTX 735.)

180. As evidenced by the following table, Towson received capital appropriations that were more than twice as much as any HBI and UMBC received more than twice as much as Morgan, the largest HBI. It made a difference in student enrollment. As discussed above, Morgan had a student population almost three times as great as Towson in 1953. In 1964, Towson was slightly bigger; by 1973, Towson was almost twice as numerous. Within eight years of its creation, UMBC shot past three HBIs and was about equal with Morgan. UMES was slightly more populous than Salisbury in 1964. By 1974, Salisbury was more than twice as populous. The schools have remained on similar trajectories since as this comparison between 1974 and 2009 shows:

| School | FTE Enrollment 1974 | FTE Enrollment 2009 | Difference |
|-----------|---------------------|---------------------|------------|
| Towson | 8887 | 17275 | 8388 |
| Salisbury | 2127 | 7219 | 5092 |
| UMBC | 4854 | 9749 | 4895 |
| UMES | 940 | 3821 | 2881 |
| Bowie | 2255 | 4496 | 2241 |
| Frostburg | 2815 | 4434 | 1619 |
| Morgan | 4686 | 6287 | 1601 |
| Coppin | 2145 | 3175 | 1030 |

(PTX 735; PTX 755 at 13.)

181. Indeed, by 1977, following this period of rapid expansion, Towson State College's FTE count of 11,324 exceeded the combined FTE of all four of Maryland's HBIs (10,383). (PTX 69 at 8.) As of FY 2009, as the above table shows, Towson is within a few hundred FTEs (17,275) of matching the four HBIs (17,779).

182. There were also some structural changes in the 1960s. In 1964, Maryland created its first statewide board with responsibility for higher education, the Advisory Council for Higher

Education. However, its authority was limited to advising the state government on higher education issues. (PTX 267 at 3.) In 1967, Morgan State was placed within the system of state colleges, which also included Bowie, Coppin, Frostburg, Salisbury and Towson. Until that time, Morgan's president reported to an independent governing board. (PTX 267 at 4.) While a similar proposal was considered for St. Mary's, it was permitted to continue functioning outside of the state college system. (PTX 267 4-5.)

183. In 1968, the Maryland Council of Higher Education ("MCHE") was created by the state legislature, and succeeded the Advisory Council. MCHE was granted new authority to make recommendations concerning proposals for new programs at Maryland's colleges and universities, but it is not given program approval authority. (PTX 267 at 4.) It then published the state's first plan for higher education, although it lacked the authority to implement any of those provisions. The plan consists primarily of data and analysis of data. With respect to segregation, the 1968 plan specifically recognizes the importance of placing unique programs at the state's historically black colleges and universities. *Id.*

184. In 1969, Morgan State College proposed it be developed as an urban university and the state's first multi-racial institution. The board of trustees for the state college system and the Governor referred the proposal to MCHE, but a special committee to MCHE ultimately rejected the proposal and recommended instead a single multi-campus institution for the Baltimore metropolitan area. (PTX 267 at 4.)

E. OCR Enforcement in Maryland Begins, Ending the *De jure* Era

185. The Office of Civil Rights ("OCR"), first as part of the United States Department of Health, Education and Welfare ("HEW") and later as part of the Department of Education, has had federal enforcement authority over Maryland higher education system since the 1960s.

Beginning in 1969, OCR has intermittently engaged with Maryland and to the extent there has been progress at the HBIs much of it has resulted from pressure by OCR. (1/5/12 AM Trial Tr. at 89-90 (Popovich).) From 1969 to 1985 there was significant engagement and conflict between OCR and Maryland, as discussed below.

186. President Johnson charged the Office for Civil Rights (OCR)—which was housed within HEW at the time—with the responsibility of enforcing state compliance with Title VI standards for student admission.

187. In 1964, the Civil Rights Act was signed into law by President Lyndon Baines Johnson. Title VI of the Act forbade federal funding for schools and colleges that discriminated against applicants and students on the basis of race, color, or national origin. Specifically, the Act's implementing regulations stated that recipients of federal funding shall not deny a service, provide a different service, subject an individual to separate or segregated treatment, restrict the enjoyment of a privilege, determine eligibility or deny participation on the ground of race, color, or national origin. (PTX 69 at 9.)

188. Following this mandate, HEW proceeded to review state higher education systems in the United States. *Id.*

189. In 1969, Maryland was formally notified by OCR that it was one of ten states operating a racially-segregated system of higher education in violation of Title VI of the Civil Rights Act. Specifically, HEW requested that Maryland, as well as the other identified states, submit to HEW plans for desegregating their systems of higher education. (PTX 69 at 28.) Maryland responded by submitting a desegregation plan that OCR initially found unacceptable. OCR requested revisions, and in 1970 Maryland re-submitted a revised plan to OCR. OCR did not respond. (PTX 69 at 12; 1/10/12 AM Trial Tr. 32 (Conrad).)

190. In 1970, the NAACP Legal Defense Fund sued HEW for its failure to enforce Title VI and for continuing to allocate federal funds to states that were operating systems of higher education in violation of the Civil Rights Act. In 1972, Judge John Pratt found in favor of the NAACP Legal Defense Fund and ordered HEW to begin enforcement proceedings against Maryland and other states in violation of Title VI. *Adams v. Richardson*, 356 F. Supp. 92 (D.D.C. 1973). On appeal, the Appellate Court modified the decision by ordering HEW to give non-complying states the opportunity to submit new desegregation plans before initiating enforcement proceedings, while also noting that these plans should uphold and sustain predominantly black institutions. *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973); (PTX 69 at 10.) The court discussed a particular concern regarding the need for statewide planning to ensure the viability of HBIs:

The problem of integrating higher education must be dealt with on a statewide rather than a school-by-school basis. Perhaps the most serious problem in this area is the lack of state-wide planning to provide more and better trained minority group doctors, lawyers, engineers and other professionals. A predicate for minority access to quality post-graduate programs is a viable, coordinated state-wide higher education policy that takes into account the special problems of minority students and of Black colleges. As *amicus* points out, these Black institutions currently fulfill a crucial need and will continue to play an important role in Black higher education.

480 F.2d at 1164-65.

191. Consequently, in 1973, OCR requested information from Maryland in order to determine whether it was in compliance with Title VI of the Civil Rights Act. Maryland provided the requested information and in May of 1973, OCR informed Maryland that its system of public higher education did not comply with Title VI and set a deadline for Maryland's submission of a new desegregation plan: June of 1973. (PTX 69 at 12.) In 1974, Maryland

developed a desegregation plan for its public higher education system. Although it was not accepted by the federal government Maryland implements the plan. (PTX 267 at 6.)

192. Thereafter, Maryland Governor Marvin Mandel appointed a task force to develop a desegregation plan for Maryland's public institutions of higher education. This plan (PTX 381) was submitted to OCR in February 1974—more than seven months after the original deadline. In response, OCR requested specific revisions to the plan, which Maryland completed. On June 19, 1974, OCR accepted Maryland's revised plan and designated the Maryland Council for Higher Education (“MCHE”) as the state agency to coordinate the implementation of the 1974 plan. (PTX 69 at 12; 1/10/12 AM Trial Tr. 32 (Conrad).)

193. The 1974 desegregation plan called for the:

[e]stablishment prior to January 31, 1974, of a bi-racial task force under the Maryland Council [sic] for Higher Education in its capacity as the State Agency for coordinating the desegregation of the public postsecondary education institutions of the State, to propose ways of enhancing the role and image of the predominantly Black public colleges in the State.

(PTX 22 at 4-5.) The chancellor of the Maryland Council for Higher Education (MCHE) formally called for the creation of such a task force and, from April to August of that year, the newly-formed Cox Task Force “heard presentations, and received documentation, from the Presidents of Bowie, Coppin and Morgan and the Chancellor of UMES. The Cox Task Force “also heard from alumni, faculty and student representatives in each of the State Colleges, and from the President of the University of Maryland.” (PTX 22 at 6.) Their findings, memorialized in the “*Report to the Maryland Council for Higher Education by the Task Force to Propose Ways of Enhancing the Role and Image of Predominantly Black Public Colleges in Maryland*” were submitted to MCHE. (PTX 22)

194. In its August 1974 report, the Cox Task Force proposed ways of enhancing Maryland's TBIs and noted that "since their beginnings" the TBIs had faced "certain inequities and disadvantages which can be attributed to insufficient State fiscal support." Black colleges filled the need precipitated by "racism, denial of opportunity, and repression." With few resources available, the TBIs "had to develop the ability to compete despite disparities." (PTX 22 at 8.) The Cox Task Force sought to implement the 1974 Maryland State Plan in a way in which the state's historically black colleges would not be forced to bear an "unequal burden" in the implementation of desegregation. (PTX 22 at 4.)

195. The Task Force therefore recommended "a degree of conscientious funding [for the TBIs] – beyond the conventional funding" in order to allow them to enhance their role and image, develop internal management systems, and maintain their uniqueness and further academic excellence. (PTX 22 at 9.) The Task Force also noted that the presidents of Bowie, Coppin, and Morgan were

placed in a defensive and reactive rather than leadership position by the way they must deal with their governing bodies and the State funding system. Each year...[they] must worry about the continuation of federal funds and must always be faced with the possibility of a tenuous future.

(PTX 69 at 39; 1/10/12 AM Trial Tr. 32 (Conrad).)

196. The Cox report further recognized that each historically black college should develop its own "specialty areas or programs within the total state system of higher education that will broaden the appeal of the institution to a more diverse student body." (PTX 22 at 20-21.) Yet it was also acknowledged that "adequate planning funds must be allotted for the research and development aspects of these specialty programs to assure that their implementation will enhance institutional academic excellence." (PTX 22 at 21.)

197. The Cox Task Force also recognized the need to empower the state's historically black colleges to actively recruit and market themselves in order to successfully compete for other race students:

198. Each historically black public college should be allocated adequate specific funds to conduct a full-scale public information program to inform the public, recruit students – specifically including other-race students – and to disseminate information to other institutions of higher education. The black colleges should be presented as the models they are of how to successfully educate black students and to work with students who are disadvantaged. The colleges should make special efforts to collect and publicize the successes of their graduates.

(PTX 22 at 22.)

199. In 1974, the Cox Task Force report anticipated that the establishment of the University of Baltimore as a public college would present a “negative impact” on Morgan and Coppin as the result of “overlapping enrollment, curriculum and funding.” Because of the “probable accompanying strong effect on racial desegregation in the Baltimore area,” the Cox report recommended “strict observance” of the law and its intent that the University of Baltimore be restricted to an upper division institution, limited to third and fourth year collegiate and graduate students. (PTX 22 at 24-25, 42.)

200. In 1975, Maryland submitted its first status report to OCR. OCR responded that Maryland had failed to execute its plan “promptly and vigorously,” and enforcement action would be taken within 30-60 days if remedial actions were not completed within that time. Maryland sued OCR in federal district court. In *Mandel v. U.S. Dep't. of Health, Education, and Welfare*, 417 F. Supp. 57 (D. Md. 1976), the District Court found that HEW had consistently failed to specify the steps necessary for Maryland to achieve compliance with Title VI and

enjoined OCR from acting at Maryland's request. On appeal, the 4th Circuit originally decided to reverse the injunction by a 4-3 vote but one of the judges in the majority died before the decision was issued. Maryland succeeded in getting the court to reconsider counting the vote of the deceased judge and the subsequent 3-3 split left the district court's decision remained in effect. (PTX 305 at 14.)

201. At the same time, Judge Pratt retained jurisdiction over HEW's enforcement activities nationally. He held HEW in violation of Title VI and ordered the agency to develop "guidelines or criteria specifying the ingredients of an acceptable higher education desegregation plan," at which point the states would have 60 days to submit revised desegregation plans in compliance with those guidelines. Maryland was not subject to the order because of the pending *Mandel* litigation. *Adams v. Califano*, 430 F. Supp. 118, 120-21 (1977); (PTX 69 at 9.) The order made clear that the OCR guidelines needed to recognize the unique role HBIs play:

The process of desegregation must not place a greater burden on Black institutions or Black students' opportunity to receive a quality public higher education. The desegregation process should take into account the unequal status of the Black colleges and the real danger that desegregation will diminish higher education opportunities for Blacks. Without suggesting the answer to this complex problem, it is the responsibility of HEW to devise criteria for higher education desegregation plans which will take into account the unique importance of Black colleges and at the same time comply with the congressional mandate.

Adams v. Califano, 430 F. Supp. at 120.

202. In response to the order in *Adams v. Califano*, the OCR office of HEW issued "Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Higher Education". 43 Fed. Reg. 6658 (Feb. 15, 1978) (attached as Exhibit D). The revised criteria were issued to assist "states in the preparation of desegregation plans as part of the process of securing voluntary compliance" with Title VI. *Id.* According to the criteria, an

acceptable plan would enable HBIs “to overcome the effects of past discrimination” and would “assure[] that students will be attracted to each institution on the basis of educational programs and opportunities uninhibited by past practices of segregation.” *Id.* at 6661. The plans, which are discussed in more detail in a later section, required states to “[d]efine the mission of each institution within the state system on a basis other than race,” and to “[s]pecify steps to be taken to strengthen the role of traditionally black institutions in the state system.” *Id.* The strengthening or enhancing aspect, which is discussed in more detail in a later section of this document, included making resource and programmatic improvements to HBIs so that they would have resources “which are at least comparable to those at traditionally white institutions having similar missions” and removing unnecessary program duplication with TWIs. *Id.*; (PTX 69 at 32.) As discussed below, these Adams criteria informed the 1981 Consultants report.

203. On the ground, during the early and mid-1970s, Maryland desegregated the TWI “very quickly” because of a concern that OCR would cut off Maryland’s federal funding according to hybrid expert Dr. Popovich, who began working in the for the Secretary for Higher Education in 1974. According to Dr. Popovich, the desegregation went only one way – black students leaving for TWIs. (1/5/12 AM Trial Tr. 85-89 (Popovich).) The following figures, taken from tables in two of Maryland’s desegregation documents, show that the number and percentage of African American full time undergraduate students at TWIs went up dramatically from 1970 to 1975 and then slightly from 1975 to 1979:

| Institution | 1970 | | 1975 | | 1979 | |
|-------------|---------|------------------|---------|------------------|---------|------------------|
| | # black | % black of total | # black | % black of total | # black | % black of total |
| Frostburg | 41 | 2 | 165 | 5.9 | 215 | 7.6 |
| Salisbury | 15 | 1.2 | 174 | 7.1 | 242 | 8.2 |
| UMCP | 861 | 3.4 | 1644 | 6.8 | 1832 | 7.3 |
| UMBC | 153 | 5.2 | 886 | 18 | 858 | 18.3 |
| Towson | 161 | 2.8 | 726 | 8.7 | 1129 | 11.8 |

(PTX 455 at 9; PTX 263 at 56.)

204. In contrast, the success that HBIs had in attracting white students had peaked prior to 1975. Much of the success was in attracting white students to graduate programs. Dr. Popovich wrote about this in a document entitled “*Trends in Graduate Students at Historically Black Colleges in Maryland.*” (PTX 184). In his report, Dr. Popovich found that the number of white graduate students peaked in 1973 (1254) and the percentage peaked in 1973 and 1975 (44%). By 2008, the number (444) and percentage (14%) were about a third of the 1973 number. (PTX 184 at 11-13.) According to Dr. Popovich, the HBIs had a window of time in which they offered unique graduate programs and when the existing governing board, the Maryland Council of Higher Education, approved duplicative programs, the window closed and the white students moved to TWIs (PTX 184 at 8-9). Dr. Popovich found that UMES, which did not offer graduate education until around 1980, is currently the most successful HBI at attracting white graduate students because its graduate programs are largely unduplicated by the neighboring TWI, Salisbury. (*Id.* at 10.) The program section of this document discusses this issue in greater detail.

205. In 1974 and 1975, there were three structural changes. The first in 1974 was that Maryland passed legislation that provided direct aid to private institutions based on putting into law the private aid program. MCHE released a major report recommending direct state aid to

private institutions operating in Maryland. MCHE referenced the adverse impact of growing competition from a rapidly-developing and improving public sector on private higher education in the state. The report noted a number of private campuses had gone out of business, and the request from the University of Baltimore that it become a public campus. (PTX 267 at 6; PTX 39 at 37; 1/5/12 AM Trial Tr. 78, 84-85, 112) (Popovich).) The result was that for FY 1976, the first year the private aid legislation took effect, Maryland's private campuses received \$4.4 million in direct state aid, which was equal to 49% of the appropriation received by Morgan that same year. (PTX 267 at 7.)

206. The second change, which occurred in 1975, was that the state passed legislation giving Morgan a designation as the state's urban university, with doctoral granting authority and restored its independent board. (PTX 39 at 40) This came after recommendations from two panel reports.

207. The first was the Cox Task Force which made the following recommendation: "[t]he Task Force recommends that MCHE support legislation and program development to change the status of Morgan to a doctoral-degree-granting urban university." (PTX 22 at 37.) The Cox Task Force correctly anticipated some of the challenges likely to result from such a move. While "total independence remains an ideal arrangement for Morgan," the task force understood that unless Morgan were sufficiently experienced and strong in all its offerings – baccalaureate and doctoral – practical considerations of economic and political competition could prove challenging. (PTX 22 at 35.)

208. The second report came from the Rosenberg Commission's 1975 Report. (PTX 380.) "In 1973 Governor Marvin Mandel appointed a 27-member Commission to study the structure and governance of education from early childhood through the graduate school, and to

report to him on the changes needed to assure quality educational opportunities for all Marylanders.” (PTX 380 at 8.) The Governor’s Study Commission on Rosenberg Commission submitted its findings on that subject to the Governor in May of 1975. The report is titled “*Final Report of the Governor’s Commission on Education.*”

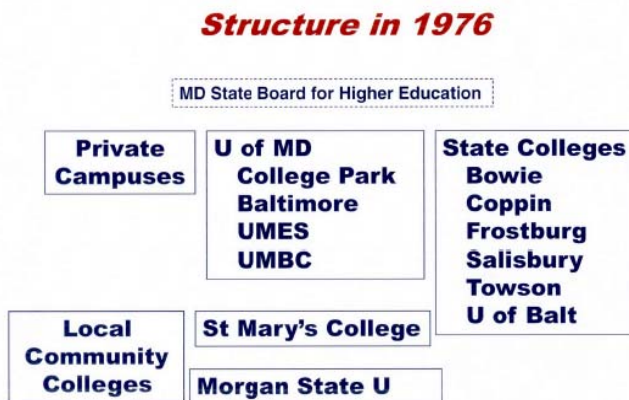
209. Referencing the Cox Task Force’s recommendation regarding Morgan, the Rosenberg Commission found ample evidence to support the elevation of Morgan State College to university status, which would not only increase Morgan’s contribution to the “overall well being” of Baltimore, but also “the equality of opportunity for graduate education.” (PTX 380 at 38.) The Rosenberg Commission outlined a potentially ambitious mission for Morgan:

210. For Baltimore City to advance, there needs to be a strong comprehensive public university to develop leadership in order that the City’s future political, business, industrial, and social life are provided an additional opportunity for improvement. A strong public university within the City will serve as an assurance that such developmental opportunities are provided. (PTX 380 at 38.)

211. The aspirations that the Cox Task Force and the Rosenberg Commission laid out for Morgan were not fully realized. In 1981, representatives of Morgan testified at a special legislative session that Morgan’s ability to develop programs had been hampered for the past decade due to the state’s insistence that new proposed programs be “urban oriented.” Such concerns led the state to reject Morgan’s efforts to develop undergraduate programs in computer science, as well as graduate programs in public administration, chemistry, biology, physics, and engineering. Morgan was further hampered by the state’s preference to force Morgan to share unique, high demand programs with other institutions. (PTX 267 at 8.) Until 1994, the state only approved one doctoral program at Morgan. (PTX 39 at 40; PTX 267 at 9.) Morgan had to

split its engineering program with UMBC and Morgan was hampered by inadequate facilities, limited funding, and a declining resource base as enrollment declined, as discussed below. (PTX 39 at 44.) Moreover, as discussed below, in the 1988 reorganization, Morgan received less priority than UMB and UMBC as a research university in the Baltimore area. (PTX 39 at 48.)

212. The third change was in governance. In 1975, the Maryland State Board for Higher Education replaced the Maryland Council of Higher Education. This Board oversaw private institutions, the four campuses of the University of Maryland system, the six colleges in the state college system, as well as Morgan State University, community colleges, and St. Mary's. (PTX 39 at 42.) Below is an organizational chart depicting the state system of higher education from 1976 until the next reorganization in 1988:



(PTX 39 at 42.)

213. This was the first true coordinating board in that it represented the first time a state agency was specifically granted the authority to approve campus missions and proposals for new academic programs. (PTX 267 at 7.) Prior to this, decisions were primarily made as the result of political considerations rather than objective data and analysis, and decisions of the state advisory boards were not binding on the campuses. (1/5/12 AM Trial Tr. 78-79 (Popovich).; PTX 268 at 1.) At times, state commissions attempted to influence decisions, but no entity was

charged with planning a rational system or process for ensuring ongoing assessment and evaluation of higher education throughout the state. (PTX 268 at 1.)

214. Most of the significant decisions that continue to impact Maryland higher education were made prior to establishment of the state's first true coordinating board, however. (PTX 267 at 2.) By the time the coordinating board finally came into existence, most of the current structure of Maryland higher education had already been established, making it difficult for a coordinating board to guide the system's growth and development. (1/5/12 AM Trial Tr. 7 (Popovich).) For example,

[T]he [fifteen] year period prior to the establishment of the board was characterized by the conversion of the state's teachers colleges to liberal arts campuses, the creation of the University of Maryland Baltimore County (UMBC), the rapid development of academic programs at competing campuses, the decision to add the financially troubled private University of Baltimore to the public system, and creation of a largest program of state aid to private institutions in the Country.

(PTX 268 at 2.)

F. Maryland's College Age Population Declines and the HBIs are Not Capable of Competing with the TWIs

215. As the number of baby boomers that reached college age peaked and started declining, it affected the Maryland higher education system and, in particular, the HBIs. In 1973, as the state was scrambling to build more campuses, the head of the Maryland Council for Higher Education warned of the problems that would result from the impending downturn in enrollments. He noted that births had declined by 16% between 1964 and 1972, lowering the number of potential students seeking higher education. As anticipated, enrollment decreases, tenured faculty, and facilities would remain relatively constant, thus resulting in more than adequate space and faculty, and thereby intensifying competition for students amongst the

existing schools. Additionally, he recognized that some institutions would have difficulty surviving, thereby placing greater responsibility upon statewide coordinating agencies to determine where existing programs should be reduced or eliminated. (PTX 268 at 5.).

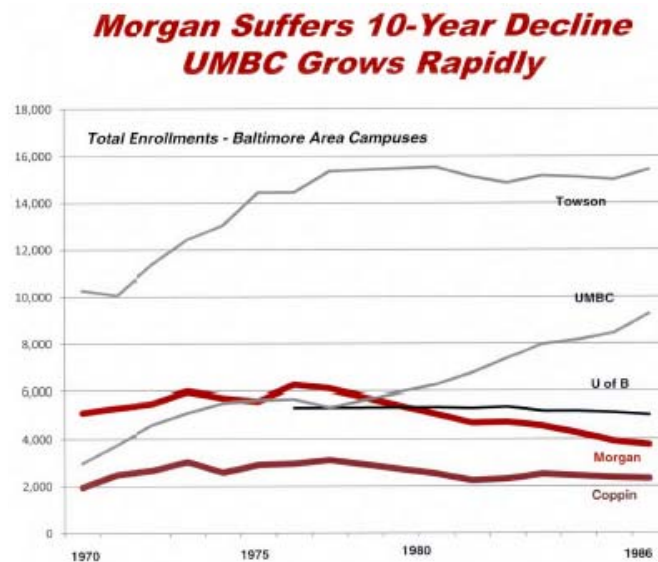
216. In 1973, Maryland's governor "appointed a 27-member Commission to study the structure and governance of education from early childhood through the graduate school, and to report to him on the changes needed to assure quality educational opportunities for all Marylanders." (PTX 380 at 8.) The Commission, known as the Rosenberg Commission, issued its report, "*Final Report of the Governor's Commission on Education*," two years later in 1975. The Rosenberg Commission report made many salient observations about the state's higher education system, but of particular interest were the discussions regarding the previous increase in school population, the program duplication that took place during that time, and the negative effects that would result from the coming decline in student population:

In this postsecondary education section, enrollment trends and related conditions in the State and nation are discussed. Within the last decade enrollment in postsecondary education has undergone dramatic growth. Current trends indicate a leveling off period is immediately ahead and will be followed by a decrease in the future. Enrollment and related trends are important determinants in shaping governmental processes and structures for postsecondary education. Over the last decade, as enrollment increased, so did every related administrative and operational measure. When enrollment decreases, the residue of the former growth period in institutions of higher education most likely remains. Given this premise, the cost efficiency and program effectiveness decreases sharply. As enrollment levels off, competition among institutions of higher education for students increases. At present in the State there is duplication of some programs in postsecondary institutions. The duplication was created, in part, during the period of rapid expansion when projected enrollment dictated such a move. The initial duplication was needed to meet enrollment demands. Today, however, excessive duplication is not only costly but unnecessary when viewed from a perspective of total State needs.

(PTX 380 at 16.) As will be discussed later in this document, the Rosenberg Commission’s comments on the aforementioned subjects proved prescient, particularly in Baltimore.

217. As of the fall of 1978, all five Baltimore area schools (other than Morgan) drew more than half of their in-state students from the city of Baltimore or Baltimore County, and all five drew more than 20% of their students from Baltimore City. (PTX 829 at 20.)

218. The following graphic shows what happened in the Baltimore area schools from 1970-1986: the white schools fared better than the HBIs. Towson grew dramatically from 1970 to 1977 and then its student population stabilized for the rest of the period so it gained about 6,000 students overall. UMBC’s population nearly tripled during the time period. UB, after the state bought it out of bankruptcy, maintained a steady population from 1976 to 1986. Coppin’s 1986 student population was around its 1970 population (about 2,000 students). Its population grew slightly from 1970 to 1978 and then declined slightly from 1978 to 1986. Morgan’s population dropped by over 1,000 students from 1970 to 1986 and by more than 2,000 from 1977 to 1986:



(PTX 39 at 39.)

219. During that period, UMBC and Towson received substantial state assistance. A 1979 report from the State Board of Higher Education, "*Higher Education in the Greater Baltimore Metropolitan Area*" (PTX 829) demonstrates this. Towson (67.7 million) and UMBC (56.1 million) received substantially greater state capital appropriations from FY 1961-1980 than Morgan (27.3 million) or Coppin (27.3 million). (PTX 829 at 39.) Moreover, of the Baltimore schools, UMBC received the highest percentage of state appropriations for operations when compared to the SBHE guideline amount (120%) and the percentage of FY 1979 expenditures (78%). (PTX 829 at 8, 37.)

220. Dr. Popovich testified as to why the HBIs were in trouble during this "no growth" period where there was also pressure to desegregate:

Well, that was essentially the dilemma that the HBU's faced and really everybody faced, but HBCU's weren't that competitive. At the same time that desegregation was required, enrollment growth had slowed down. We had been in a period of very fast enrollment growth during the '60s, early '70s, but that tapered off. And so there really -- and remember we were bringing two new campuses into this system, UMBC, and University of Baltimore. Well, then the state started desegregating its campuses. And like I said, there weren't more students coming into the system. It became pretty much a zero sum gain. And when it came to zero sum gain, my loss is your gain, or your gain is my loss, and that's what happened. White schools kept their white students and added black students. Okay. And the black schools did not add white students. So the white schools pretty much kept their clientele and then added new students in the form of African Americans.

(1/5/12 AM Trial Tr. 109 (Popovich).).

221. Additionally, Dr. Popovich testified as to why the coordinating board's arrival came too late for the HBIs:

It's a competitive environment. Anybody can fare poorly in the competition and need not be an HBCU. But I think we know from history

that HBCU's were less well-equipped for the competition that ensued when development started taking place than the white schools were. I think I would just look at it from the point of view of them having started from a disadvantaged position. . . . And so I think when you're -- unless you have an advocate, such as a coordinating board, saying you should develop this school there, and that school there, the state doesn't have any guidance as to whether -- where it should put its money, the focus is resources. So if you're starting out at a disadvantage, I think you very well maintain that disadvantage.

(1/5/12 AM Trial Tr. 82-83 (Popovich).)

222. While Maryland was still battling with OCR, the SBHE produced a desegregation plan in December 1980 that was intended to cover 1980-85. (PTX 263.) One section of the plan covered enhancement of the HBIs. The plan stated that enhancement was necessary to “overcome past neglect” and to allow students of all races to freely attend HBIs and receive an education equal in quality to that of a TWI. (PTX 263 at 45.) The plan stated that the state would undertake a study regarding enhancement of the HBIs. *Id.*

223. The ensuing report was released in November 1981 and entitled “Enhancement of Maryland’s Predominantly Black Collegiate Institutions: Consultants’ Report to the Desegregation Task Force of the State Board for Higher Education.” (PTX 40) (hereinafter “Consultants’ Report”).

224. Aspects of the Consultants’ Report are discussed in greater detail in later sections of this document but are summarized here. The report referenced the Adams criteria in stating that the concept of enhancement requires a state to ensure that historically black institutions have the facilities, quality and range of programs, degree offerings, faculties, student services and other resources comparable to those at traditionally white institutions having similar missions. (PTX 40 at 9.) The Consultants’ Report defined enhancement so as to encompass the areas of

mission, programs, facilities, and equipment and stated that providing enhancement would require the provision of “special funding” beyond FTE-based funding. (PTX 40 at 9.)

225. The Consultants stated the that state’s policy of tying faculty positions to enrollment hurt the HBIs significantly given their losses in enrollment. As such, they found that the HBIs needed more faculty members in various disciplines but that they would likely be faced with more cuts based on continued projected enrollment losses. To make matters worse, the Consultants acknowledged that the HBIs needed more faculty members rather than less due to significant enrollments in remedial classes as well as in lower division classes at the HBIs which both required a lower student to faculty ratio. (PTX 40 at 246.) They found that all schools had issues with reductions in faculty causing some courses be cancelled or faculty to take on over-load teaching assignments – sometimes without additional remuneration, but that the problem was “more serious and more pronounced in the historically black institutions.” (PTX 40 at 245.)

226. Specific to Coppin, the Consultants reported that “Coppin appears not to have recovered its fiscal, administrative, or psychological balance since the cut-backs of about 1973.” (PTX 40 at 137-138.)

227. Other findings of the Consultants’ Report, which are discussed in greater detail elsewhere, included the following:

- The lab facilities at the HBIs were inferior to those at neighboring high schools. (PTX 40 at 246.)
- A statement that anybody who visited the facilities at Towson, UMBC, or Morgan would choose Towson or UMBC regardless of the quality of the program.
- The State Board reported that low levels of operating support, continually eroded by inflation, resulted in obsolete equipment, low salaries, little money for travel and personnel development, and substantial deferred maintenance in all public colleges and universities. The same conclusion

was reached by the Enhancement Team when it studied the historically black institutions. In addition to the other problems the minority institutions face, the historically black institutions suffer from the State's overall inadequate funding of higher education. (PTX 40 at 245.)

- Deferred maintenance was described as a major obstacle to the enhancement of Maryland's HBCUs, most notably at Morgan and UMES. The study specifically recommended that adequate funds be provided through specific set aside in the annual appropriation for those institutions to maintain and replace instructional equipment. The maintenance of instructional equipment was cited nearly unanimously by academic and non-academic staff as a critical problem at the HBCUs, where relatively small amounts of preventive maintenance could restore unusable equipment to productive status. (PTX 40 at 50.)
- "The physical facilities in humanities at Coppin do not compare favorably with those at Towson, either in scale or in quality. The facilities and equipment at nearby high schools are reported to be superior to those at Coppin." (PTX 40 at 137.)
- The report that the libraries at the HBIs were a particular problem:

In conclusion, the libraries of the four historically black Institutions are in need of new, expanded financial support, consistent funding, managerial freedom for the directors, increased staffing and travel/continuing education funds, and upgraded equipment.

(PTX 40 at 69.) In addition, since 1968, the library at UMES had been "intermittently without air conditioning, and since the Spring, 1980, [sic] it has been totally without air conditioning. This is obviously detrimental both to users as well as materials; and this deficiency should be corrected without delay." (PTX 40 at 60.)

228. According to Dr. Popovich, who worked at SBHE during its 1975 to 1988, SBHE's ability to enhance HBIs was hampered because it did not have control over facility and operating budgets, which were the province of the State's budget office. (1/9/12 AM Trial Tr. 30-31, 76-77 (Popovich).)

G. The HBIs Suffer as OCR Withdraws and the State Restructures its Higher Education System

229. In 1985, Maryland adopted a new statewide desegregation plan entitled *A Plan to Assure Equal Postsecondary Educational Opportunity 1985-1989*. (PTX 305 at 1.) OCR and Maryland put aside their differences and reached agreement on the 1985-1989 plan. (PTX 4 at 6.) According to Maryland, the 1985-1989 plan focused on desegregating HBIs by making them comparable to competitive to TWIs:

The Plan was accepted by OCR as one which could meet the requirements of Title VI. Its principal objectives were (1) the continued integration of Maryland's TWIs through a portfolio of enrollment goals, recruitment measures, retention efforts and affirmative action plans, and (2) the enhancement of Maryland's HBCUs to ensure that they are comparable and competitive with TWIs with respect to capital facilities, operating budgets, and new academic programs. The Plan provided for a wide range of measures and activities to meet these objectives, including enhancement of the HBCUs, desegregating student enrollments through increased recruitment and improved retention programs for African American students, and desegregating faculties, staffs and governing boards, all of which were designed to meet the mandates of Title VI in the state-supported institutions of higher education in Maryland.

(PTX 4 at 6.)

230. When the 1985-89 plan expired, Maryland submitted a final report on the plan in 1991. (PTX 44.) Statistics from the 1991 report demonstrated that Maryland had not been key desegregation goals. One goal related to percentage of other-race enrollments, for first time, full-time freshmen at the HBIs. None of the four HBIs were at the 1989 goal and overall, the HBIs were at half the percentage in the goal:

| Institution | Fall 1989 Other Race % | Fall 1989 Other Race % |
|-------------|------------------------------|------------------------------|
| | Actual | Goal |
| Bowie | 13.5% | 29% |
| Coppin | 11.3% | 15% |

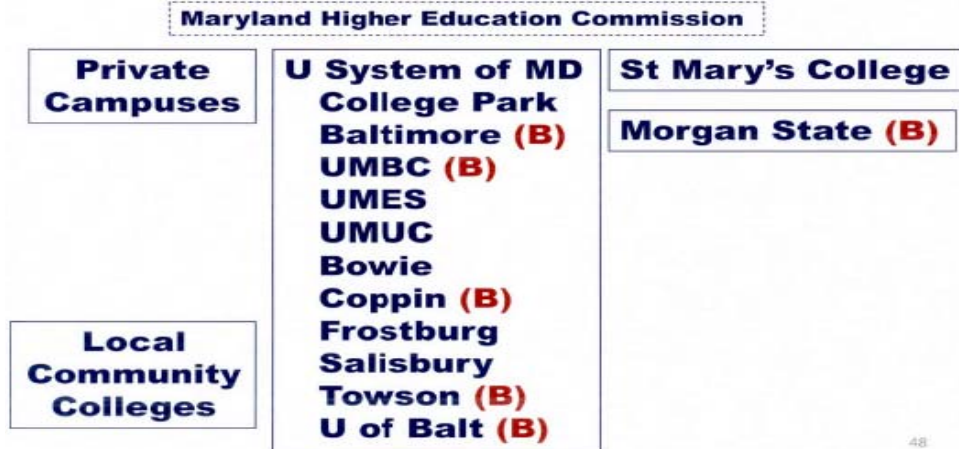
| | | |
|---------------|-------|-----|
| Morgan | 2.9% | 15% |
| UMES | 19.4% | 25% |
| Total | 10.5% | 19% |

(PTX 44 at 58.) Additionally, in regard to programs, the 1985-1989 plan stated that Maryland would commit to implement 25 programs at the HBIs from 1985-89 but the May 1991 report indicated that the State had implemented only 13 new programs at the HBIs since the adoption of the 1985 plan. (PTX 44 at 14.)

231. From the time the 1985-1989 plan expired until 1999, OCR was silent regarding Maryland's compliance with the 1985-1989 plan. (1/9/12 AM Trial Tr. 27-28 (Popovich).) The only thing OCR did with respect to Maryland higher education was issue a "*Notice of Application of Supreme Court Decision*" applying *Fordice* to all pending Title VI evaluations of statewide higher education systems with expired desegregation plans, including Maryland. (PTX 4 at 7.) The factors that OCR intended to consider included those addressed in *Fordice* and those in the criteria for acceptable desegregation plans published by OCR in the Federal register. Specifically, OCR stated that states may not place an "unfair burden on African American students and faculty in the desegregation process" and that "state systems of higher education may be required to strengthen and enhance HBCUs." (PTX 4 at 23.)

232. At the same time, Maryland reorganized its higher education system in 1988 and that is basically the system in place today. The following graphic shows the organization:

Structure Following Reorganization



(PTX 39 at 48.) Aspects of the current organization are detailed elsewhere and are summarized or not discussed here. Some of the changes related to the new structure follow.

233. As shown above, the oversight body changed from State Board of Higher Education to the Maryland Higher Education Commission (“MHEC”). SBHE and its Commissioner were independently appointed whereas MHEC and its Secretary are appointed by the Governor and the Secretary is part of the Governor’s cabinet. As a result, the coordinating body is less independent. (1/9/12 AM Trial Tr. 23-24 (Popovich).)

234. MHEC’s responsibilities include approving mission statements and academic programs, making operational funding decisions based on guidelines it has created, and making capital funding recommendations. Md. Code Ann., Educ. §§ 10-203, 11-302, 11-105, 11-206. MHEC also has the responsibility of ensuring that Maryland complies with desegregation laws. In addition, the Code obligates MHEC to include funding for enhancing programs at HBIs as a part of the funding recommendations it provides to the General Assembly. *Id.* at § 11-105.

235. In addition, as shown above, the University System of Maryland was created as the governing body for all of the senior public institutions of higher learning other than Morgan

State and St. Mary's. Md. Code Ann., Educ. §§ 10-101, 12-101(b)(5). The Education Code includes a whole set of duties for USM. The USM Board of Regents is the governing body for the USM institutions and the USM's day-to-day operations are led by a Chancellor. Among other duties, the USM Board and/or Chancellor hires the presidents of USM institutions and submits the budget proposals for the system and its institutions, and sets tuitions for the institutions. As a precursor to MHEC approval, the USM Board and/or its Chancellor approves mission statements and program proposals for individual USM institutions. Md. Code Ann., Educ. §§ 10-207(a), 10-208-09.

236. In the reorganization, certain TWIs were given unique roles. For example, UMCP was given a special role as a "flagship campus with programs and faculty national and internationally recognized for excellence in research and the advancement of knowledge." Md. Code Ann., Educ. § 11-105(b)(5)(i). The Code also states that UMCP is to be given a "level of operating funding and facilities necessary to place it among the upper echelon of its peers." Md. Code Ann., Educ. § 12-106(a)(1)(iii). The Code also provides for a "Higher Education Center for Research and Graduate and Professional Study in the Baltimore area, comprised of the University of Maryland, Baltimore and the University of Maryland Baltimore County." Md. Code Ann., Educ. § 12-106(a)(2).

237. Dr. Popovich has called this era after the 1988 reorganization and during OCR's inattention as the "Fourth and free market coordination" (PTX 39 at 49). He provided an example of this in his testimony and how the free market approach resulted in increased program and mission duplication:

Q: You mean the desegregation plan.

A: The desegregation plan expired, shortly thereafter, the coordinating board moved to more -- a less restrictive approach on campus development. I just happened to be at one of the commission meetings in the early '90s, and there was I think a matter pending concerning the University of Phoenix wanting to operate in the state. Campuses generally were opposed to that. I think the commission was putting campuses, that campus through a lot of obstacles. The Secretary of Higher Education announced that the Governor and her talked about that, and the Governor wanted more competition, not less competition. So I think there was guidance, if am to read her statement correctly, there was guidance to open up development of programs and to have, I call it a free market, because there was a lot more program development from there on than there had been previously.

Q: What effect, if any, has this had on Morgan?

A Well, I think it has had an effect everywhere. There's just a lot more programs, and I think there's just a lot more duplicative programs. So to the extent that campuses duplicate one another, and to the extent that that may be harmful to a given campus, I think that gets exposed in this. Generally speaking, you know, it became harder to be unique in this environment. It became harder to have a mission that differed from everyone else's. There was just simply a lot more program approval activity. The other thing I think changed was missions. I think there was a point up through here where you could look at campus missions succinctly and know who was responsible for what, who was doing associate degrees, who was doing master's degrees, and who was doing doctorates, and in what areas. I think now if you looked at mission statements from mostly just about every four-year school, they would look pretty much similar. So I think the same thing that happened with missions has happened with programs. They became more comparable.

(1/9/12 AM Trial Tr. 25-27 (Popovich).)

238. In that vein, the 2000-2010 USM State Plan, which was adopted in July 2000 advocated for a “free market and open competition” model because schools such as a more restrictive approach “reduce[d]” the ability for schools like Towson and UMBC “to achieve national prominence.” (PTX 133 at 26.)

239. Enrollment at the HBIs improved in the 1990s but it came at the cost increased segregation and greater financial strain on the HBIs. Segregation increased at the HBIs in the

1990s: enrollment of African Americans increased and white enrollment decreased. A team of researchers at the University of Maryland issued a paper which stated this resulted from state policies: “*State Public Policies and Racial/Ethnic Stratification of College Access and Choice in the State of Maryland.*” (PTX 851 at 1.) Interim MHEC Secretary Howard was part of that research team that wrote the paper and she has referenced the paper in her work though she did not work on the paper. (1/23/12 AM Trial Tr. 64-66 (Howard).) The number of black first-year, full-time undergraduates increased by 41% whereas the number of white first-year, full time undergraduates decreased by 49% at HBIs between 1990 and 2000. (PTX 851 at 7-9.) State appropriations to HBIs between 1990 and 2000 increased at a lower rate than to TWIs and tuition and fees at HBIs also increased by a lower rate. The differential in tuition and fees when from \$390 in 1990 to \$1,125 in 2000. (PTX 851 at 13-17.) For the reason that African Americans are more sensitive to tuition changes, the researchers concluded that “increases in tuition appear to be cause of the increased racial/ethnic stratification of higher education access in Maryland.” (PTX 851 at 12). Thus, the HBIs improved their African American enrollment while their financial situation became worse relative to TWIs as a result of lower increases in state appropriations as well as tuition and fees.

240. A 1999 state task force report found that MHEC and USM had not met its obligation in the 1988 code reorganization to develop a desegregation plan for the HBIs and to enhance the HBIs. “[T]he 23 members of the Larson Task Force were appointed to examine issues related to the University System of Maryland ten years after its creation.” (PTX 563 at 4.)

The Task Force [was] charged with studying: 1) the governance, coordination, and funding of the University System of Maryland; 2) methods to increase the prominence of the University System of Maryland’s constituent institutions nationally and internationally; and 3) the efficiency of higher education services to Maryland citizens.

(PTX 563 at 23.) When making its final report, in addition to the aforementioned items,

[t]he Task Force focused on key issues raised by stakeholders and experts in higher education in a number of areas including: statewide goals and priorities for higher education; the governance structure of the University System of Maryland (USM); duplication and overlap of authority between the Maryland Higher Education Commission (MHEC) and USM; flexibility in management and reporting functions; and funding issues.

(PTX 563 at 4.) The Larson Task Force released its report, “*Task Force to Study the Governance, Coordination, and Funding of the University System of Maryland*,” to Maryland’s Governor and General Assembly in January of 1999. (PTX 563 at 4.)

241. The Larson Task Force report contained an analysis of Maryland’s Department of Legislative Services regarding “discrepancies” in the efforts of MHEC and USM to implement their responsibilities under the 1988 reorganization. One of the discrepancies was that, according to DLS, MHEC did not create a program of desegregation until ten years after the 1988 reorganization:

MHEC is required to develop a program of desegregation and equal educational opportunity which must include an enhancement plan for the historically black colleges and universities (HBIs). MHEC continues to use its *Plan to Assure Equal Postsecondary Educational Opportunity* as an enhancement plan. However this plan was developed between 1985-1989, prior to the enactment of this Act. Additionally, MHEC articulated specific goals for the enhancement of HBIs in the 1991 and 1998 statewide plans for higher education. However, it is unclear if these goals meet the statutory requirement of a “program” or “enhancement plan.” In 1998, MHEC initiated the *Access and Success* program, a plan of action for Maryland’s HBIs. However, this action was not taken until the budget committees adopted narrative requiring MHEC to establish a plan. DLS suggests that the statutory requirement to develop a program and enhancement plan was not met until 1998 when the *Access and Success* program was initiated. Additionally, DLS notes that the graduation and retention rates of African American students remains well below other students and requires greater focus.

(PTX 563 at 60.)

242. In addition, DLS found that MHEC had not included special initiative funding for academic programs at HBIs as required by the statute until ten years after the reorganization even though the HBIs had submitted enhancement plans upon MHEC's request:

MHEC's funding proposals for public senior higher education institutions must include special initiative funding for academic programs at HBIs. In 1992, MHEC requested enhancement plans from the four HBIs. The plans submitted by the HBIs included requests for additional general fund support for special initiatives. However, additional funding was not requested in MHEC's "consolidated budget recommendation" due to the economic recession. In response to a directive from the joint budget committees, MHEC proposed special initiative funding for HBIs in 1998 as part of the *Access and Success* program. DLS interprets the statute to require MHEC to include special initiative funding for academic programs at HBIs in its annual proposal for funding public senior higher education. It is possible that special initiative funding may not be included in MHEC's "consolidated budget recommendation." However, this special initiative funding should be included in MHEC's proposal on the "appropriate level of funding."

(PTX 563 at 61)

H. After Five Years Of Silence From OCR, Maryland And OCR Enter A Five-Year Partnership Agreement In 2000

243. In 1998, MHEC approved and published its statewide plan for postsecondary education, "*Educating for the 21st Century*." Its goals, strategies and tactics addressed (1) the ethnic diversity of Ph.Ds in faculty and administrative positions at all institutions; (2) the promotion of campus climates accepting of diverse groups and the establishment of multicultural approaches to educational experiences; (3) multicultural diversity on state campuses; (4) recruitment and retention of minority students, faculty and professional staff; and (5) gender and salary equity of faculty and administrative staff of public colleges and universities. (PTX 4 at 12.)

244. Later that same year, a task force was formed to study the governance, coordination and funding of the University System of Maryland. In response to the task force's recommendations, the state legislature restructured Maryland's system of higher education. Among other things, the legislation required a new state plan for higher education with long and short term objectives and priorities, and guidelines for achieving them. The legislation created the Maryland Commission for Higher Education, as well as a process by which the Commission would object to proposed programs which would violate Maryland's equal educational opportunity obligations under state and federal law. (PTX 4 at 12.)

245. "In response to the Southern Education Foundation reports entitled *Redeeming the American Promise: Report of the Panel on Educational Opportunity and Postsecondary Education* (1995) and *Miles to Go: A Report on Black Students and Postsecondary Education in the South* (1998), the State formed the Southern Education Foundation Maryland Leadership group and issued a 'call to action.'" (PTX 4 at 16.)

246. "In its 1999 report entitled *Miles to Go – Maryland*, the Southern Education Foundation acknowledged Maryland's efforts to improve access and success for its African American students," but nevertheless determined that Maryland still "has a long way to go before it achieves the promise of equal educational opportunity for all students." (PTX 4 at 16.) Maryland agreed to address college readiness, teacher preparation, and financial aid to achieve the promise of educational opportunity for all students. (PTX 4 at 16.)

247. From the conclusion of Maryland's five-year plan in 1989 until 1999, OCR did not comment upon the status of the state's compliance with Title VI. (PTX 4 at 23.) Starting in 1999, OCR conducted site visits to all four of Maryland's HBIs followed by separate visits to many of Maryland's TWIs, including UMBC, UB, Towson, Salisbury and Frostburg. OCR did

follow-up visits to the HBIs the next year. On the basis of those visits and OCR's review of data and documents, it identified "several issues of access and equity for African American students in Maryland. For example, Maryland officials and OCR recognize that *enhancement of the HBIs will remain an important concern even though information provided by Maryland demonstrates that numerous enhancement initiatives were implemented as a result of the 1985-1989 desegregation plan and have continued since that time.*" (PTX 4 at 24.) (emphasis added) In other words, in OCR's assessment, enhancement efforts through 1989 had yet to resolve the equity issues faced by African American students throughout the state.

248. In the 2000 State Plan, MHEC acknowledged that Maryland had not desegregated its system of higher education, which would require both financial investment and a commitment to programs:

249. Additionally, the State recognizes its fiscal responsibilities to achieve and sustain a desegregated system of higher education consistent with Title VI of the Civil Rights Act of 1964 and as mandated by the 1992 U.S. Supreme Court decision in *U.S. v. Fordice*. Achieving and sustaining a desegregated system will require additional State investments in historically black colleges and universities as well as a commitment to programs that improve educational opportunities for African-American students.

(PTX 293 at 30.)

250. In that 2000 State Plan, MHEC also acknowledged that the Partnership Agreement with OCR would set forth Maryland's legal obligations under *Fordice*. "Because of its history of *de jure* racial segregation, Maryland has an obligation under both federal law and court decisions to remedy past discrimination and remove its vestiges. The State is working with

the U.S. Office of Civil Rights to develop a partnership agreement that will further equal educational opportunity in Maryland postsecondary education.” (PTX 293 at 41.)

251. Thirty years after OCR first informed Maryland it had failed to desegregate its colleges and universities, OCR notified the state once again that it had yet to dismantle its dual and unequal system of higher education. (1/11/12 AM Trial Tr. at 28 (Oliver).) In spite of years of federal monitoring and oversight, as well as state legislation requiring MHEC to create a plan to enhance the state’s four HBIs, Maryland had failed to eliminate the vestiges of discrimination from its public colleges and universities. Maryland recognized that even as of 2000, the State’s HBIs were not comparable and competitive to the TWI peers and “there was disparity between the TWIs and HBIs that was an issue that needed to be addressed immediately.” (1/11/12 AM Trial Tr. 41 (Oliver).)

252. In 1999, OCR therefore initiated another series of conversations with Maryland, during which OCR communicated its concern that Maryland remained out of compliance with Title VI and needed to correct the ongoing segregation at Maryland’s higher education institutions. (1/11/12 AM Trial Tr. at 28 (Oliver).) Specifically, OCR “believed that Maryland had not completely eliminated the vestiges of the *de jure* segregation that had existed historically and Maryland had not lived up to its obligation to eliminate those vestiges.” (1/11/12 AM Trial Tr. at 28 (Oliver).)

253. OCR offered Maryland the option of either subjecting to a compliance review, or entering a partnership agreement designed to ensure compliance with the Equal Protection Clause and Title VI. (1/10/12 AM Trial Tr. 36 (Conrad); PTX 851 at 18; PTX 69 ¶ 50; 1/11/12 AM Trial Tr. at 28 (Oliver).) Faced with those options, on October 25, 1999 Maryland agreed to engage in another five-year partnership agreement with OCR.

254. The agreement took effect in 2000, with the Maryland Higher Education Commission (MHEC) serving as the designated enforcement agent for Maryland. (PTX 851 at 19; PTX 69 at 50; 1/10/12 AM Trial Tr. 36 (Conrad).) “In accordance with the ‘Partnership Agreement,’ the Maryland Higher Education Commission (MHEC of “the Commission”) has an obligation to remedy all policies and practices in the Maryland Higher Education System traceable to a prior system of segregated education.” (PTX 8 at 73.)

255. Integral to this agreement was the understanding that the state’s obligations under Title VI involved desegregation of not just its TWIs, but also its HBIs. Based upon its analysis, OCR elected to focus the agreement on enhancing Maryland’s four HBIs to improve educational opportunities for the African American students who attend them, and to increase their attractiveness to students of all races, especially white students, including the elimination of unnecessary academic program duplication among the HBIs and geographically proximate TWIs. (PTX 4 at 24.) Declines in “other race enrollment” at any level of study would require “immediate corrective action.” (PTX 4 at 31.)

256. Maryland also agreed to increase access for African American students at Maryland’s TWIs and community colleges and to implement financial aid programs designed to minimize the barriers to higher education. (PTX 4 at 24.)

257. The commitments reflected in the 2000 Partnership Agreement represent Maryland’s understanding of what was required to bring its system into compliance with Title VI. The Agreement outlined the concrete steps Maryland understood it must take to eliminate those vestiges of its *de jure* system of higher education still existing in 1999 by 2005. (1/11/12 AM Trial Tr. at 35 (Oliver).) Maryland’s position was that it was not in compliance with its obligations under federal law, and the Partnership Agreement represented an important “first

step” in addressing the remnants of segregation still in existence as of 2000. (1/11/12 AM Trial Tr. at 35 (Oliver).)

258. Central to the 2000 Partnership Agreement was Maryland’s commitment to the continuing contributions of its four HBIs and “the necessity of ensuring that these institutions are comparable and competitive with the State’s TWIs in all facets of their operations and programs.” (PTX 4 at 25.) Remedying the vestiges of past discrimination required expanding educational opportunities for African American students without placing unfair burdens on them in the desegregation process, or compromising the unique role of HBIs and their students, faculty, and staff. (PTX 4 at 25.)

259. Comparability and competitiveness in mission and programs is essential to the elimination of racially identifiable campuses. Therefore, Commitment 8 of the Partnership Agreement pledged to develop unique, high-demand academic programs at the HBIs and to ensure that the programs were not unnecessarily duplicated at nearby TWIs. The state’s affirmative obligation to develop unique, high-demand programs at the HBIs exists irrespective of efforts by the institutions themselves to expand their curricular offerings. (1/11/12 AM Trial Tr. at 38 (Oliver).)

260. This obligation was embodied in Commitment 8 of the 2000 Partnership Agreement. There are two aspects to this commitment: (1) the avoidance of unnecessary program duplication among geographically proximate Historically Black Institutions (HBIs) and Traditionally White Institutions (TWIs); and (2) expansion of mission and program uniqueness and institutional identity at the HBIs.” (PTX 8 at 73.)

261. In the context of the 2000 Partnership Agreement, “unnecessary program duplication” referred to those instances in which broadly similar academic programs (i.e., with

respect to overarching purposes, overall curriculum content, and expectations of program graduates) were offered in areas other than the core undergraduate liberal arts and sciences at geographically proximate TWIs and HBIs. (PTX 4 at 36.) MHEC was instructed to reject unnecessarily duplicative program proposals unless it identified “sound educational justification.” (PTX 4 at 36.)

262. At the same time, comparability and competitiveness demands not just that programs are unique, but that HBIs are able to offer high-quality, high-demand programs. Therefore, in addition to preventing unreasonable program duplication, MHEC was also directed to ensure that “new, unique high demand and other programs are approved by HBIs by operation of law or by MHEC, for the purpose of promoting their institutional competitiveness and ensuring these institutions attract students regardless of race.” (PTX 4 at 37.) Dr. Thompson testified that “a good indicator of the extent to which HBIs are competitive with their peers will be the extent to which they attract students of other races based on program quality.” (1/4/12 PM 28:13-29:1 (T. Thompson).)

263. Commitment 9 of the 2000 Partnership Agreement required the state to enhance its historically black colleges and universities and to make the HBIs comparable and competitive with the TWIs by authorizing MHEC to review and approve the institutional role of each school within its system. Consistent with state law, each institution was to revise its mission to ensure compliance with the 2000 State Plan for Education in a way which would support the expansion of programs at the HBIs and promote desegregation at both the TWIs and the HBIs. (PTX 4 at 38.)

264. “The revised missions will support future establishment of high demand programs at the HBIs that will enhance their respective institutional identities. The missions will ensure

that they do not promote racial identifiability at any of the State's public institutions of higher education or otherwise foster segregation and discrimination by race." (PTX 4 at 36.)

265. Enhancement was needed "as soon as possible." This included

the distinctiveness of the HBCUs programmatic missions; the uniqueness and mix of quality academic programs that are not unnecessarily duplicated at proximate TWIs; operational funding consistent with the mix and degree level of academic programs, support for the development of research infrastructure and support consistent with the academic profile of students; lower student-faculty ratios to support their missions; the expanse, functionality and architectural quality of physical facilities; the appearance, attractiveness and ambiance of the campus and surrounding public infrastructure...is funding to support students' quality of campus life.

(PTX 4 at 38.)

266. The 2000 Partnership Agreement recognized that enhancement of Maryland's HBIs would require a meaningful investment of state funds, both in terms of operational funding and capital funding. With respect to operational funding, Commitment 9 noted that consistent with the Agreement, commitments to enhance the HBIs would be provided through the normal budget process based on operating budget funding guidelines and, as may be appropriate and available, special enhancement funding. (PTX 4 at 38.) "The State agrees to assess and incorporate into its established budget and program review procedures the operating (including academic programs) and capital enhancement funding proposals for each HBI." (PTX 4 at 38.)

267. In addition, Commitment 9 required Maryland to ensure that facilities at its HBIs are of the quality necessary to support the missions and programs of the institutions. It contemplated that HBI facilities be "comparable in scope and quality," to the state's TWIs. Commitment 9 also envisioned improvements to campus infrastructure. (PTX 4 at 38.) Included in this commitment was the enhancement of campus environments "to ensure parity with the

TWIs” in terms of the “quality and adequacy of facilities necessary to support the missions and programs of the institutions.” (PTX 4 at 38.)

268. The 2000 Partnership Agreement also identified other “critical activities” essential to desegregating Maryland’s HBIs. Specifically, Maryland agreed to promote diversity at the HBIs and improve their ability to attract other race students by enhancing admissions and the “development and implementation of an admissions strategy that is competitive with other publicly funded institutions in recruiting and admitting a racially diverse group of qualified students.” This involved enhancing the administration of financial aid at the HBIs “to provide student financial aid counseling as well as timely and appropriate processing and payment of student financial assistance.” (PTX 4 at 39.)

269. Moreover, the Agreement acknowledged that enhancement required improving the ability of these institutions to reach out to – and recruit – students through institutional program development “including public relations, governmental relations, community relations, alumni affairs and development – designed and implemented so as to increase the institution’s visibility within its community and across Maryland.” (PTX 4 at 40.)

270. Of particular concern to OCR was the status of Coppin State. The 2000 Partnership Agreement required Maryland and MHEC to complete an independent study leading to a comprehensive strategic plan for the revitalization of Coppin. (PTX 4 at 42.) The Agreement was specific in its description of the concrete steps necessary to enhance an institution: expanded mission, unique programs, comparable facilities and equipment capable of supporting programs and mission, all leading to a diverse student population. (PTX 4 at 42.) While these issues were identified specific to Coppin, each is informative of OCR’s understanding of institutional enhancement more generally:

The strategic plan will provide a vision for the future of Coppin, including an enhanced mission, academic programs, administrative and faculty staffing, institutional advancement, fiscal affairs, and physical plant. The strategic plan will identify the new construction and renovation of existing facilities needed to provide campus facilities which are equivalent to those at other publicly funded institutions.

(PTX 4 at 42, 43.)

271. The “strategic plan for the revitalization of Coppin” was ordered to address the following:

In this study, consideration will be given to classrooms, laboratories and other instructional facilities as well as academic, counseling and administrative offices, walkways, and other common areas. Consideration will also be given to those facilities as are found in nearby, publicly funded institutions that provide for parking, childcare, athletic opportunities, recreation and other supplementary services. For this purpose, facilities will be regarded as “equivalent” if they support the institution’s mission and provide an atmosphere of safety and security, comfort, and convenience at a level comparable to TWIs.

(PTX 4 at 43.)

272. MHEC anticipated that additional support – including financial – would be integral to program development: “MHEC will support the development and approval of additional academic programs at Coppin, consistent with its revised mission, and *provide any assistance necessary in the development of these new programs, as well as the strengthening of existing academic program offerings.*” (PTX 4 at 43.)(emphasis added)

273. Moreover, it was clear at even without new programs, Coppin would benefit from additional support to strengthen its current programs: “In addition, the plan will identify steps to be taken in order to ensure a broader mix of students, such as through the enhancement of an endowment at Coppin to provide full tuition, four-year merit scholarships to undergraduate students.” (PTX 4 at 43.)

274. The commitments Maryland made in the 2000 Partnership Agreement are educationally sound. Mr. Oliver, who served as Chairman of MHEC and signatory to the agreement on behalf of Maryland, describe the commitments as practical as well as achievable: “We felt they were very practical because we really, with the amount of effort that went into the negotiations, the parties that were involved, we really had a clear sense that these commitments, these obligations could be fulfilled, and they were practical ones. Because it was our belief, particularly my belief, that otherwise they wouldn’t be in the agreement.” (1/11/12 AM Trial Tr. at 37 (Oliver).)

275. Despite the practicability and achievability of these commitments, Maryland did not abide by Commitments 8 and 9 of the Partnership Agreement. Specifically, as will be outlined below, Maryland failed to act on enhancement requests submitted by the HBIs in 2001 pursuant to the Partnership Agreement. (1/12/12 PM Trial Tr. 33 (Richardson).) Upon expiration of the Agreement, Maryland would convene two “blue ribbon” panels to assert the State had fully complied with all of the commitments in the Agreement, but as outlined below, witnesses at trial questioned both the substance and the process involved in reaching those conclusions.

I. The Years Since The 2000 Partnership Agreement Confirm Maryland Has Not Yet Eliminated The Vestiges Of Discrimination From Its System Of Higher Education

276. From the mid-1990s onward, Maryland once again experienced growth in student enrollment. (PTX 267 at 2.) But following the expiration of the 2000 Partnership Agreement, Maryland’s system of higher education is characterized by too many campuses in Baltimore and on the Eastern Shore, but too few opportunities for higher education in growth regions of the state. While many of the TWIs became increasingly selective, the HBIs continue to serve a high

percentage of minority, first generation college students with high remedial and financial needs. Overall, there has been insufficient funding to adequately support Maryland's current system, or to expand to serve unmet needs. (PTX 39 at 62.)

1. When Maryland's funding guidelines were modified after 2004 to consider overall enrollment, Maryland's HBIs were losing students

277. Between 1989 and 2004, MHEC adjusted its funding guidelines to exclude workload measures such as enrollment at a time when growth at the HBIs was accelerating as the state witnessed an increase in black students of college age. (PTX 829 at 1.) As a result, state appropriations for Coppin, Bowie and UMES actually decreased and there was a much smaller increase in funding for Morgan in comparison to the increases experienced by Maryland's TWIs. (PTX 266 at 52.) These factors combined to produce unfunded growth at the state's black campuses. (PTX 829 at 1.)

278. When the state reverted to enrollment-based funding, the system of higher education was characterized by weak state coordination, extensive expansion in statewide programs, and duplication of missions and programs which increased competition for resources. (PTX 39 at 51.) This led to greater reliance on revenues from tuition. (PTX 892 at 23.) Even with the freeze on in-state tuition, tuition and fee revenues made up a larger share of the incomes of four-year colleges and universities. Forty-eight percent of revenues in FY 2010 came from tuition and fees, up from 44.8% in FY 2008. (PTX 892 at 23.)

279. This occurred at a time when HBIs experienced overall declines in enrollment. For example, between 2006 and 2011, the five-year change in enrollment reveals declines for all USM institutions, but marked declines for Bowie (-18.5%) and UMES (-33.7%). Coppin's one-year change in enrollment between 2010 and 2011 represents a decline of 7.4% at a time when

its overall enrollment numbers were already the lowest in the USM system. By contrast, Salisbury's undergraduate enrollment saw a 21.8% increase over the five-year period between 2006 and 2011. (PTX 941 at 8.)

280. The following table shows trends in enrollment of first-time, full-time undergraduates for 2001-20011:

| First Time Full Time Undergraduates | | | | | | | | | | | | One-Year | Five-Year |
|-------------------------------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|-----------------|-----------------|-----------------|--------------|--------------|
| Institution | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | % Change | % Change |
| BSU | 599 | 576 | 754 | 627 | 647 | 764 | 820 | 773 | 706 | 671 | 623 | -7.2% | -18.5% |
| CSU | 540 | 579 | 571 | 601 | 689 | 508 | 570 | 605 | 566 | 525 | 486 | -7.4% | -4.3% |
| FSU | 927 | 1,001 | 990 | 959 | 927 | 1,013 | 1,059 | 1,030 | 1,031 | 1,028 | 825 | -19.7% | -18.6% |
| SU | 945 | 909 | 947 | 983 | 956 | 1,028 | 1,144 | 1,201 | 1,279 | 1,253 | 1,252 | -0.1% | 21.8% |
| TU | 1,912 | 2,203 | 1,756 | 2,085 | 2,322 | 2,692 | 2,657 | 2,829 | 2,398 | 2,428 | 2,545 | 4.8% | -5.5% |
| UB | | | | | | | 143 | 163 | 174 | 155 | 152 | -1.9% | |
| UMBC | 1,333 | 1,357 | 1,489 | 1,403 | 1,415 | 1,420 | 1,425 | 1,557 | 1,524 | 1,499 | 1,415 | -5.6% | -0.4% |
| UMCP | 4,358 | 3,900 | 4,057 | 4,179 | 4,199 | 3,945 | 4,225 | 3,902 | 4,211 | 3,925 | 3,990 | 1.7% | 1.1% |
| UMES | 1,194 | 1,114 | 952 | 926 | 983 | 1,128 | 875 | 1,038 | 876 | 944 | 748 | -20.8% | -33.7% |
| UMUC | 52 | 47 | 45 | 77 | 60 | 187 | 118 | 115 | 150 | 150 | 186 | 24.0% | -0.5% |
| USM | 11,860 | 11,686 | 11,561 | 11,840 | 12,198 | 12,685 | 13,036 | 13,213 | 12,915 | 12,578 | 12,222 | -2.8% | -3.6% |
| MD H.S. Grads** | 56,855 | 58,527 | 60,037 | 61,105 | 65,335 | 64,502 | 66,658 | 68,291 | 66,607** | 65,013** | 65,013** | | |

Source: * MHEC Preliminary Opening Fall Enrollment (2011) and EIS (2001-2010) ** Public and nonpublic high school graduates data - MSDE
 **The 2009-2011 actual Maryland high school graduates is currently not available; WICHE estimates used.

(PTX 941 at 8.)

2. Pursuant to the 2000 Partnership Agreement and the 2000 State Plan, Maryland promised to revitalize Coppin, but two new buildings did little to transform the overall campus and Coppin remained largely unchanged

281. Pursuant to the 2000 Partnership Agreement, Maryland prepared a 2001 Revitalization Plan for Coppin. Nevertheless, Maryland failed to invest the substantial resources necessary to elevate Coppin to a level which would allow it to become comparable and competitive. Even today, Coppin struggles with the effects of low tuition, the need for additional capital funds, and a mission which no other institution is willing to serve – educating some of the state's most challenging students. (PTX 810 at 15.)

282. “Coppin's ability to remain relevant and dynamic, however, hinges on a serious, extensive revitalization effort.”

283. Without the College's existence, it is doubtful that any other institution would take up Coppin's mission, a mission that is especially expensive to fulfill. The students Coppin attracts are often beset by financial difficulties, making it impossible for the College to pass along costs to them. Furthermore, the programs from which they graduate - valuable as they are to sustaining the community and the City of Baltimore - are not those that typically produce wealthy alumni. (PTX 810 at 15-16.)

284. The 2001 Coppin Revitalization Study found that Coppin needed not only substantially more capital funding, but also an infusion of operating funds to allow it to recover from "a century of constraints." (PTX 810 at 15.) "The operation of a university campus involves certain fixed costs regardless of the enrollment of the institution. The high cost per FTE for Coppin ... is reflective of the campus being built out" pursuant to the capital plan to, "accommodate a larger enrollment than Coppin has yet to achieve. (PTX 810 at 52.) In spite of what Coppin has historically lacked, the guiding premise on campus has been, "Do the best you can with what you've got." (PTX 810 at 14.)

285. In terms of tuition, Coppin's tuition is \$600 per year below the next lowest tuition in the USM. Although Coppin historically endeavored to keep its tuition level modest to accommodate students from low-to moderate-income families, the freeze on in-state undergraduate tuition has resulted in a current rate that is lower than necessary to accommodate its student body. Further, the shortfall in revenue inhibits the development of programs that would lead to student success. (PTX 810 at 52.)

286. Coppin was also found to lack dedicated trained staff with experience and knowledge in how to obtain external funding:

A stand-alone Office of Sponsored Research (OSR) has not been established however, the services associated with that office are being provided by personnel who have other unrelated primary responsibilities.” Because of the complexity of operations and federal regulations associated with a well-organized office capable of securing research funds, Coppin requires personnel fully experienced and knowledgeable in external funding submissions, implementation, and pre- and post-award processes.

(PTX 810 at 27.)

3. As white enrollment at HBIs continued to decrease over time, Maryland moved further away from desegregating its programs during the period covered by the 2000 Partnership Agreement

287. Maryland’s HBIs experienced not just declines in overall enrollment, but significant declines in white enrollment, as well. Maryland began to collect student data by race from its public campuses in 1970. By 1972, all campuses were able to provide student data by race. That data reveals that in spite of federal oversight and two agreements with OCR prioritizing other race enrollment at Maryland’s HBIs, white graduate students are considerably more concentrated at TWIs today than 40 years ago. (PTX 184 at 1.) Although the overall number of graduate students at HBIs has been stable since 2000, other public campuses have seen a 44% increase since 2000. (PTX 184 at 3.) The decline in white graduate students at the HBIs between 1972 and 2008 represents a 56% decrease in the overall enrollment of white graduate students. “This loss ... has had a devastating impact on the ability of HBIs to grow.” (PTX 184 at 2.)

288. “The first major decline in white enrollments at HBIs took place between the early-1970s and mid-1980s, ... [when] the State was desegregating its public campuses.” However, the second major decline in white enrollments took place more recently, during the five year period covered by the 2000 Partnership Agreement with OCR. (PTX 184 at 2.) “In 1972, white students attending historically black institutions (HBIs) accounted for over 8% of the

total white graduate/professional students attending public campuses statewide. Currently, only 2% of white students pursuing advanced degrees are enrolled at an HBI.” (PTX 184 at 1.)

289. “In 2000, Bowie enrolled 396 white graduate students, who made up 25% of its entire graduate enrollment. By 2005 the number of white graduate students had declined to only 131 and white students made up only 11% of Bowie’s graduate enrollment,” representing a 67% decline in graduate white enrollment. (PTX 184 at 5.) Meanwhile, Coppin enrolled 234 white graduate students in 2000, which represented 29% of its graduate enrollment. By 2005, that number had decreased to 63 and white students only accounted for 8% of Coppin’s graduate enrollment. The decline at Coppin represented a drop of 73%. (PTX 184 at 5.)

290. This cannot be explained by decreases in the overall numbers of white graduate students in Maryland. In 1972, 43% of graduate students enrolled at HBIs were white. Currently, white graduate students constitute only 14% of total graduate enrollments at these campuses, despite the fact that there are over 7,000 more white graduate and professional students in the state’s higher education system than forty years ago. (PTX 184 at 2; 1/9/12 AM Trial Tr. at 84 (Popovich).)

291. Undergraduate enrollment trends are similar. In 2009, 18% of the undergraduate student population at UMES was comprised of non-African-American students, a 23% decrease since 2006 which also marked the lowest proportion of non-African Americans enrolled at UMES in at least the last four years. The school attributes the steady decline in the percentage of non-African American students to “insufficient resources for the effective marketing of high-demand, high knowledge/skills, and high-wage programs” and university-wide budget cuts which undermine plans to implement aggressive marketing strategy to recruit other race students. (PTX 892 at 90.)

292. As Dr. Popovich described at trial, “Now what makes that significant is that the state’s desegregation plan, the one we just talked about, the 2000 plan, said that if there was a sharp decline in other race students at any campus, they would study the situation and take action. In this case, the coordinating board did not even recognize that these declines had taken place. *Then when we got to this writing of the final report, it was pointed out to them that these declines had taken place, and asking what had the state’s findings done, and that they conceded that they had not looked at it.*” (emphasis added) (1/9/12 AM Trial Tr. 58 (Popovich).)

293. “[T]he failure of Maryland’s public colleges and universities to improve upon the gains temporarily achieved in other-race enrollment by the TBIs in the 1970s suggests that racial segregation, racial segregation in Maryland’s public higher education has increased.” (1/10/12 AM Trial Tr. 39 (Conrad).)

294. Dr. Taylor testified that state and national demographics suggest the historically black colleges and universities will have an increasing important role given that more African Americans and Hispanics are taking advantage of educational opportunities. In Maryland in particular, over the past decade all of the growth in higher education has been either African Americans or other minority students. “[I]nstitutions like Morgan, like Coppin, Bowie, University of Maryland Eastern Shore, will have an increasingly important role in educating the citizenry than even in the past.” (1/10/12 AM Trial Tr. 56 (Taylor).)

4. The decline in both overall and white enrollment at Maryland’s HBIs corresponded with Maryland’s failure to enhance the mission and programs of those institutions in a way which would allow them to become comparable and competitive with their TWI peers

295. Weak statewide coordination of the Maryland system fundamentally eliminated any advantage that program development efforts may have conferred on the state’s HBIs. While

Maryland did approve new and attractive programs at its HBIs during that period, competition with geographically proximate institution and lack of funding to support those programs diluted and undermined the results of these efforts. (PTX 268 at 18.)

296. Maryland did not meet its commitments to accelerate program development at HBIs relative to TWIs as required by the Partnership Agreement. Between 1976 and 2008, three of Maryland's four HBIs dropped in ranking in terms of the total number of degree programs offered in comparison to their TWI peer institutions. In 1976, Morgan offered more degree programs than Towson, UMBC, as well as UB. But by 2008, UMBC and Towson both exceeded Morgan in terms of available programs. And while UMES experienced a relative increase in the overall number of degree offerings when compared to other institutions in Maryland, it still offers fewer programs than Salisbury, its geographically proximate peer institution. (PTX 39 at 60.)

297. This corresponds to declines in overall headcount at Morgan State and Coppin during the same time period. As Towson and UMBC surpassed Morgan in program offerings, Morgan's headcount enrollments as compared to Towson and UMBC fell behind both of those institutions, as well. In 1977, Coppin's total headcount exceeded that of three other institutions, but by 2008 it only enrolled more students than St. Mary's. UMES saw increases in total headcount numbers during those years, but remained behind Salisbury in terms of overall headcount as of 2008. (PTX 39 at 61.)

298. The University System of Maryland planned to accommodate growth in enrollment by channeling it toward certain institutions able to accommodate it. To the extent the HBIs experienced growth in overall enrollment, however, the HBIs were not adequately funded to support that growth. For example, although Bowie State University was designated a growth

institution and expected to receive a disproportionate share of anticipated growth in student enrollment, it was not provided additional funding to support that growth. (1/5/12 PM Trial Tr. at 62-64 (Burnim).) Dr. Thompson testified that this resulted in funding advantages for the majority institutions. Meanwhile, traditionally white campuses were not experiencing the same sort of enrollment growth and to the extent their budget remained static and needs fell, those institutions had access to excess money. (1/4/2012 PM Trial Tr. 27-28 (T. Thompson).)

299. Declining enrollment may be symptomatic of a lack of comparability and competitiveness. When asked about declining white enrollment at Bowie State, Dr. Burnim testified that, “[T]here is increased competition for the degree programs that enroll a lot of our white students. So I think that is one significant factor. (1/5/12 PM Trial Tr. 62 (Burnim).)

5. In 2005, the HBI Presidents submitted a letter and draft a report to the Legislative Black Caucus expressing continued concern about inadequate funding and limited missions at Maryland’s HBIs

300. At the request of the Maryland Legislative Black Caucus, Dr. Thelma Thompson prepared a letter and report to Delegate Rudolph Crane on behalf of the Presidents of Maryland’s four HBIs. The “Report on the Status of Efforts Under the Partnership Agreement Between the State of Maryland and the U.S. Department of Education, Office for Civil Rights” purported to outline the history, current status, and future needs of Maryland’s historically black institutions. (PTX 13 at 1.) This collaborative document reflected the agreement of the four HBI Presidents about their institutional needs. (1/4/12 PM Trial Tr. 13 (T. Thompson).)

301. The 2005 Report emphasized that in spite of progress, “the relative position of HBIs to traditionally white institutions (TWIs) has not improved,” but had in some instances worsened because of the consistency and scale of continued investments in Maryland’s majority institutions. (PTX 13 at 3.) The HBI presidents cautioned that the relative position of the HBIs

“[threatened] to deteriorate further as certain TWIs were targeted as growth institutions and unique missions and programs further eroded.” (PTX 13 at 3.) The Report further emphasized that “these institutions will require special attention over a sustained period if the gap in their overall competitiveness with majority institutions is to close.” (PTX 13 at 3.)

302. At trial, Dr. Thompson emphasized the importance not just of additional support but of *sustained* support. While a one-time infusion of funds can help an institution, “you won’t see a marked difference or improvement” unless the funding is sustained over time. (1/4/12 PM Trial Tr. 20:3-11 (T. Thompson).) Even today, Maryland continues to treat HBI enhancement as “an effort that can be compartmentalized into minor components and as a short-term commitment.” (1/4/12 PM Trial Tr. 24 (T. Thompson).)

303. Enhancement requires the state to do more than maintain the status quo between the HBIs and majority campuses. Rather, enhancement contemplates affirmative action to close the gap to allow HBIs attain parity in their ability to attract an academically and racially diverse student body, quality faculty, federal funds and private funding. (PTX 13 at 8.) Dr. Thompson testified that had Maryland given priority to achieving parity between the HBIs and the majority campuses, the HBIs would attract students who want good programs regardless of race. (1/4/12 Trial Tr. 21-22 (T. Thompson).)

304. The 2005 Report noted that historically, the HBIs had relatively narrow missions and substantially fewer academic programs than majority campuses, which limited their attractiveness to students of all races. The 2000 Partnership Agreement sought to expand the missions and unique, quality programs at Maryland’s HBIs. However, Maryland’s campuses became more duplicative rather than more distinct. (PTX 13 at 9.) “During the first three years of the Plan, HBIs received approval to offer only 21 new academic programs (10 bachelor’s, 5

master's, and 6 doctorates). The other public campuses in the state received approval to offer 103 (32 bachelor's, 64 master's, and 7 doctorates). With majority campuses already having broader academic missions than HBIs, this level of new program development widened the gap between them and HBIs.” (PTX 13 at 9.)

305. By folding enhancement funding into the regular budget process, operating enhancement was left to compete with other priorities for state funding each year. In addition to operating costs, the Report recognized that HBIs have “special funding needs” that must be reflected in operating budgets, including lower student-faculty ratios and investments in remedial instruction and financial aid. (PTX 13 at 9-10.) Unfortunately, “[t]he commitment to operating budget enhancement at HBIs in the Plan unfortunately is weak ... This approach generally makes it difficult for campuses to expand their missions ...” (PTX 13 at 9.)

306. The Report also called for the appointment of a panel of experts to address this issue, particular to address:

- How the missions of HBIs can be expanded and made more substantive;
- How to ensure that when new academic, research, and service programs supporting the expanded missions are developed at HBIs they will be adequately funded rather than requiring support to be re-allocated from existing programs; and
- What measures are necessary to ensure enhanced mission and academic programs. (PTX 13 at 14.)

307. The Report ultimately concluded that “HBIs need to offer students the same quality and range of educational experiences as students attending other campuses,” and that those campuses “need to be competitive for students of all races and students who can afford to attend without substantial financial assistance.” (PTX 13 at 13.)

6. In 2005, Maryland convened committees to review compliance with the 2000 Partnership Agreement, and while both reported compliance with each of the commitments, those conclusions are questionable in terms of both substance and process

308. Anne Emery and Maurice Taylor were members of Committee I, which was tasked with reviewing Maryland's progress under Commitment 8. Neither felt that Commitment 8 had been met, and both testified that Maryland's letter to OCR asserting compliance did not reflect the consensus of the committee, the work of the committee, or even the vote of the committee. (01/10/12 AM Trial Tr. 77-78 (Taylor); 01/11/12 AM Trial Tr. 65 (Emery).)

309. The process by which Committee I reached its conclusions is suspect. Committee I was presented with a draft report and provided little opportunity to influence the analysis or conclusions in that report. The report ultimately submitted to OCR did not incorporate or reflect concerns raised by Committee I during meetings. (01/10/2012 AM Trial Tr. 67-70 (Taylor).) There was no consensus among the members of Committee I that the data demonstrated that Maryland had met its obligations under the first eight commitments of the Agreement. (PTX 12 at 2.) Instead, Dr. Taylor believed that the goal of Committee I was to present a report to OCR concluding the State "fully complied" with all nine of its commitments under the Agreement by relying on data that is generally irrelevant to the core issue(s) that gave rise to the Partnership Agreement with OCR. (PTX 11 at 1.)

310. The basis of the Committee's findings is questionable given its flawed analysis. "The focus of Commitment 8 is whether and how has the State expanded mission, programs, and institutional identity at HBIs to make them comparable and competitive with their TWI peers within Maryland." (PTX 12 at 4.) A meaningful analysis of compliance must address the types of academic programs approved, not just the number, which goes directly to the ability of an

institution to expand its mission. It should also address whether Maryland provided adequate support to those programs, in terms of funding and facilities. (1/10/12 AM Trial Tr. 74-75 (Taylor).) For example, Dr. Thompson testified that no new buildings were built at UMES as a result of the OCR agreement, and that no commitment was provided to accommodate the growth in its academic research or service components. Instead, upgrades were limited to correcting hazards that existed before the Agreement. (1/4/2012 PM Trial Tr. 36 (T. Thompson).)

311. From the outset, there were problems associated with the reported data related to program approval as it included time frames beyond the period covered by the Partnership Agreement. (PTX 12 at 2.) The data used to justify compliance with Commitment 8 was non-probative on the issue of whether the programs approved during the agreement expanded the mission of the HBIs, whether they were sufficiently unique to attract a wide spectrum of students, or whether those courses were duplicated at the state's TWIs. (PTX 12 at 4.)

312. There was little data or evidence presented to Committee I to explain how the denial of programs to traditionally White institutions, or the approval of new program and new degree levels for HBIs, expanded the mission and program uniqueness or institutional identity of the HBIs. (PTX 12 at 4.) Nor did the Committee I report address how the eleven programs approved at HBIs compared to the fourteen approved at the TWIs. (PTX 11 at 2.) Of particular concern was the Committee's failure to address or explain MHEC's approval of the Master's in Business Administration program at a TWI proximate to an HBI already offering the degree which occurred during the period of the Partnership Agreement. (PTX 12 at 4.) At best, Dr. Taylor described the Committee's conclusion that Maryland had fulfilled its first eight commitments under the Agreement as "an overreaching interpretation of the data and other evidence." (PTX 12 at 2.)

313. Similar concerns were expressed regarding the findings of Committee II, which focused exclusively on assessing Maryland's compliance with Commitment 9. Geoffrey Newman, a member of Committee II, stated that the findings in that committee's report did not support the conclusion that HBIs were comparable and competitive with TWIs in all facets as required by the Partnership Agreement. (03/08/10 Newman Dep. 168-69).

7. 2008 HBI Panel documents disparities at Maryland's HBIs which prevent them from functioning as comparable and competitive institutions

314. The Panel on Historically Black Institutions ("HBI Panel") was appointed by the Bohanan Commission "to study the policy and funding issues regarding Maryland's HBIs, to define the terms comparable and competitive, and to identify performance 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 [OCR]." (PTX 3 at 2.) It released its "Report to the Maryland Commission to Develop the Maryland Model for Funding Higher Education" in November of 2008, which was fully incorporated in the Bohanan Commission report. (PTX 2 at 45.)

315. While there was ongoing discussion about the precise indicators that would determine the meaning of "comparable" and "competitive," Maryland adopted these terms to describe its obligations as they relate to the desegregation of its system of higher education. (PTX 1 at 26-27.) The Panel's efforts to define comparability and competitiveness were informed by Maryland's "long history of racial segregation and disparate treatment ... and decades of attempts to implement fully a federally required desegregation plan designed to eliminate the ... [vestiges]" of discrimination from its system of higher education. (PTX 3 at 5.) But the Panel also recognized that comparability and competitive represented "terms of art" in

the federal government's evaluation of whether the state has remedied state-sanctioned racial discrimination in its public colleges and universities. (PTX 3 at 5.)

316. Comparability describes institutional capacity, or the resources, programs, facilities, funding and other factors which enable an institution to generate instructional, research and service outcomes. (PTX 3 at 8.) Once achieved, comparability places the HBIs in the position they would have been absent the perpetuation of discriminatory policies and practices to allow them to compete effectively with other public institutions in the state. (PTX 3 at 7.)

317. According to the 2008 HBI Panel Report, “[t]here 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 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.” (PTX 3 at 7.) Had the state consistently treated HBIs in a manner comparable to the treatment of TWIs over the span of their history, the HBIs would “be competitive with other public institutions in these and other aspects of their operations both at the undergraduate and doctoral levels.” (PTX 3 at 7.)

318. The state made some efforts to improve the facilities, physical space, and other institution-wide operational and administrative elements of the HBIs. However, the overall facilities at the HBIs are not comparable to those at the TWIs.

319. All institutions have unmet capital needs. However, the Panel wishes to make a special case for addressing the needs of the HBIs both as a priority and as expeditiously as possible. We recommend this not only out of our first-hand findings that the HBIs visibly lag

behind the TWIs but also because *addressing this deficiency is crucial to achieving the goals of capacity and competitiveness of the HBIs in both undergraduate and graduate education.*

(PTX 3 at 29-30.) (emphasis added)

320. MHEC agrees there are many indicators that suggest substantial additional resources must be invested in the HBIs to overcome the competitive disadvantages caused by prior discriminatory treatment. (2/1/12 PM Trial Tr. 48 (Newman).) For example, “absent its racial character and past treatment, there is every reason to believe that [Morgan] would have ... developed the capacity to attain the status and quality ... of a quality doctoral institution. [While] it would not necessarily have become UMBC or UMCP, each of which is unique in its category within the state,” it would very likely have been an institution of comparable quality, resources, reputation and support. (PTX 3 at 22.)

321. In light of that, the HBI Panel recommended that the state “expedite its review of [any] revisions and accelerate the funding for the resulting capital improvement priorities of the HBIs to close as quickly as possible the gaps that exist between the comparability and competitiveness of the state’s public HBIs with the state’s public TWIs.” (PTX 3 at 32.) To achieve this, the HBIs were instructed to identify to facilities needed on to improve their capacity to become comparable and competitive. (PTX 3 at 32.)

322. The HBI Panel acknowledged the unfunded dual mission of the HBIs. It found that HBIs need a different form and level of capacity because, unlike the TWIs, they “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.” (PTX 3 at 13.)

323. HBIs face unique financial challenges given the profile of students served. Substantial additional state resources are needed to ensure that HBIs are comparable and competitive given the resources needed to educate both high-achieving students as well as others who may require supplemental support. (PTX 1 at 32.) The Panel noted that excluding UMUC, close to 60% of Maryland's African American college students are attending one of its four HBIs. (PTX 2 at 125.)

324. The HBI Panel emphasized the role of unique, high-quality programs in enhancing the HBIs. Program approval describes the process by which a state sets university missions, approves and funds new programs, and holds institutions accountable for results. Intentional or not, the past treatment of HBIs with respect to programs has substantially marginalized the HBIs and their ability to develop and maintain comparable quality and competitiveness in the state's system of higher education. This is especially the case with respect to the doctoral granting status of Morgan State University (MSU) and the University of Maryland, Eastern Shore (UMES). (PTX 3 at 33.)

325. "The current result of these longstanding past practices is that there exists a substantial lack of comparability and capacity (as compared generally with quality doctoral granting institutions both in and outside of the state, taking scale and composition into account) at both MSU and UMES (whose status as a doctoral granting institution is somewhat different from that of MSU)." (PTX 3 at 18.)

326. Among the challenges cited by the HBI Panel are the following: "lack of state-of-the-art science and technology laboratories; aging physical plants and lack of consistent funding for maintenance; poor retention and graduation rates as compared to TWIs; and a large number

of low-income and educationally underserved students in need of financial assistance and other support services.” (PTX 1 at 57.)

327. Maryland had pledged to develop capacity and outcome indicators to build institutional capacity of identified graduate and professional programs. (PTX 1 at 34.) Plaintiff Anthony Robinson testified that Maryland is second only to the State of California in the amount of research and development money that flows through the state. Yet Maryland’s HBIs often lack the institutional capacity to take advantage of those funding opportunities. (01/12/2012 AM Trial Tr. 31-32 (Robinson).)

8. 2008 Bohanan Commission recommends funding of dual mission during time when HBIs receive more funding per FTE

328. In 2006, the Commission to Develop the Maryland Model for Funding Higher Education was established, among other things, to “review options and make recommendations relating to the appropriate level of funding for the State’s historically black institutions to ensure that they are comparable and competitive with other public institutions.” (PTX 2 at 3.) This Commission was chaired by Delegate John Bohanan (Bohanan Commission), and presented its final report in 2008. (PTX 2 at 3-4.)

329. The Bohanan Commission accepted the 2008 HBI Panel’s working definitions and indicators of comparability and competitiveness. It acknowledged that Maryland was the first state to seek to define both comparability, which the HBI Panel related to capacity, and competitiveness, which the Panel defined in terms of outcomes and results. (PTX 2 at 45.) The Panel determined that in both undergraduate and doctoral education, “[the] HBIs are not comparable and, therefore, are not competitive.” (PTX 2 at 45.)

330. For many indicators of institutional capacity, the “HBIs and TWIs are more similar than different.” (PTX 2 at 45.) But there is a critical difference in the type of students served, and this means that the actual task of educating students is fundamentally different at the HBIs and TWIs. Above and beyond the responsibility for providing a traditional college education, HBIs must also accommodate the needs of some of Maryland’s most vulnerable students by enrolling “higher percentages of underprepared students many of whom are from low-income families.” (PTX 2 at 45.) Ultimately, the Panel recognized – and the Bohanan Commission agreed – that this demands an investment in a level of institutional capacity that the state’s funding formula alone had failed to account for.

331. “Recognizing the considerable remediation effort and continuing support demanded of the historically black institutions at the undergraduate level,” the Commission specifically recommended that “a supplement should be provided to these institutions over and above the figure determined from the Higher Education Funding Model for Maryland.” (PTX 2 at 46.)

332. Educating students with high levels of need creates other challenges, as well. The consequences of serving a higher percentage of students from low-income families include the following:

- HBIs must expend a higher percentage of revenue toward student financial aid;
- HBIs must charge lower tuition and fees because students cannot afford higher costs. Consequently, in FY 2007, the revenue from tuition and fees for HBIs is on the average \$1,500/FTE student less than that of TWIs (this analysis excludes UMUC and St. Mary's College because of their unique status);

- The HBIs' graduation rates are less than that of the TWIs because of the challenges associated with graduating students from low-income families at the same rate as that of students from higher income families; and
- HBIs must expend larger portions of their budgets toward developmental education and academic support than TWIs.

(PTX 2 at 125.)

333. Maryland's HBIs did not voluntarily assumed the role of educating the state's most vulnerable and least prepared students – they have been assigned their dual mission.

334. As part of their dual missions, HBIs are charged with providing access to academically well-qualified students and also a significant percentage of under-prepared students. Responding to the needs of poor and under-prepared students requires academic and support services tailored to their needs.

(PTX 1 at 56.) (emphasis added)

335. “Quality doctoral universities require 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 described above that are the hallmarks of quality doctoral programs. MSU and UMES have not had that opportunity and support to the same or sufficient degree.” (PTX 2 at 135; 1/17/2012 AM Trial Tr. 76 (Kaiser).)

336. Dr. Thompson testified that when UMES was authorized to add engineering and pharmacy, the state did not provide additional buildings or equipment to support the new

programs. “And here it is saying UMES expands to accommodate engineering and pharmacy and no new funding provided for faculty, facilities, or equipment.” (1/4/12 PM Trial Tr. 46 (T. Thompson).)

337. The Bohanan Commission’s summary of the HBI Panel’s analysis shows that funding-related policies and practices that focus on “per FTE” funding will tend to underfund the HBIs because they have a more difficult mission than the TWIs, in fact a dual mission,¹⁶ a mission which leaves them with students who bring in less tuition revenues and require more financial aid and remedial services. *See* (PTX 2 at 120.)

338. The Panel noted that on traditional capacity indicators such as funding per student and student faculty ratios, HBIs and TWIs are more similar than different. However, the Panel found differences in both the kinds of students served, e.g., higher percentages of underprepared students many of whom are from low-income families, and the outcomes achieved by HBIs and TWIs. Dr. Thompson confirmed that the funding received to provide remedial education consistent with that dual mission is insufficient. “[W]hen one requests money to help with remediation and you get enough money at the University of Maryland Eastern Shore to remediate 184 students for a year, but the need is twice that.” (1/4/12 PM Trial Tr. 24:10-17 (T. Thompson).)

339. “The panel concluded that HBIs need a different form and level of capacity because, unlike TWIs, HBIs have a dual mission to provide regular collegiate programs and to provide strong developmental education for students, mostly from low-income families, who

¹⁶ “[T]he mission of the HBIs in providing an undergraduate degree is substantially different and more challenging than that of TWIs. HBIs historically and into the future have a dual mission. They are committed to the traditional mission of any institution of higher education to provide a quality educational experience and guide students to the attainment of an undergraduate degree.” (PTX 2 at 120.)

otherwise would not have an opportunity to pursue a bachelor's degree and that HBIs are not funded appropriately to carry out both missions at once. (PTX 2 at 45.)

340. Maryland made no commitment to accommodate growth in the academic research or service components at its HBIs. Dr. Thompson testified that this meant that no financial commitment was made to provide more resources to do what the institution thought it could do. (01/04/2012 PM Trial Tr. 37 (T. Thompson).)

9. Maryland agrees with the fundamental findings and recommendations of the HBI Panel and the Bohanan Commission in its 2009 State Plan

341. Maryland has specifically agreed with and adopted the conclusions of this independent panel of leading experts in its 2009 State Plan for Higher Education. The HBI Panel, which was incorporated into the Final Report of the Bohanan Commission, identified a number of challenges to ensuring that the State's four public HBIs are comparable to and competitive with TWIs. Among others concerns, they identified the following as limiting the comparability and competitiveness of Maryland's HBIs are the following:

- Lack of state-of-the art science and technology laboratories;
- Aging physical plants and lack of consistent funding for maintenance;
- Poor retention and graduation rates as compared to TWIs; and
- A large number of low-income and educationally underserved students in need of financial assistance and other support services. (PTX 1 at 57.)

342. The State will need to provide "substantial additional resources" to create a comparable institutional platform to support doctoral and graduate education at the HBIs, in particular at Morgan State University and the University of Maryland Eastern Shore. (PTX 1 at 31.) Significant deficiencies were found at the HBIs, especially those with doctoral programs. (PTX 1 at 31.)

343. Going beyond the findings of the HBI Panel, Maryland's 2009 State Plan noted that "[t]he lack of comparable IT services restricts the capacity of HBIs to compete in certain markets for students and to be competitive in the delivery of effective and efficient administrative services." (PTX 1 at 31.) The lack of proper IT infrastructure directly affects the HBIs ability to fulfill their academic missions.

J. The Current Infrastructure Of The Hbis Reveals The Cumulative Effect Of The State's Policies And Practices

344. Dr. Taylor testified that successful program development at the graduate level and undergraduate level rests on a stool of three f's: Faculty, facilities, and funding. "And if you're not talking about faculty, facilities or funding, funding in terms of student support, funding in terms of operations, funding in terms of infrastructure, if you're not talking about that in the context of whatever program development, then really it's just an idea. It's platitudes, and so unless there's faculty associated with it, unless there's facilities associated with it, unless there's funding associated with it." (1/10/2012 PM Trial Tr. 48 (Taylor).)

345. Dr. Taylor also testified about the relationship between facilities and programs. "Facilities represent a place where programs are offered. And in that context, facilities are, of course, more than just a building or a space, depending upon the program. You may need wet labs. You may need smart boards. You may need various specialized equipment. So to approve a program of any particular fashion, that is, of any particular detail that requires some kind of specialized programming, without the space that provides the equipment and the facilities, that's why facilities are important." (1/10/1 PM Trial Tr. 50 (Taylor).) Dr. Kaiser testified, "From my own personal experience, it's quite clear that facilities affect missions. Facilities support missions. Facilities allow you to conduct programs." (1/17/12 AM Trial Tr. 21 (Kaiser).)

346. Facilities are also important not just to offer the program, but they need to be of such a nature that students and faculty want to be in those places.” (1/10/12 PM Trial Tr. 51 (Taylor).) “The facilities of HBIs will never achieve parity with those of the TWIs if the state continues to make substantial investments in improving the already-superior TWI campuses.” (PTX 661 at 13.) In this way, facilities affect student choice. Dr. Kaiser testified that he understood facilities to play a key role in student choice. (1/17/12 AM Trial Tr. 12 (Kaiser).) This opinion was shared by Dr. Thompson, who testified that the research shows “campus visits constitute a major factor as students choose where they will get their degrees,” and that “they would choose a campus that has facilities that are state-of-the-art and modern.” (1/4/12 PM Trial Tr. 18 (T. Thompson).)

347. Faculty members are also a critical part of an institution’s infrastructure. (01/03/12 PM Trial Tr. 79 (Wilson).) Maryland’s HBIs have difficulty attracting revenue-generating faculty, impose heavier workloads on their professors, and are otherwise limited in their ability to attract external funding. “Academic program quality and ranking, appropriate ‘start-up’ packages, and clear and equitable promotion and tenure systems are among the variables that determine whether faculty will seek employment at specific institutions.

348. “Compensation is another important faculty recruitment factor.” (PTX 133 at 36.) MHEC agrees that substantial additional resources are needed to ensure that the state’s HBIs are comparable to the state’s TWIs in attracting and retaining quality faculty. (1/18/12 PM Trial Tr. 78 (Reid).) Yet in 2009, faculty members at HBIs in the USM had lower salaries and taught more courses. (PTX 168) (attached as Exhibit A.) Professors, associate professors, assistant professors, instructors and lecturers at all of Maryland’s HBIs received salaries below the average for four-year public institutions. (PTX 755 at 27.) Graduate faculty are paid differently

and require different workloads, labs, and equipment to train their students. “So simply to add on a couple of doctor’s programs to a professor who teaches freshman this and master’s and does everything, in a way, you can get them to instruct, but they, the professionals, won’t have the time comparable to what a great program calls for.” (1/4/12 PM Trial Tr. 33 (T. Thompson).)

349. Excluding UMUC and UMB, Maryland’s HBIs utilize part-time faculty members to a greater extent than Maryland’s TWIs. (PTX 754 at 3.) Contractual faculty members are not eligible to compete for research grants. (1/4/12 AM Trial Tr. 18-20 (Wilson).)

350. Dr. Chris Heidelberg, himself a Morgan graduate, declined opportunities to teach at both Morgan and Coppin and explained his reasoning at trial as follows: “I refused, because I was already at Loyola where we had state-of-the-art facilities, industry standard equipment, support for the program. And I knew that if I went to Morgan, which is the best of all of the HBIs in terms of these things and Coppin didn’t have it, and Bowie, from my prior experience, I had friends that worked there, there was no way I was going to go to a situation and be expected to deliver students who could cut the muster in a very tough industry for everybody, but especially for minorities.” (1/9/2012 PM Trial Tr. 85 (Heidelberg))

a. Maryland’s HBIs are less competitive for grants, contracts, and extramural funding than the TWIs.

351. “Much of the revenue-generating capacity of an institution comes from the investment the state makes in the infrastructure.” (1/12/12 AM Trial Tr. 88 (Richardson).) Dr. Thompson testified that research professors capable of bringing in “millions of dollars to help themselves, their students and their universities.” (1/4/12 PM Trial Tr. 33 (T. Thompson).) “HBIs have historically lacked surplus or additional resources beyond those required to insure day to day operation. Without the luxury of extra resources, HBIs were not able to invest in

upgrading institutional development functions such as fundraising or grantmaking.” (PTX 661 at 12.)

352. Maryland is second only to California in the amount of research and development money that flows through the state. (1/12/12 AM Trial Tr. 31 (Robinson).) Plaintiff Anthony Robinson testified that based on his experience attempting to place potential research projects at Morgan, at that time Morgan lacked the institutional capacity, including staffing to develop proposals and to comply with reporting requirements, necessary to compete for federal grants. (1/12/12 AM Trial Tr. 36-37 (Robinson).) His experience with the limited infrastructure at Morgan and UMES resulted in the loss of opportunities to access billions of dollars in research and development funding, and to expose students to the private sector. (1/12/12 AM Trial Tr. 44 (Robinson).)

353. State extramural funds are state grants. They are operating monies that pay for salaries. They are separate from state appropriations. (1/31/12 AM Trial Tr. 74-75 (Vivona).) In FY 2010, Maryland’s HBIs received about \$600 less in state extramural funding per FTE than the TWIs. (PTX 1024 at 5.)

b. Maryland’s HBIs have smaller endowments and fund balances than the TWIs because of their inferior infrastructures.

354. Maryland’s HBIs “don’t have sufficient revenues to develop the infrastructure and human capital structure to be competitive for external funding and also to be competitive for donations, you need to have a certain infrastructure in place to be successful at running fundraising campaigns.” (01/17/12 PM Trial Tr. 42-43 (Kaiser).) On average, Maryland’s HBIs have significantly smaller endowments than the TWIs. (PTX 714) Universities with a sufficient fund balance are able to finance certain capital projects by paying in cash for the fund balance.

For example, in FY 2012, Towson was able to immediately access the \$8 million in funds to obtain a public safety building. (1/31/12 AM Trial Tr. 69-71 (Vivona); PTX 966 at 2; PTX 972.)

c. Maryland's HBIs have substantial deferred maintenance backlogs.

355. “[T]he HBIs spend a disproportionate amount of their operating funds on operations and maintenance, and even with those high expenditures, they really cannot satisfactorily maintain their physical plants.” (1/17/12 AM Trial Tr. 27 (Kaiser).) The amounts needed for total and urgent deferred maintenance at the HBIs are probably understated. Because of unsatisfactory facilities conditions, some HBIs are at risk or are limited in their ability to meet their missions adequately. (PTX 387 at 58.)

356. In general, Maryland’s HBIs have higher Operations and Maintenance expenses than the TWIs. (PTX 846 .) For FY 2011, Coppin, Bowie, Morgan and UMES were all ranked in the top five institutions in terms of the percentage of their budget committed to operations and maintenance. Coppin spends over 15% of its budget on operations and maintenance, which is double of that at UMBC, UMCP and UB. “A dollar spent on operations and maintenance is a dollar you are not spending on student aid or other services at the university. So it affects the quality of the support you are giving other areas....” (1/17/12 AM Trial Tr. 64 (Kaiser).)

357. Previous work by Dr. Kaiser concluded that “there were past patterns of inequitable funding, that is historically, through *de jure*, and even post *de jure*. There was inadequate funding for operations and maintenance at the HBIs, and that built up a backlog of major maintenance called deferred maintenance.” (1/17/12 AM Trial Tr. 17 (Kaiser).)

2. Systemic Challenges Facing Maryland's HBI's Manifest Themselves Individually on Each Campus.

a. *Bowie's Institutional Goals Are Constrained By Inadequate Infrastructure.*

358. “Despite recent campus additions of the Center for Learning and Technology and the Computer Science Building, most of BSU’s remaining facilities and infrastructure do not meet the educational administrative, student support, physical education, athletics, or recreational requirements typically associated with living and learning in the 21st century and found at other institutions-both within the State of Maryland and its peers.” (PTX 346 at 52.)

359. “A substantial number of remaining campus buildings, especially those supporting the academic mission and student life and development, are inadequate and aged, [m]any have inflexible structures and floor plans which preclude cost-effective renovations. Classroom space is inadequate to support discipline needs. Office space in older buildings is overcrowded, undersized, and inadequate. Study and library facilities are worn and appear insufficient to meet the long-term campus needs.” (PTX 346 at 52.)

360. Bowie recently spent between \$4 million and \$5 million dollars out of its operating budget on unplanned repairs to its computer network. It needed to take a loan to cover the expense. (1/5/12 PM Trial Tr. 32 (Burnim).)

361. Bowie’s science building “was constructed in the 1950s or 1960s. So in many respects, it has outlived its usefulness.” (1/5/12 PM Trial Tr. 51 (Burnim).) Bowie’s students often travel to UMCP to conduct research both because Bowie’s library has inadequate space and because Bowie does not have “funding for the support of acquisitions and the maintenance of [its] periodicals. (1/5/12 PM Trial Tr. 52 (Burnim).) Bowie’s ability to expand its high-demand nursing program is limited by space constraints. (1/5/12 PM Trial Tr. 53-54 (Burnim).)

362. Several capital projects in Bowie's 2004 master plan have not been funded. (PTX 830 at 2-3.) Bowie's Crawford Science Center has labs that are as bad or worse than those found in 1930s public schools in New York City. (1/17/12 AM Trial Tr. 46 (Kaiser).) To find a leaky roof on the Bowie campus, "[y]ou could pretty much close your eyes and point in any direction." (1/5/2012 PM Trial Tr. 54 (Burnim).)

363. Limited resources at Bowie impacts program development. Bowie's ability to expand its high-demand nursing program is limited by space constraints. (1/5/12 PM Trial Tr. 54 (Burnim).) Bowie's students often have to travel to UMCP to conduct research both because Bowie's library has inadequate space and lacks "funding for the support of acquisitions and the maintenance of [its] periodicals. (1/5/12 PM Trial Tr. 52 (Burnim).) Bowie's sciences equipment is "woefully inadequate and much of it is not functional. The science building is so inadequate and ill equipped that when recruiting high achieving science students, the school would prefer to steer them clear of the science building. (1/5/12 PM Trial Tr. 51-52 (Burnim).)

b. Recent Improvements on Coppin's Campus Have Not Resolved Infrastructure Issues.

364. "Substantial investment is still required to bring CSU's facilities in line with current need, instructional and workplace technology, the planned enrollment changes, and the academic goals for instruction and research." (PTX 843 at 62.)

365. "Despite the recent campus addition of the Health and Human Services Building and the Physical Education Complex, most [of Coppin's] remaining facilities do not meet the educational, administrative, and student related support needs typically associated with living and learning in the 21st century and found at other institutions both within the State of Maryland and within its peers. Many programs, services, and functions are fragmented within buildings,

across buildings, and even across the expanding campus. ... A substantial number of the campus buildings, especially those supporting the academic mission and student life and development, are inadequate, aged, and not located contiguously. In addition to a classroom deficiency, those within the older buildings are inadequate to meet the University's instructional delivery goals. Class laboratories are insufficient and inadequate to support discipline needs. Office space in older buildings is variously oversized and undersized, and inadequate. Study and library facilities are worn and are insufficient to meet long-term campus needs. Insufficient support space is available to ensure proper maintenance of the campus." (PTX 843 at 62; 1/17/12 AM Trial Tr. 41 (Kaiser).)

366. Coppin does not have sufficient funding to maintain its existing facilities. (1/9/12 PM Trial Tr. 6 (Avery).) And the institution "desperately either need[s] additional classroom buildings or certainly and upgrade to the ones that exist." (1/9/12 PM Trial Tr. 5 (Avery).)

367. In the Coppin State University 2009-2019 Facilities Master Plan completed in September of 2010, an independent consultant found almost all of the thirteen buildings on campus revealed deficiencies in their ability to meet the current or foreseeable programmatic needs, size and capacity, access, safety, building systems, meeting and gathering space and storage. (PTX 843 at 39.) Coppin's auditorium has several deficiencies, including building code violations. (PTX 843 at 49.) Coppin's library has inadequate space and restroom facilities. (PTX 843 at 52.)

368. "Coppin's equipment is not industry standard. And they don't have enough of it. They don't have enough faculty to go with it even if they did have it." (1/9/12 PM Trial Tr. 77 (Heidelberg).) Coppin also needs funding for IT infrastructure. (1/9/12 PM Trial Tr. 38 (Avery).)

369. Because Coppin was arguably the most neglected of the HBIs, the Partnership Agreement called for a Coppin Revitalization Study. That study found severe deficiencies in Coppin's infrastructure:

The College's infrastructure - water, sewer, electrical, security, communications, and fire protection - systems are antiquated and in need of replacement and/or modernization. Classroom, office, research, library, and physical-education space are severely deficient, a problem that will worsen with expected enrollment increases.

(PTX 549 at 12)

370. The Study concluded that in addition to substantial facilities improvement, Coppin needed "an infusion of operating funds to ... [make up for] a century of constraints." (PTX 549 at 8). Not only did Maryland not provide the "infusion of operating funds" to fund Coppin's "especially expensive" mission (PTX 549 at 8) but it did not provide all of the capital funds called for in the 2001 study. The State funded 7 of 19 projects recommended in the 2001 Coppin revitalization report. (PTX 660 at 33.)

371. Ten years later, the 2011 Coppin Revitalization Commission acknowledged the recent investments in Coppin but concluded:

"Despite the recent campus additions of the HHSB and PEC, most of CSU's remaining facilities do not meet the educational, administrative, and student related support needs typically associated with living and learning in the 21st century and found at other institutions-both within the State of Maryland and within its peers. Coppin will continue to request funds to construct and renovate the buildings as recommended in the Study Team report."

(PTX 810 at 55.)

372. The Commission pointed out that additional substantial investments in Coppin's infrastructure were necessary to allow Coppin to fulfill its mission:

Coppin State University can fulfill its important mission only if the funding needed to complete the recommendations as summarized in Table

VI-4 is quickly attended to; the Office of Capital Planning at CSU played a remarkable role in the systematic development of the institution. The overriding strategic goal of the institution is to continue development of facilities and its infrastructure as set forth in the September 2001, "Report of the Independent Study Team on the Revitalization of Coppin State College. (PTX 810 at 59.)

373. The 2011 Revitalization Study directly addressed Coppin's high per FTE funding and attributed it to Coppin's small size:

The operation of a university campus involves certain fixed costs regardless of the enrollment of the institution. The high cost per FTE for Coppin shown in Appendix V-I, Chart 2, is reflective of the campus being built out, as a consequence of the capital plan in Imperative VI, for a larger enrollment than Coppin has yet to achieve.

(PTX 810 at 52.)

374. Despite a high per FTE funding (like Princess Anne during the *de jure* era) the Revitalization Study concluded that Coppin was dramatically underfunded under Maryland's funding guidelines, and recommended that in light of its mission Coppin's be funded using "aspirational peers" (as is the case with UMBC and College Park). (PTX 810 at 63.)

375. In further discussing the constraints due to inadequate funding, the Commission noted that Coppin had developed through "non-state funds" an award winning IT system (which Maryland pointed out numerous times at trial) but it lacked the operating funds to keep it operational:

During the past 10 years, Coppin, through donations and federal grants, has used a total of \$13.3 million in non-state funds toward the implementation of its award-winning IT program and to develop a state-of-the-art IT system. Currently, Coppin's voice and data are connected to the world through one path. In the current day and age where we all depend on being connected, this is a high risk. Coppin needs an additional voice and data connection to serve the campus. It is better to utilize a different service provider point of presence and a different internet service provider. This can be accomplished with a one-time capital cost of \$355,000 and an ongoing cost of \$48,000. Coppin will also need an

additional \$200,000 to fund the implementation of online courses/programs (detailed recommendation 4) and an estimated increase in its operating budget of \$1,000,000 to cover the cost of supporting all the newly implemented IT at Coppin.

(PTX 810 at 10-11.)

376. The Commission pointed out that Coppin even lacks the funds necessary to operate its new facilities:

Second, Coppin's state support was significantly increased in FY 2007 to address recommendations of the 2001 Study Team. However, in subsequent years, Coppin had to redirect funds to cover the operating costs of new facilities because the State's funding was not sufficient to cover these additional costs. Consequently, the General Fund Operating Support, excluding costs to operate new facilities, in constant dollars was reduced to the level of FY 1990.¹⁷

(PTX 810 at 11.)

c. Morgan Has A Poor Infrastructure That Makes It Difficult To Compete With Maryland's TWIs And Expand Its Mission.

377. The 2008 HBI panel acknowledged that Morgan was in need of substantial resources in order for its graduate programs to be comparable and competitive. The panel addressed the need for enhancement of Morgan's infrastructure, laboratories, faculty, and funding. (1/10/12 PM Trial Tr. 53 (Taylor).) Dr. Taylor confirmed that as of the adoption of the 2011 strategic plan for Morgan State, Maryland had not implemented *any* of the specific recommendations of the 2008 HBI Panel. (1/10/12 PM Trial Tr. 54 (Taylor).) As described by Dr. Wilson, the factors mentioned in the 2008 HBI Panel Report such as lack of state of the art labs, lack of consistent funds for maintenance, and financial aid still apply today. (1/4/12 AM Trial Tr. 21-22 (Wilson).)

¹⁷ As described by Dr Avery, Coppin lacks the funds to keep the new buildings clean, to equip them, or provide faculty for what should be going on inside the buildings. (1/9/12 PM Trial Tr. 8 (Avery).)

378. Dr. Taylor further testified that Maryland did not provide Morgan the funding, faculty or facilities necessary to fulfill its mission as a doctoral research institution. Tenured track faculty are essential in terms of executing the research, but they are also necessary for an institution to receive the grants necessary to support that level of funding. Funding for facilities and equipment are essential to create the infrastructure essential to the research that the faculty must engage in. (1/10/2012 PM Trial Tr. 57-58 (Taylor).)

379. Of particular concern was the fact that Maryland provided insufficient funding for new programs. “Well, in the -- from 2001 to 2008, during the period in which I was dean, I was only aware of one source of funding in the programs that were approved. And that was some funding that came for the MBA program, master’s in business administration. And it came in the context of the dispute that was about Towson and University of Baltimore’s joint program competing with Morgan. But in those seven years, from 2001 to 2008, as dean of the graduate school, I saw no funding beyond that for the MBA for any of our graduate programs from the state.” (1/10/2012 PM Trial Tr. 49 (Taylor).)

380. As the HBI Panel Report noted, many of Morgan’s programs are not quality programs. (PTX 2 at 129). The institution does not have the faculty necessary to adequately staff the programs. (1/3/12 PM Trial Tr. 83 (Wilson).) Morgan employs more contractual faculty members than it would absent budgetary constraints. (1/11/12 AM Trial Tr. 84-86 (Vollmer).) Morgan needs 30 faculty members to staff nine recently-approved programs. (1/3/12 PM Trial Tr. 83 (Wilson).)

381. But Morgan’s attractiveness to talented faculty members is diminished because it lacks funding for graduate assistants and laboratory start-up funds, which makes Morgan less competitive for students who want to study with these professors. (1/4/12 AM Trial Tr. 14-16

(Wilson).) Morgan has lost potential faculty members to other institutions that were in a position to offer higher salaries and better infrastructure. (1/12/12 PM Trial Tr. 35-36 (Richardson).)

382. Thirty-eight percent of its faculty is contractual,¹⁸ and cannot serve as principal investigators on research grants from federal agencies. Nor do they provide the kind of academic support to students that full time faculty do. (1/4/12 AM Trial Tr. 18-20 (Wilson).) As a result, many full-time faculty have a heavier teaching load compared to true research institutions. (1/3/12 PM Trial Tr. 80-82 (Wilson).) Since 2007, Morgan's enrollment has grown by 15%, but the size of its faculty has only grown by 3%. (1/3/12 PM Trial Tr. 79 (Wilson).) Morgan's full-time faculty members, therefore, teach almost 7.5 courses each year, as opposed to the ideal of 5 courses per year, which limits the amount of available time for research and academic advising. (1/03/12 PM Trial Tr. 80-82 (Wilson).)

383. Morgan's technology infrastructure is very poor and makes it difficult for the institution to compete with TWIs in the state that have better-developed infrastructures. (1/4/12 AM Trial Tr. 33-35 (Wilson); 1/9/12 PM Trial Tr. 63 (Heidelberg).) In recent years, Morgan University has suffered long periods without campus-wide internet service. (1/9/12 PM Trial Tr. 74 (Heidelberg).)

384. Dr. Kaiser testified that UMBC is a more attractive campus than Morgan or UMES. (1/17/12 AM Trial Tr. 70 (Kaiser).) Morgan "is really not a cohesive, coherently planned campus. They sort of put buildings down where they could find room and developed a spine." (1/17/12 AM Trial Tr. 49 (Kaiser).) Several facilities, including Calloway Hall, Holmes

¹⁸ By contrast, the percentage of contractual faculty at UMCP is 15.3% and at UMBC 13.6%. (PTX 835 at 20).

Hall, Hurt Gymnasium, and the infirmary, were built in the 1950s and remain their original size. (PTX 39 at 20.)

385. Morgan's science complex "is a hodgepodge facility. It's a make-do facility. It is a facility that was not designed [with the way] faculty members conduct research in the sciences now. And so because that facility was so old, and then you kind of attach something else to it, it does not really meet the standard of a world class university science complex that you would see at institutions in the state of Maryland, and outside of the state." (1/4/12 AM Trial Tr. 22 (Wilson).) According to Dr. Wilson, Morgan "simply do[es] not have the kinds of laboratories that would enable our faculty to spurn out the kind of research that would enable us to move to that next level in the Carnegie house, which is where [our] vision is right now." (1/3/12 PM Trial Tr. 59-60 (Wilson).) UMBC "probably ha[s] a better electrical engineering infrastructure than is at Morgan" because Maryland invested in UMBC's infrastructure while allowing UMCP to offer programs on UMBC's campus. (1/12/12 PM Trial Tr. 27-28 (Richardson).)

386. "[T]he HBI libraries are greatly under-resourced and inadequate compared to the TWI libraries, and just compared to a general standard of what one needs in order to execute highest quality instruction and research." (2/8/12 PM Trial Tr. 21 (Allen).) The structure of Morgan's new library "has won all kinds of national awards, but it doesn't have much in it." (1/4/12 AM Trial Tr. 27-28 (Wilson).) "Due to constrained resources, Morgan has not been able to dedicate sufficient funds to the library for electronic and printed materials. With the recent development of [eleven] doctoral programs and the associated increasing emphasis on research, it is critical that increased allocations are dedicated to library resources." (PTX 281 at 16.)

387. Yet Morgan's faculty members and students often have to conduct research at other institutions because Morgan's library lacks access to online electronic databases that cost

several hundred thousand dollars a year. (1/4/12 AM Trial Tr. 27-29 (Wilson).) According to Muriel Thompson, the newly remodeled library still lacks the resources necessary for her doctoral level research. (1/3/12 PM Trial Tr. 28 (M. Thompson).)

388. “Constructed in 1974, [Morgan’s] Jenkins Behavioral Science [F]acility . . . has never been renovated. The building, which houses the School of Education and Urban Studies among other disciplines, does not meet many code requirements and is in poor condition. The building’s systems are failing and areas experience flooding, power outages and are often without heating and cooling.” (PTX 473 at 9) (attached as Exhibit B.) In Dr. Wilson’s view of Morgan’s Jenkins Building, “it is just unthinkable that we would have our students . . . in a [building] where, when it rains, we literally have to put trash cans all over the place to collect the water, where there is mold and mildew and [it is] smelly.” (1/4/12 AM Trial Tr. 12 (Wilson).)

389. Dilapidated facilities such as the Montebello Complex “should have been torn down 25 years ago.” A student visit to Morgan begins at the Montebello complex, a former state psychiatric hospital that was donated to Morgan. It presents a negative first impression of Morgan to high-achieving students of all races. Noted Dr. Wilson, “[Montebello] is one of the most dilapidated buildings [I] have seen on a college campus.” Morgan has to regularly take money from its operating budget to make repairs at Montebello. (1/4/12 AM Trial Tr. 6-9 (Wilson).)

390. Likewise, the vacant Soper building on Morgan’s campus “[is] fast becoming an eye sore. It is on the major corridor on the campus, and students look over there. It’s on the major mall way. You know, that building is sending them a message that, once again, no one cares.” (1/4/12 AM Trial Tr. 23 (Wilson).)

391. For years, Morgan did not have the resources from the state to obtain classroom equipment such as sufficient chairs, desk or chalk for chalkboards. (1/9/12 PM Trial Tr. 69 (Heidelberg).) Morgan offers a degree involving film editing, but it does not have the equipment that students need to edit film. (1/3/12 AM Trial Tr. 62 (Wilson).) Dr. Wilson observed that if you enter Morgan's new communications building, then "you discover that there is a \$15 million equipment need. And that need is so acute that I have had radio stations here who have taken our interns coming out of the communications program to tell me that, unless we at the university do something to equip those laboratories in a way that will undergird the curriculum, they will not take our interns any longer." (1/3/12 AM Trial Tr. 61 (Wilson).) Morgan's science labs also lack basic equipment, such as working microscopes. (1/3/12 AM Trial Tr. 63 (Wilson).)

392. In 2009, Maryland's State Plan concluded that the HBIs needed "substantial additional resources" "to attract, retain and graduate an academically, racially, and culturally and ethnically diverse student body." According to Dr. Wilson, the same is true of Morgan today. (1/4/12 AM Trial Tr. 30.) Like the other HBIs, Morgan cannot compete for highest performing students because of financial aid burden. (1/3/12 PM 68-69 (Wilson).) Morgan's students do not benefit from diversity as do students at the TWIs. Maryland has attributed this lack of diversity in part to lack of resources. In 2008, Morgan had a white graduate student population of 11% compared to 43% in 1970. (PTX 184 at 11, 13)

d. Maryland Has Failed To Significantly Enhance UMES' Infrastructure.

393. Since the late 1990s, the development of facilities at UMES has lagged well behind that of TWIs. (1/4/12 PM Trial Tr. 16-17 (T. Thompson).) UMES did not receive any

new buildings as a result of the Partnership Agreement. (1/4/12 PM Trial Tr. 36-37 (T. Thompson); (PTX 762 at 46.)

394. UMES' science labs are comparable to those that you would find at a high school. (1/17/12 AM Trial Tr. 54 (Kaiser).)

395. UMES' library is undersized, cramped, and inappropriate for an institution with doctoral-research aspirations. (1/17/12 AM Trial Tr. 55 (Kaiser).) The UMES library needs more technology and "[o]ne of the limiting factors is the number of stations available, for example, computers available for students to access other libraries throughout the state or throughout the nation." (1/5/2012 PM Trial Tr. 21 (Neufville).)

396. Maryland has never provided UMES with the resources necessary to match its federal land grant funding. The state is supposed to match federal funding dollar for dollar, but in fact, it currently makes available less than 30% of the necessary matching funds. (1/5/2012 PM Trial Tr. 10-11 (Neufville); 1/4/2012 PM Trial Tr. 42-43 (T. Thompson)). On the other hand, Maryland provides approximately seven dollars in matching funds for every dollar of federal land grant funding received by UMCP. (1/5/2012 PM Trial Tr. 11 (Neufville); PTX 875 at 3 Fig. 2). In 2011, the Education Policy Committee of the USM Board of Regents acknowledged that UMES does not get sufficient state funding to make its federal match and that UMES risks losing the federal funding because the state does not match it. (PTX 875 at 4.)

K. HBIs Today Continue To Serve Students With Lower Entering SAT Scores, Higher Remedial Needs, And Higher Financial Needs Which All Contribute To Lower Retention And Graduation Rates

397. As a group, the 2009-10 incoming freshman at Maryland's four HBIs have lower combined SAT scores than their peers at Maryland's TWIs. (PTX 755 at 9.) In addition, a higher percentage of incoming freshman at the HBIs are in need of remediation. For example,

for the same cohort, over 61% of the incoming freshman at Bowie, over 69% of the incoming freshman at UMES, and over 73% of the incoming freshman at Coppin, are in need of developmental education. (PTX 755 at 18.)

398. Consistent with their dual mission, Maryland's four HBIs serve higher numbers of students receiving federal Pell Grants, indicative of the level of student financial need. (PTX 39 at 83.) "Minorities and students from low-income families tend to respond differently to tuition prices and to various types of financial aid than students in the aggregate. There is generally a negative relationship between tuition and the enrollment rates of minority and low-income students, and prior research suggests that tuition increases result in some student groups enrolling in two-year rather than four-year institutions." (PTX 849 at 58.)

399. Students at Maryland's HBIs have lower second year retention rates and six year graduation than those at the majority institutions. According to the 2011 Data Book of the Maryland Higher Education Commission, there is minimal difference between the overall retention and graduation rates for African American students and the overall student population given the fact that most of those campuses are predominantly African American. However, a comparison of the retention and graduation rates for African American students at the HBIs compared to African American students at the TWIs shows a wide disparity between the success those students experience at the different campuses. (PTX 732.)

400. Retention and graduation rates reflect that HBIs and their students are not competitive with Maryland's TWIs. The demonstrative below demonstrates that in spite of relatively stable indicators of college readiness, retention and graduations rates have decreased slightly. For example, the six year graduation rate for African American students at Coppin is 17.4% while at Towson, African American students have a six year graduation rate of over 75%.

Likewise, the graduation rate of African American students at UMES is 39%, while the graduation rate for African American students at Salisbury is almost 65%.

Retention and Graduation Rates for University System of Maryland Colleges and Universities

| Retention Rates for University System of Maryland Colleges and Universities | | | Graduation Rates for University System of Maryland Colleges and Universities | | |
|---|-------------------------|------------------------------|--|------------------------|-----------------------------|
| School | 2nd year retention rate | 2nd year retention rate - AA | School | 6-year graduation rate | 6-year graduation rate - AA |
| UMCP | 93.00% | 90.70% | Towson | 75.10% | 75.90% |
| Towson | 83.00% | 87.60% | UMCP | 82.70% | 70.80% |
| UMBC | 85.20% | 87.10% | UMBC | 67.90% | 65.60% |
| Salisbury | 79.90% | 78.30% | Salisbury | 72.30% | 64.60% |
| Frostburg | 71.90% | 72.40% | Frostburg | 60.40% | 53.90% |
| Bowie* | 70.80% | 71.00% | Bowie* | 43.20% | 43.40% |
| UMES* | 68.60% | 69.60% | UMES* | 37.80% | 39.00% |
| Morgan* | 68.30% | 68.50% | Morgan* | 34.80% | 35.40% |
| Coppin* | 61.80% | 61.00% | Coppin* | 17.50% | 17.40% |

| Key: |
|----------|
| * - HBCU |

| Other: |
|--|
| Schools ranked by 6-year graduation rates of African American students |
| All Data from 2011 Data Book of the Maryland Higher Education Commission |

(PTX 732.)

401. Dr. Burnim testified that Bowie’s freshmen and sophomore retention rate is between 70 and 75 percent. “At College Park, it’s probably 85 to 95 percent, as an example. If you compare that retention rate, freshmen and sophomore, to the other comprehensive institutions in the University System, that 70 to 75 percent will probably be a little bit higher than the other HBIs by a percentage point or two or three. It will be five to eight percentage points probably lower than say that for Frostburg or Salisbury, and probably 10 or 12 percentage points below that for Towson and UMBC.” (1/5/12 PM Trial Tr. 35 (Burnim).)

III. MARYLAND'S REPORTS ESTABLISH THAT HBIS NEED TO BE ENHANCED SO THAT THEY CAN BE COMPARABLE AND COMPETITIVE TO TWIS AND PROVIDE A CHOICE TO STUDENTS OF ALL RACES

402. Going back several decades, the State, through various reports, has acknowledged that in order to desegregate the HBIs, HBIs need to be enhanced to become comparable and competitive with TWIs so that they can provide students of all races with an equal education.

403. In the state's first desegregation plan that OCR accepted (1974), the state acknowledged the need to enhance the HBIs. Maryland's 1974 desegregation plan provided for the establishment

of a bi-racial task force under the Maryland Council [sic] for Higher Education in its capacity as the State Agency for coordinating the desegregation of the public postsecondary institutions of the State, to propose ways of enhancing the role and image of the predominantly Black public colleges in the State.

(PTX 22 at 5.) The first recommendation of that commission (Cox Commission) was that:

A DEGREE OF CONSCIENTIOUS FUNDING MUST BE PROVIDED TO ALLOW THE HISTORICALLY BLACK COLLEGES TO FURTHER ENHANCE THEIR ROLE AND IMAGE, AND TO DEVELOP INTERNAL MANAGEMENT SYSTEMS TO ACHIEVE GREATER EFFICIENCY IN REALIZING INSTITUTIONAL OBJECTIVES.

(PTX 22 at 9.) (emphasis in original).

404. As discussed in the Chronology section above, in 1978, pursuant to an order in *Adams v. Califano*, OCR issued criteria regarding how states go about desegregating system of higher education. Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate Public Systems of Higher Education, 43 Fed. Reg. 6658 (Feb. 15, 1978) (Ex. D). One component of the criteria requires the state to create a plan. The criteria states that the outcome sought by the plan is to enable students to choose a school based on quality:

An acceptable plan shall commit the state to the goal of organizing and operating the system and institutions of higher education in a manner that promises realistically to overcome the effects of past discrimination and to disestablish the dual system, and which assures that students will be attracted to each institution on the basis of educational programs and opportunities uninhibited by past practices of segregation.

Id. at 6661.

405. The criteria include a number of components for the plan, including:

- “Defin[ing] the mission of each [HBI] on a basis other than race.”
- “Specify[ing] steps [that need] to be taken to strengthen the role of traditionally black institutions in the state system,” including:
 - “Commitments that necessary improvements will be made to permit the traditionally black institutions to fulfill their designed mission. These improvements will extend to physical plant and equipment; quality and range of program offerings; number and quality of faculty; student, faculty, and professional staff services; student financial assistance; and other financial support;”
 - “Commitments that traditionally black institutions will have the resources (including those enumerated in [the bullet] above which are at least comparable to those at traditionally white institutions having similar missions.”
- “Commit[ting] the state to take specific steps to eliminate educationally unnecessary program duplication among [traditionally] black and traditionally white institutions in the same service area.”
- “Commit[ting] the state to give priority consideration to placing any new undergraduate, graduate, or professional degree programs, courses of study etc., which may be proposed, at traditionally black institutions, consistent with their missions.”

Id. Thus, the concepts of choice, comparability, and enhancement appear in the 1978 criteria.

406. In Maryland’s next desegregation plan, which covered 1980-1985, the state used the language of the *Adams* criteria in stating that enhancement of the HBIs was necessary to give students of all races a real choice between HBIs and TWIs:

Students of any race who freely choose to attend a historically black institution should have the opportunity for an education equal in quality to students who choose to attend a historically white institution with a similar mission. Enhancement of the historically black institutions to overcome past neglect is therefore critical.

(PTX 263 at 45.)

407. The 1980-85 desegregation plan stated that the state

SHALL UNDERTAKE A COMPREHENSIVE STUDY OF THE STATE'S FOUR HISTORICALLY BLACK INSTITUTIONS TO DETERMINE WITHIN THE AREAS OF GENERAL ADMINISTRATION, PROGRAM, FACULTY, SUPPORT SERVICES, STUDENT AID, FACILITIES AND GENERAL FINANCIAL SUPPORT THE SPECIAL NEEDS THAT MUST BE MET IN ORDER TO ENHANCE THESE INSTITUTIONS.

(PTX 263 at 45.)

408. The resulting 1981 study, "*Enhancement of Maryland's Historically Black Institutions*," also referred to as the 1981 Consultants' report, specifically referenced the *Adams* criteria in defining enhancement. The Consultants' report gave enhancement a definition that tied directly to comparisons between HBIs and TWIs:

[E]nhancement requires a state to ensure that historically black institutions have the facilities, quality and range of programs, degree offerings, faculties, student services and other resources comparable to those at traditionally white institutions having similar missions.

(PTX 40 at 9.)

409. The 1981 study further defined what it would take to "implement this concept of enhancement." (PTX 40 at 8.) The analysis included program enhancement, facility enhancement, and operating funding enhancement beyond what an FTE-based funding formula would provide:

[N]ot only must a detailed analysis be made of the resources to support and upgrade existing programs at a level comparable to those at peer institutions, but note must be taken of the need for resources to purchase

new equipment and maintain equipment already on hand. Additionally, special library needs, laboratory facilities, and the need for sophisticated learning centers in mathematics, sciences, and communication skills must be met. Enhancement will mean that in addition to the general funds support based on an enrollment-based formula, provision for special funding must also be made. These special funds should be targeted to the amelioration of specific deficiencies discovered through institutional self-study and by outside technical assistance as was done in this Study.

(PTX 40 at 8.)

410. The 1981 study also defined enhancement

as the sum total of all actions taken by the state (a) to strengthen the role and mission of the historically black institutions; (b) to provide regular and special fiscal and other resources at a level consistent with that provided for historically white institutions with similar role and mission; and, (c) to facilitate the development of the historically black institutions so that the services and programs they offer are responsive to the educational needs of the citizens of the region in which these institutions are located.

(PTX 40 at 9.) In its conclusions, the Consultants' report referenced the concepts of comparability and competitiveness: "If the recommendations of this Study are implemented, the State's historically black institutions will be put in the position to be competitive with comparable institutions and will be assured of the continued capability to serve all citizens of the State, regardless of creed or color." (PTX 40 at 246.)

411. Maryland characterized its next desegregation plan, its 1985-1989 plan, as seeking to meet its legal obligation to desegregate the HBIs by enhancing them to make them comparable and competitive to TWIs:

The Plan was accepted by OCR as one which could meet the requirements of Title VI. Its principal objectives were (1) the continued integration of Maryland's TWIs through a portfolio of enrollment goals, recruitment measures, retention efforts and affirmative action plans, and (2) the enhancement of Maryland's HBCUs to ensure that they are comparable and competitive with TWIs with respect to capital facilities, operating budgets and new academic programs. The Plan provided for a wide range

of measures and activities to meet these objectives, including enhancement of the HBCUs, desegregating student enrollments through increased recruitment and improved retention programs for African American students, and desegregating faculties, staffs and governing boards, all of which were designed to meet the mandates of Title VI in the state-supported institutions of higher education in Maryland.

(PTX 4 at 6.)

412. According to the then-Chair of MHEC, the 2000 Partnership Agreement with OCR set forth what was necessary to desegregate the HBIs. (1/11/12 AM Trial Tr. 35:15-20 (Oliver)) Indeed, the Partnership Agreement says as much:

Part III sets forth the commitments that the State and OCR anticipate will result in agreement that Maryland is in full compliance with its obligations under federal law, particularly Title VI of the Civil Rights Act of 1964 (42 U.S.C. Section 2000d, et seq.) (Title VI) and the standards set forth in *United States v. Fordice*, 505 U.S. 717 (1992) (*Fordice*) regarding Maryland's system of public higher education.

(PTX 4 at 4.) The ninth commitment was to enhance the HBIs so that they would be comparative and competitive and thus would be attractive to students of all races:

[T]he state commits to design measures to ensure that the HBCUs are comparable and competitive with the TWIs in all facets of their operations and programs, as soon as possible and before the expiration of this Agreement. These measures will be designed to ensure that these institutions provide equal opportunity for a quality education to all students who choose to attend them and to enable them to compete for and be attractive to students regardless of race.

(PTX 4 at 37-38.)

413. At the termination of the Partnership Agreement, the Committee who studied commitment 9 stated that “there remain a number of areas in which the HBIs have not reached parity with the TWIs.” It stated that the Committee “found it extremely difficult to make an assessment of whether the State had provided the appropriate level of support to the HBIs to ensure that they are ‘comparable and competitive’ to the TWIs.” (PTX 9 at 20.) The Committee

recommended that “quantifiable measures be developed to guide future efforts to address remaining areas of special needs.” (PTX 9 at 20.)

414. The 2008 HBI Panel was charged by the Commission to Develop the Maryland Model for Funding Higher Education, also known as the Bohanan Commission, to “define the terms comparable and competitive.” (PTX 3 at 5.) The HBI Panel stated that the “comparability and “competitiveness” of HBIs to corresponding TWIs is closely related to a State’s legal obligation to desegregate its HBIs: “The terms ‘competitiveness’ and ‘comparability’ are often used as terms of art in the federal government’s evaluation of whether the state has remedied state-sanctioned racial discrimination in its public colleges and universities and eliminated where practicable the vestiges of that discrimination as required by both U. S. Supreme Court decisions in *Brown v. Board of Education* and *U.S. v. Fordice* and Title VI of the 1964 Civil Rights Act.” (PTX 3 at 5.)

415. The HBI Panel developed the following definitions of comparable and competitive:

We attached the term ‘comparable’ to describe institutional comparisons of capacity, which refers to resources, including various student and faculty inputs, programs, facilities, funding, and other factors. In other words, we examined those indicators whose organized and effective interaction enables an institution to generate instructional, research and service outcomes.

We used ‘competitive’ to refer to comparisons across institutions of their outcomes or results, such as degree production, student graduation rates, external funding generated, etc.

(PTX 3 at 8.)

416. The HBI Panel found that comparability leads to competitiveness: “Comparability once achieved will place HBIs in the position they would have been, absent the perpetuation of

discriminatory policies and practices, to compete effectively with other public institutions in the state.” (PTX 3 at 7.)

417. The HBI Panel concluded that the state had not treated HBIs comparably to the TWIs and that the HBIs needed to be enhanced to be competitive with the TWIs:

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 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. Indeed, one can reasonably assume that had the state consistently treated HBIs over their lifespan in a manner comparable to the treatment of TWIs, the HBIs would currently be competitive with other public institutions in these and other aspects of their operations both at the undergraduate and doctoral levels.

(PTX 3 at 7.)

418. Moreover, the HBI Panel recognized that enhancement of the HBIs is critical to eliminating the vestiges of segregation:

The [Bohanan] Commission’s charge to the Panel portends its intent to pursue a more strategic approach to the enhancement of HBI programs and facilities to eliminate any vestiges and effects of prior discrimination and the disadvantages created by the cumulative shortfall of funding over many decades.

(PTX 3 at 7.)

419. Subsequent to the HBI Panel’s report, the 2009 Maryland State Plan for Higher Education discussed the need to enhance the HBIs so that they would be comparable and competitive:

In summary, the investment of substantial additional resources by the State needed to ensure that its public HBIs are comparable and competitive with its public TWIs refers to the sum total of resources needed to deliver on the HBIs’ 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.

(PTX 1 at 32.)

IV. MISSION

420. As demonstrated by the evidence in this case, the present day mission of the HBIs is traceable to the era of *de jure* segregation.

421. The mission of a university is “what [the university] actually does . . . in terms of the major kind of activities associated with institutions, academic, the public service, their teaching, functions.” (2/8/12 PM Trial Tr. 3 (Allen).) It bears “some relationship to the mission statement” of the institution but goes beyond that to encompass “what happens on that campus on a day-to-day basis.” (2/8/12 PM Trial Tr. 3 (Allen).)

422. The 2008 HBI Panel Report unequivocally states that the HBIs’ current and future missions follow from their historic mission. According to this Maryland report, HBIs have had a dual mission to educate students in the way that institutions typically do and to specifically focus on poor students who are underprepared for college:

First and most important, the mission of the HBIs in providing an undergraduate degree is substantially different and more challenging than that of the TWIs. *HBIs historically and into the future have a dual mission.* They are committed to the traditional mission of any institution of higher education to provide a quality educational experience and guide students to the attainment of an undergraduate degree. HBIs in the State of Maryland also have as their mission to address the educational needs of students who come from families with traditionally less education and income and who are often under prepared as a result of their circumstances - not their abilities - for college level work. Helping these under prepared students earn a bachelor's degree is central to the HBI mission. This function for the HBIs is disproportionately more important than in the TWIs.”

(PTX 2 at 120 (emphasis added))

423. The 2009 Bohanan Commission, which commissioned the HBI Panel Report, similarly found that the HBIs have a dual mission:

HBIs have a dual mission to provide regular collegiate programs and to provide strong developmental education for students, mostly from low-income families, who otherwise would not have an opportunity to pursue a bachelor's degree.

(PTX 2 at 30.)

424. The 2009 Maryland State Plan also recognized the dual mission: “As part of their dual missions, HBIs are charged with providing access to academically well-qualified students and also a significant percentage of under-prepared students. Responding to the needs of poor and under-prepared students, requires academic and support services tailored to their needs.”

(PTX 1 at 56.)

425. MHEC’s Interim Secretary, MHEC’s Director of Finance and Facilities, and the Chancellor of USM all acknowledged that the HBIs have a dual mission. (1/23/12 AM Trial Tr. 89-90 (Howard); 1/24/12 AM Trial Tr. 91 (Kirwan); 2/1/12 AM Trial Tr. 48, 50 (Newman).)

426. After noting that the HBIs’ mission of educating under prepared students is more challenging than that of the TWIs, the HBI Panel recognized that the fulfillment of an institution’s mission depends on its capacity: “Simply comparing the traditional indicators of capacity (funding levels, student-faculty ratios, etc.) poses the question: What kind of capacity is truly needed to carry out such a challenging mission?” (PTX 2 at 120.) The Study Panel found that HBIs require additional funding in order to successfully carry out their broader missions.

(PTX 2 at 124.)

427. In the *de jure* era, both aspects of the dual mission flowed from racial separation. First, in terms of providing a regular public collegiate education, African American students in

Maryland had to go to HBIs except for when they successfully sued to attend white professional schools. (PTX 826 at 20.) Second, many of the students attending the HBIs were poor and/or underprepared. In 1937, the Soper Commission stated: “It will be granted that, generally speaking, Negro college students come from economic environments much less likely to provide them with funds for higher education than is the case with white students.” (PTX 17 at 68.) In studying the professions and incomes of the parents of students at Morgan, the Marbury Commission (1947) found that African American students were typically poor: “[T]he data suggest that the cost of sending their sons and daughters to college must be a tremendous financial strain on parents of such low economic level. And these data must be interpreted in light of the fact that the Morgan students are drawn from a higher economic level than the students of the other two state colleges for Negroes.” (PTX 18 at 80-81.) The Marbury Commission also found that African Americans suffered from poor pre-college educations: “The elementary and secondary schools for Negroes are in general inferior to those for whites. Perhaps the most arresting statistic revealing differences in the quality of secondary education, particularly, is that only one Negro high school in the entire state is accredited by the Middle States Association of Colleges and Secondary Schools. It is obvious that the Negro colleges of the state must recruit their students from inferior schools.” (PTX 18 at 81-82.)

428. The HBIs have gone from educating an all-African American and largely poor and/or underprepared population in the *de jure* era to a predominantly African American and significantly poor and/or underprepared population presently. Currently, TWIs have distinctive institutional identities based on their program offerings, which have supported program development and expansion consistent with advancing their missions. (1/10/12 AM Trial Tr. 40-41, 102-104 (Conrad); Allen Demonstrative 29.) In contrast, HBI missions are not sufficiently

inclusive to ensure comparable program development and expansion; rather, their missions continue to largely reflect the purpose for which they were founded— to provide modest educational opportunities for blacks. (1/10/12 AM Trial Tr. 102-104 (Conrad); PTX 856 at 29.) As discussed more fully elsewhere, the HBIs are only about five percent white, have a high percentage of students that require remediation, and charge lower tuition. When USM Chancellor Kirwan was asked about the definition of an HBI as: “. . . any historically black college or university that was established prior to 1964, whose principal mission was, and is, the education of black Americans,” he stated that this definition is “essentially the operational mission of Maryland’s HBIs . . . in terms of what we call facts on the ground” today. (1/24/12 AM Trial Tr. 39-40 (Kirwan).)

429. In their general capacity as institutions of higher learning, HBIs have always had more limited missions than TWIs. (Conrad Expert Report ¶ 14; PTX 630 at 1.) For example, in 1862, Maryland set up its first land-grant institution for White citizens. (PTX 18 at 84.) However, the State’s comparable institution for Black citizens (UMES) did not receive State funding until 1919 and was not even accredited for nearly another four decades. (PTX 18 at 84.)

430. The Soper Commission’s report compared TWIs and HBIs as of 1937. Its findings included the following:

- “[S]everal of the important functions exercised by white institutions are entirely missing in the program of the Negro institutions.”
- “Only one Negro institution of higher learning is accredited by the standardizing body.”
- “The instruction in the Negro institutions, generally speaking, is considerably inferior to that provided in the white institutions.”
- “Negro students have no opportunity, as white students have, to obtain a bachelor’s degree, or four years’ work, in elementary education.”

- “Prospective Negro high school teachers do not receive as extensive training as the white students at the University of Maryland. The quality of the instruction is not as good as in the white colleges generally.”
- “Princess Anne Academy – the Negro land-grant college – offers a very meager curriculum compared with the University of Maryland.”
- “Industrial Arts is the only subject in which any technical education is offered to Negroes, and the courses given are very few, as compared with the almost bewildering array of courses in mechanical and engineering subjects at the University of Maryland and Johns Hopkins.”
- “Business education is almost entirely neglected in the Negro institutions while strongly stressed in several white colleges.”
- “Health and physical education are not stressed as strongly or taught as efficiently in the Negro institutions as in the White, notwithstanding the great health needs of the Negro race.”
- “Fine arts instruction, that is, in art and music, is much superior in the white institutions. In addition, the state and Baltimore City appropriate considerable sums to the Maryland Art Institute which excludes Negroes.”
- “University extension which includes classes, popular institutes and field work, is almost entirely absent from the program of Negro higher education. Practically all of both state and federal funds used for this purpose go to support the white program, amount in 1935-36 to \$473,546 of which \$164,514 came from state funds. Only two Negro agricultural agents are employed, with no Negro Home demonstration agents. In view of the lower socio-economic status and of the large rural element of the Negro population this absence of extension service in connection with higher education appears almost calamitous. Not only Negro welfare but the potential wealth of the entire state seems to be overlooked in this absence of extension service.”
- “Research graduate opportunities do not exist for Negro students. This, in spite of real need, and of the actual feasibility of such opportunities.”
- “In professional education the state provides institutions for white students in the fields of Law, Medicine, Dentistry, and Pharmacy, with no corresponding provision for Negro students. The nursing profession for Negroes receives some state support but not comparably to that given white nursing education in the University of Maryland Hospital which received a state appropriation of \$105,000 in 1935-1936. Beside providing facilities to the state grants a reduction in fees to Maryland white students in the first four professions named.”

- “Pre-professional courses in law, medicine, dentistry, and pharmacy are offered in white institutions. Only one, pre-medical, is offered in the Negro institutions.”

(PTX 17 at 34-36.)

431. One of the “master conclusions” of the Soper Commission was that the scope of the functions of the HBIs were not equal to that of TWIs, and they should be:

An equivalent of higher education for the colored population involves not only the equivalence of individual financial aid . . . but also the equivalent provision of all the forms of education provided, in whole or in part, by the state for white students. These forms, usually referred to in this report as functions, should be made available to colored students where practicable within the state . . .

(PTX 17 at 37.)

432. Ten years later the Marbury Commission reached a similar determination:

We are fully aware of the constitutional obligation upon the state to afford equal educational facilities to Negroes and whites alike – an obligation which seems to us to be inherent in a democracy. We are equally aware of the difficulties which lie in the way of complete fulfillment of this obligation so long as the principle of maintaining separate schools is carried through graduate and professional instruction. . . . [W]e are convinced that their successful continuance depends on the willingness and ability of the state to improve the facilities which it now offers for the higher education of Negroes.

At present the state is scattering its shots badly. Princess Anne and Morgan State College are each performing some part of the functions which the University of Maryland performs for white students.

(PTX 18 at 379.)

433. In 1954:

There was a major land-grant university, the University of Maryland, College Park, as we know it, that offered advanced graduate degree programs, master's and doctoral programs. It was beginning to be a very comprehensive university, clearly the flagship institution in the state, a comprehensive and distinct mission, including its land- grant function, along with the many programs associated with being a land-grant school,

as well as the State's flagship university. In addition to that, there were the three Teachers Colleges, Towson, Salisbury, and Frostburg.

434. (1/10/12 AM Trial Tr. 21 (Conrad).) “In short, the TWIs had much more comprehensive missions, inclusive missions, distinctive missions, circa 1954.” (1/10/12 AM Trial Tr. 26 (Conrad).)

435. In the 1960s and early 1970s, the Maryland system of higher education underwent a period of enormous growth. Several studies were commissioned regarding how the growth should be managed. One of the issues that emerged was expanding the University of Maryland into Baltimore beyond UMB. In 1960, the Frampton Commission stated that it was logical to make Morgan the University of Maryland's Baltimore-based branch. (PTX 20 at 21.) Nonetheless, the possibility of expanding Morgan was essentially ignored by the State legislature, who elected to create UMBC. (PTX 268 at 4.)

436. In the Baltimore area during this period of growth, as shown in the table below, Maryland invested in Towson and the new predominantly white institution, UMBC, to a much greater degree than in HBIs Morgan, Bowie, and Coppin.

| FTE Students and State Appropriations, 1964-1974 | | | | |
|--|-----------|-----------|------------------|--------------------------|
| School | 1964 FTES | 1974 FTES | Increase in FTES | Appropriations 1964-1974 |
| Towson | 3,412 | 8,887 | 5,475 | \$ 49,169,200.00 |
| UMBC | NA | 4,854 | 4,854 | \$ 46,067,000.00 |
| Frostburg | 1,768 | 2,815 | 1,047 | \$ 26,339,800.00 |
| Bowie* | 520 | 2,255 | 1,735 | \$ 24,370,600.00 |
| Coppin* | 431 | 2,145 | 1,714 | \$ 22,520,920.00 |
| Morgan* | 2,879 | 4,686 | 1,807 | \$ 19,131,400.00 |
| Salisbury | 624 | 2,127 | 1,503 | \$ 15,032,000.00 |
| UMES* | 632 | 940 | 308 | \$ 9,355,700.00 |

| Key: |
|---------|
| * - HBI |

| Source: |
|---|
| Report to the Maryland Council for Higher Education by the Task Force to Propose Ways of Enhancing the Role and Image of Predominately Black Public Colleges in Maryland, August 9, 1974. MDED_00017388 |

(PTX 735.)

437. Also during this period, Towson and Morgan both built or refurbished the same types of buildings on campus but Towson's were much bigger. (PTX 660 at 20-21.) Towson supplanted Morgan as the school with largest enrollment in the Baltimore area, and UMBC, within 8 years of its founding, had larger enrollments than the three HBIs and a similar enrollment to Morgan. As discussed above, Morgan had a student population almost three times as great as Towson in 1953. In 1964, Towson was slightly bigger; by 1973, Towson was almost twice as numerous. Within eight years of its creation, UMBC shot past three HBIs had enrollment about equal with Morgan. UMES was slightly more populous than Salisbury in 1964. By 1974, Salisbury was more than twice as populous. The schools have remained on similar trajectories since as this comparison between 1974 and 2009 shows:

| School | FTE Enrollment 1974 | FTE Enrollment 2009 | Difference |
|-----------|---------------------|---------------------|------------|
| Towson | 8887 | 17275 | 8388 |
| Salisbury | 2127 | 7219 | 5092 |
| UMBC | 4854 | 9749 | 4895 |
| UMES | 940 | 3821 | 2881 |
| Bowie | 2255 | 4496 | 2241 |
| Frostburg | 2815 | 4434 | 1619 |
| Morgan | 4686 | 6287 | 1601 |
| Coppin | 2145 | 3175 | 1030 |

438. (PTX 735; PTX 755 at 12.) This strategy had the effect of preventing Morgan from attracting white students: “[T]he decision to create UMBC and develop Towson ensured that the potential pool of white students available to Morgan at the undergraduate level would be smaller than otherwise would be the case.” (PTX 268 at 17.)

439. On the Eastern Shore, a similar pattern emerged. As the table above shows, as of 1964, Salisbury and Princess Anne/UMES had similar enrollments. In the next 10 years, Salisbury received \$15,032,000 compared to \$9,355,700 million for UMES. Salisbury’s enrollment grew from 624 to 2,127 FTEs whereas UMES’s enrollment only grew from 632 to 940 FTEs. (PTX 735.) In the late 1960s, Morgan sought to expand its mission by proposing to become Baltimore’s regional university with a multiracial focus. No serious consideration was given to this proposal. (PTX 184 at 8; PTX 39 at 24.)

440. During this time, the Heller Commission recommended converting Salisbury to a community college and maintaining UMES as the only four year college on the Eastern Shore. The Commission noted that the two schools were only 12 miles apart and that the “well known” reasons for having two schools “close together in the lightly populated area” had changed. The first changed circumstance was that formerly Salisbury and UMES “maintained the racial

separation in education which was the custom at the time of their founding...,” and now “[r]acial separation may no longer be provided.” (PTX 409 at 31-34.)

441. For at least the last three decades, the State has explicitly acknowledged the role mission plays in desegregation. The 1980-85 desegregation plan, in a section entitled “ENHANCEMENT OF HISTORICALLY BLACK INSTITUTIONS,” stated that the HBIs “should be developed to their fullest potential in keeping with their roles and missions” and “that the State’s historically black institutions have been unique in their contribution to diversity of educational opportunity and freedom of choice in Maryland.” (PTX 263 at 14-15.) The plan then set forth a recommendation to study how the HBIs needed to be enhanced:

442. Therefore the Task Force recommends that:

THE STATE BOARD FOR HIGHER EDUCATION, WITH THE COOPERATION OF THE TASK FORCE AND THE INSTITUTIONAL AND SEGMENTAL GOVERNING BOARDS, SHALL UNDERTAKE A COMPREHENSIVE STUDY OF THE STATE’S FOUR HISTORICALLY BLACK INSTITUTIONS TO DETERMINE WITHIN THE AREAS OF GENERAL ADMINISTRATION, PROGRAM, FACULTY, SUPPORT SERVICES, STUDENT AID, FACILITIES, AND GENERAL FINANCIAL SUPPORT, THE SPECIAL NEEDS THAT MUST BE MET IN ORDER TO ENHANCE THESE INSTITUTIONS. THIS STUDY SHALL BE COMPLETED BY APRIL 1, 2011.

(PTX 263 at 15.)

443. The resulting study, the 1981 Consultants Report, set forth a definition of enhancement that encompassed mission. The report defined enhancement as state action: (a) to strengthen the role and mission of the historically black institutions; (b) to provide regular fiscal and other resources at a level consistent with that provided for historically white institutions with similar role and mission; and, (c) to facilitate the development of the historically black

institutions so the services and programs they offer are responsive to the educational needs of the citizens of the region in which these institutions are located. (PTX 40 at 8.)

444. As discussed below, the 1981 Consultants Report compared TWIs to HBIs with “somewhat comparable missions.” (1/9/12 AM Trial Tr. 15-16 (Popovich).) It also made a number of general comparisons that were unfavorable to the HBIs, such as,

- Without a doubt, the most critical need of each historically black institution – Bowie, Coppin, Morgan, and University of Maryland - Eastern Shore - is the upgrading of the science facilities and equipment. A frequently-made observation was that science facilities and equipment at neighboring high schools were superior to those at the historically black institutions. (PTX 40 at 245-246.)
- The underattainment [sic] of enrollment then led to the reduction of faculty positions, which in turn, led to some courses being cancelled or faculty being asked to teach over-load assignments, sometimes without additional remuneration. This type of situation occurred in non-black institutions; however, it seemed to be more serious and more pronounced in the historically black institutions. (PTX 40 at 245.)
- The need for more faculty in various disciplines was frequently noted by the consultants in the Enhancement Study. However, the present State policy which ties faculty positions to full-time equivalent student enrollment makes it difficult to justify the need for additional faculty. If the projected enrollment declines materialize, reductions in faculty will be required. Some reductions in faculty can be achieved by reducing the number of part-time faculty and through normal attrition. However, these means may not be the complete solution in those areas and departments with large numbers of tenured faculty and declining student enrollments. Moreover, since the black institutions have significant enrollments in remedial classes and heavy enrollments in lower division classes, these institutions should have a lower student/faculty ratio; more faculty may be needed instead of fewer faculty. (PTX 40 at 246.)
- That adequate funds be provided through specific set aside in annual appropriation/budget for institutions to maintain and replace instructional equipment. The maintenance of instructional equipment [at the HBIs] was cited nearly unanimously by academic and non-academic staff as a critical problem. Often, instances were cited where relatively small amounts of preventive maintenance could restore unusable equipment to productive status. (PTX 40 at 50.)(emphasis in original)

- Most of the campuses, notably Morgan and UMES, suffer from a serious burden of ‘deferred maintenance.’ While the reality of tight budgets and fiscal constraints cannot be ignored, a definite and equitable plan is essential to restore the rapidly deteriorating segments of the campuses’ physical plant.” (PTX 40 at 57.)
- In conclusion, the libraries of the four historically black institutions are in need of new, expanded financial support, consistent funding, managerial freedom for the directors, increased staffing and travel/continuing education funds, and upgraded equipment.

(PTX 40 at 69.)

445. In Commitment 8 of the 2000 Partnership Agreement, Maryland pledged “[e]xpansion of the Mission and Program Uniqueness and Institutional Identity of the HBIs” where “revised missions will support future establishment of high demand programs at the HBIs that will enhance their respective institutional identities.” (PTX 4 at 36.)(emphasis removed) In Commitment 9, Maryland promised to enhance “the distinctiveness of the HBI’s programmatic missions.” (PTX 4 at 38.)

446. In 2005, the last year of the Partnership Agreement, the four HBI Presidents wrote a letter which acknowledged that the conditions at the HBIs had improved in absolute terms since 1985, but relative to TWIs their position had “not improved” and “in some instances, worsened because of the consistency and scale of continued investment in majority institutions.” (PTX 13 at 3.) The letter also discussed the limited missions of the HBIs and how they had not improved since the Partnership Agreement:

447. Historically, HBIs have had relatively narrow missions and substantially fewer academic programs than majority campuses.... A number of the provisions of the [Partnership Agreement] are to expand HBI missions, make them more visible, and permit them to offer attractive programs without undue duplication at nearby campuses. (PTX 13 at 9.)

448. “However, rather than becoming more distinct, campuses have tended to become more duplicative of one another in recent years. . . . During the first three years of the [Partnership Agreement], HBIs received approval to offer only 21 new academic programs (10 bachelor’s 5 master’s, and 6 doctorates). The other public campuses in the state received approval to offer 103 (32 bachelor’s, 64 master’s and 7 doctorates).” (PTX 13 at 9.)

449. The 2008 HBI Panel also discussed how Maryland has disadvantaged the HBIs in the process of setting missions, approving programs, and funding them:

We refer to the process by which a state sets university missions, approves new programs, funds them through some model or process, and then holds universities accountable for results. Whether intentional or not, the past treatment of the historically black institutions 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.

(PTX 3 at 17.)

450. In addition to overall comparisons of the institutions, some of the studies have compared subgroups of the institutions because of some commonality of mission. One subgroup has been the schools that started out as normal schools, became teachers’ colleges and then became comprehensive universities (Towson, Salisbury, Frostburg, Bowie, and Coppin). The other subgroup contains the schools thought to have more of a research orientation, including the land grant schools (UMCP, UMBC, Morgan, Princess Anne/UMES). Both in the *de jure* era and since, the HBIs consistently suffer in these comparisons.

451. The Soper Commission evaluated the five schools that focused on teacher education at the time: the three TWIs (Towson, Salisbury and Frostburg) and two HBIs (Coppin and Bowie). (PTX 17 at 79.) Four were state schools and Coppin was not a state institution but

was owned by the City of Baltimore. All began in the public system as normal schools, which were designed to educate teachers for primary school. In 1934, by act of the Maryland General Assembly, Towson, Frostburg, and Salisbury were granted authority to offer Bachelor of Science degrees in education, which allowed for four year degrees in elementary education. (PTX 17 at 79.) The state legislation also converted the TWIs to “state colleges” whereas Coppin and Bowie remained normal schools. (PTX 17 at 79-80.)

452. In subsequent years, the TWI teacher schools remained ahead of the HBIs. Indeed, UMES was the only non-teacher public college that served African Americans, but it “wasn’t collegiate.” (1/5/12 AM Trial Tr. 40 (Popovich).) Rather, it had “very limited degree offerings at the bachelor’s level, often called a liberal arts college, but its mission was much more circumscribed than that, mostly offering land-grant related fields of study, such as agriculture, nursery school education, and the like.” (1/10/12 AM Trial Tr. 20 (Conrad).)

453. The TWIs began offering junior college degrees in non-teacher education that were not available at the HBIs even as of 1960. (PTX 19 at 23.) The TWIs began offering four year liberal arts degrees in 1960, which did not happen at Bowie until 1963. (PTX 21 at 32; PTX 763 at 6.) In fact, unlike the white teachers’ colleges, the black teachers’ colleges did not even offer a training program for high school teachers. (1/10/12 AM Trial Tr. 21 (Conrad); PTX 69 at 21.) By 1959, Frostburg and Towson offered graduate degrees in education before any HBI, including Morgan, offered graduate degrees. (PTX 20 at 46, 49; PTX 268 at 17.) Bowie and Coppin did not offer graduate degrees until a number of years later. (PTX 763 at 7, 13.) The five schools are referred to as comprehensive universities today. (PTX 763 at 5, 13, 17, 24, 34.)

454. The 1981 Consultants Report contained a comparison of Towson compared to Bowie and Coppin. (PTX 40 at 10.) In most respects, Coppin and Bowie suffered. For example:

- “There is no doubt that the comparison of Coppin with Towson in all the areas mentioned is an unfavorable one.” (PTX 40 at 131.)
- “Comparisons of fine arts and foreign language programs at Coppin and Towson must take into account the fact that Towson offers degree programs at the bachelor’s and master’s levels; no degree programs these fields are offered at Coppin. In some other subject matter areas of the humanities, Coppin offers degree programs to a smaller number of candidates than Towson does, thus accounting for the limited range of course offerings and the smaller faculty. Coppin appears not to have recovered its fiscal, administrative, or psychological balance since the cutbacks of about 1973, based on faculty perceptions reported.” (PTX 40 at 137-38).
- “Although there are some problems of the language program as discussed later, the chairman is a vigorous person with a strong dream for excellence at Coppin. The meager facilities for language do not compare to those at Towson, and since Coppin’s students are drawn from areas with little language training and background, the need for facilities; tapes, playback equipment, etc. Is very strong. Although Coppin need not have as large a system as Towson, it should certainly have a modern one on a smaller scale. To this end we recommend a visit to Towson and to the splendid set-up at UMBC to see the state of the art today.” (PTX 40 at 129.)
- “A comparison of science facilities and programs at the historically black institutions reveals some basic differences. Both Coppin and Bowie reflect the lock-step development of the historically black institutions when science and science facilities were developed several decades ago as a first step toward equity in education. The science facilities and programs then were permitted to lie fallow as the emphasis shifted to other disciplines. Such development in itself is not bad as long as science is not permitted to become static. Unfortunately, the sciences in the black institutions did not continue to advance.” (PTX 40 at 214.)

455. As part of the 2000 Partnership Agreement, Maryland committed to developing a strategic revitalization plan for Coppin that was to include an enhanced mission:

By September 1, 2001, the USM Board of Regents, in collaboration with MHEC, will complete an independent study leading to a comprehensive strategic plan for the revitalization of Coppin. The strategic plan will provide a vision for the future of Coppin, including an enhanced mission, academic programs, administrative and faculty staffing, institutional advancement, fiscal affairs, and physical plant. The strategic plan will identify the new construction and renovation of existing facilities needed to provide campus facilities which are equivalent to those at other publicly funded institutions. In this study, consideration will be given to classrooms, laboratories and other instructional facilities as well as academic, counseling, and administrative offices, walkways and other common areas. Consideration will also be given to those facilities as are found in nearby, publicly funded institutions that provide for parking, childcare, athletic opportunities, recreation, and other supplementary services. For this purpose, facilities will be regarded as “equivalent” if they support the institution’s mission and provide an atmosphere of safety and security, comfort, and convenience at a level comparable to TWIs. MHEC will support the development and approval of additional academic programs at Coppin, consistent with its revised mission, and provide any assistance necessary in the development of these new programs, as well as the strengthening of existing academic program offerings. In addition, the plan will identify the steps to be taken in order to ensure a broader mix of students, such as through the enhancement of an endowment at Coppin to provide full tuition, four-year, merit scholarships to undergraduate students.

(PTX 4 at 42-43.) The study team issued its report on September 10, 2001. (PTX 549.)

456. The “enhanced” mission that the 2001 study team developed reinforced Coppin’s dual mission as reflected in the first sentence of the mission statement that the study team proposed:

A comprehensive, urban, liberal arts institution with a commitment to excellence in teaching, research and continuing service to its community, Coppin State College provides educational access and diverse opportunities for students with a high potential for success and for students whose promise may have been hindered by a lack of social, personal or financial opportunity. (PTX 549 at 20.)

457. Except for dividing this sentence into three sentences, this statement became the beginning of Coppin’s mission statement. (PTX 763 at 13.)

458. Indeed, despite the commitment to enhanced mission required by the Partnership Agreement, the study team focused on vision instead of mission: “The most noticeable immediate changes that must occur for Coppin to become a revitalized institution are matters of vision, rather than large-scale changes to its mission.” (PTX 549 at 10.)

459. The 2001 study team discussed the financial challenges Coppin’s mission creates and the extra resources needed to fulfill that mission:

Coppin’s ability to remain relevant and dynamic, however, hinges on a serious, extensive revitalization effort. Without the College’s existence, it is doubtful that any other institution would take up Coppin’s mission, a mission that is especially expensive to fulfill. The students Coppin attracts are often beset by financial difficulties, making it impossible for the College to pass along costs to them. Furthermore, the programs from which they graduate – valuable as they are to sustaining the community and the City of Baltimore – are not those that typically produce wealthy alumni. Therefore, the Coppin Study Team recommends that the State of Maryland invest to revitalize Coppin State College’s academic programs, facilities, and operating budget.

(PTX 549 at 8.)

460. The 2001 Coppin study team detailed the problems Coppin faced as of 2001 in developing programs, most of which involved inadequate resources:

According to information provided by Coppin State College and other sources, the College has been historically plagued with the following challenges: (1) budget cuts; (2) faculty and staff vacancies to accommodate budget shortfalls; (3) high faculty teaching loads with consequent limited ability to write grants, publish scholarly papers and books, and conduct research; (4) reliance on too few staff to accomplish many tasks in too little time; (5) enrollment increases without accompanying budget increases; (6) classrooms lacking state-of-the-art instructional technology; (7) an inability to implement new program initiatives; (8) a failure to “internationalize” the curriculum; (9) limited funds for faculty development activities such as travel to conferences, seminars and symposia to present papers or to engage in other scholarly activities; (10) poor facilities, such as insufficient auditorium and conference spaces; (11) limited technology, print, and audiovisual resources in the library; (12) inadequate and antiquated laboratory

facilities, supplies, and equipment in natural, biological, and behavioral sciences; and (13) an inability to revise curriculum due to outdated equipment.

(PTX 549 at 23.)

461. The study team devoted seven pages of its report to analyzing the adequacy, quality and availability of faculty and staff, financial resources, course offerings, and instructional equipment and learning resources of various units at Coppin. (PTX 549 at 24-30). The analysis of the units demonstrated the depth of the problems at Coppin. The following examples are illustrative, and some cases reflect that things had gotten even worse since the 1981 Consultants report:

Department of Natural Sciences

Shortages of faculty and staff members exist in several academic programs... Faculty loads are so high that faculty research and scholarly productivity are low...When the departments of biology, physics and chemistry were combined in 1981, the total operating budget other than salaries was \$48,000 per year. Currently, the operating budget is only \$6,000 or 1/8 of the 1981 science budget. As a result, the quality and quantity of the science program have seriously eroded...Lack of funds for laboratory materials has resulted in biochemistry being taught by Michigan State University through distance education, no laboratory experience in the cell biology course, and the indefinite suspension of virology lecture-laboratory courses... The existing animal laboratory is not usable; the tissue culture facility is too small for class use. The chemistry laboratories are too noisy and poorly lighted. Hoods in the organic laboratories are poorly constructed, making it difficult for faculty to observe students at work. The cage washer is not working; and autoclaves are not operable. Because equipment for biology, physics and chemistry laboratories has not been purchased since 1982, most of it is obsolete or in disrepair.

Department of Mathematics and Computer Science

Approximately 10 years ago, the Department had 14 full-time faculty members; currently, there are only nine...Faculty teach eight course preparations a year, including laboratory and classroom courses...Since there is no laboratory support staff for this department, faculty members must do all of the teaching...Financial resources are quite thin. New

faculty members cannot be appointed. Modern and up-to-date equipment cannot be purchased. Laboratory support staff cannot be appointed... Courses need to be added...However, scarce faculty resources prevent these improvements from occurring...Without UNIX workstations, Macintosh workstations, or other sophisticated computer platforms and software, graduates are not provided with a cutting-edge education, which limits their ability to be competitive in the workplace...Laboratory print and e-resources are scarce and require upgrading. The mathematics program requires a laboratory, and would like to offer more mathematics laboratory courses; however, space and computer equipment are not available. There is only one laboratory to accommodate 500 students.

Department of Fine Arts and Communication

Additional faculty members would be needed to offer new initiatives such as majors in art, theater and music...Fiscal resources are tightly constrained...Faculty members would like to offer new courses in photographic art as well as majors in music, dance and theater, but they are hindered by financial constraints.... Video units are unavailable to record student performances for self-critiques. Many classrooms do not have lecterns. Dark room facilities are ill equipped, too small, and lack air conditioning, limiting enrollment to 15 students in photography per semester. The College does not offer digital photography, even though faculty members have the credentials to do so, because it does not have scanners or a computerized art laboratory. Art students lack easels and must work on flat tables....Pianos and other musical instruments are either not available or do not work. The music program lacks computerized technology and musical instrument digital interface (MIDI) equipment. The dance studio does not have the proper flooring for the dance program and is not air-conditioned. The auditorium does not have an operative lighting system, a costume shop, or state-of-the-art equipment for the theater program. The new ceramics studio and the existing painting and drawing laboratories do not have furniture or equipment.

Department of Humanities and Media

The Department is chronically understaffed, with 15 full-time faculty members teaching 66 sections of general education courses each semester, in addition to filled and overfilled courses in the major, and elective courses. Consequently, 23 part-time faculty members are teaching from one to three classes each. Additional full-time faculty positions are needed in English composition, literature and philosophy...Due to inadequate resources, faculty members are not able to meet the growing demands of the field. Funding for performances, exhibits, publicity, and faculty development is virtually non-existent. Classroom space, faculty members, instructional materials and equipment are in short supply...At

this time, there are insufficient major courses to attract new students to the program. The Department does not have up-to-date instructional equipment. The Media Arts track, which enrolls a large majority of the Department's majors, needs such basic items as cameras and editors. The language laboratory is too small and needs computer-based equipment to take students beyond the tape recorder and earphones of a generation ago.

Department of Psychology and Rehabilitation

The most critical challenge facing the Department is chronic understaffing. Although full-time tenure-track faculty members should teach all sections of General Psychology, the Department is unable to meet this basic requirement...Faculty members are unable to participate in research and other scholarly activities because of program travel restrictions...More course options in the undergraduate psychology curriculum would make CSC psychology students more competitive for graduate school. (In the past, only a small number of students progressed to master's and doctoral programs in psychology at other institutions.)...Statistical packages and assessment measures for student use, instructional space, classrooms, and research space are inadequate.

Division of Education

...Currently, too few faculty members and staff are available to carry out the Division's many mandates...Chronic underfunding also plagues the Division of Education. Faculty salaries are less than competitive. Instructional equipment, classroom space, and technology laboratories are insufficient to offer a high quality teacher education program...The inadequate number of faculty members has hampered the ability to offer multiple sections of required courses. As a result there is not enough diversity in the curriculum. The curriculum offered is a "lock step" one, which unduly prolongs program completion...Too few funds are available to purchase supplies and materials and to support continuous professional development. Teaching-learning facilities are insufficient to support instruction and learning.

Division of Nursing

Information presented from individual testimonies as well as data regarding other CSC peer institutions revealed that one major challenge is the availability of resources...Expansion of the Program to accommodate increased enrollment cannot become a reality without adequate faculty for instruction and clinical supervision of students at additional clinical sites. The Nursing Resource Center needs to be adequately equipped with computers and equipment/supplies in order to provide students with appropriate learning experiences. More classroom space is also

needed...The library has limited holdings in nursing...The Nursing Resource Center has limited equipment, supplies, audiovisuals, and hours of operation. Funding is not available for faculty to travel and present papers at professional conferences...A shortage of funding in the Division of Nursing retards faculty recruitment. Even adjunct faculty members are hard to recruit because of the very low hourly payment rate. Inadequate labs and clinical resources, as well as limited financial resources/aid, makes recruiting and retaining students difficult. Limited physical resources (classrooms, faculty offices, student lounge, etc.) and supporting staff (secretarial) also affect the development of the program...

Honors Division

In positioning itself to establish a competitive edge against other educational institutions, CSC must recruit a more diverse population of students. As more minority and under-represented students seek higher education, measures must be taken to attract more high achievers to CSC. Recruitment of additional students for the Honors Division will necessitate appointment of additional staff to implement plans for attracting and matriculating outstanding applicants...Information presented from individual testimonies as well as data regarding CSC peer institutions revealed that the College loses approximately 30 students annually to other universities and colleges within and outside the USM because it cannot afford to provide full scholarships (tuition, fees, room and board). Currently, CSC offers only tuition and fee stipends, making it less competitive with other educational institutions. If the College is to be revitalized, it must expand the number of highly talented students enrolled by providing competitive scholarship support for high achievers enrolling in the Honors Division.

Parlett L. Moore Library

Like many other entities on the CSC campus, dwindling resources have led to staff shortages...With the continued rising costs of resources and services, the library has not been able to maintain a relevant and current book collection... Limited resources have led to a decrease in the number of print and electronic journals, periodicals, and serial holdings available. In some instances, students travel to other libraries to access learning materials required for class preparation. ...The existing library is technologically deficient and has few of the amenities of modern libraries, such as electronic classrooms for innovative self-instruction. Its furnishings are sparse and its décor is less than inviting.

(PTX 549 at 24-30.)

462. The Maryland General Assembly directed USM to conduct a 2011 analysis of the implementation of the 2001 Coppin study plan. (PTX 810 at 1.) The 2011 analysis revealed that a number of the key deficiencies remained and some key recommendations had not been implemented. For example:

As discussed above, many of Coppin's units did not have enough faculty in 2001. In 2011, that problem persisted: "In fiscal year 2002, the University System of Maryland experienced a hiring freeze preventing CSU and other USM institutions from filling new faculty vacancies. Since that time, the University has been able to recruit new faculty. Although the freeze has been lifted, CSU has not had adequate resources to allocate to the recruitment and retention faculty. Consequently, existing faculty have had to maintain workloads above departmental requirements." (PTX 810 at 33.)

The 2001 study team found that Coppin was disadvantaged compared to other schools in attracting honors students in part because it could not offer full scholarships as its peers could and recommended that 30 such scholarships were needed "[i]f the College is to be revitalized." (PTX 549 at 30.) The 2011 study team found that the recommendation had not been implemented because of the cost. (PTX 810 at 35.)

463. The 2001 Coppin study team recommended the creation of 19 new programs. (PTX 549 at 35.) The 2011 team found that only one of the 19 nineteen programs had been implemented. (PTX 810 at 29-30.) Though the university had created 21 programs, their significance was limited because: some of the programs were core programs like political science and sociology that should have been created years before; seven of the programs were not degree programs but merely certificate programs; more than half of the programs had been approved since 2009 and some of those had not been implemented or were just being implemented; and several programs did not have adequate faculty. (PTX 1027 at 10; 02/08/12 PM Trial Tr. 9-13 (Allen).)

464. As a result of the 2001 Coppin study team report, Coppin received some capital upgrades. Despite the capital upgrades, the 2010 Master Plan Update came to a similar conclusion as the 2001 study team regarding the inadequacy of Coppin's facilities, with the exception of the new facilities. The 2001 study team stated that, "[o]verall, Coppin's physical plant does not meet the educational, administrative, student-support or recreational requirements typically associated with living and learning in the 21st century and found at other institutions." (PTX 549 at 47.) Similarly, the 2010 Master Plan Update included the statement that,

[d]espite the recent campus addition of the Health and Human Services Building and the Physical Education Complex, most CSU's remaining facilities do not meet the educational, administrative, and student related support needs typically associated with living and learning in the 21st century and found at other institutions—both within the State of Maryland and within its peers.

(PTX 843 at 62.)

465. Moreover, the 2011 study team found the maintenance associated with those capital upgrades had placed significant strain on Coppin's operating budget: "Beginning in FY 2008, though, the State's resources were not sufficient to fully fund the additional operating costs to operate new facilities within the USM. USM institutions, including Coppin, with new facilities coming on line were required to redirect existing budget dollars to fill the gap. By 2011, the effect on Coppin was that its General Fund operating budget support, in constant dollars and net of the mandatory costs to operate the new facilities, was roughly at the level it was in FY 1990."

(PTX 810 at 50.)

466. The difference in scope between the TWI teacher colleges turned comprehensive universities and their HBI counterparts persist until the present day. For example, as of 2008, Towson offered 107 degree programs, Salisbury offered 57 degree programs, and Frostburg

offered 51 degree programs, compared to 42 degree programs at Bowie and 34 degree programs at Coppin. (PTX 39 at 60.)

467. With respect to the land grant/liberal arts turned research universities, the HBIs have also had a more limited scope than the corresponding TWIs. At the time of the Soper Commission, the difference between the TWI land-grant university, UMCP, and the HBI land-grant, Princess Anne, was dramatic. The Soper Commission stated: “The most obvious difference is between Princess Anne Academy and the University of Maryland, both land-grant colleges. Princess Anne offers a very meager curriculum in agriculture compared with the University of Maryland. In addition, the Negro land-grant college offers few courses in industrial arts as compared with a bewildering array of courses in industrial subjects and engineering at the white land-grant college.” (PTX 17 at 88.)

468. Indeed, the Soper Commission was unsparing in citing the State’s neglect of Princess Anne and recommended that it be closed down:

Princess Anne Academy had far better be abandoned altogether than continue its present pretense as a college. It is not now a four year college worthy of the name, and indeed it has never been a junior college of sufficiently high standard to serve its students effectively or to represent the state. Little of property value would be lost to the State if it were closed. We do not mean to say that the principal and faculty of the school have not made an earnest effort to carry on, or that they are without qualifications for teaching positions. But the truth is, that the school has been denied the means with which to do the work.

(PTX 17 at 18.)

469. The Marbury Commission (1947) and Weglin Commission (1950) had similar views regarding Princess Anne. The Weglin Commission stated:

The position of Maryland State College at Princess Anne has been an anomalous one almost from its very inception and it has always been forced to play the role of an unwanted step-child. Under the tutelage of

Morgan College, Princess Anne fared poorly because the parent institution had trouble keeping its own head above water. In 1935, when the state completed the purchase of the college and placed it under the direct supervision of the University of Maryland, it fared little better until the report of the 'Marbury Commission' was published in 1947. That Commission pointed out the lamentable lack of facilities at Princess Anne and recommended its forthright abandonment.

(PTX 826 at 42-43.)

470. At the time of the Soper Commission, Morgan was a private university. The Soper Commission made a recommendation to the State that Morgan be adopted as a State-owned institution of higher education for African Americans, and by the time of the Marbury Commission report, the State had, in fact, gained ownership of the school. (PTX 17 at 20; PTX 18 at 89.) The Marbury Commission compared Morgan and College Park, and Morgan compared unfavorably:

[T]he College Park division of the University of Maryland spends more than twice as much per student as Morgan State College. While the University of Maryland has certain graduate and professional programs that are not provided at Morgan College and that are inherently expensive, the comparison is otherwise appropriate. The conclusion is not that the University of Maryland spends too much, but rather that too little is provided for Morgan State College.

(PTX 18 at 165.)

471. The Weglin Commission (1950) found that neither Morgan nor Princess Anne offered any graduate or professional courses. (PTX 826 at 20-21.) The Commission recommended that the State offer graduate degrees at Morgan:

The Commission also recommends that as many courses leading to the master's degree as possible be instituted at Morgan State College, these to include the major fields of study, i.e., English, social sciences, etc., and ultimately the physical sciences. The Commission feels that, while neither Morgan State College nor [Princess Anne/UMES] is in a position to offer all the courses in any of the professional fields, they could offer specialized courses to prepare students for such work.

(PTX 826 at 25.) Despite this recommendation, graduate courses were not available at Morgan until the mid-1960s and Princess Anne/UMES did not have any graduate students as late as 1975. (PTX 39 at 18; PTX 455 at 10.)

472. As mentioned above, UMBC became part of the Maryland system of higher education in 1966. In Maryland's desegregation reports, UMBC is commonly referred to as a predominantly white institution. (See e.g., PTX 381 at 385.) As discussed above, in the 1981 Consultants report UMBC was used as the comparator school to Morgan and UMES and the Consultants consistently found that UMBC's, and in some instances Towson's, programs and facilities were superior to Morgan and UMES. For example:

Crucial also is the extraordinary job that Morgan is called upon to do, that is, in contrast to UMBC (or Towson). Its students are almost all black, and many of them come from inner city high schools with inadequate college preparation, and from families in which college has never played a role. This mission is both the pride and problem with Morgan.

(PTX 40 at 163.)

Again, the contrast [in humanities at Morgan] with similar facilities at UMBC is deplorable. Other problems besides equipment and facilities are pressing in this department, but an English faculty does need the standard tools of writing today.

(PTX 40 at 152.)

Any student who visited the neat, trim, well-kept, well-supplied, clean, freshly painted, well-lit classrooms, halls, studios and seminar rooms at UMBC or Towson and then compared them with Morgan would immediately choose the former regardless of the quality of the program. Of all the things needed for enhancement of Morgan, this very limited budgeted area could make the most immediate difference in the humanities for recruitment and faculty morale. That the institution has a dedicated and good faculty who will continue under these conditions is a testimony to the strength of their belief in the mission of Morgan

(PTX 40 at 150.)

The present photography darkroom is totally inadequate and equipment is limited and in poor repair. Because of extreme space difficulties, the class is not always offered in spite of strong student interest. Again a decent facility and equipment would effect recruitment and retention of good students - students who would now choose UMBC or Towson if they saw what was available at Morgan.

(PTX 40 at 149.)

The mission [at Morgan] should be in place as an historically black institution that could be a prototype for public, black universities. This mission is not being accomplished. Sciences, which should be strong, are unfortunately weak and getting weaker. The situation, however, is not bleak. The sciences can be put back into a position of competitiveness, but only with a concerted enhancement effort.

(PTX 40 at 218-219.)

The sciences are poorly housed at Morgan State University, and it is apparent that the institution as a whole needs special attention if it is to achieve its new university status. The early development of science programs at Morgan did not continue; consequently, the initial vitality of the science programs waned dramatically. Facilities and programs in many case are out-of-date and inadequate; Faculty 'dedication is high, but dedication alone will not build competitive programs.'

(PTX 40 at 218.)

As with Morgan State University, science space at UMES is clearly a problem as well as the constant lack of maintenance support staff and funds.

(PTX 40 at 219.)

If UMBC were designed to be a research-oriented, golden arm of the University system, then the mission is on its way to being accomplished.

(PTX 40 at 217.)

In general there is a quality of the relation of faculty to administration at Morgan that is hard to define. At UMBC, for example, administrators praised their department heads, who in turn, seemed to have a strong sense of being supported in their goals to offer a first-rate education. Admittedly UMBC is a superior small university, but the same atmosphere pertained at Towson. Evidently high school students, or their counselors, are aware of this, too, and it has been necessary to put a cap on Towson

student population so that more students are not taken away from Morgan. In the last part of this report we will address some general concerns touched on here and there, to deal, in part with this serious situation.

(PTX 40 at 161.)

473. The HBI Panel did a thorough comparison of the research and doctoral capacity of UMES and Morgan compared to UMCP and UMBC and it found that the HBIs suffered in comparison. With respect to UMES and Morgan, “[t]he panel found *a substantial lack of comparability* both in terms of the institutional platform upon which doctoral programs are built and specific programs offered by MSU and UMES.” (PTX 2 at 47.)(emphasis added)

474. Maryland’s HBI Panel linked the lack of research capabilities at UMES and Morgan to their historic treatment by the State, in particular the process by which the state sets new missions:

We refer to the process by which a state sets university missions, approves new programs, funds them through some model or process, and then holds universities accountable for results. Whether intentional or not, the past treatment of the historically black institutions 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. *This is especially the case with respect to the doctoral granting status of Morgan State University (MSU) and the University of Maryland, Eastern Shore (UMES).* The current result of these longstanding past practices is that there exists a substantial lack of comparability and capacity (as compared generally with quality doctoral granting institutions both in and outside of the state, taking scale and composition into account) at both MSU and UMES (whose status as a doctoral granting institution is somewhat different from that of MSU). The substantial lack of comparability, and therefore the inability to be competitive, exists both in terms of the institutional platform upon which doctoral programs must be built and sustained, and with respect to the quality and nature of the specific doctoral programs offered by these two HBIs.

(PTX 2 at 129.) (emphasis added)

475. In particular, the HBI Panel stated that the research capabilities of these HBIs are inferior to that of the TWIs:

Quality doctoral universities require 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 described above that are the hallmarks of quality doctoral programs. *MSU and UMES have not had that opportunity and support to the same or sufficient degree.*

(PTX 2 at 135.) (emphasis added)

476. The panel noted of Morgan State University, the only HBI in the State to be classified as a Doctoral Research University, the following:

[A]s an historical fact, MSU's ability to develop as a quality doctoral university has been slower than the other doctoral institutions in the state. Specifically, even taking into account scale and uncertainty over intended specific missions, the data show that MSU has been slower to develop as a graduate/doctoral university than UMBC over roughly the same period (from the mid-1970s forward). UMBC gained clear direction by the 1980s in terms of its institutional role within the state and developed its current program cohort at a faster pace. In comparison, MSU's development as a graduate and doctoral university occurred seemingly without the support of a state strategic plan that delineated and directed specific state support of its graduate mission.

We have been unable to determine the extent to which the state's approval of MSU's doctoral programs carried with it specific funding commitments or the nature of any state oversight of subsequent program development. We find a continuing lack of consensus between the state and MSU on how specifically to develop and support MSU's graduate/doctoral role. In 1975, the state statutorily authorized and approved MSU to offer doctoral and professional programs as an 'urban-oriented institution.' The statute did not define or provide further direction as to the scope of the doctoral level programs authorized at MSU. However, fifteen such programs have been approved since that time and their development has certainly not

been within the same trajectory as found in most quality doctoral universities with which we are familiar.

The Panel believes that the doctoral programs at MSU should have the support needed to become quality doctoral programs according to accepted standards of quality for doctoral programs of the kind offered by MSU. Equally important, Morgan should have the resources required to mount the kind of university-wide institutional platform needed, and generally expected in the higher education community, to support quality and competitive doctoral programs and quality doctoral universities.”

(PTX 2 at 132.) In terms of addressing the inferior research capacity, at MSU, the panel recommended:

The next step involves developing a more specific definition of capacity and comparability in the context of MSU's institution-wide platform of support and its specific doctoral program offerings and a practical but comprehensive plan for building such capacity at MSU. This determination of comparable capacity needs to address both university-wide institutional platform components, particularly facilities and space, administrative support and specific doctoral program development.”

(PTX 2 at 135.) The panel noted in summary that,

[g]uided by these recommendations of MHEC and the Secretary of Higher Education and in consultation with them, the Governor and Legislature should establish a comprehensive program and provide the resources designed to make Morgan a quality doctoral research institution.

(PTX 2 at 136.)

477. Regarding UMES, the panel advised that Maryland:

[U]ndertake steps similar to those recommended to guide MSU's development in the previous section of this report with respect to the research doctoral programs offered at UMES taking into account UMES' status as a land-grant university. These steps include providing MHEC and the Secretary of Higher Education with a detailed strategic plan designed to improve its institutional platform and the specific doctoral programs it offers to make them comparable with those of similarly situated quality institutions. As in the case of MSU, MHEC and the Secretary would provide the Governor and the Legislature with their recommendations. Guided by these recommendations, the Governor and the Legislature should establish a comprehensive program and provide resources to make UMES comparable and competitive within each institutional category.

The Panel further recommends that the state use the same process recommended for MSU of appointing a small panel of experts to determine the threshold support and capacity needed for each of the priority targeted programs identified by UMES for development. The appointed panel of experts should identify and consider the capacity and outcome indicators required to establish baseline capacity, outcome goals for degree production and R&D funding if appropriate for the fields and programs targeted at UMES. While recognizing the differences in the tri-fold land grant mission of UMES, the HBI Panel believes that the recommended strategies and process outlined for MSU can be utilized effectively for moving UMES into comparability and competitiveness in its institutional category.

(PTX 2 at 139.)

478. With respect to UMES, the panel identified UMCP as an appropriate comparator for the doctoral level program offerings: “For the research doctoral programs at UMES, a comparison should be made with similar doctoral programs offered at UMCP or other appropriate out-of-state universities.” (PTX 2 at 139.)

479. Maryland’s Education Code sets forth the role of many of the individual institutions in the public system of higher education. While the Code specifies ambitious roles for several TWIs, the HBIs are primarily identified as HBIs, and to the extent they are not, their roles are duplicative of TWIs. This has significance for the mission statements of the schools, their funding, and their facilities and infrastructure.

480. The Education Code provides that the USM Chancellor is to develop an overall plan which incorporates a number of priorities. The Code specifically mentions four TWIs and each has a special status. The first priority is to “[e]nhance the mission of the University of Maryland, College Park as the State’s flagship campus with programs and faculty nationally and internationally recognized for excellence in research and the advancement of knowledge.” Md. Code Ann., Educ. § 12-106(a)(1)(iii). Another TWI-specific priority is to “[m]aintain and

enhance an academic health center and a coordinated Higher Education Center for Research and Graduate and Professional Study in the Baltimore area, comprised of the University of Maryland, Baltimore and the University of Maryland Baltimore County, with a focus on science and technology.” *Id.* A third TWI-specific priority is to “[s]upport Towson University as the largest comprehensive institution.” *Id.* With respect to the HBIs, the only reference to a priority relates to their status as HBIs: “Enhance the historically African American institutions and recognize the role of the University of Maryland Eastern Shore as the State’s 1890 land grant institution.” *Id.*

481. Amongst the non-USM institutions, the Education Code identifies TWI St. Mary's College of Maryland as “a public honors college.” Md. Code Ann., Educ. § 14-401. Morgan’s first identified role puts it in a duplicative and more limited status than UMB and UMBC: Morgan “[h]as the responsibility, with other educational institutions, for providing higher education research and graduate study in the Baltimore area.” Morgan’s second identified role “[i]s the State's public urban university with a mission of instruction, research, and service.” Md. Code Ann., Educ. § 14-101(b). That role could have potentially been unique; however, as discussed below, it has been duplicated to a significant degree by Towson, whose mission statement identifies it as “the State’s metropolitan university.” (PTX 100 at 1.)

482. As part of the 1988 higher education reorganization, the Education Code provides for a mission statement approval process. Md. Code Ann., Educ. § 11-302(a). MHEC was given the authority to approve mission statements. (1/11/12 PM Trial Tr. 59, 60 (Sabatini).) Maryland has significant involvement in determining the mission statements of its universities. Although “[t]he president of each public institution of higher education is responsible for developing a mission statement,” the Maryland Code for Higher Education directs that the

president shall also “submit the mission statement to the institution’s governing board” for approval. Md. Code Ann., Educ. § 11-302(a).

483. Although the mission statements originate with the institutions, they must be approved by several Maryland entities before they are ultimately approved. First, the mission statement must be shared with the USM Chancellor prior to sharing it with the Board of Regents, and the USM Chancellor shall make recommendations. Md. Code Ann., Educ. § 11-302(b)(2). Next, the statement may be shared with the institution’s governing board, which may adopt the mission statement as submitted or with amendments, or may require the president to revise the mission statement. Md. Code Ann., Educ. § 11-302(c)(2). Once approved, the institution’s governing board shall submit the statement to MHEC. Md. Code Ann., Educ. § 11-302(b)(1)(iii).

484. Next, MHEC must deem the statement consistent with the Maryland Education Code and, for the USM schools, the statement must further be approved by the USM Chancellor and the Board of Regents. MHEC can return the mission statement with objections if it determines it is inconsistent with the State Plan. Md. Code Ann., Educ. § 11-302(d); § 10-207(4). MHEC Interim Secretary Howard and former MHEC Acting Secretary Sabatini confirmed that MHEC has approval authority over the mission statements. (1/11/12 PM Trial Tr. 59 (Sabatini).) Indeed, former MHEC Acting Secretary Sabatini explained that an institution must put forth “substantial justification” for MHEC to approve any changes to the institution’s existing mission statement. (1/11/12 AM Trial Tr. 61 (Sabatini).)

485. Given that the mission statements must be consistent with the Education Code, State Plan, and USM Plan, it follows that all of the mission statements for Maryland’s HBIs reflect a continuing role of providing education for populations with remedial or limited financial

means. For example, Bowie's mission statement maintains that the institution plans "to continue [its] historical, present, and future role in providing access and success to individuals with limited financial means." (PTX 763 at 8.) According to Coppin's mission statement, "Coppin State University provides educational access and diverse opportunities for students with a high potential for success and for students whose promise may have been hindered by a lack of social, personal or financial opportunity." (PTX 763 at 13; 1/9/12 PM Trial Tr. 11 (Avery).) As described by President Avery, Coppin's mission is to serve a student body that might not be academically qualified to enroll at other institutions. (1/9/12 PM Trial Tr. 11 (Avery).) Finally, Morgan's mission statement is that:

[t]he University enrolls a student body from a wide variety of academic and socioeconomic backgrounds...Morgan enrolls a relatively broad segment of the young population, from those who have outstanding pre-college preparation to those who require support to realize their potential in college and complete a degree.

(PTX 763 at 99.)

486. The continued existence of the HBIs' dual mission has been corroborated by the testimony of their presidents at trial. When asked to describe the dual mission, Bowie President Dr. Mickey Burnim stated:

[W]e are to serve students who come to us as a comprehensive university, that is, providing the usual array of degree program offerings at acceptable quality levels, to serve those students, and at the same time, we are to serve students who have the potential to succeed, but who come to us with some educational deficiencies for various reasons. So that is the duality of the mission described.

487. (1/5/12 PM Trial Tr. 41 (Burnim).) Former UMES President Dr. Thelma Thompson similarly confirmed that HBIs, including UMES, historically and into the future have a dual mission. (01/04/12 PM Trial Tr. 34 (T. Thompson).)

488. Decisions MHEC has made in the mission approval process have disadvantaged the HBIs. In 1999, UMES proposed amending its mission statement to expand its PhD offerings in 5-7 disciplines. UMES's president contended that this expansion was consistent with UMES's mission and constituent needs and would benefit UMES by attracting quality faculty and through enhanced funding. MHEC denied approval. (PTX 254 at 108-09.) This serves as an example that HBIs are "not independently empowered to make determinations about their missions." (02/08/12 PM Trial Tr. 6 (Allen).)

489. In the 2005-2006 period, MHEC approved mission enhancements for two TWIs – Towson and UB – over Morgan's objection. Towson sought to have its mission statement revised to identify itself as the State's metropolitan university. (PTX 287 at 1.) As stated above, Morgan has a statutory designation as the State's urban university. Morgan objected to Towson's proposal because it duplicated Morgan's mission; metropolitan and urban can be used interchangeably and Morgan and Towson are only a few miles apart. *Id.*; (01/12/12 AM Trial Tr. 96-98 (Richardson).) The first sentence of Towson's approved mission statement reflects that Towson got what it sought: "Towson University, as the State's Metropolitan University, focuses on providing highly developed educational experiences and community service through a broad range of intellectual opportunities to a diverse student body at both the graduate and undergraduate levels." (PTX 763 at 34.)

490. The issue regarding the University of Baltimore traces back to its origins in the public system. University of Baltimore began as a private university. During the 1960s and 1970s, as the public sector expanded, 12 private schools closed and others were threatened. (1/5/12 AM Trial Tr. 83-85 (Popovich).) At the time, there were four public universities in the Baltimore area. In addition, in 1973, the head of the Maryland Council of Higher Education

warned of the impending downturn in enrollments because of a decrease in the number of college age residents. (PTX 268 at 5; PTX 39 at 30-32.) At the time, UB was financially troubled and although its programs in law and business were unaccredited, those programs “had graduated numerous public legislators and public officials” and “thus, found strong support in certain quarters for its rescue.” (PTX 268 at 18.) The State agreed to convert the University of Baltimore into a public institution in 1975. (PTX 22 at 24-25.) According to the Baltimore Sun, this created a “mess” in Baltimore because of the number of schools. (PTX 39 at 31; 1/5/12 AM Trial Tr. 95 (Popovich).)

491. At first, there were mission limitations on UB because of mission duplication concerns. In 1974, the Cox Commission expressed concern about the effect of UB on Morgan and Coppin and recommended that UB not be allowed to enroll first and second year students because of desegregation concerns:

The judgement [sic] of the Task Force is that the establishment of the University of Baltimore as a public college may have a negative impact on Morgan and Coppin in terms of overlapping enrollment, curriculum and funding. Also, because of the probable accompanying strong effect on racial desegregation in the Baltimore metropolitan area, the following recommendation is made.

RECOMMENDATION 10:

THAT THE MARYLAND COUNCIL FOR HIGHER EDUCATION AND THE BOARD OF TRUSTEES OF THE STATE COLLEGES MAKE CERTAIN THAT THERE BE STRICT OBSERVANCE OF THE LAW (AND ITS INTENT) WHICH ESTABLISHED THE UNIVERSITY OF BALTIMORE AS A PUBLIC INSTITUTION, STARTING JANUARY 1, 1975. THE LAW MAKES IT CLEAR THAT THE UNIVERSITY OF BALTIMORE WOULD OPERATE "AS AN UPPER DIVISION ACADEMIC INSTITUTION, THAT IS THIRD AND FOURTH COLLEGIATE YEAR AND POSTGRADUATE STUDIES".

(PTX 22 at 24-25.) Legislation passed in 1975 made clear stated that UB was limited to upper division students with at least 56 undergraduate credits. Md. Code Ann., Gen. Pub. Law § 14M art. 77A; *see also* 1975 Ch. 319; (1/30/12 AM Trial Tr. 53-54 (Bogomolny).)

492. When the Education Code was reorganized in 1988, the limitation regarding the University of Baltimore was not included. In the 1990s, UB began the process of seeking permission to admit first and second year students. In 1998, MHEC gave UB approval to start admitting sophomores for a five year period. (PTX 254 at 108.) In 1999, when UB sought approval to offer enrollment to second first and second years without condition, MHEC's staff was of the view that UB should remain an upper division institution. (PTX 254 at 108.)

493. UB and USM did not give up. USM Chancellor Kirwan testified about how USM and UB collaborated to obtain MHEC approval and how adding first and second year students to UB has enhanced UB's mission:

Q We heard some testimony in this litigation about the expansion of University of Baltimore, and the lower division initiative. What, if any, role did you play in the creation of the lower division initiative at the University of Baltimore?

A: Right. Well, given my role as CEO of the System, I played I think an important role in that process...[T]here were a lot of things that the Board undertook to streamline its work and also to enable the state to produce more college degrees in a cost-effective way. So one piece of this strategy was to look at University of Baltimore. You know, it sort of had an anomalous mission. It only served juniors and seniors. It didn't have any lower division student body. ... So we sought permission to change the mission statement of the University of Baltimore to allow it to take freshman and sophomore students, and by that means, expand its enrollment. So we took that. The Board approved that. We took it to MHEC, and MHEC approved its change in its mission.

Q What, if any, level of success have you seen with regard to the original intent of that initiative?

A Well, we think it has been, it has been highly successful...I think you could say it has, it has had a very positive effect on the institution overall because it now sees itself as, you know, a real university in the sense that, you know, it is like all the other universities. It has freshmen and sophomores. That's enriching the curriculum and it serves the educational -- I think it has enhanced the educational mission of the institution, and has been, I would describe it, as a very successful step for us.

(1/24/12 AM Trial Tr. 63-66 (Kirwan).)

494. In USM's and UB's proposal to MHEC about the UB mission expansion, they stated that the no new facilities would be required as part of the mission expansion because during the daytime only the facility utilization rate was 10-40%. (PTX 103 at 41; 1/30/12 AM Trial Tr. 59-61 (Bogomolny)). UB also represented that the expansion involved no new programs. (PTX 103 at 43; 1/30/12 AM Trial Tr. 60 (Bogomolny).) Additionally, the proposal stated the expansion was needed because of an increased number of school age residents. (PTX 103 at 52-53.)

495. None of these representations have borne out. UB is growing with new facilities and programs while enrollment in the higher education system is stagnant. In the recent University of Baltimore Foundation's Annual Report, UB President talked about the building and the "transformation" occurring on campus:

You need only spend a few minutes in UB Midtown, whether it's catching the train in or out of Penn Station, walking along North Charles Street or driving down the Jones Falls Expressway, to recognize the transformation that's occurring on the University of Baltimore campus. The signs are pervasive, cranes, hard hats, bulldozers and cement mixers. You can actually see UB's progress, and it's happening at an extraordinary rate.

(PTX 916 at 3; 1/30/12 AM Trial Tr. 47 (Bogomolny).)

496. One new building under construction is a new law school, which UB's President has described as an "iconic, forward looking building." (PTX 921 at 1.) The building cost \$107 million and the University received \$15 million in private donations. (PTX 920 at 1; 1/30/12

AM Trial Tr. 41-42 (Bogomolny).) Regarding the existing law school, which opened in 1982 and is 120,000 square feet, UB's President says UB is "going to repurpose the building to help the growth that has been occurring at the university. We are now almost 2,000 students larger than we were in 2002, and we have to accommodate the growth in terms of faculty offices and space, student facilities." (1/30/12 AM Trial Tr. 44 (Bogomolny).)

497. In UB's most recent Strategic Plan, UB states that it seeks to develop new undergraduate programs that broaden the four-year curriculum. (PTX 917 at 4; 1/30/12 AM Trial Tr. 61-62 (Bogomolny).) Indeed, since the mission expansion, UB has created new bachelor's programs in integrated arts, international studies, and environmental sustainability and human ecology. (1/30/12 AM Trial Tr. 62 (Bogomolny).)

498. UB's Master Plan, which is approved by the USM Board of Regents, states that UB's vision is to increase the student head count to 8,000. (PTX 962 at 8; 1/30/12 AM Trial Tr. 48 (Bogomolny).) UB is seeking to become a "medium institution" with an enrollment between 8,000 and 10,000 because "[t]he data on university financing indicates that medium universities between eight and 10,000 become a better unit in terms of scale for being cost-efficient. So our desire is to make the university more available to more students who need the education, and also to reduce the overall cost of the institution by reason of scale." (PTX 962 at 15; 1/30/12 AM Trial Tr. 49 (Bogomolny).) Additionally, UB's Strategic Plan states that UB seeks designation from USM as a growth institution. According to UB's President, this is because "[w]hen and if there is ever growth funding available, such a university might in fact receive funding related to the additional student head count in order to offset the costs relating to those individual students." (PTX 962 at 11; 1/30/12 AM Trial Tr. 61 (Bogomolny).)

499. In MHEC's 2011-2020 enrollment projections, UB is projected to increase its undergraduate enrollment by 58% and its graduate enrollment by 14% in the next years. Dr. Ben Passmore, USM's Assistant Vice Chancellor for Administration and Finance, authors USM's enrollment projection report that MHEC uses to create the system-wide enrollment projections. (1/25/12 AM Trial Tr. 62-65 (Passmore).) Dr. Passmore stated that UB's projected growth, which "largely" came from UB's staff, was "dramatic" and an "outlier" in the system because of the addition of first and second year students. (1/25/12 AM Trial Tr. 65-67 (Passmore).)

500. Contrary to USM's representation that system-wide student demand was increasing, student demand has leveled off. According to USM's enrollment data, the number of first year, full-time students within USM has decreased every year since 2008 and the five-year change rate is -3.6%. (PTX 941 at 8; 1/25/12 AM Trial Tr. 57-61 (Passmore).) All three HBIs that are within USM have had enrollment decreases in the last year and over the last five years. (PTX 941 at 8; 1/25/12 AM Trial Tr. 61-62 (Passmore).)

501. USM's institutional decision to push for the mission expansion of one of its institutions – UB – has negatively impacted one of its other institutions – Coppin. UB is a few minute drive from Coppin. (1/30/12 AM Trial Tr. 64-65 (Bogomolny).) As UB's President acknowledged on cross-examination, Coppin's enrollment has been declining since UB's mission was expanded. Indeed, Coppin's Fall 2011's first-year undergraduate, full-time enrollment is its smallest first year class going back to at least 2001. (PTX 941 at 8.)

502. While Coppin did not object to the UB expansion, it would have been hard pressed to do so given that its President reports to USM's Board of Regents and Chancellor, and USM pushed for UB's mission expansion. Instead, the President of Morgan, who reports to a

Board of Directors independent of USM, objected to UB's mission expansion because it would duplicate the missions of neighboring institutions. (PTX 287.)

503. Another decision by USM that enabled mission expansion at some TWIs but no HBIs was USM's designation of growth institutions. USM originally designated Towson, Salisbury and UMUC as growth institutions. During a three year period before the 2008 recession, Towson and Salisbury received capital funding enhancements. (1/31/12 AM Trial Tr. 23-24 (Vivona).) Bowie was designated as a growth institution "about two years ago." (1/31/12 AM Trial Tr. 23 (Vivona).) Bowie has not received any benefit from its designation as a growth institution. (1/5/12 PM Trial Tr. 63 (Burnim).)

504. The missions of the HBIs are threatened by the expanded mission scope at the TWIs because to the extent a TWI's mission exceeds or duplicates an HBI's mission, the result tends to be "continuation of segregation by race." (2/8/12 PM Trial Tr. 23-24 (Allen).) Interim Secretary Howard testified that institutional isomorphism is the phenomenon within public higher education in which institutions become more alike over time because of competitive and prestige pressures. (1/23/12 AM Trial Tr. 73 (Howard).) These competitive and prestige pressures are reflected in institutions competing to improve their Carnegie classifications and program offerings, including levels, and change their status from colleges to universities, so that they are more like more highly ranked institutions. These behaviors are particularly evident in institutions that are less selective, less research intensive, and have lower Carnegie classifications. As a result, the institutions became more similar to one another and less distinctive and diverse (1/23/12 AM Trial Tr. 73-75 (Howard).)

505. Institutional isomorphism has taken place in Maryland. "During the early 1990s, the Secretary [of Higher Education] announced that the Governor wanted more competition in

higher education in the state.... This guidance led to a more permissive role by the coordinating board with respect to campus missions, authorized degree levels, and academic programs.”

506. (PTX 184 at 5.) For example, in the 1999 mission statement process, five USM institutions sought new or supplemental doctoral granting authority (Bowie, Towson, UB, UMUC, and UMES) and all but UMES’s was approved. (PTX 254 at 104-113.)

507. In MHEC’s current mission review process, MHEC staff acknowledged in a January 2012 memorandum that the problem of institutional isomorphism exists in Maryland as reflected in the proposed mission statements:

The statute obliges public institutions to build upon the unique strength of the campus thus ensuring unique missions, goals and programs. Yet a trend among a few campuses with liberal arts/education missions indicates an increase in academic programs not related to their missions, primarily in technology. Mission creep is an issue that develops when an institution stretches its mission and builds new certificates and degree programs not central to its mission. The situation may result in minimizing the cost-economies of mission focused program delivery. When program proposals exceed the boundaries of their missions, they become problematic. Further study, policy analysis and discussion of the issue are needed.

(PTX 866 at 19.) Nonetheless, in the next paragraph of the memorandum, staff recommended approving the submitted mission statements. *Id.*

Missions, Funding & Programs

508. In Maryland public higher education, programs and funding are dependent on a university’s mission.

509. The Maryland Code for Higher Education connects State funding to institutions with their missions. With respect to an institution’s base funding, the Code states: “Funding proposals for public senior higher education institutions shall include: (1) Base funding in

accordance with the role and mission of the institution, as approved by the Maryland Higher Education Commission.” Md. Code Ann., Educ. § 10-203(c).

510. With respect to capital funding, the Code further states: “Funding proposals for public senior higher education institutions shall include: . . . (3) Capital funding to support construction, operation, and maintenance of a physical plant that is consistent with each institution’s mission.” *Id.*

511. Moreover, the USM Board, in consultation with the institutions and Chancellor, shall “[e]stablish standards for funding based on differences in the size and mission of the constituent institutions.” Md. Code Ann., Educ. § 12-105(a)(1)(i).

512. According to State officials, institutions with research missions receive a greater level of funding because they are higher cost institutions. (1/31/12 AM Trial Tr. 42-44 (Vivona).) According to Joseph Vivona, USM’s Chief Operating Officer and Vice Chancellor for Administration and Finance, there are three research institutions within USM, UMCP, UMB, and UMBC – all TWIs. (1/31/12 AM Trial Tr. 44 (Vivona).) Bowie and Coppin are comprehensive universities and UMES is an 1890 Land Grant university that is treated as doing some research but is not “considered a research university.” (1/31/12 AM Trial Tr. 44-45 (Vivona).)

513. The impact of an institution’s mission on its funding as a practical reality was explained by Dr. Allen, who stated, “The contemporary funding disparities, those disparities that persist, are due to the assignment of less research intensive and prestigious missions to HBIs, the point being there that a research mission, for example, translates into higher levels of funding because it is presumed and understood that you need different resources, you need different faculties, you need different facilities. So to the extent the mission category has been denied

HBI, then their potential for receiving higher levels of funding has been capped.” (1/18/12 AM Trial Tr. 69-70 (Allen).)

514. Maryland’s HBI Panel likewise recognized the connection between missions and programs. The panel noted that with respect to mission and classification: “The number and kind of graduate programs, especially at the doctoral level, depend on defined institutional missions. Most public institutions do not offer doctoral programs; those that do, offer different kinds and numbers by state design.” (PTX 2 at 130.)

515. Indeed, the connection between missions and programs is reflected in Maryland’s own higher education code. Although a president of a Maryland public college or university may propose to establish a new program, the president is required to notify the institution’s governing board and the Maryland Higher Education Commission. Md. Code Ann., Educ. § 11-206.1(b). Within 30 days of receiving notice, the Commission or any institution may file an objection to the implementation of a proposed program based on inconsistency of the proposed program with the institution’s *approved mission* for a public institution of higher education and the mission statement published in the official catalog of a nonpublic institution of higher education. Md. Code Ann., Educ. § 11-206.1(e). Furthermore, if an attempt to resolve the objection is unsuccessful, “the Commission shall make a final determination on approval of the new program. Md. Code Ann., Educ. § 11-206.1(f)(5).

516. The relationship between missions and programs was likewise explained by Dr. Allen, who stated “HBI missions, on the other hand, have not been sufficiently inclusive to ensure comparable program development and expansion relative to TWIs. Rather, the missions of those HBIs continue to be largely a reflection of the purpose for which they were founded, to

provide modest, and honestly, it may be more acceptable to say substandard educational, higher educational opportunities for blacks.” (1/18/12 AM Trial Tr. 65 (Allen).)

517. As a result of the lack of support for the academic missions of HBIs, their institutions are limited by race. As Dr. Allen explained, “[i]t’s a definition of the campus more so on racial identity and less so, as I said, on academic programs or on a programmatic definition.” (1/18/12 PM Trial Tr. 17 (Allen).) He further stated, “The first thing that all too often comes to mind with, or for better or worse that comes to mind for HBI’s, they are HBI’s. They are racially identified institutions.” (1/18/12 PM Trial Tr. 18 (Allen).)

V. PROGRAM DUPLICATION & PROGRAM UNIQUENESS

A. Introduction

518. Maryland’s policies and practices of unnecessary program duplication, unequal program development, and program inequality were hallmarks of its racially segregated higher education system during the *de jure* era. These practices continue today as a result of State regulations governing program development and perpetuate the lack of racial diversity at the HBIs.

519. During the *de jure era*, the academic programs offered at HBIs were limited in number, quality, and degree-level consistent with the State’s limited vision for HBIs (namely, providing modest educational opportunities for Blacks). (1/18/12 Trial Tr. 65 (Allen).) The few academic programs that HBIs did have were often duplicated at neighboring TWIs and under-resourced, causing them to be of inferior quality. Maryland has admitted that unnecessary program duplication was part and parcel of its *de jure* higher education system. (Defendants’ Answers To Plaintiffs’ First Request For Admissions And Objection To Second Set Of Interrogatories To All Defendants 2 (attached as Exhibit E); Lyons Designations 362.)

520. Moreover, Dr. Clifton F. Conrad, the nation's seminal expert on academic program duplication and former adviser to defendants and OCR on academic program duplication in Maryland, testified as plaintiffs' expert on unnecessary program duplication and determined that more than 50% of academic programs at Maryland's HBIs are unnecessarily duplicated at the State's TWIs. Dr. Conrad also found Maryland's HBIs only have 11 non-duplicated (unique) programs that are high-demand, non-core programs. By contrast, Maryland's TWIs have 122 such programs.

521. Without unique, high-demand programs, Maryland HBIs are greatly circumscribed in their ability to attract a racially-diverse population of prospective students as evidence by the 1997 Conrad, Brier and Braxton study on the reasons white students select HBIs. The study, performed at North Carolina Agricultural and Technical State University, Winston-Salem State University, Southern University at New Orleans, Kentucky State University and Savannah State College surveyed white students at these HBIs and requested that they rank their reasons for attending their HBI. The study found that the existence of unique and high-demand academic programs played a "very large role in encouraging Whites to attend HBIs." Dr. Conrad served as the lead author of the study. Based in part on his investigation, Dr. Conrad attributes the lack of diversity at Maryland's HBIs to unnecessary program duplication and the absence of unique, high-demand programs at those schools.

522. Similarly, Dr. Walter E. Allen, plaintiffs' student choice expert who testified on the same issue on behalf of the United States' Justice Department in *Fordice*, determined that unnecessary program duplication is hindering racial diversity at Maryland's HBIs. Dr. Allen explained that such duplication is harmful to desegregation goals, irrespective of whether the institution with the original program was the TWI or the HBI. When he was asked whether it

mattered if the TWI or the HBI had the program first, he stated “ultimately not.” Dr. Allen explained that this was due both to “a history that restricted and limited the ability of HBIs to have programs first” and to the fact that the program duplication maintains a dual system, which allows for racial bias to influence student choice. (1/18/12 AM at 19 & 23 (Allen).).

523. Specifically, without unique, high-demand programs, the HBIs will continue to be confined to *racial* -- rather, than academic -- identities and thereby vulnerable to racial bias by other-race students, who will prefer TWIs’ stronger and better-resourced menu of academic program offerings without a distinctive racial identity. (1/8/12 AM Trial Tr. at 88-89 (Allen).) (“All too often those [historically black] schools now are identified by their racial history as opposed to [by] programs.”).

524. Dr. Allen testified that for Maryland to rectify the lack of diversity at its HBIs it must implement unique, high-demand academic programs at those institutions: “Maryland’s policy and practice of not providing a mission supported by meaningful program uniqueness at HBIs means the defining characteristic of these HBIs is their historic racial identity and their mission to serve black students...The remedy is to refine the institutional identity to create academic foci and specialties for HBIs. Maryland ought to give selected program emphases and program exclusivity to HBIs.” (1/18/12 AM Trial Tr. at 88-89.)

525. Dr. Joseph Popovich, a hybrid-expert witness on institutional planning and research in Maryland higher education, including programs, corroborated the role of unique, high-demand programs in attracting other-race students to Maryland’s HBIs. Dr. Popovich is the vice president for planning and information technology at Morgan State. He has a doctorate in higher education administration from UMCP. Dr. Popovich has worked in Maryland higher education since 1976. (1/5/12 AM Trial Tr. at 3-4 (Popovich).)

526. Specifically, Dr. Popovich analyzed patterns of white-student enrollment at Maryland's HBIs over a forty-year period. He determined that in 1972, when Maryland's HBIs had a greater number of unique, high-demand academic programs (particularly at the graduate level), the institutions enjoyed greater white-student enrollment. (PTX 184 at 1.) Dr. Popovich similarly determined that as the number of unique, high-demand programs at HBIs have declined, so too have their numbers of white students.

B. *De jure* Era Academic Programming Policies & Practices

527. Maryland's policies and practices of unnecessary program duplication, unequal program development, and program inequality between its HBIs and TWIs are vestiges of its *de jure* era higher education system.

528. Unnecessary program duplication as a policy and practice in Maryland higher education during the *de jure* era has been repeatedly admitted by the defendants. Defendants' Answers To Plaintiffs' First Request For Admissions And Objection To Second Set Of Interrogatories To All Defendants 2 (Ex. E); Lyons Designations 362 ("Defendants *admit* that there was program duplication between at least one of Maryland's historically black institutions (HBIs) and at least one traditionally white institution (TWI) as part of that segregated system.") (emphasis added).

529. Indeed, a November 2005 Maryland Attorney General Opinion to MHEC specifically stated that, "[t]here is no doubt that *Maryland operated de jure segregated public higher education programs 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." (PTX 698 at 19) (emphasis added).

530. Moreover, an April 2005 memo from Pace McKonkie, who was a Maryland Assistant Attorney General and the Counsel to MHEC, pointedly informed MHEC that “[u]nnecessary program duplication was *part and parcel of the prior segregated system of higher education in Maryland.*” (PTX 14 at 3; 1/11/12 AM Trial Tr. 50 (Oliver).) (emphasis added)

531. Maryland’s *de jure* era practice of duplicative programming between the HBIs and TWIs in Maryland is well-documented, beginning as early as 1937 in Maryland’s Soper Commission Report. Specifically, the Commission found “[t]hat several institutions of both the white and Negro groups are undertaking to perform *the same cluster of functions.*” (PTX 17 at 56)(emphasis added).

532. The duplication of academic programming between the State’s HBIs and TWIs was made worse by the fact that programming at the HBIs was more limited in scope. On this point, the Soper Commission made the following findings:

1. That the University of Maryland exercises all of the educational functions found in any of the white institutions.
2. That the corresponding Negro institutions, Princess Anne, [sic] *can lay claim at most to but three of the twelve functions.*
3. That Morgan College exercises but *seven of the twelve functions.*
4. That aside from the scholarship provisions that *several important functions of higher education are entirely missing* in the entire set-up of Negro institutions.

(PTX 17 at 56.) (emphasis added).

533. The duplication of program offerings between HBIs and TWIs during the *de jure* era was not coincidental; Maryland had an active role in the programming at those institutions. As the Soper Commission noted, in 1937, four of the five then-existing teachers’ schools --

Towson (a TWI), Salisbury (a TWI), Frostburg (a TWI), and Bowie (an HBI) -- were all State-operated. The fifth teachers' school, Coppin (an HBI), was operated by the City of Baltimore. (PTX 17 at 79.)

534. The Soper Commission noted that all of the teachers' schools -- HBIs as well as the TWIs -- began as "normal schools" designed to educate teachers for *primary school*. (PTX 17 at 79) (emphasis added). However, subsequent to the schools' development, Maryland's General Assembly passed an act granting *only the TWI* normal schools the authority to offer a four-year degree in *elementary education* as well as a Bachelor of Science in education, which qualified their graduates to teach *high school*. (PTX 17 at 79.) (emphasis added) The State legislation also converted the TWIs' status to "teachers' colleges;" whereas, the HBIs were left as normal schools. (PTX 17 at 80.)

535. The Soper Commission found the greatest programmatic difference between the land-grant schools, Princess Anne Academy (now UMES, an HBI) and the University of Maryland (a TWI): "The most obvious difference is between Princess Anne Academy and the University of Maryland, both land-grant colleges. Princess Anne offers a *very meager curriculum* in agriculture compared with the University of Maryland. In addition, the Negro land-grant college offers *few courses* in industrial arts as compared with a *bewildering array* of courses in industrial subjects and engineering at the white land-grant college." (PTX 17 at 88.) (emphasis added).

536. The disadvantages in the number and quality of programs at the HBIs were compounded by the disadvantages in the facilities and infrastructure to support those programs. The Soper Commission specifically connected the weaknesses in the curriculum at Princess Anne with the lack of adequate facilities, observing:

On the academic side, the *curriculum has always been weak because of lack of adequate library* and deficiencies in instruction in modern languages, *but more especially in laboratory work in the sciences*. On the side of agriculture and mechanic arts, there has always been a deficiency in shops, equipment and soil testing facilities. Inadequate salaries have made it impossible to secure a strong teaching staff. The general result has been that the students, when leaving and entering other institutions of learning, have been unable to secure the standing to which they were supposed to be entitled at Princess Anne. (PTX 17 at 20.) (emphasis added).

537. Indeed, the combination of inadequate programs and facilities at Princess Anne yielded such an abysmal result that the Soper Commission recommended the institution's closure:

Princess Anne Academy had far better be abandoned altogether than continue its present pretense as a college. It is not now a four year college worthy of the name, and indeed it has never been a junior college of sufficiently high standard to serve its students effectively or to represent the state...We do not mean to say that the principal and faculty of the school have not made an earnest effort to carry on, or that they are without qualifications for teaching positions. *But the truth is, [sic] that the school has been denied the means with which to do the work*. (PTX 17 at 18.) (emphasis added)

538. However, Princess Anne was not the only HBI that suffered from inadequate infrastructure and facilities to support its programs during the *de jure* era. The Soper Commission noted the universal absence of adequate facilities to support graduate study at the HBIs and the need to rectify the issue:

An objectively minded student of Negro education in Maryland cannot fail to be impressed by *the almost entire absence of essentially important facilities for Negro graduate study*. The field of Negro need, which should by all means be thoroughly explored the use of through going research techniques, is enormous."

...

It would seem to be imperative that steps should be taken, as soon as possible, to man the faculty and equip the libraries and laboratories of a Negro college for college work.

(PTX 17 at 108.)

539. Despite these observations, a decade later the State's Marbury Commission likewise found that Maryland's policy of unequal programmatic offerings at the TWIs and HBIs continued. Specifically, that Commission made the absolute observation that: "*None* of [the HBIs] is equal in quality to the corresponding institution maintained for the white population."

(PTX 18 at 78.) (emphasis added)

540. The Marbury Commission specifically identified the continued disparity in the number of academic program offerings between the HBIs and TWIs, stating: "In view of the difference in the availability of curriculums at the University of Maryland and the Negro colleges, the small number of undergraduate awards *is surprising*." (PTX 18 at 111.) (emphasis added). Indeed, aside from Morgan, none of the HBIs had attained accreditation by an accreditation agency outside of Maryland. (PTX 18 at 90, 93, 94, 96.)

541. The Commission likewise echoed the Soper's Commission finding on the absence of facilities necessary to support academic study at the HBIs, leading to the Commission's determination that, "[t]he state has consistently pursued a *policy of providing higher education facilities for Negroes which are inferior to those provided for whites*." (PTX 18 at 108.) (emphasis added). The Commission went on to provide numerous examples in support of its conclusion, including:

- Although the State maintains extensive facilities for the graduate and professional education of white persons, *there is no provision for the equivalent training of Negroes in the State...* (PTX 18 at 78.) (emphasis added)
- Facilities for the graduate and professional education of Negroes are not available within the state in either public or private institutions (with the single exception of the law curriculum at the University of Maryland). Further, a number of undergraduate curriculums which are offered for

white students at the University of Maryland are not offered in any of the institutions of higher education for Negroes. (PTX 18 at 108.)

- The library at Bowie is “especially weak.” (PTX 18 at 249.)
- The tabulation shows that the libraries at Princess Anne College, Coppin Teachers College, and St. Mary’s Female Seminary have [an] extremely weak collections of books. Coppin Teachers College has practically no library at all when judged by college standards; it rates slightly higher in the table than the Princess Anne College library because of the relatively narrow curriculum at Coppin Teachers College as contrasted with the broad fields of subject matter which Princess Anne College attempts to cover. The Princess Anne College library is extremely limited for an institution which has responsibilities for the widely varied fields of study that must be represented in a land-grant college. (PTX 18 at 249.)
- The most urgent need at Morgan State College is for a new building for classrooms and administrative offices. The present dining hall is entirely too small and should be replaced by a much larger unit. The institution is practically without gymnasium facilities; it should have a new gymnasium and field house to be used for instruction in physical education and athletics. (PTX 18 at 279.)

542. Like the Soper Commission, the Marbury Commission was extremely critical of Maryland’s treatment of Princess Anne’s programmatic development, stating:

The [S]tate has not taken seriously its responsibilities for the development of a land-grant college program for the Negro population. The history of the relationship of the [S]tate to Princess Anne College, the nominal land-grant college for Negroes, *reveals that the [S]tate has consistently and at every point possible neglected its legal and moral obligation to provide adequate agricultural and mechanic arts education for the Negro population.* (PTX 18 at 108.) (emphasis added)

543. Like the Soper Commission, the Marbury Commission also laid blame for the condition of Maryland’s HBIs with the State: “The final control exercised by the State of Maryland over its institutions of higher education resides in the legislature. . . The responsibility for direct and continuing control of each of the Maryland institutions is lodged by the legislature in a constituted board; the plan for the appointment of the members of each board is determined by the legislature.” (PTX 18 at 118.)

544. The conditions at Maryland's HBIs remained largely the same for the remainder of the *de jure* era as reflected in the 1953 Pullen Commission report, which was the last commission report to examine the needs of higher education in Maryland before the 1954 *Brown* decision.

545. The Pullen Commission held its organizational meeting in 1953 and issued its report in 1955. (PTX 19 at 4.) The Commission found disparities in the "Types of Programs Offered" at Maryland's HBIs and TWIs.

546. Specifically, the Pullen Commission determined that of Maryland's five teachers' colleges, only the two HBIs were still limited to providing teacher education. Salisbury and Towson, both TWIs, offered junior college-level curriculum in addition to the teacher education programming. (PTX 19 at 32.) In addition, while Morgan State (an HBI) and Princess Anne (an HBI) both offered liberal arts education and teacher training, neither were authorized to offer graduate or professional programming. (Id.) Despite the Soper, Marybury, and Pullen Commissions' observations, the TWI normal schools remained ahead of their HBI counterparts in program offerings even after the Supreme Court's ruling in *Brown*.

C. Post-*Brown* Academic Programming Policies & Practices

547. After *Brown*, there was an uneven expansion of program offering between Maryland's TWI and HBI teachers' colleges. (PTX 21 at 32.) The TWIs had a series of "firsts" in graduate, four-year and junior college education ahead of the HBIs. By 1959, the TWI Towson was offering a graduate degree in education before any HBI, including Morgan. (PTX 20 at 46, 49; PTX 268 at 17.) By 1960, the TWIs began offering junior college degrees in non-teacher education and four-year liberal arts degrees years before such programs were universally available at the HBIs. (PTX 21 at 32; PTX 763 at 6.)

548. Despite these challenges, in the 1960s and 1970s, when Maryland’s HBI’s began offering master’s degrees and unique, high-demand programs, they were able to attract fairly substantial numbers of white graduate students. (Conrad Demonstrative 27; *see generally* PTX 455 at 235-546; 1/10/12 AM Trial Tr. 32 (Conrad).) Examples of the significant numbers of white-students enrolled at the HBI masters’ programs are reflected in the below tables.

1975: Examples of White Enrollment in TBI Graduate Programs

| Coppin State University: 1975 | | | | |
|--------------------------------------|-------|-------|-------|------------------|
| | Black | White | Total | Percentage White |
| Masters in Correctional Education | 80 | 47 | 127 | 37.00% |
| Masters in Rehabilitation Counseling | 70 | 40 | 110 | 36.40% |

| Morgan State University: 1975 | | | | |
|------------------------------------|-------|-------|-------|------------------|
| | Black | White | Total | Percentage White |
| Masters in Urban Policy – Planning | 58 | 24 | 82 | 29.30% |
| Masters in Science | 13 | 14 | 27 | 51.90% |

| Bowie State University: 1975 | | | | |
|--------------------------------|-------|-------|-------|------------------|
| | Black | White | Total | Percentage White |
| Masters in Education – General | 340 | 506 | 846 | 59.80% |

Source: PTX455 at pp. 235-546, Maryland Council for Higher Education, Second Annual Desegregation Status Report for Public Postsecondary Education Institutions in the State of Maryland (1976)

MARYLAND STATE COLLEGES

A-15

STUDENT ENROLLMENT, FULL-TIME/PART-TIME, BY RACE,
FALL 1970-1973

| | 1970 | | 1971 | | 1972 | | 1973 | |
|------------------------|--------------|--------------|--------------|--------------|--------------|--------------|--------------|--------------|
| | FT | PT | FT | PT | FT | PT | FT | PT |
| MORGAN STATE | | | | | | | | |
| Undergraduate | | | | | | | | |
| White | 137 | 115 | 148 | 45 | 156 | 51 | 134 | 20 |
| Black | 3,668 | 343 | 3,788 | 442 | 4,156 | 866 | 3,717 | 1,085 |
| Other | 10 | 16 | 30 | 5 | 28 | 9 | 14 | 0 |
| Total | <u>3,815</u> | <u>474</u> | <u>3,966</u> | <u>492</u> | <u>4,340</u> | <u>926</u> | <u>3,865</u> | <u>1,105</u> |
| Graduate | | | | | | | | |
| White | | 287 | 406 | | 441 | | 444 | |
| Black | | 360 | 388 | | 527 | | 523 | |
| Other | | 19 | 60 | | 72 | | 48 | |
| Total | | <u>666</u> | <u>854</u> | | <u>1,040</u> | | <u>1,015</u> | |
| SALISBURY STATE | | | | | | | | |
| Undergraduate | | | | | | | | |
| White | 1,278 | 98 | 1,446 | 269 | 1,574 | 363 | 1,710 | 330 |
| Black | 15 | 2 | 21 | 0 | 71 | 24 | 130 | 42 |
| Other | 6 | 0 | 9 | 0 | 10 | 1 | 13 | 6 |
| Total | <u>1,299</u> | <u>100</u> | <u>1,476</u> | <u>269</u> | <u>1,655</u> | <u>388</u> | <u>1,853</u> | <u>378</u> |
| Graduate | | | | | | | | |
| White | | 135 | 187 | | 285 | | 376 | |
| Black | | 33 | 52 | | 31 | | 59 | |
| Other | | 0 | 0 | | 0 | | 8 | |
| Total | | <u>168</u> | <u>239</u> | | <u>316</u> | | <u>443</u> | |
| TOWSON STATE | | | | | | | | |
| Undergraduate | | | | | | | | |
| White | 5,350 | 2,080 | 5,801 | 2,162 | 5,717 | 3,381 | 6,491 | 3,755 |
| Black | 161 | 21 | 194 | 42 | 392 | 61 | 502 | 96 |
| Other | 156 | 37 | 185 | 87 | 585 | 27 | 83 | 64 |
| Total | <u>5,667</u> | <u>2,138</u> | <u>6,180</u> | <u>2,291</u> | <u>6,694</u> | <u>3,469</u> | <u>7,076</u> | <u>3,915</u> |
| Graduate | | | | | | | | |
| White | | 1,921 | 2,150 | | 1,122 | | 1,335 | |
| Black | | 74 | 80 | | 91 | | 99 | |
| Other | | 19 | 31 | | 20 | | 25 | |
| Total | | <u>2,014</u> | <u>2,261</u> | | <u>1,233</u> | | <u>1,459</u> | |

A-14

MARYLAND STATE COLLEGES

STUDENT ENROLLMENT, FULL-TIME/PART-TIME, BY RACE,
FALL 1970-1973

| | 1970 | | 1971 | | 1972 | | 1973 | |
|------------------------|--------------|------------|--------------|------------|--------------|------------|--------------|--------------|
| | FT | PT | FT | PT | FT | PT | FT | PT |
| BOWIE STATE | | | | | | | | |
| Undergraduate | | | | | | | | |
| White | 311 | 236 | 350 | 220 | 446 | 195 | 304 | 247 |
| Black | 904 | 87 | 798 | 207 | 1,078 | 165 | 1,218 | 199 |
| Other | 59 | 33 | 76 | 47 | 72 | 27 | 196 | 40 |
| Total | <u>1,274</u> | <u>356</u> | <u>1,224</u> | <u>474</u> | <u>1,596</u> | <u>386</u> | <u>1,718</u> | <u>486</u> |
| Graduate | | | | | | | | |
| White | | 295 | | 303 | | 398 | | 609 |
| Black | | 333 | | 305 | | 364 | | 408 |
| Other | | 39 | | 47 | | 53 | | 15 |
| Total | | <u>667</u> | | <u>655</u> | | <u>815</u> | | <u>1,032</u> |
| COPPIN STATE | | | | | | | | |
| Undergraduate | | | | | | | | |
| White | 69 | 10 | 73 | 12 | 91 | 14 | 120 | 58 |
| Black | 1,042 | 316 | 1,505 | 304 | 1,570 | 258 | 1,502 | 555 |
| Other | 0 | 0 | 0 | 0 | 6 | 0 | 7 | 0 |
| Total | <u>1,111</u> | <u>326</u> | <u>1,578</u> | <u>316</u> | <u>1,667</u> | <u>272</u> | <u>1,629</u> | <u>613</u> |
| Graduate | | | | | | | | |
| White | | 143 | | 166 | | 170 | | 201 |
| Black | | 294 | | 416 | | 280 | | 543 |
| Other | | 7 | | 12 | | 20 | | 41 |
| Total | | <u>444</u> | | <u>594</u> | | <u>470</u> | | <u>785</u> |
| FROSTBURG STATE | | | | | | | | |
| Undergraduate | | | | | | | | |
| White | 1,913 | 148 | 2,172 | 133 | 2,308 | 103 | 2,434 | 126 |
| Black | 41 | 0 | 83 | 2 | 114 | 1 | 116 | 1 |
| Other | 53 | 0 | 59 | 0 | 62 | 0 | 64 | 0 |
| Total | <u>2,007</u> | <u>148</u> | <u>2,314</u> | <u>135</u> | <u>2,484</u> | <u>104</u> | <u>2,614</u> | <u>127</u> |
| Graduate | | | | | | | | |
| White | | 180 | | 277 | | 331 | | 412 |
| Black | | 0 | | 10 | | 11 | | 11 |
| Other | | 0 | | 0 | | 3 | | 8 |
| Total | | <u>180</u> | | <u>287</u> | | <u>345</u> | | <u>431</u> |

549. Yet, after these organic increases in white-student enrollment, Maryland had no comprehensive desegregation plan in place to protect these gains. (Conrad Demonstrative 31; PTX 740; PTX 69 at 78-80.)

550. The first major decline in white-student enrollment at HBIs took place between the early 1970s and mid-1980s, the period during which the State was desegregating its public campuses and prior to its first acceptable desegregation plan (1985). (PTX 184 at 2.)

551. The substantial decline is attributable in part due to the fact that HBIs were less well-equipped for the competition that ensued when development started taking place at the white schools. “[u]nless you have an advocate, such as a coordinating board, saying you should develop this school there, and that school there, the state doesn’t have any guidance as to whether -- where it should put its money, the focus is resources. So if you’re starting out at a disadvantage, I think you very well maintain that disadvantage.” (1/5/12 AM Trial Tr. 82-83 (Popovich).)

552. During the first decline, many public and private institutions of higher education across the country—including those in Maryland— strove to manage an unprecedented increase in student enrollment that was driven by students of the so-called “baby boomer” generation. Maryland experienced rapid growth in enrollment numbers, facilities, faculty, and programs. In part because this growth was unaccompanied by an over arching state plan for desegregation, there was an over-expansion of public institutions of higher education and a significant amount of duplication of program offerings among public institutions. (PTX 69 ¶ 40.)

553. This period was marked by very large investments in the State’s traditionally white institutions, most notably the creation of UMBC and the expansion of Towson. In effect, the 1960s and 1970s were “the golden era of higher education” in Maryland, and as current

operating revenues reflect, the TWIs that expanded at that time (including Towson and UMBC) have maintained a significant advantage over the HBIs. (PTX 3 and 5; PTX 69 ¶ 41.) For example, “[b]etween 1964 and 1975, Towson ‘skyrocketed’ and ‘UMBC went from nothing to a campus of around 4,000 students. Towson, on the other hand, went from around 3,000 to around 9,000.’” While the growth of Morgan and Coppin “tapered off” during this time, “Towson and UMBC were growing throughout that whole period.” (1/5/12 AM Trial Tr. 87 (Conrad).)

554. Although in 1975, Maryland took legislative action to provide Morgan with doctoral-granting authority, only one doctoral program was approved by Maryland and offered at the institution in the following two decades. (PTX 39 at 40.) This limited support was not sufficient to overcome the harmful effect of unnecessary program duplication that occurred when Maryland’s governing board of the state college system approved programs at TWI campuses, primarily Towson, that duplicated those at Morgan. (PTX 184 at 8.)

555. White-student enrollment gains at HBIs were further undermined in the mid-1970s, when the State expended considerable resources to acquire the then financially-struggling University of Baltimore and began a program that provided State aid to Maryland’s private institutions, including several in the Baltimore area—already home to an unusually large number of colleges and universities.

556. On the Eastern Shore, in 1975 the Governor’s Study Commission recommended the consolidation of Salisbury and UMES to diversify educational opportunities on the Eastern Shore. (PTX 380.) This recommendation was ignored. Rather than take a step in the direction of integration, Maryland once again took a step in the direction of perpetuating segregation. (1/10/12 AM Trial Tr. 32 (Conrad).)

557. Little attention—monetarily or otherwise—was given to the state’s HBIs in the 1970s, which undermined the prior gains in desegregation at the HBIs. (1/10/12 AM Trial Tr. 32 (Conrad).) In particular, enrollment in Morgan’s MBA program specifically declined following the availability of e UB’s MBA program in the university system as reflected below. (PTX 184 at 9.)

Enrollment in Morgan's MBA Program Before and After UB Becomes a Public Institution

| | Morgan | | UB | |
|------------------------|--------|-------|-------|-------|
| | White | Black | White | Black |
| 1975 Enrollment | 54 | 176 | NA | NA |
| 1985 Completion | 0 | 48 | 177 | 14 |

Source: PTX 455, pp. 293-294 MSU-00051535-36; IPEDS Database

30

558. Morgan provides one example of the consequences of establishing additional campuses in the Baltimore region without regard to educational need. At the same time that the State was appropriating funds to create UMBC and support the transition of Towson from a teachers’ college to a comprehensive liberal arts campus, Morgan was proposing to mount an

aggressive campaign to attract more white students and to develop unique programs at the graduate level, primarily for teachers, that would be attractive to white students. As the Baltimore Sun Times noted in a lengthy opinion piece about the need for more orderly development of higher education in the state, Morgan “was stigmatized as Negro only.” Hence, it had further to go than historically white institutions where it was preparing to compete for its students. Morgan’s board and president did not disagree with this assessment and made plans to become more integrated much earlier than other campuses. The comments by Morgan board members, the campus president, and community supporters at the time suggests a level of interest in recruiting “other-race” students that was not present at historically white institutions. However, the decision to create UMBC and develop Towson ensured that the potential pool of white students available to Morgan at the undergraduate level would be smaller than otherwise would be the case. (PTX 268 at 17.)

559. During the 1970s and 1980s, there was not enough enrollment growth in the university system to allow for simultaneous growth at the HBIs and TWIs. “[T]here wasn’t enough growth to allow everyone to go up while we were desegregating and bringing new students into the schools into the system. . . . Coppin and Morgan, mostly Morgan,. . . suffered the brunt of the decline during this period where particularly UMBC at that point started growing. First it was Towson that grew rapidly and the next era,. . . UMBC started growing. Both would have affected Morgan.” (1/15/12 AM Trial Tr. 115-116 (Popovich).)

560. As a result of the University System’s overall declining enrollment, and the inferior resources at the State’s HBIs, desegregation occurred only at Maryland’s TWIs. As Dr. Popovich of Morgan State explained: “Well, that was essentially the dilemma that the HBU’s faced and really everybody faced, but HBI’s weren’t that competitive. At the same time that

desegregation was required, enrollment growth had slowed down. We had been in a period of very fast enrollment growth during the '60s, early '70s, but that tapered off. And so there really -- and remember we were bringing two new campuses into this system, UMBC, and University of Baltimore. Well, then the state started desegregating its campuses. And like I said, there weren't more students coming into the system. It became pretty much a zero sum [game]. And when it came to zero sum ... my loss is your gain, or your gain is my loss, and that's what happened. White schools kept their white students and added black students. Okay. And the black schools did not add white students. So the white schools pretty much kept their clientele and then added new students in the form of African Americans." (1/15/12 AM Trial Tr. 109 (Popovich).)

561. In other words, desegregation was taking place, and the desegregation was all in one direction: it was black students moving from black schools to white schools. (1/15/12 AM Trial Tr. 88-89 (Popovich).)

562. Dr. Popovich described the years from 1974 to 1975 as marked by "a rapid flow of the black students away from the black schools." (1/15/12 AM Trial Tr. 88 (Popovich).)

563. During this period, the responsibility for enhancing the HBIs lay with Maryland as part and parcel of the coordinating board's desegregation efforts. (1/5/12 AM Trial Tr. 87 (Conrad).) Despite this responsibility, the HBIs did not grow as much during this period because "they were not equipped for that kind of competition. Morgan . . . had old facilities at that time whereas the state built a grand new campus at UMBC. And [UMBC] had special capital appropriations for the state teachers colleges to get them ready." (1/5/12 AM Trial Tr. 88 (Conrad).)

Enrollment at Md. Institutions: 1964-1974

| FTE Students and State Capital Appropriations, 1964-1974 | | | | |
|--|-----------|-----------|------------------|----------------------------------|
| School | 1964 FTES | 1974 FTES | Increase in FTES | Capital Appropriations 1964-1974 |
| Towson | 3,412 | 8,887 | 5,475 | \$49,169,200.00 |
| UMBC | NA | 4,854 | 4,854 | \$46,067,000.00 |
| Frostburg | 1,768 | 2,815 | 1,047 | \$26,339,800.00 |
| Bowie* | 520 | 2,255 | 1,735 | \$24,370,600.00 |
| Coppin* | 431 | 2,145 | 1,714 | \$22,520,920.00 |
| Morgan* | 2,879 | 4,686 | 1,807 | \$19,131,400.00 |
| Salisbury | 624 | 2,127 | 1,503 | \$15,032,000.00 |
| UMES* | 632 | 940 | 308 | \$9,355,700.00 |
| St. Mary's | 270 | 998 | 728 | \$7,093,400.00 |

| |
|-------------|
| Key: |
| * - HBI |

| |
|---|
| Source: |
| Report to the Maryland Council for Higher Education by the Task Force to Propose Ways of Enhancing the Role and Image of Predominantly Black Public Colleges in Maryland, August 9, 1974. MDED_00017388 |

Source: PTX 735

26

564. In August 1975, Maryland submitted its first status report to OCR. OCR ordered the State to complete remedial action within 30-60 days or face enforcement action. Maryland initiated a series of meetings with OCR in an attempt to develop a better working relationship with the agency. The last in this series of meetings occurred in October 1975, at which time OCR agreed to follow-up by providing Maryland with further guidance regarding how best to modify its desegregation plan. (PTX 69 ¶ 43.)

565. In December 1975, OCR informed Maryland that it was referring the state to HEW's Office of General Counsel in order to initiate administrative fund termination proceedings against the State for failure to properly desegregate higher education. Maryland

stood to lose millions of dollars in federal support for its higher education institutions. The State sued OCR in federal district court. (PTX 69 ¶ 44.)

566. At that same time, Morgan became independent again. Morgan “just didn’t do well in that state college system....[Maryland had] let programs develop nearby whereas they could have parceled out the programs and specialized [each of Baltimore’s] campuses. Morgan suffered a lot by having its graduate programs in particular duplicated. It certainly lost graduate enrollment rapidly, but most importantly, it lost its white graduate enrollment.” (1/15/12 AM Trial Tr. 92 (Popovich).)

567. In 1976, Maryland created the State Board for Higher Education (“SBHE”), which was subsequently replaced by the Maryland Higher Education Commission (“MHEC”). MHEC has legal authority to review and approve campus missions and proposals for new academic programs. (PTX 69 ¶ 46.)

568. In 1982, Maryland and OCR officials renewed discussions with Maryland regarding its desegregation, following Maryland’s development and adoption of its “Plan to Assure Equal Postsecondary Educational Opportunity” for 1980-85. Part of this plan was the development of articulation plans between HBIs and TWIs to recruit other-race students through unique academic programs. (PTX 263 at 49.)

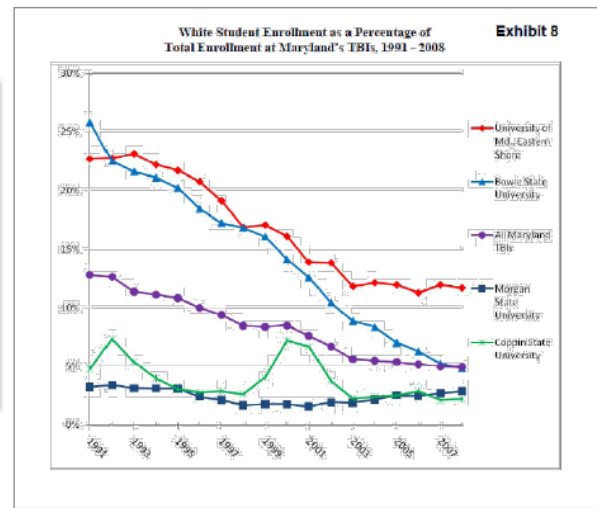
569. In 1985, OCR accepted Maryland’s desegregation plan, which covered the years 1985-89. That plan likewise included the development of 25 new academic programs at the HBIs. Yet, during the period of the plan, Maryland created only 13 such programs. (PTX 44 at 14.)

570. Going forward, for most of the 1990s, desegregation policies in Maryland appeared to involve little more than MHEC’s “monitoring” of the efforts undertaken by the

State’s public institutions to increase access for Blacks. As a result, white-student enrollment at the HBIs continued to decline. (PTX 851 at 263.)

Declining White Total Enrollment at TBIs: 1991-2008 (Rpt. I, Ex. 8)

| | 1991 | 2000 | 2008 | | 1991 | 2000 | 2008 |
|-----------------------|--------------|--------------|-------------|---------------------|--------------|--------------|--------------|
| Bowie | | | | Morgan | | | |
| Undergrad | 19.7% | 8.7% | 3.1% | Undergrad | 2.1% | 0.8% | 1.6% |
| Graduate | 38.0% | 24.9% | 11.5% | Graduate | 13.6% | 11.0% | 11.4% |
| Bowie Total | 25.8% | 14.1% | 4.9% | Morgan Total | 3.2% | 1.8% | 2.9% |
| Coppin | | | | UMES | | | |
| Undergrad | 4.2% | 1.5% | 0.8% | Undergrad | 20.8% | 13.2% | 9.3% |
| Graduate | 9.9% | 29.3% | 8.3% | Graduate | 46.1% | 42.7% | 31.2% |
| Coppin Total | 4.8% | 7.2% | 2.2% | UMES Total | 22.7% | 16.1% | 11.7% |
| All TBIs | | | | | | | |
| Undergrad | 10.2% | 5.1% | 3.5% | | | | |
| Graduate | 30.4% | 25.3% | 13.6% | | | | |
| All TBIs Total | 13.5% | 8.7% | 5.1% | | | | |



Source: PTX 69 at 80

33

571. As a result, the second major decline in white-student enrollment at the HBIs took place during the period of its 2000 Partnership Agreement. (PTX 184 at 2.)

572. Although the State had passed legislation that required MHEC to create a plan to enhance the State’s four HBIs, it was not until October of 1999 that Maryland and tOCR, entered into a voluntary partnership (“Partnership Agreement”) aimed at ensuring Maryland’s compliance with the Equal Protection Clause and Title VI of the Civil Rights Act. (PTX 851 at 263; PTX 69 ¶ 50; Conrad Demonstrative 34; 1/10/12 AM Trial Tr. 36 (Conrad).)

573. The context of the agreement was a series of discussions between Maryland and OCR, during which OCR communicated their concern regarding Maryland's lack of compliance with Title VI of the Civil Rights Act and the need to take steps to correct the desegregation of Maryland's higher education institutions. (1/11/12 AM Trial Tr. at 28 (Oliver).) Specifically, OCR "believed that Maryland had not completely eliminated the vestiges of the *de jure* segregation that had existed historically and Maryland had not lived up to its obligation to eliminate those vestiges." (1/11/12 AM Trial Tr. at 28 (Oliver).)

574. The 2000 State Plan, a contemporary document, described the Partnership Agreement as follows: "Because of its history of *de jure* racial segregation, Maryland has an obligation under both federal law and court decisions to remedy past discrimination and remove its vestiges. The State is working with the U.S. Office of Civil Rights to develop a partnership agreement that will further equal educational opportunity in Maryland postsecondary education." (PTX 293 at 41.)

575. The Partnership Agreement outlined the steps Maryland had to take in order to satisfy OCR's belief that the vestiges from Maryland *de jure* system that *still existed* would be eliminated. (1/11/12 AM Trial Tr. at 35 (Oliver).)

576. Maryland shared OCR's understanding and agreed that the Partnership Agreement was an important *first* step in addressing remnants of segregation *still in existence as of 2000*. (1/11/12 AM Trial Tr. at 35 (Oliver).)

577. In Commitment 8 of the Partnership Agreement, Maryland committed developing unique, high-demand academic programs at the HBIs and to ensuring that those programs were not unnecessarily duplicated at nearby TWIs. Maryland understood that its obligation to develop

unique, high-demand programs at the HBIs existed *irrespective of any efforts by the institutions*. (1/11/12 AM Trial Tr. at 38 (Oliver).).

578. Commitment 8 utilized Dr. Conrad's definition of unnecessary program duplication, which had been adopted by the United States Supreme Court in *Fordice*, because of his role as a consultant to OCR on the agreement. (1/10/12 AM Trial Tr. at 54-55 (Conrad).)

579. In Commitment 9 of the Partnership Agreement, Maryland committed to undertake a series of steps to enhance its HBIs such that they were comparable and competitive with the TWIs in all facets. (2010.03.08 Newman Dep. 152). This commitment included enhancing the distinctiveness of HBIs' *programmatic missions*. (PTX 2 at 116.) Maryland made this commitment because it recognized that even as of 2000, the State's HBIs were not comparable and competitive with its counterpart TWIs and because "there was disparity between the TWIs and HBIs that was an issue that needed to be addressed immediately." (1/11/12 AM Trial Tr. at 41 (Oliver).)

580. The Partnership Agreement took effect in 2000 with the Maryland Higher Education Commission (MHEC) serving as the designated enforcement agent for Maryland. The commitments in the Partnership Agreement were to be met by 2005. (PTX 851 at 263; PTX 69 ¶ 50; 1/10/12 AM Trial Tr. 36 (Conrad).)

581. However, Maryland did not abide by Commitments 8 and 9 of the Partnership Agreement. In 2001, Maryland failed to act on enhancement requests submitted by the HBIs pursuant to the Partnership Agreement. (1/12/12 PM Trial Tr. 33 (Richardson).)

582. Moreover, Anne Emery and Maurice Taylor, members of the committee tasked with reviewing Maryland's progress under Commitment 8, testified that they did not agree with the conclusion that the commitment had been met. Both committee members testified that

Maryland's letter to OCR stating that it had complied with the Partnership Agreement did not reflect the consensus of the committee, the work of the committee, or even the vote of the committee. (1/10/12 AM Trial Tr. 77-78 (Taylor); 1/11/12 AM Trial Tr. 65 (Emery).)

583. Even Geoffrey, Newman, MHEC's Director of Finance and a member of Committee II tasked with assessing compliance with Commitment 9, stated that the findings in his committee's report did not support the conclusion that HBIs were comparable and competitive with TWIs in all facets at the conclusion of the Partnership Agreement. (3/8/10 Newman Dep. 170).

584. Although the Partnership Agreement committed Maryland to carry out a study if a major decline in "other race" enrollments took place on any campus, the State neither acknowledged nor studied the very large declines in white-student enrollment that took place at Coppin and Bowie during the period of the agreement. These declines are reflected in the below table.

| White Graduate Enrollment at HBCUs, 1990-2008 | | | | | | | | | | | | |
|---|-------|-------|--------|-------|--------|-------|--------------------|-------|-----------|---------|-------|--|
| | Bowie | | Coppin | | Morgan | | UM - Eastern Shore | | All HBCUs | | | |
| | White | Total | White | Total | White | Total | White | Total | White | % White | Total | |
| 1990 | 611 | 1310 | 29 | 253 | 80 | 530 | 72 | 142 | 792 | 35% | 2235 | |
| 1991 | 560 | 1472 | 28 | 284 | 67 | 492 | 83 | 180 | 738 | 30% | 2428 | |
| 1992 | 507 | 1600 | 21 | 306 | 85 | 488 | 66 | 164 | 679 | 27% | 2558 | |
| 1993 | 497 | 1678 | 27 | 351 | 68 | 467 | 115 | 225 | 707 | 26% | 2721 | |
| 1994 | 504 | 1658 | 24 | 424 | 72 | 410 | 125 | 234 | 725 | 27% | 2726 | |
| 1995 | 547 | 1835 | 45 | 533 | 88 | 415 | 159 | 268 | 839 | 27% | 3051 | |
| 1996 | 536 | 1957 | 40 | 507 | 54 | 338 | 175 | 304 | 805 | 26% | 3106 | |
| 1997 | 525 | 2010 | 42 | 496 | 56 | 461 | 148 | 296 | 771 | 24% | 3263 | |
| 1998 | 509 | 1870 | 46 | 555 | 47 | 496 | 149 | 313 | 751 | 23% | 3234 | |
| 1999 | 467 | 1656 | 102 | 632 | 56 | 528 | 136 | 296 | 761 | 24% | 3112 | |
| 2000 | 396 | 1591 | 234 | 798 | 64 | 584 | 140 | 328 | 834 | 25% | 3301 | |
| 2001 | 387 | 1639 | 223 | 764 | 111 | 524 | 111 | 290 | 832 | 26% | 3217 | |
| 2002 | 315 | 1584 | 116 | 609 | 130 | 628 | 130 | 387 | 691 | 22% | 3208 | |
| 2003 | 256 | 1466 | 50 | 517 | 131 | 616 | 131 | 436 | 568 | 19% | 3035 | |
| 2004 | 227 | 1387 | 35 | 585 | 134 | 648 | 134 | 429 | 530 | 17% | 3049 | |
| 2005 | 185 | 1299 | 71 | 855 | 134 | 691 | 134 | 422 | 524 | 16% | 3267 | |
| 2006 | 169 | 1216 | 82 | 794 | 134 | 750 | 134 | 433 | 519 | 16% | 3193 | |
| 2007 | 136 | 1179 | 54 | 690 | 152 | 857 | 152 | 471 | 494 | 15% | 3197 | |
| 2008 | 131 | 1143 | 63 | 760 | 148 | 891 | 148 | 475 | 490 | 15% | 3269 | |

Sources:

PTX 579 (Maryland Higher Education Commission, Trends in Enrollment by Race and Gender 47-75 (July 2001) (data from 1991 through 2000)

PTX 448 (Maryland Higher Education Commission, Trends in Enrollment by Race and Gender 47-75 (July 2009) (data from 1999 through 2008)

PTX 755 (Maryland Higher Education Commission, 2011 Databook 10-11 (Enrollment by Race and Gender data from Fall 2009)

585. Notably, Coppin experienced a **73%** decline of white students during the Partnership Agreement. In 2000, Coppin enrolled 234 white graduate students, who made up 29% of its graduate enrollment. By 2005 the number of white graduate students had decreased to 63 white students accounting for only 8% of Coppin's graduate enrollment. (PTX 184 at 5.)

586. Similarly, Bowie experienced a **67%** decline in white students during the same period. In 2000, Bowie enrolled 396 white graduate students, who comprised 25% of its entire graduate enrollment. By 2005 the number of white graduate students had declined to 131 white students comprising only 11% of Bowie's graduate enrollment. (PTX 184 at 5.)

587. The declines continued after the Partnership Agreement, such that between 1991 and 2008, white-student enrollment declined at all of the HBIs. Additionally, other-race students

similarly showed patterns of preferring enrollment at Maryland's TWIs over the HBIs. (1/18/12 AM/PM Trial Tr. 98 (Allen); PTX 856 at 30-32.)

588. Although the number of total graduate students at HBIs has been *stable* since 2000, graduate/professional enrollments at other public campuses have increased by 44% since 2000. The decline of white students at HBIs has resulted in *stability* in their total graduate enrollments while graduate enrollment has *grown* rapidly at other campuses. (PTX 184 at 3.)

589. Faced with these significant losses in diversity at HBIs, Maryland did not abide by its commitment in the Partnership Agreement to correct the decline. As Dr. Popovich described at trial, “[w]ell, I think most people knew that both Bowie, particularly Bowie, but also Coppin, had lost white graduate students recently. Now I think I mentioned earlier that Morgan had lost white graduate students during the desegregation of the ‘70s; but after 2000, both Bowie and Coppin had lost white graduate students. Now what makes that significant is that the State’s desegregation plan, the one we just talked about, the 2000 plan, said that if there was a sharp decline in other-race students at any campus, they would study the situation and take action. In this case, the coordinating board did not even recognize that these declines had taken place. Then when we got to this writing of the final report, it was pointed out to them that these declines had taken place, and asking what had the state’s findings done, and that they conceded that they had not looked at it.” (1/9/12 AM Trial Tr. 57 (Popovich).)

590. In March 2005, the presidents of the HBIs wrote Maryland’s legislature providing their own review of the programmatic development at their institutions pursuant to the Partnership Agreement. Despite the commitments in the agreement, the Presidents noted that there was “the relatively low level of program development at HBIs during [the Partnership Agreement] ... not because their proposals received unfavorable review by the State. Rather, it

reflects the inadequate infrastructure on the campuses, which [made] it prudent to emphasize existing programs rather than new initiatives. The gap in program offerings has significantly widened between HBIs and majority campuses since the implementation of the [Partnership Agreement, and] ... [t]his has substantially narrowed the areas in which HBIs can develop new programs in the future.” (PTX 13 at 9.) Thus, during as well as after the Partnership Agreement, Maryland’s *de jure* era policies and practices with respect to academic programming continued.

D. Current Unnecessary Duplication, Unequal Program Development & Program Inequality

591. Plaintiffs presented expert testimony on the continued existence Maryland’s *de jure* era academic programming policies and practices through the direct examination of Dr. Conrad, a professor of higher education at the University of Wisconsin-Madison. (1/10/12 AM Trial Tr. 4 (Conrad).)

592. Dr. Conrad, who provided expert testimony on higher education, with a particular focus on academic programming, mission, and desegregation, holds a Ph.D. in Higher Education from the University of Michigan and has significant experience in analyzing program duplication, program curricula and program inequality. (1/10/12 AM Trial Tr. 11 (Conrad); Conrad Demonstrative 2.)

593. Prior to this lawsuit, Dr. Conrad served as a testifying expert witness on these issues in several key higher education desegregation cases, including: *Fordice, Knight v. Alabama*, 900 F. Supp. 272 (N.D. Al. 1995) and *U.S. v. Louisiana*, 380 U.S. 145 (1965). (Conrad Demonstrative 6.)

594. In addition, Dr. Conrad has repeatedly served a consultant to OCR regarding desegregation of higher education in states with former *de jure* systems, including Maryland,

Virginia, Oklahoma, and Texas. (Conrad Demonstrative 5.) As part of his consulting work in Maryland, he specifically advised OCR on the terms of Commitments 8 (unnecessary program duplication) and 9 (enhancement of the HBIs) in the Partnership Agreement. (1/10/12 AM Trial Tr. 36-39 (Conrad).)

595. Indeed, even the Maryland has retained Dr. Conrad for his expertise on these issues. In 2004, MHEC hired Dr. Conrad to determine whether two proposed academic programs at TWIs would unnecessarily duplicate programs at HBIS within the State. Dr. Conrad's finding was that the proposed programs would unnecessary duplicate programs at HBIs within the State. Maryland credited Dr. Conrad's opinion and did not implement those programs. (1/18/12 AM Trial Tr. 9 (Conrad).

596. Dr. Conrad has published extensively on academic programming and unitary and dual systems of higher education in former *de jure* states, including his own quantitative studies . (1/18/12 AM Trial Tr. 7-8 (Conrad).) These publications, include:

Curriculum Vitae: Publications

Haworth, Jennifer Grant, and Conrad, Clifton F. Emblems of Quality: Developing and Sustaining High-Quality Academic Programs. Boston, Massachusetts: Allyn and Bacon, 1997. (253 pp.)

Conrad, Clifton F., Brier, Ellen M., and Braxton, John. "Factors Contributing to the Matriculation of White Students in Public HBCUs." Journal for a Just and Caring Education 3 (January, 1997), pp. 37-62.

Young, Denise L., Blackburn, Robert T., and Conrad, Clifton F. "Research Note: Dimensions of Program Quality in Regional Universities." American Educational Research Journal 24 (Summer, 1987), pp. 319-323.

Conrad, Clifton F., and Shrode, Paul. "The Long Road: Desegregating Higher Education." Thought and Action 6 (Spring, 1990), pp. 35-45.

Kim, Mikyong and Conrad, Clifton F. "The Impact of Historically Black Colleges and Universities on the Academic Success of African American Students." Research in Higher Education 47 (June 2006), pp. 399-427.

(Conrad Demonstrative 4.)

1. Conrad Analysis & Methodology

597. In this case, Dr. Conrad performed four assessments regarding Maryland's academic programming policies and practices, which he memorialized in his expert reports (PTXs 69-71) and shared with the Court during his trial testimony. These assessments were whether: (i) there is a history of segregation in Maryland; (ii) Maryland took sufficient actions to remove the policies and practices of *de jure* segregation from the system of higher education in compliance with the Partnership Agreement of 2000 and the *Fordice* decision; (iii) the dual system of higher education continues in Maryland as reflected in the programmatic identities of HBIs and TWIs; and (iv) there continues to be inequality between HBIs and TWIs with respect to the number, level, and quality of their academic programs. (Conrad Demonstrative 7.)

598. With respect to his first assessment, Dr. Conrad determined that Maryland has a history of *de jure* segregation and that the legacy of this system remains to the extent that there are current academic programming policies and practices traceable to that era. These policies and practices are unnecessary program duplication and disparities in programmatic development and equality between HBIs and TWIs. The continued existence of these policies and practices presence renders Maryland's higher education system dual as well as unequal. (Conrad Demonstrative 37.)

599. In support of this initial investigation, Dr. Conrad consulted historical materials in his library as well as those supplied by counsel. His historical findings of Maryland's *de jure* system and its legacy are recounted in detail on June 15, 2010 expert report and set forth in the chronolgy section of this document. (PTX 69; Conrad Demonstratives 8-38.)

a. Maryland's Practice of Unnecessary Program Duplication

600. Dr. Conrad also analyzed Maryland's current policy and practice of unnecessary program duplication. As memorialized in his second expert report, he investigated whether, Maryland continued to engage in a policy and practice of unnecessary program duplication between 2001 and 2009. He also investigated the continued existence of unnecessary program duplication at TWIs and HBIs in 2010 and memorialized those findings in his third expert report. (Conrad Demonstratives 74 & 80-82.)

601. The purpose of Dr. Conrad's analysis of the period 2001 and 2009 was to evaluate whether Maryland abided by its commitment in the Partnership Agreement to avoid unnecessary program duplication. (1/10/12 AM Trial Tr. 45 (Conrad).)

602. The purpose of Dr. Conrad's analysis in 2010 was to provide the Court with an understanding of the amount of unnecessary program duplication in Maryland with the latest information then available. (1/10/12 AM Trial Tr. 79-81 (Conrad).)

603. Dr. Conrad's methodology for assessing for unnecessary program duplication in both reports involved four steps. First, he developed three regional comparison groups of schools with overlapping service areas, within which he would compare the programs at the TWIs and HBIs. (PTX 70 at 70-71.) These groups were a statewide group, a Baltimore/College Park group, and an Eastern Shore group, which are reflected below with their corresponding institutions.

Statewide Comparison Group (Rpt. II, Ex. 3)

| <u>Statewide Comparison</u> | |
|--|---|
| <u>Traditionally White Institutions (TWIs)</u> | <u>Traditionally Black Institutions (TBIs)</u> |
| University of Maryland, College Park (UMCP) Salisbury University (SU) University of Maryland, Baltimore County (UMBC) Towson University (TU) University of Maryland, Baltimore (UMB) University of Baltimore (UB) University of Maryland University College (UMUC) | Morgan State University (MSU) U. of Maryland Eastern Shore (UMES) Bowie State University (BSU) Coppin State University (CSU) |

Source: PTX 70 at 70

47

(Conrad Demonstrative 47.)

Regional Comparison Groups (Rpt. II, Ex. 4)

The first of the two groups of TWIs and TBIs with distinctly regional as well as statewide service areas consists of the 6 TWIs and 3 TBIs located in the Baltimore-College Park vicinity. The institutions in this group are:

| <u>Baltimore-College Park Comparison</u> | |
|---|--|
| <u>Traditionally White Institutions (6 TWIs)</u> | <u>Traditionally Black Institutions (3 TBIs)</u> |
| University of Maryland, College Park (UMCP) University of Baltimore (UB) University of Maryland, Baltimore County (UMBC) Towson University (TU) University of Maryland, Baltimore (UMB) University of Maryland University College (UMUC) | Morgan State University (MSU) Coppin State University (CSU) Bowie State University (BSU) |

The second regional group consists of two institutions located in the Eastern-Shore including one TWI and one TBI. The two institutions included in this regional group are:

| <u>Eastern Shore Comparison</u> | |
|--|--|
| <u>Traditionally White Institution (1 TWI)</u> | <u>Traditionally Black Institution (1 TBI)</u> |
| Salisbury University (SU) | U. of Maryland Eastern Shore (UMES) |

Source: PTX 70 at 71

48

(Conrad Demonstrative 48.)

604. Defendants' expert, Dr. Hossler, has testified that most college students attend an institution within 80 miles of where they live. (2/6/12 PM Trial Tr. 72 (Hossler).) Maryland's HBIs and TWIs are within 49 miles of one another: Coppin is 8 miles from Towson and UMBC, 4 miles from UMB, and 3 miles from UB; Morgan is 6 miles from UMB and approximately 5 miles from UB, Bowie is approximately 11 miles from UMUC, and UMES is 12 miles from Salisbury. (1/18/12 AM Trial Tr. 45 (Allen); PTX 856 at 15 and 16.) Accordingly, the schools in each comparison group are well-within the radius identified by Dr. Hossler.

605. Next, Dr. Conrad developed an inventory of academic programs offered at TWIs and HBIs based on then available data in the Classification of Instructional Programs (CIP) in Higher Education. (PTX 943; PTX 70 ¶78) Dr. Conrad's reason for the use of CIP codes was two-fold. First, CIP codes are assigned by MHEC after MHEC approves proposed programs and are used by public universities in Maryland for collecting, reporting, and interpreting data on educational programs. Moreover, CIP codes provide a program classification scheme by identifying programs that are broadly similar and grouping them together in terms commonly understood in the field of higher education. (PTX 943; PTX 70 ¶19) Dr. Conrad's academic program inventory for the programs in existence between 2001 and 2009 is located at Exhibit 6 of his second report. (PTX 70 at 103-145) His inventory of the programs in existence in 2010 is located at Exhibit 24 of his third report. (PTX 71 at 125 - 168.)

606. Dr. Conrad's findings with respect to programs he determined were unnecessarily duplicative at HBIs and TWIs were based on the programs having identical CIP codes. Due to the potential for reporting errors with those codes, Dr. Conrad assessed in a supplemental report the degree to which his findings would be different had he determined duplication based the additional metrics of program title, program purpose, and program curriculum. (PTX 72.) He

determined that while these additional metrics would in some instances alter his determination of whether a particular program had been duplicated, that such instances would be *de minimis* and that employing the additional criteria had, in fact, revealed an *underestimation of* unnecessary program duplication using CIP codes. As a result, his findings with respect to unnecessary program duplication were not meaningfully impaired by reporting errors with the use of CIP codes. (1/10/12 AM Trial Tr. 104 (Conrad).)

607. In his third step, Dr. Conrad formulated a set of definitions to apply in his analysis. These definitions, which were the same in both reports, were as follows:

- **TWIs:** 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. (PTX 70 ¶ 21.)
- **TBIs:** 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 include: Bowie State University, Coppin State University, Morgan State University, and University of Maryland - Eastern Shore. (PTX 70 ¶ 22.)
- **Dual curriculum structure:** A structure in which there is a substantial amount of unnecessary program duplication between TWIs and TBIs and there is not meaningful program uniqueness at both sets of institutions. (PTX70 ¶ 23.)
- **Unitary curriculum structure:** A structure of higher education in which there is not a substantial amount of unnecessary program duplication between TWIs and TBIs and there is meaningful program uniqueness at those institutions. (PTX 70 ¶ 24.)
- **Program duplication:** Two programs duplicate each other if they are “broadly similar” and are offered by a TBI and a TWI with overlapping service areas. (PTX 70 ¶25.)

- **Unnecessary program duplication:** A duplicated program is unnecessarily duplicated if it is not essential for the provision of general and specialized education in the core liberal arts and sciences at the undergraduate level. All programs not identified as core programs, and which are duplicated at the TBIs and TWIs within a comparison group, are classified as unnecessarily duplicated. (PTX 70 ¶ 26.)
- **Overlapping service areas:** When the missions of two or more institutions aim to serve students from broadly similar geographical areas, they have overlapping service areas. While there is often geographic proximity among institutions with overlapping service areas, more significant is the similarity among institutions with respect to targeting and recruiting students from overlapping geographical areas. (PTX 70 ¶ 27.)
- **Core programs:** Programs essential to providing general and specialized education in the basic liberal arts and sciences at the undergraduate level. All graduate level programs are considered non-core on the grounds that are essential programs are basic-that is, baccalaureate-level programs. (PTX 70 ¶ 28.)
- **Unique programs:** A program is unique if it is not duplicated- that is, if it is not broadly similar to any programs at other-race institutions with overlapping service areas (i.e., TWIs if the program is offered by a TBI, TBIs if the program is offered by a TWI). (PTX 70 ¶ 29.)
- **Meaningful program uniqueness:** An institution has meaningful program uniqueness when it has a substantial number of high-demand, non-core programs that are not duplicated. Meaningful program uniqueness provides the foundation of an institutional identity that goes beyond "racial identity" and is critical to attracting students to attend institutions that they traditionally have not been likely to attend because of race. It is therefore essential to desegregating former *de jure* segregated systems of higher education. (PTX 70 ¶ 30.)
- **High-demand programs:** Programs which a disproportionately large number of students can be expected to choose as their major field of study. The presence of programs that are high-demand is often at the epicenter of institutional identities - identities that provide institutions with programmatic niches if they are not replicated at institutions with overlapping service areas. In turn, such programs will often attract students who choose to matriculate at an institution because of its program offerings. (PTX 70 ¶ 31.)

608. Third, Dr. Conrad applied his definitions to the academic program inventory to determine the programs that fell within the definitions of: (i) core, (ii) high-demand, and (iii) unique (non-duplicated), non-core programs. (PTX 70 at 8-9.)

609. After applying these definitions, Dr. Conrad tabulated the number and instances of unnecessary program duplication for 2001 through 2009 and in 2010. Dr. Conrad found that between 2001 and 2009, Maryland had approved **18 new** programs at TWIs that unnecessarily duplicated programs at HBIs. Of those, **13 duplicated high-demand programs** at HBIs. (Conrad Demonstrative 60) (emphasis added).

610. In particular, Dr. Conrad found that between 2001 and 2009 in the Baltimore/College Park region, **12 new programs** at TWIs unnecessarily duplicated programs at HBIs. Of those, **9 duplicated high-demand programs** at HBIs. On the Eastern Shore, there was limited duplication primarily due to the limited, non-core program offerings at the HBI and TWI located there. (Conrad Demonstrative 60.) These findings are reflected below.

Summary of New Unnecessarily Duplicative Programs: 2001-2009 (Rpt. II, Ex. 5.7)

| <small>NUMBER OF NEW PROGRAMS (2001-2009) WHICH LE PROGRAMS (INCLUDING HIGH-DEMAND PROGRAMS)</small> <small>STATEWIDE COMPARISON</small> <small>Traditionally White Institutions</small> <small>(UMCP, UMBC, TU, UMB, UB, UMUC, SU)</small> | | <u>STATEWIDE COMPARISON</u> | | | | | |
|--|---|--|----------|----------|----------|--------------|--|
| | | <u>B</u> | <u>M</u> | <u>D</u> | <u>F</u> | <u>Total</u> | |
| <small>No. of New Programs Which Unnecessarily Duplicate Programs</small> <small>No. of New Programs Which Unnecessarily Duplicate High-Demand Programs</small> | <small>BALTIMORE-COLLEGE PARK COMPARISON</small> <small>Traditionally White Institutions</small> <small>(UMCP, UMBC, TU, UMB, UB, UMUC, SU)</small> | 10 | 7 | 1 | 0 | 18 | |
| <small>No. of New Programs Which Unnecessarily Duplicate Programs</small> <small>No. of New Programs Which Unnecessarily Duplicate High-Demand Programs</small> | <small>BALTIMORE-COLLEGE PARK COMPARISON</small> <small>Traditionally White Institutions</small> <small>(UMCP, UMBC, TU, UMB, UB, UMUC, SU)</small> | 7 | 5 | 1 | 0 | 13 | |
| | | <u>BALTIMORE-COLLEGE PARK COMPARISON</u> | | | | | |
| | | <u>Traditionally White Institutions</u> (UMCP, UMBC, TU, UMB, UB, UMUC, SU) | | | | | |
| | | <u>B</u> | <u>M</u> | <u>D</u> | <u>F</u> | <u>Total</u> | |
| <small>No. of New Programs Which Unnecessarily Duplicate Programs</small> <small>No. of New Programs Which Unnecessarily Duplicate High-Demand Programs</small> | <small>101</small> | 6 | 6 | 0 | 0 | 12 | |
| <small>No. of New Programs Which Unnecessarily Duplicate Programs</small> <small>No. of New Programs Which Unnecessarily Duplicate High-Demand Programs</small> | | 5 | 4 | 0 | 0 | 9 | |

Source: PTX 70 at 101

611. As part of his 2010 analysis, Dr. Conrad found that statewide, **65 of the 109 non-core programs at Maryland’s HBIs were unnecessarily duplicated** at a TWI. In addition, 65 of the 361 non-core programs at Maryland’s TWIs were unnecessarily duplicated at an HBI. (Conrad Demonstrative 78.) In terms of percentage, **60%** of the non-core programs at Maryland’s HBIs and 18% of non-core programs at Maryland’s TWIs were unnecessarily duplicated. His findings on the statewide- level are reflected in the below table.

Unnecessary Program Duplication (By Degree Level) in Statewide Comparison Group (Rpt. III, Ex. 8)

| STATEWIDE COMPARISON | | | | | | | | | | |
|---------------------------------|--|-----|----|----|-------|---|-----|-----|----|-------|
| | Traditionally White Institutions (UMCP, UMBC, TU, UMB, UB, UMUC, SU) | | | | | Traditionally Black Institutions (MSU, UMES, BSU, CSU) | | | | |
| | B | M | D | F | Total | B | M | D | F | Total |
| Number of Non-Core Programs | | | | | | | | | | |
| Unnecessary Duplicated | 32 | 27 | 6 | 0 | 65 | 32 | 27 | 6 | 0 | 65 |
| Number of Non-Core Programs | 111 | 147 | 98 | 5 | 361 | 50 | 46 | 13 | 0 | 109 |
| Percent Unnecessary Duplication | 29% | 18% | 6% | 0% | 18% | 64% | 59% | 46% | 0% | 60% |

Source: PTX 71 at 84-85

78

612. In the Baltimore/College Park area, Dr. Conrad found that in 2010 **51 of the 86 non-core programs at HBIs** were unnecessarily duplicated; whereas, only 51 of the 359 non-core programs at the TWIs were unnecessarily duplicated at an HBI. Dr. Conrad determined that as a percentage, **59% of the non-core programs** at Maryland's HBIs are unnecessarily duplicated as compared with only 14% at the TWIs. (Conrad Demonstrative 80.) A table of these figures is reflected below.

**Unnecessary Program Duplication (By Degree Level) in
Baltimore-College Park Comparison Groups (Rpt. III, Ex. 8)**

| BALTIMORE-COLLEGE PARK COMPARISON | | | | | | | | | | |
|-----------------------------------|--|-----|----|----|-------|---|-----|-----|----|-------|
| | Traditionally White Institutions (UMCP, UMBC, TU, UMB, UB, UMUC) | | | | | Traditionally Black Institutions (MSU, BSU, CSU) | | | | |
| | B | M | D | F | Total | B | M | D | F | Total |
| Number of Non-Core Programs | | | | | | | | | | |
| Unnecessary Duplicated | 25 | 24 | 2 | 0 | 51 | 25 | 24 | 2 | 0 | 51 |
| Number of Non-Core Programs | 109 | 147 | 98 | 5 | 359 | 35 | 42 | 9 | 0 | 86 |
| Percent Unnecessary Duplication | 23% | 16% | 2% | 0% | 14% | 71% | 57% | 22% | 0% | 59% |

Source: PTX 71 at 84

80

613. By way of context, in 2010 Maryland had *more unnecessary program duplication* at the bachelor's level in the statewide and Baltimore/College Park comparison groups than Mississippi had (40 %) in 1994. Maryland also had *more unnecessary program duplication* at the doctoral level in statewide group and approximately the same amount of unnecessary program duplication in the Baltimore/College Park group than Mississippi had (25 %) in 1994. (Conrad Demonstrative 82; *Ayers v. Fordice*, 111 F.3d 1183, 1218 (5th Cir. 1997).)

614. Dr. Conrad's findings with respect to these definitions were memorialized in the following portions of his expert reports:

- **Exhibit 5.1 of Conrad's Second Report** provides a list of core programs. (PTX 70 at 73-74.)
- **Exhibit 5.2 of Conrad's Second Report** provides a list of high-demand programs. (PTX 70 at 75-80.)
- **Exhibit 5.5 of Conrad's Report** identifies the number of new, unique, non-core programs (including high-demand) at each institution in the three

comparison groups, introduced between 2001 and 2001. (PTX 70 at 99-100.)

- **Exhibit 5.6 of Conrad's Second Report** identified the number of new unique, non-core programs established generally at the TWIs and HBIs between 2001 and 2009. (PTX 70 at 101.)
- **Exhibit 5.7 of Conrad's Second Report** identifies the number of new programs (including high-demand programs) established in the TWIs between 2001 and 2009 which unnecessarily duplicate programs in the HBIs. (PTX 70 at 102.)
- **Exhibit 4 of Conrad's Third Report** identifies programs classified as core. (PTX 71 at 76-7.)
- **Exhibit 5 of Conrad's Third Report** identifies the unnecessarily duplicated programs in the statewide comparison between the TWIs and HBIs. (PTX 71 at 78-81.)
- **Exhibit 6 of Conrad's Third Report** identifies the unnecessarily duplicated programs in the Baltimore/College Park Comparison. (PTX 70 at 81-82.)
- **Exhibit 7 of Conrad's Third Report** identifies the unnecessarily duplicated programs in the Eastern Shore comparison. (PTX71 at 84.)
- **Exhibit 8 of Conrad's Third Report** identifies the number and percentage of non-core programs that are unnecessarily duplicated and the number of such programs offered. (PTX 71 at 84-85.)
- **Exhibit 9 of Conrad's Third Report** identifies the high-demand, non-core programs offered at TWIs and HBIs. (PTX 71 at 87-93.)
- **Exhibits 10-12 of Conrad's Third Report** identifies the unique, non-core programs (including high-demand) in the three comparison groups by CIP code and degree level. (PTX 71 at 94-113.)

Unnecessary Program Duplication (By Degree Level) in Baltimore-College Park Comparison Groups (Rpt. III, Ex. 8)

| BALTIMORE-COLLEGE PARK COMPARISON | | | | | | | | | | |
|-----------------------------------|--|-----|----|----|-------|---|-----|-----|----|-------|
| | Traditionally White Institutions (UMCP, UMBC, TU, UMB, UB, UMUC) | | | | | Traditionally Black Institutions (MSU, BSU, CSU) | | | | |
| | B | M | D | F | Total | B | M | D | F | Total |
| Number of Non-Core Programs | | | | | | | | | | |
| Unnecessary Duplicated | 25 | 24 | 2 | 0 | 51 | 25 | 24 | 2 | 0 | 51 |
| Number of Non-Core Programs | 109 | 147 | 98 | 5 | 359 | 35 | 42 | 9 | 0 | 86 |
| Percent Unnecessary Duplication | 23% | 16% | 2% | 0% | 14% | 71% | 57% | 22% | 0% | 59% |

Source: PTX 71 at 84

80

b. Statewide Analysis of Program Duplication

615. A statewide analysis of unnecessary program duplication is appropriate due to the proximity of the Maryland institutions. Maryland's HBIs and TWIs are within 49 miles of one another: Coppin is 8 miles from Towson and UMBC, 4 miles from UMB, and 3 miles from UB; Morgan is 6 miles from UMB and approximately 5 miles from UB, Bowie is approximately 11 miles from UMUC, and UMES is 12 miles from Salisbury. (1/18/12 AM Trial Tr. 45 (Allen); PTX 856 at 15 and 16.) Moreover, all of these institutions draw their largest student enrollments from the same Maryland counties. (PTX 934.)

616. Defendants' expert, Dr. Hossler, has testified that most college students attend an institution within 80 miles of where they live and that a statewide analysis of unnecessary program duplication in Maryland is appropriate. (2/6/12 PM Trial Tr. 72 (Hossler).)

617. Furthermore, Morgan's response to the June 19, 2008 geographic proximity survey issued by Maryland's Assistant Secretary for Planning and Academic Affairs, stated that Maryland's increased reliance on distance learning in various venues, such as online programs, has the effect of expanding and overlapping service areas. (PTX 703 at 2.)

618. At a minimum, USM has admitted that institutions within a 35-mile radius should be considered geographically proximate to determine if there is program uniqueness (non-duplication) at those schools. (PTX 677 at 23.) Accordingly, all of the institutions in the Baltimore area should be considered geographically proximate for purposes of unnecessary program duplication. Moreover, Maryland admits that its institutions, including UMUC and UMCP, have a statewide draw of students and overlapping service areas. (1/25/212 Trial Tr. 67 (Passmore).) Programs at UMUC and UMCP should not be treated separately for a program duplication analysis. Several programs unnecessarily duplicated at UMCP and the Baltimore HBIs are racially identifiable. (PTX 741 [admitted on disk].) These include:

- The Master's degree in Counselor Education & School Counseling (CIP 13.1101) at UMCP was completed by 35 white students and 11 black students; whereas, BSU's similar program was completed by 3 white students and 23 black students.
- The Bachelor's degree in Electrical, Electronics, and Communications Engineering (CIP 14.1001) at UMCP was completed by 50 white students and 6 black students, whereas MSU's similar program was completed by 0 white students and 36 black students.
- The Bachelor's degree in Finance (CIP 52.0801) at UMCP was completed by 155 white students and 12 black students; whereas, MSU's similar program was completed by 0 white students and 41 black students.
- The Master's degree in Architecture (CIP 4.0201) at UMCP was completed by 28 white students and 5 black students; whereas, MSU's program was completed by 9 white students and 21 black students.

(PTX 934.)

619. Maryland specifically recognized the programs at UMUC can duplicate programs at the Baltimore HBIs, such as in the Community College Leadership Program. (PTX 259 .)

c. Limited Program Duplication on the Eastern Shore

620. There is a limited amount of unnecessary program duplication on Maryland's Eastern shore for two reasons. First, there is only one TWO on the Eastern shore, so the number of TWIs that can be considered to duplicate its programs are fewer than for HBIs in the Baltimore/College Park comparison group. (1/3/12 PM Trial Tr. at 122.) Second, as between UMES and the neighboring TWI, Salisbury, those institutions have fewer course offerings (and thereby, fewer non-core course offerings) that can be duplicated as compared with the schools in the Baltimore/College Park area. (1/10/12 PM Trial Tr. 28 (Conrad).)

621. Specifically, UMES only has 33 non-core programs and Salisbury only has 29 non-core programs. (Conrad Demonstrative 81.) Therefore, the population of relevant programs for an unnecessary program duplication analysis is smaller and less likely to yield a high percentage. A table reflecting Dr. Conrad's findings with respect to unnecessary program duplication on the Eastern Shore is below.

Unnecessary Program Duplication (By Degree Level) in Eastern Shore Comparison Group (Rpt. III, Ex. 8)

| EASTERN SHORE COMPARISON | | | | | | | | | | |
|-----------------------------------|---------------------------------------|----|----|----|-------|---|-----|----|----|-------|
| | Traditionally White Institutions (SU) | | | | | Traditionally Black Institutions (UMES) | | | | |
| | B | M | D | F | Total | B | M | D | F | Total |
| Number of Non-Core Programs | | | | | | | | | | |
| Unnecessary Duplicated | 2 | 1 | 0 | 0 | 3 | 2 | 1 | 0 | 0 | 3 |
| Total Number of Non-Core Programs | 17 | 12 | 0 | 0 | 29 | 19 | 9 | 5 | 0 | 33 |
| Percent Unnecessary Duplication | 12% | 8% | 0% | 0% | 10% | 11% | 11% | 0% | 0% | 9% |

Source: PTX 71 at 84

81

622. Notably, the smaller amounts of unnecessary program duplication on the Eastern Shore have resulted in more unique programs and greater diversity at UMES. This is supported by data on of white-student enrollment in duplicated versus unique (non-duplicated) programs at UMES, which show that white students prefer non-duplicated academic programs. (PTX 856 at 51.) Examples of white-student enrollment in unique versus duplicated programs are below.

Data Support for Remedies

2010 White Enrollment in UMES Unique Programs

| Program | UMES | |
|--|-------|-------|
| | Black | White |
| Technology Teacher Education/Industrial Arts Teacher Education | 1 | 11 |
| Hotel/Motel Administration/Management | 12 | 11 |
| Physical Therapy/Therapist | 4 | 8 |
| Physician Assistant | 8 | 5 |

2010 White Enrollment in UMES Duplicated Programs

| Program | UMES | | Salisbury | |
|--------------------------------------|-------|-------|-----------|-------|
| | Black | White | Black | White |
| Secondary Education and Teaching | 0 | 3 | 0 | 13 |
| Biology/Biological Sciences, General | 29 | 3 | 9 | 75 |
| Mathematics, General | 5 | 1 | 2 | 17 |

Coalition, et al. v. MHEC, et al.
Civil No. CCB-06-2773

Source: PTX 741 (2010 Undergraduate, Graduate, and All Levels Completion Rates at Maryland Schools by Race data compiled from IPEDS database)

51

623. Former President of UMES, Dr. Thelma Thompson, testified that there are higher numbers of white-student enrollment at UMES in programs that are not duplicated by the neighboring TWI. For example, UMES’ aeronautics program is “quite heavily patronized by white students” and the “pharmacy program is unique in that it’s a three-year degree, not a four-year degree, so it’s very attractive to all races.” (1/4/12 PM Trial Tr. 80 (T. Thompson).)

624. Her testimony is corroborated by Dr. Popovich’s 2009 report on the Trends in White Graduate Students in Maryland, which states: “[t]he representation of white students is much higher at UMES than at the other HBIs because its graduate programs are unique in its region. UMES began offering graduate programs in 1982. White students currently make up a significant portion—31%—of its graduate enrollments. Its white students has been essentially

stable since the mid 1990s. UMES offers eleven programs at the master's level. Only one - the Master's of Arts in Teaching - is duplicated by nearby Salisbury University and that program is offered jointly by the two campuses. Salisbury offers no doctoral study but UMES offers seven doctoral programs." (PTX 184 at 10.)

d. MHEC Has Applied Wrong Legal Standard

625. The presence of unnecessary program duplication in Maryland is the result of a program approval process that does not expressly take this into consideration. Under Maryland law, there is no express basis for objecting to a proposed program as a result of unnecessary program duplication. MHEC or a proposing institution may file an objection to the implementation of a proposed program based on one or more of four criteria: (1) inconsistency of the proposed program with the institution's approved mission for a public institution of higher education and the mission statement published in the official catalog of a nonpublic institution of higher education; (2) not meeting a regional or statewide need consistent with the Maryland State Plan for Postsecondary Education; (3) unreasonable program duplication which would cause demonstrable harm to another institution; or (4) Violation of the State's equal educational opportunity obligations under State and federal law. Md. Code Ann Educ. § 11-206.1(e).

626. Dr. Conrad, a seminal expert in the field of program duplication, who has consulted OCR and Maryland on unnecessary program duplication, testified that "unreasonable program duplication" is not a standard that he has ever come across or used to assess unnecessary program duplication. (1/10/12 AM Trial Tr. 57 (Conrad).)

627. Moreover, Maryland's claim to address unnecessary program duplication as part of assessing the State's equal educational obligations lacks evidentiary support. In the lone

document in which Maryland refers to this standard, it does not discuss, mention or otherwise refer to unnecessary program duplication. (DTX 329B)

e. Morgan MBA Program

628. The most glaring example of the harm associated with the lack of a clear State prohibition against unnecessary program duplication is the State's recent approval of the Towson and UB joint MBA program. This program was duplicative of Maryland's pre-existing MBA program.

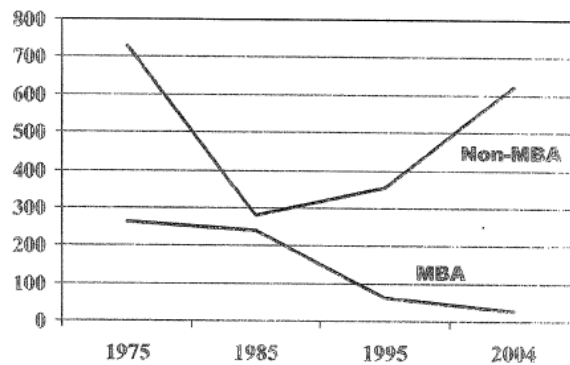
629. The duplication of Morgan's program first began in 1976 by the entry of the UB into the public system. UB's signature graduate program, the MBA, duplicated Morgan's MBA, which had been in existence since the early 1970s. (PTX 184 at 9.)

630. The MBA program at UB grew as the program at Morgan correspondingly declined. The private UB, bolstered by the strong support of alumni throughout Maryland's political establishment, was rescued from bankruptcy by becoming a public campus. Enrollments statewide already had stabilized when that campus became public and a number of private schools had recently gone out of business due to lack of enrollment demand. However, no study was carried out to determine the need for its programs, despite the fact that the 1968 Phase 1 Master Plan of MCHE -a predecessor to MHEC- provided detailed criteria to be applied to determining if a new institution was warranted. (PTX 184 at 9.)

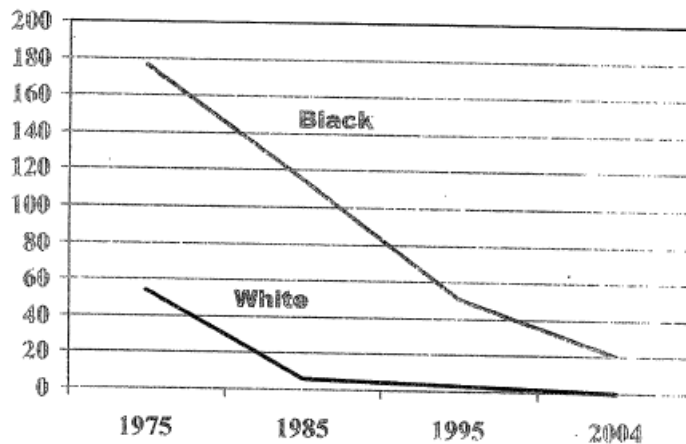
631. Following the entry of UB into the public system, enrollment (including white-student enrollment) in Morgan's MBA program dropped precipitously: "With the addition of the University of Baltimore MBA program, the number of white students enrolled in the Morgan MBA dwindled. In 1975, the year before the University of Baltimore became a public institution, Morgan enrolled 54 white students in its MBA program. This was 21% of the total

program enrollment. By 1985, Morgan’s MBA white-student enrollment was only 6 students. This amounted to only 2% of the total program enrollment!” (PTX 184 at 9.)

632. The declines in overall enrollment and white-student enrollment in Morgan’s MBA program are reflected in the below tables:



(PTX 266 at 57.)



(PTX 266 at 55.)

633. Later, in the fall of 2004, Towson sought to develop an MBA program with Morgan State. In November of 2004, the Secretary denied the program as unnecessarily duplicative without sound educational justification of the program already offered at Morgan. Yet, subsequently, on March 15, 2005, the Secretary reversed his decision. (1/11/12 AM Trial Tr. 43 (Oliver).)

634. Although the Secretary acknowledged that approval of the Towson program constituted program duplication, he believed it was justified by the fact that Towson had a student body that was large enough and a faculty that was capable enough to be able to teach an MBA-level program and that it would be convenient for Towson to be allowed to create such a program. (1/11/12 AM Trial Tr. 44 (Oliver).)

635. On April 13, 2005, Wendella Fox, the Director of OCR's Philadelphia office and participant in the Partnership Agreement negotiations, notified MHEC of their concern that approval of the program constituted unnecessary program duplication lacking sound educational justification. Specifically, the letter stated: "We have *serious questions* about whether approval of the program is consistent with Maryland's Commitments in its Agreement with the Office for Civil Rights, specifically those included in Commitment 8, *Avoiding Unnecessary Program Duplication and Expansion of Mission and Program Uniqueness and Institutional Identity at the HBIs*. We are concerned that MHEC has misinterpreted the requirements under 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." (PTX 36.)(emphasis added)

636. Shortly thereafter, MHEC Chairman Oliver sought legal advice from the Maryland Attorney General's Office regarding the legality of approving the program in light of Maryland's obligations under *Fordice* and received a legal opinion from Pace McKonkie, who was the Attorney General appointed as counsel to MHEC. (1/11/12 AM Trial Tr. 43-44 (Oliver).) The opinion informed MHEC and its Chairman that "the Towson proposal approval was in violation of the Partnership Agreement, and it was inconsistent with the Title VI obligations. And it was an unnecessary duplication without sound educational justification, in

spite of what the Secretary offered in his approval as being such.” (1/11/12AM Trial Tr. 48 (Oliver).) In particular, the opinion made the following points, all of which Chairman Oliver agreed:

- *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. Rather, he has attempted, as he is entitled to do, to justify the ‘unnecessary program duplication’ on grounds that it is educationally sound to do so. (PTX 14 at 2; 1/11/12 AM Trial Tr. 48 (Oliver).) (emphasis added)*
- Unnecessary program duplication is part and parcel of the prior segregated system of higher education in Maryland. 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 vestige. (PTX 14 at 3; 1/11/12 AM Trial Tr. 50 (Oliver).) (emphasis added)
- On its face, the Secretary's March 15th determination appears to be deficient in that his analysis primarily addresses sound educational justification in the context of Towson University's capacity to adequately offer the MBA program jointly with the University of Baltimore in the face of an apparent need for the program. It is a matter of concern, however, that the Secretary's analysis does not adequately address ‘sound educational justification’ in the specific context of a desegregating system of higher education with very specific and continuing legal obligations. 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 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. (PTX 14 at 3; 1/11/12 AM Trial Tr. 50 (Oliver).) (emphasis added)

637. In late May, Chairman Oliver conducted a hearing concerning the approval of the program with relevant stakeholders from OCR, MHEC, and Towson. At the hearing, OCR reiterated through its representative, Dr. Conrad, that it believed approval of the Towson MBA program constituted unnecessary program duplication. (1/11/12 AM Trial Tr. 51 (Oliver).)

638. Following the hearing, on May 25, Chairman Oliver similarly issued a memorandum to Dr. Calvin Burnett, Earl Richardson, Dr. Earl Richardson, Dr. Robert Caret, and Robert Bogomolny describing the outcome of the hearing. In the memo, he shared MHEC's opinion that approval of the program would constitute unnecessary program duplication and as a result, outlined potential collaborative alternatives. (PTX 330 at 3; 1/11/12 AM Trial Tr. 52 (Oliver).)

639. In particular, the memorandum described the impact of the approval of the program on Morgan: "The decline and segregated condition of the program at Morgan State University is especially of concern. And this concern is magnified in light of the Partnership Agreement and the commitment to enhance Morgan." (PTX 330 at 2).

640. Following Chairman Oliver's letter, Oliver convened a special committee to work with the stakeholders towards the possibility of an alternative collaborative solution. A cooperative solution was not achieved and a few months later the proposal was approved by the Commission. (1/11/12 AM Trial Tr. 54 (Oliver).)

E. Unequal Program Development

641. Dr. Conrad also investigated the issue of program uniqueness at Maryland's HBIs and TWIs. In particular, he examined the number of programs introduced from 2001 to 2009 at the HBIs that were not duplicated at the TWIs and vice-versa. (Conrad Demonstrative 67-70.)

642. To determine program development at the TWIs as compared with the HBIs, Dr. Conrad used the academic program inventory to tabulate the number of new, unique (non-duplicated), non-core programs at HBIs as compared the same approved at TWIs during that period.

643. Dr. Conrad determined that between 2001 and 2009, **137** new programs were introduced at the HBIs, whereas, **57** new programs were introduced at the TWIs. Of those programs, the TWIS received **106** programs that were unique and **24** that were high-demand; whereas, the HBIs only received **25** programs that were unique and **4** that were high demand. (Conrad Demonstrative 67.)

644. These differentials were most pronounced in the Baltimore/College Park area. There, **100** new programs were introduced at the TWIs and of those **24** were high-demand. By comparison, **23** new programs were introduced at the HBI and, of those, **4** were high-demand. (Conrad Demonstrative 67.) A table of Dr. Conrad's findings is reflected below.

Finding: Lack of Program Uniqueness (2001-2009)

- Examined the number of programs introduced from 2001 to 2009 at the TBIs that were not duplicated at the TWIs and vice-versa.
- **Total programs**
 - **57** new programs were introduced at the TBIs.
 - **137** new programs were introduced at the TWIs.
- **Statewide comparison**
 - **25** new programs at TBIs that were unique. Of those, were **4** high demand.
 - **106** new programs at TWIs that were unique. Of those, **24** were high demand.
- **Baltimore/College Park comparison**
 - **23** new programs at TBIs that were unique. Of those, **4** were high demand.
 - **100** new programs at the TWIs that were unique. Of those, **24** were high demand.
- **Eastern Shore comparison**
 - **7** new programs at the TBI were unique. Of those, **3** were high demand.
 - **12** new programs at the TWI were unique. Of those, **5** were high demand.

67

645. As shown above, the State's TWIs received not only more new programs, but also programs across more degree levels than the programs created at the HBIs. (Conrad Demonstrative 68.)

**New Programs by Degree Level at TBIs and TWIs:
2001-2009 (Rpt. II, Ex. 5.4)**

Exhibit 5.4
NUMBER OF NEW PROGRAMS, BY DEGREE LEVEL, IN TRADITIONALLY BLACK AND TRADITIONALLY WHITE INSTITUTIONS (2001-2009)

| | Degree Level | | | | Total |
|---|--------------|-----------|----------|----------|-----------|
| | B | M | D | F | |
| Towson University (TU) | 11 | 13 | 3 | 0 | 27 |
| University of Maryland, Baltimore Co | 11 | 9 | 3 | 0 | 23 |
| University of Maryland, College Park | 11 | 6 | 0 | 0 | 17 |
| Salisbury University (SU) | 7 | 17 | 11 | 0 | 35 |
| University of Baltimore (UB) | 11 | 3 | 0 | 0 | 14 |
| Morgan State University (MSU) | 9 | 13 | 5 | 0 | 27 |
| U. of Maryland Eastern Shore (UMES) | 3 | 0 | 3 | 0 | 6 |
| Coppin State University (CSU) | 9 | 1 | 0 | 0 | 10 |
| Bank State University (BSU) | 5 | 4 | 1 | 0 | 10 |
| University of Maryland, Baltimore (UMB) | 4 | 4 | 1 | 0 | 9 |
| Traditionally White Institutions Total (UMBC, UMCP, SU, UB, UMES) | 0 | 3 | 3 | 0 | 6 |
| Traditionally Black Institutions Total (CSU, BSU) | 9 | 13 | 5 | 0 | 27 |
| Total | 11 | 16 | 8 | 0 | 35 |

Source: Maryland Higher Education Commission, Academic Programs Data, downloaded from <http://data.ohioepi.com/and/Traditional/Active/2008/2009/2010/2011/2012/Academic/2012/Programs.asp> (April 26, 2010).

Source: PTX 70 at 97

68

646. As a result of these figures, Dr. Conrad concluded that the number of newly introduced programs at the HBIs fell short of Maryland’s commitment to expand program uniqueness at the HBIs. (Conrad Demonstrative 71.)

647. Dr. Conrad similarly determined that as late as 2010 the disparity in unequal program offerings at the HBIs and TWIs remained. Specifically, Dr. Conrad tabulated the number of unique, high-demand programs in the academic program inventory for 2010. His findings revealed a large disparity in program offerings at the HBIs and TWIs. Specifically, Maryland’s TWIs offered *122 unique, high-demand programs* as compared with only *11* such programs at the HBIs. (Conrad Demonstrative 95.)

648. In the Baltimore region, this disparity was most pronounced, with *126 unique, high-demand programs* at the TWIs and *10* such programs at the HBIs. On the Eastern shore, the disparity was smaller, but nonetheless existent, with *18 unique, high-demand programs* at

Salisbury as compared with only *10* such programs at UMES. (Conrad Demonstrative 95.) A summary of these findings is below.

Findings: Unique, High-Demand Programs at TWIs and TBIs (2010)

- **Program Uniqueness Analysis**
 - Comparison of the number of non-core, unique, high-demand programs at TWIs v. TBIs in 2010.

- **Findings**
 - Statewide
 - TWIs offer **122 programs**.
 - TBIs offer **11 programs**.
 - Baltimore/College Park
 - TWIs offer **126 programs**.
 - TBIs offer **10 programs**.
 - Eastern Shore
 - TWIs offer **18 programs**.
 - TBIs offer **10 programs**.

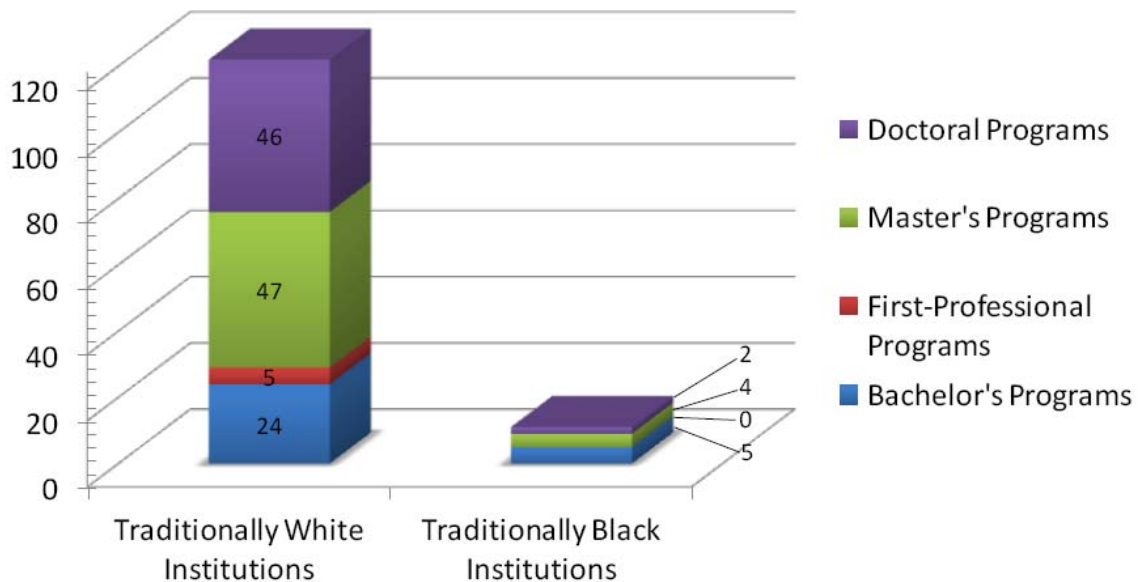
Source: PTX 71 at 13

95

649. As a result of the above findings, Dr. Conrad concluded that Maryland also failed to enable the HBIs to keep pace with the growth of programs at TWIs, particularly at the graduate level. (PTX 70 at 12.) The disparity in program offerings is a real concern that has practical effects on the academic integrity of the HBIs. For example, it was not until 2001 that Coppin received approval for academic programs in the core areas, sociology and political science. (2/8/12 PM Trial. Tr. 9-10 (Allen).)

650. Dr. Conrad concluded that the number and type of disparity in program development at the HBIs has caused them to lack meaningful program uniqueness as compared

Absence of Meaningful Program Uniqueness



Number of Unique, High-demand, Non-Core Programs by Sector by Level

to the TWIs. (Conrad Demonstrative 70.) A table comparing the institutions by the number and level of degree offerings is below.

651. Dr. Conrad attributes the absence of meaningful program uniqueness at the HBIs to their limited missions. (Conrad Demonstrative 71.) (“Maryland did not significantly change its policy of limited missions at the HBIs. HBIs do not have the comprehensive and distinctive missions – and program offerings – that TWIs have.”)

652. The causal relationship between limited missions and the number of programs that an institution offers was similarly explained by Dr. Allen, who stated “HBI missions... have not been sufficiently inclusive to ensure comparable program development and expansion relative to TWIs. Rather, the missions of those HBIs continue to be largely a reflection of the purpose for which they were founded, to provide modest, and honestly, it may be more

acceptable to say substandard educational, higher educational opportunities for blacks.” (1/18/12 AM Trial Tr. 65 (Allen).)

653. Indeed, the connection between missions and programs is reflected in Maryland’s own higher education code. Although a president of a Maryland public college or university may propose to establish a new program, the president is required to notify the institution’s governing board and MHEC. Md. Code Ann Educ. § 11-206.1(b). Within 30 days of receiving notice, MHEC or any other institution may file an objection to the implementation of a proposed program based on inconsistency of the proposed program with the institution’s *approved mission* and *the mission statement* published in the official catalog of a nonpublic institution of higher education. Md. Code Ann Educ. § 11-206.1(e). Furthermore, if an attempt to resolve the objection is unsuccessful, “the Commission shall make a final determination on approval of the new program.” Md. Code Ann Educ. § 11-206.1(f).

654. Maryland’s HBI Panel likewise recognized the connection between missions and programs, stating: “The *number and kind of graduate programs, especially at the doctoral level, depend on defined institutional missions*. Most public institutions do not offer doctoral programs; those that do, offer different kinds and numbers by state design.” (PTX 2 at 130.) (emphasis added).

1. Program Inequality

655. Dr. Conrad also analyzed the quality of Maryland’s programs at HBIs and TWIs in 2010 across eleven indicators. These indicators were based on two dimensions of quality: first, the level and number of programs, including the degree level; second, the number of programs offered across those levels. With this in mind, Dr. Conrad identified nine indicators of quality and two indicators of number and level. (1/1/0/12 Trial Tr. AM 84-85.)

656. Many of Dr. Conrad's indicators, which are set forth below, also have been used by Maryland agencies and commissions to ascertain and compare program quality at their institutions. (1/120/12 AM Trial Tr. 85 (Conrad).) The indicators are:

- number and level of program offerings
- level of program offerings
- U.S. News and World Rpt. rankings
- second-year student retention rate
- size of library collections
- student selectivity
- graduation rates (four and six-year)
- average faculty salary
- percentage of faculty with terminal degrees
- student-faculty ratio
- faculty scholarship

657. Dr. Conrad investigated the publicly available data across these criteria and determined that HBIs generally perform below TWIs. (Conrad Demonstratives 83-90.) The most notable disparities were in rankings, retention rates, student selectivity, graduation rates, faculty salary, and percentage of faculty with terminal degrees. Dr. Conrad's tables of HBI and TWI performance in these areas are reflected below.

Program Equality Indicator: U.S. News and World Report Rankings (Rpt. III, Ex. 15)

| U.S. NEWS AND WORLD REPORT RANKING ⁸⁴ | |
|--|---|
| <u>Traditionally White Institutions</u> | Rankings |
| University of Maryland College Park | #53 National |
| Salisbury University | #38 Northern Region #7 Public University -- Northern Region |
| Towson University | #43 Northern Region #8 Public University -- Northern Region |
| University of Baltimore | Tier 4 Northern Region |
| University of Maryland- Baltimore County | #1 Up-and-Coming University #4 Best Undergraduate Instruction Tier 3 National |
| University of Maryland-University College | Not Reported |
| University of Maryland-Baltimore | Not Reported |
| <u>Traditionally Black Institutions</u> | |
| Bowie State University | Tier 4 Northern Region |
| Coppin State University | Tier 4 Northern Region |
| Morgan State University | Tier 4 National |
| University of Maryland-Eastern Shore | Tier 4 Northern Region |

Source: PTX 71 at 115

85

(Conrad Demonstrative 85.)

Program Equality Indicator: Second-Year Student Retention Rate (Rpt. III, Ex. 16)

| SECOND-YEAR STUDENT RETENTION RATE ⁸⁵ | | |
|--|---|---|
| <u>Second Year Retention Rate</u> | | |
| University of Maryland-College Park | 94% | |
| University of Maryland- Baltimore County | 87% | |
| Salisbury University | 83% | |
| Towson University | 81% | |
| University of Baltimore | 77% | |
| Bowie State University | 70% | |
| Morgan State University | 68% | |
| University of Maryland-Eastern Shore | 66% | |
| Coppin State University | 58% | |
| University of Maryland-University College | Not Reported | |
| University of Maryland-Baltimore | Not Reported | |
| <i>Traditionally Black Institutions listed in boldface type.</i> | | |
| <u>Group Comparisons (Average Second-Year Student Retention Rate)⁸⁶</u> | | |
| | <u>Traditionally Black Institution(s)</u> | <u>Traditionally White Institution(s)</u> |
| Statewide: | 66 | 84 |
| Baltimore-College Park: | 65 | 85 |
| Eastern Shore Comparison: | 66 | 83 |

Source: PTX 71 at 116

86

(Conrad Demonstrative 86.)

Program Equality Indicator: Student Selectivity (Rpt. III, Ex. 18)

| STUDENT SELECTIVITY ⁵⁹ | |
|--|------------------------|
| University of Maryland-College Park | most selective |
| University of Maryland- Baltimore County | more selective |
| Salisbury University | selective |
| Towson University | selective |
| Morgan State University | less selective |
| Bowie State University | less selective |
| Coppin State University | less selective |
| University of Maryland-Eastern Shore | least selective |
| University of Baltimore | not reported |
| University of Maryland-Baltimore | not reported |
| University of Maryland-University College ⁶⁰ | not reported |
| <i>Traditionally Black Institutions listed in boldface type.</i> | |

Source: PTX 71 at 118

88

(Conrad Demonstrative 88.)

Program Equality Indicator: Four- and Six-year Graduation Rate for Incoming Freshmen (Rpt. III, Ex. 19)

| FOUR- AND SIX-YEAR GRADUATION RATE FOR INCOMING FRESHMEN ⁶¹ | | | |
|--|---|---|---------------------------|
| University of Maryland-College Park | 59% (4 Year) | 82% (6 Year) | |
| Salisbury University | 48% (4 Year) | 75% (6 Year) | |
| Towson University | 38% (4 Year) | 70% (6 Year) | |
| University of Maryland- Baltimore County | 32% (4 Year) | 66% (6 Year) | |
| University of Maryland-Eastern Shore | 24% (4 Year) | 46% (6 Year) | |
| Bowie State University | 19% (4 Year) | 45% (6 Year) | |
| Morgan State University | 12% (4 Year) | 34% (6 Year) | |
| Coppin State University | 6% (4 Year) | 18% (6 Year) | |
| University of Baltimore | Not Reported | | |
| University of Maryland-Baltimore | Not Reported | | |
| University of Maryland-University College | Not Reported | | |
| <i>Traditionally Black Institutions listed in boldface type.</i> | | | |
| <u>Group Comparisons (Four- and Six-Year Graduation Rate for Incoming Freshmen)⁶²</u> | | | |
| | <u>Traditionally Black Institution(s)</u> | <u>Traditionally White Institution(s)</u> | |
| <u>Statewide:</u> | 15% (4 Year) | 36% (6 Year) | 44% (4 Year) 73% (6 Year) |
| <u>Baltimore-College Park:</u> | 12% (4 Year) | 32% (6 Year) | 43% (4 Year) 73% (6 Year) |
| <u>Eastern Shore Comparison:</u> | 24% (4 Year) | 46% (6 Year) | 48% (4 Year) 75% (6 Year) |

Source: PTX 71 at 119

89

(Conrad Demonstrative 90.)

Program Equality Indicator: Average Faculty Salary (Rpt. III, Ex. 20)

| AVERAGE FACULTY SALARY ⁶⁵ | | |
|--|---|---|
| <u>Average Faculty Salary</u> | | |
| University of Maryland-Baltimore | \$109,359 | |
| University of Maryland-College Park | \$101,081 | |
| University of Baltimore | \$93,847 | |
| University of Maryland-Baltimore County | \$83,214 | |
| Towson University | \$65,024 | |
| Morgan State University | \$64,979 | |
| University of Maryland-Eastern Shore | \$64,834 | |
| Bowie State University | \$64,331 | |
| Salisbury University | \$63,383 | |
| Coppin State University | \$62,784 | |
| University of Maryland-University College | \$60,769 | |
| <u>Group Comparisons (Average Faculty Salary)⁶⁴</u> | | |
| | <u>Traditionally White Institution(s)</u> | <u>Traditionally Black Institution(s)</u> |
| <u>Statewide:</u> | \$82,425 | \$64,232 |
| <u>Baltimore-College Park:</u> | \$85,326 | \$64,031 |
| <u>Eastern Shore Comparison:</u> | \$63,383 | \$64,834 |

Source: PTX 71 at 120

90

(Conrad Demonstrative 95.)

658. Notably, with respect to the above indicator, HBIs lag TWIs in faculty salary even when compared by Carnegie Classification, such that Maryland’s HBI doctoral universities pay their faculty salaries consistent with the salaries paid to faculty at a Maryland TWI masters’ university. (Conrad Demonstrative 90.) A table reflecting this comparison below.

Comparison of Faculty Salary by Carnegie Classification (Rpt. III, Ex. 20)

Doctoral Institutions (Including Research)

| School | Faculty Salary at Doctoral Level Institutions |
|---|---|
| University of Maryland-Baltimore | \$109,359 |
| University of Maryland-College Park | \$101,081 |
| University of Maryland-Baltimore County | \$83,214 |
| Morgan State University | \$64,979 |
| Bowie State University | \$64,331 |

Master's Institutions

| School | Faculty Salary at Masters Level Institutions |
|----------------------|--|
| Salisbury University | \$63,383 |
| Towson University | \$65,024 |

Source: PTX 71 at 120

91

(Conrad Demonstrative 91.)

659. Similarly problematic is the HBIs' lack of infrastructure to support their programs. Maryland has admitted that the continuing existence of inadequate facilities as support for their programs at HBIs is a vestige of *de jure* segregation. (Lyons 3/5/2010 Dep. Tr. 267.) Historically, Maryland's own reports have described the conditions at HBIs as a "disgrace" to the State. (PTX 18 at 271.)

660. In recent years, Morgan has not had the resources from the State to allow it perform basic maintenance or even to obtain classroom equipment such as sufficient chairs, desk or chalk for chalkboards. (1/9/12 PM Trial Tr. 63, 79 (Heidelberg).)

661. Dr. Heidelberg, an alumni of Morgan' College and Graduate School, deemed the situation at Morgan "egregious" with respect to technology, equipment, library, and facilities. (1/17/12 AM Trial Tr. 94.) Dr. Harvey Kaiser likewise noted that, "research facilities don't really exist. "(1/17/12 AM Trial Tr. 52.)

662. Maryland's own documents have continued to chronicle the lack of necessary programmatic infrastructure for the HBIs. For example, Bowie's 2002 Facilities Master Plan made the following observation:

Despite recent campus additions of the Center for Learning and Technology and the Computer Science Building, most of BSU's remaining facilities and infrastructure do not meet the educational administrative, student support, physical education, athletics, or recreational requirements typically associated with living and learning in the 21st century and found at other institutions-both within the State of Maryland and its peers. A substantial number of the remaining campus buildings, especially those supporting the academic mission and student life and development, are inadequate and aged, and many of them have inflexible structures and floor plan which preclude cost-effective renovations. Classroom space is inadequate to support discipline needs...Office space in older buildings is overcrowded, undersized, and inadequate. Study and library facilities are worn and appear insufficient to meet the long-term campus needs.

(PTX 346 at 52.)

663. Most of these conditions are still true today as corroborated by the testimony of Dr. Mickey Burnim, the President of Bowie State University, who testified that Bowie's ability to expand its high-demand nursing program is limited by space constraints. (1/5/12 PM Trial Tr. 54 (Burnim).) As for its library, Bowie's students often have to travel to UMCP to conduct research both because Bowie's library has inadequate space and because Bowie does not have "funding for the support of acquisitions and the maintenance of [its] periodicals. (1/5/12 PM Trial Tr. 52 (Burnim).) Moreover, the sciences equipment is "woefully out-of-date" as Bowie's

science labs have been described as looking like a “1970’s high school. “ Tr 45- Indeed, there was “no evidence of computers in the science buildings”, cabinets had doors hanging off them, and there were too few fume hoods. (1/5/12 PM Trial Tr. 52.)

664. Likewise, at UMES, despite its description by Chancellor Kirwan as UMES “a research university” with the “same array of degree programs that College Park has,” the library collection is about 1/10th the size of the library collection at UMCP and 1/5th the size of the collection at UMBC, the two TWI doctoral research institutions. (1/23/12 PM Trial Tr. 60; PTX 2 at 135.) Given these conditions, the Chief Operating Officer of the USM system, Dr. Vivona, testified in truth that UMES is “not at all a research intensive institution.” (1/31/12 AM Trial Tr. 45 (Vivona).)

665. Coppin likewise suffers sufficient infrastructure support for its programs. For example, the 2001 Coppin Revitalization Study found severe deficiencies in Coppin’s infrastructure -- even compared to Maryland’s other neglected HBIs:

The College’s infrastructure - water, sewer, electrical, security, communications, and fire protection - systems are antiquated and in need of replacement and/or modernization. Classroom, office, research, library, and physical-education space are severely deficient, a problem that will worsen with expected enrollment increases.

(PTX 549 at 12)

666. Ten years later these problems remained. The 2011 Coppin Revitalization Commission acknowledged the recent investments in Coppin, but still concluded:

Despite the recent campus additions of the HHSB and PEC, most of CSU's remaining facilities do not meet the educational, administrative, and student related support needs typically associated with living and learning in the 21st century and found at other institutions-both within the State of Maryland and within its peers. Coppin will continue to request funds to construct and renovate the buildings as recommended in the Study Team report.”

(PTX 810 at 55.)

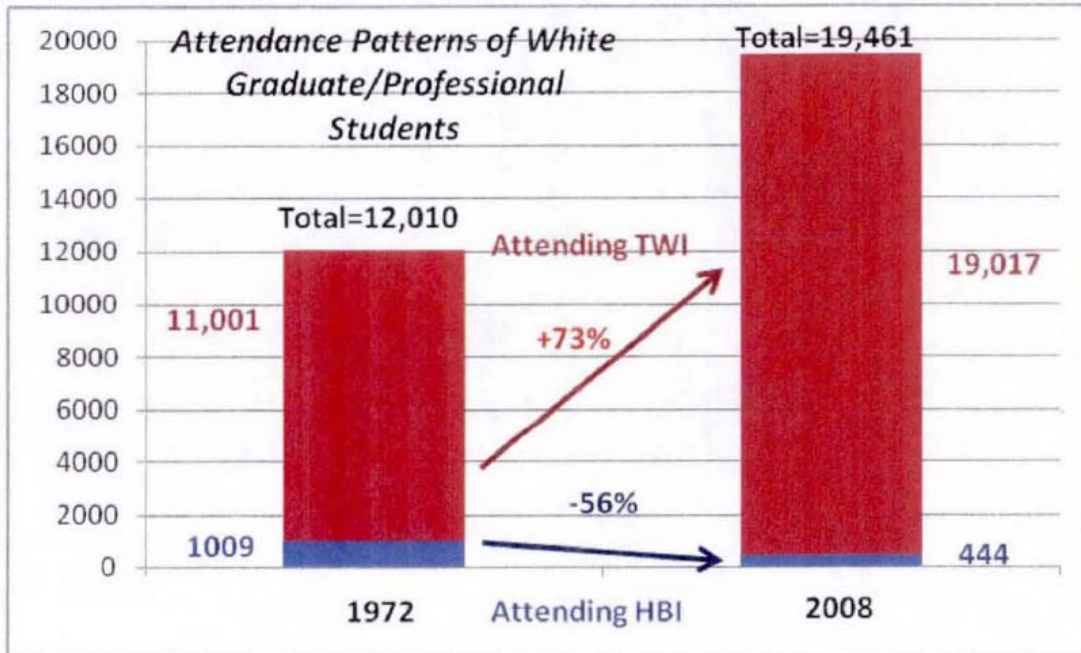
VI. SEGREGATIVE EFFECTS

A. Increased Racial Segregation at the HBIs

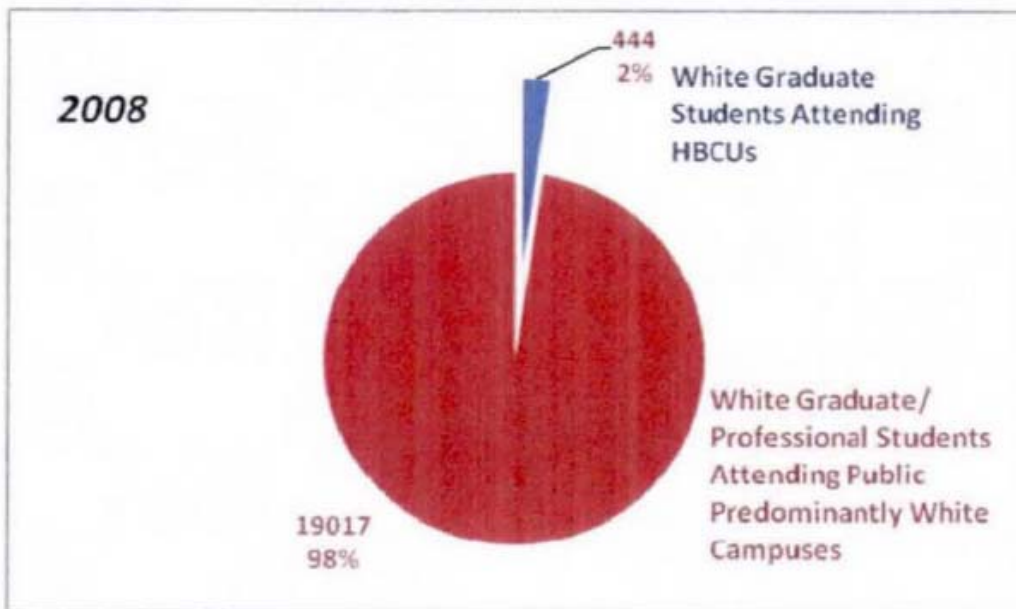
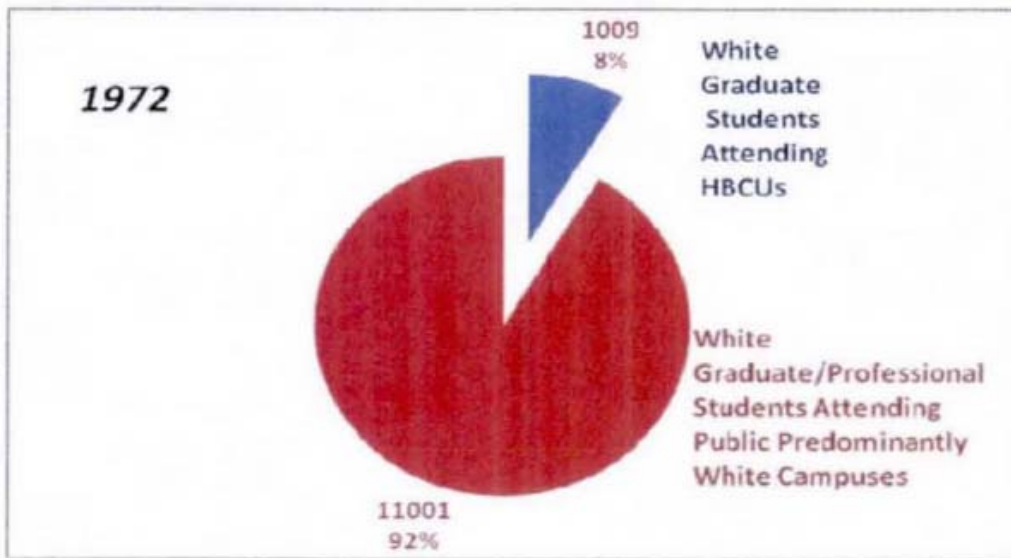
667. Defendants acknowledge that today, Maryland's HBIs are neither diverse nor successful at attracting other-race students. (1/24/12 PM Trial Tr. 30 (Kirwan).)

668. Maryland began to collect student data by race from its public campuses in 1970. By 1972, all campuses were able to provide student data by race. A comparison between 1972 and the present shows that white students pursuing advanced degrees are considerably more concentrated at TWIs today than they were 40 years ago. (PTX 184 at 1.)

669. The reversal in white students attending HBIs since 1972 has been dramatic and sustained. In 1972, 43% of graduate students enrolled at HBIs were white (1,009). Currently, there are only 444 white graduate students at the State's HBIs and they make up only 14% of total graduate enrollments at these campuses. This is despite the fact that there are over 7,000 more white graduate/professional students in the state's higher education system than forty years ago. The decline in white graduate students at HBIs between 1972 and the present represents a 56% decrease. This loss of white graduate students has had a devastating impact on the ability of HBIs to grow. (PTX 184 at 2.) A chart depicting this decline is below.



670. In 1972, white students attending HBIs accounted for over 8% of the total white graduate/professional students attending public campuses statewide. Currently, only 2% of white students pursuing advanced degrees are enrolled at an HBI. (PTX 184 at 1.) A pie chart reflecting this decrease is below.



671. The decline in white graduate students at HBIs between 1972 and the present represents a 56% decrease. This loss of white graduate students has had a devastating impact on the ability of HBIs to grow. (PTX 184 at 2.)

672. This decline is due to the growing disparity between HBIs and TWIs with respect to programs, funding, and infrastructure—not demographics or racial concerns. (1/25/12 AM Trial Tr. 36 (Passmore).)

673. “[T]he failure [sic] of Maryland’s public colleges and universities to improve upon the gains temporarily achieved in other-race enrollment by the [sc] HBIs in the 1970s suggests that segregation, racial segregation in Maryland’s public higher education has increased.” (1/10/12 AM Trial Tr. 39 (Conrad).)

B. Impact of Maryland’s Policies & Practices on Student Choice

674. Defendants’ own expert, Dr. Donald Hossler, acknowledges that it is a bigger challenge for HBIs to attract other-race students than for TWIs and that the comparability and competitiveness of HBIs and TWIs is relevant to student choice. (2/6/2012 PM Trial Tr. at 53, 56 (Hossler).)

675. Dr. Hossler also admits that the number of non-duplicated programs is relevant to an institution’s ability to attract more students. (2/6/12 Trial Tr. PM 63 (Hossler).)

676. In Maryland, unnecessary program duplication between proximate HBIs and TWIs has specifically undermined white-student enrollment. “[W]ithout meaningful academic differentiation, white students choosing between an HBI and a TWI with similar programs [are] almost inevitably going to choose to attend the institution that does not have an explicit racial focus on students of a racial group different than their own.” (1/18/12 AM Trial Tr. at 89 (Allen); PTX 661 at 8.) Examples of these declines are reflected in the below tables. (Conrad Demonstrative 59.)

Declining Enrollment Following Program Duplication

MS in Computer Science

| School Name | Degree | Program Name | App. Y | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 |
|-------------|--------|--------------|--------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|
| Towson | MA | Comp.Sci. | 1994 | 23 | 73 | 142 | 184 | 182 | 217 | 225 | 210 | 182 | 174 | 147 | 128 | 101 | 91 | 101 |
| Bowie | MA | Comp.Sci. | 1984 | 119 | 99 | 95 | 82 | 78 | 54 | 47 | 62 | 45 | 35 | 27 | 20 | 14 | 22 | 29 |

MA in Teaching

| School Name | Degree | Program Name | App. Y | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 |
|-------------|--------|----------------|--------|------|------|------|------|------|------|------|
| UMBC | MA | Teaching (MAT) | 2002 | - | 48 | 107 | 92 | 97 | 105 | 90 |
| Bowie | MA | Teaching (MAT) | 1995 | 95 | 98 | 69 | 57 | 63 | 60 | 57 |
| Coppin | MA | Teaching (MAT) | 1992 | 35 | 26 | 30 | 32 | 33 | 29 | 19 |
| Morgan | MA | Teaching (MAT) | 1992 | 12 | 31 | 29 | 3 | 5 | 3 | 2 |

Source: PTX 446 and 668; Defendants' Response to Interrogatory No. 3

59

C. Demographics Do Not Explain White Student Declines at HBIs

677. Regional demographics changes in and around the HBIs do not account for their declining white-student enrollments. All of Maryland's public universities draw students from throughout the State. (PTX 934 at 24.)

678. Morgan students come from a broader area than just Baltimore City and areas surrounding the school. (1/9/12 AM Trial Tr. 62 (Popovich).) Moreover, "Coppin, Towson, UB, UMBC, UMB -- College Park draws from everywhere or anywhere -- and UMUC, although UMUC, again, much like College Park, draws from all over. . . ." (1/25/12 AM Trial Tr. 67 (Passmore).)

679. Furthermore, Maryland agrees that both Salisbury and UMES "have greater statewide draw than the other two institutions that we have talked about. So that is to say they

are not relying on simply populations on the Eastern Shore to bring students in.” (1/25/12 AM Trial Tr. 47 (Passmore).)

680. At Bowie, the number of black students enrolled has increased, while Asian and Hispanic populations remain small and the white student population is one-sixth of what it was in 1990. (1/25/12 AM Trial Tr. 30 (Passmore).) These changes cannot be explained by demographics as the white population, as discussed by Dr. Allen: “The changes in enrollment of non-black students from 2002 to 2009 that are reflected in a drop of 269 students on the Bowie campus, 269 *non black* students on the Bowie campus, is not a function of demographic change in Prince George’s County. The fact of the matter is that the county -- or the difference between non black students from PG County in 2002 and 2009 is minimal. So, in fact, it’s more of a result of some other key factors in terms of those changes and those other key factors often being program duplication. The inability to mount unique high-demand programs and just being under-resourced in terms of the kinds of programs that are being offered, that are the true explanation rather than demographic factors driving those changes.” (2/8/12 PM Trial Tr. 25 (Allen).)(emphasis added)

681. Similarly, at Coppin, the number of white students enrolled is one-third the number it was in 1980 and one-sixth of the number it was in 2000. (1/25/12 AM Trial Tr. 37 (Passmore).) Moreover, Coppin is not drawing substantial numbers of Asian or Hispanic students. (1/25/12 AM Trial Tr. 33 (Passmore).) As acknowledged the University System of Maryland’s Assistant Vice Chancellor, the decrease in white-student enrollment at Coppin cannot be explained by demographic changes because Coppin is now drawing from areas that have a “substantial white population.” (1/25/12 AM Trial Tr. 38-39 (Passmore).)

682. These declines also cannot be explained by a generalized decline in white-student enrollment in the University System. While white-student enrollments did decline between 1990 and 2000, since 2000, the white population in the university system has “relatively steadily gone up, though, at a slow pace.” (1/25/12 AM Trial Tr. 27-28 (Passmore).)

683. Moreover, irrespective of the period of decline of white-student enrollment in the University System, TWIs have still been able to increase their white-student enrollment relative to their HBI counterparts. For example, Salisbury and Eastern Shore both draw students from all over the State, but Salisbury is “drawing proportionally relatively more white students” than UMES and has increased its white-student enrollment from 3,800 to 6,660 at a time when the white population in the University System was declining. (1/25/12 AM Trial Tr. 49 (Passmore).)

684. Conversely, as of 2010, UMES was still experiencing a “steady decline in the percentage of non-African American students from 22.5% in 2004 to 18% in 2010.” The university attributed this decline to “insufficient resources for the effective marketing of our high-demand, high knowledge/skills, and high-wage programs, . . . [and] university-wide budget cuts [which meant] that an aggressive marketing strategy cannot be fully implemented until funds become available for establishing a position for a non-African-American (*i.e.*, [w]hite) recruiter.” (PTX 892 at 90.)

685. Irrespective of whether demographic shifts are occurring in the regions and neighborhoods surrounding HBIs, the need for desegregation at these institutions remain. As the University System Chancellor Kirwan stated: “I don’t think [demographic change] changes [HBIs’] importance. We all have an obligation. And each of our institutions will be expected to play a vital role in ensuring greater rates of success in terms of admission and completion for the

rising population of high school graduates, which will be increasingly coming from populations that are traditionally underrepresented in higher education.” (1/24/12 PM Trial Tr. 4 (Kirwan).)

686. Indeed, as a result of these changes, Maryland should implement policies and practices that will make the HBIs attractive and able to better serve students of all races -- not merely rely on black student enrollment to drive growth. As stated by plaintiffs’ remedies expert, Dr. Walter Allen, “I think [Plaintiffs’ proposed remedy is] actually bolstered [by demographic changes], because the remedies I propose have, would have the ultimate effect of expanding higher education opportunities in the State of Maryland and ensuring that the group of students who have aspirations to earn degrees would have a broader set of choices and be able to earn those degrees in institutional settings that were excellent to the greatest extent possible. So literally, it would expand the capacity of the State to serve that growing population of students who would like to pursue higher education, and with the benefit then deriving to the State. (1/18/12 PM Trial Tr. 64 (Allen).)

D. Racial Tensions Do Not Support White Declines at HBIs

687. The argument that racial tensions or sensibilities explain the low numbers of white-student enrollment at Maryland’s is similarly unsupported by evidence. HBIs were able to successfully recruit and retain white students in the 1960s and 1970s when racial attitudes and tensions were more polarized than they are today. (1/10/12 AM Trial Tr. 30-31 (Conrad).)

688. Moreover, white students at Maryland’s HBIs have reported positively of their experiences as indicated in studies performed on HBI campuses. For example, the Maryland’s own study in 1969 summarized the reaction of white students at black campuses who were asked, “On the whole, do you feel you made the right decision in attending a black college?” Eighty percent of the students interviewed replied affirmatively. (PTX 848 at 19.)

689. Similarly, in Elam's 1972 study regarding acceptance of white students on black campuses, a racial attitude scale was discussed and administered to 238 students at Bowie State College in Maryland. The survey group consisted of 149 black students and 89 white students. Significant differences in racial attitudes of blacks and white students were shown. The racial attitudes of whites were *more positive* than were those of blacks. (PTX 848 at 18.)

690. As likewise discovered by Ida Steven-Burghardt, Dean of Students at Bowie State College, in her 1976 study, far from being concerned with their minority status, white students at Bowie State college attended black colleges and universities solely to get an education. For these reasons the quality of education that HBIs are able to provide is critically important to their ability to recruit other-race students. (PTX 848 at 9.)

VII. MARYLAND'S CURRENT POLICIES AND PRACTICES REGARDING OPERATING FUNDING ARE TRACEABLE TO THE *DE JURE* ERA AND RESULT IN SUBSTANTIAL RESOURCE DEFICIENCIES AT THE HISTORICALLY BLACK INSTITUTIONS.

691. As the HBI Panel found, and the Bohanan Commission and State Plan affirmed, the HBIs need an enhanced level of financial capacity because of their dual mission. This is because:

- (1) HBIs must expend a greater percentage of revenue toward student financial aid;
- (2) HBIs must charge lower tuition; and
- (3) HBIs must spend larger portions of their budgets on developmental education.

The HBI Panel explicitly found that the HBIs have not received adequate funding to carry out their dual mission.

692. In addition, other state documents and testimony from witnesses in this case have established that HBIs are disadvantaged in that:

- (1) HBIs have to spend a larger percentage of their budget on maintenance
- (2) HBIs are smaller and have larger costs per student because of economies of scale
- (3) HBIs have been underfunded in the past and require catch-up funding
- (4) HBIs have smaller endowments and fund balances because of their historical underfunding and fundraising limitations

693. Commission reports dating back to the 1937 Soper Commission through the HBI Panel and Bohanan Commission have consistently found that the State has not only failed to provide HBIs with the funding necessary to expand their missions, but it has also underfunded the current, limited missions of the HBIs. This underfunding is a current practice that traces back to the era of *de jure* segregation.

694. Institutions of higher education use operating funding to carry out their missions and depend upon several revenue sources, including state appropriations, tuition and fees, and grants and contracts. Dr. Robert Toutkoushian, a professor of Higher Education at the University of Georgia and plaintiffs' funding expert, observes that Maryland's HBIs have experienced substantial cumulative deficiencies in each of these categories, among others. These continuing disparities result from the maintenance of less research-intensive missions at the HBIs and Maryland's historical and contemporary reliance on institutional mission to determine or influence funding allocations.

695. Defendants' expert and political historian, Dr. Allan Lichtman presents a misleading picture of the finances of Maryland's HBIs by not only ignoring the factors that Maryland has repeatedly acknowledged as uniquely impacting the finances of the HBIs, but also by excluding UMCP from many of his calculations without providing the analysis necessary to

support that it is either a substantive or a statistical outlier. In fact, while the University of Maryland at Baltimore, an institution excluded as an outlier by both experts, received more than twice as much FTE funding than UMCP in FY 2010, and UMUC, the other agreed-upon outlier, received approximately \$3,600 less in funding per FTE than the next-lowest institution on this metric, Coppin, an institution included by both experts only received approximately \$1,200 per FTE less than UMCP.

696. The State's argument in this case that it is in legal compliance because the HBIs are receiving equal or even more state appropriations per FTE has been soundly rejected by its own reports and commissions. In 1947, the Marbury Commission noted that Princess Anne received substantially more funding per FTE than College Park and found that it was insufficient. Both the 1974 Cox Commission and the 1981 Consultant's Report to the Desegregation Task Force of the State Board for Higher Education found that the HBIs required an enhanced level of funding, even though the HBIs received higher funding per FTE student. And the Consultants report made that finding specifically in the context of the State's legal obligation. It is notable that the HBI Panel, Bohanan Commission, and the 2009 State Plan all called for increased funding for the HBIs at a time when HBIs were receiving higher funding per FTE than the TWIs.

697. In addition, the State has greater capacity to fund the HBIs without taking funds from the TWIs. A series of reports going back to the 1937 Soper Commission through the Bohanan Commission have found that Maryland has underfunded its public institutions of higher education relative to state's wealth and have called for increased funding. Maryland also provides tens of millions of dollars in unrestricted revenues to private institutions through its

Joseph A. Sellinger program. Maryland's level of support for private institutions is not only unusual, but it is also more generous than any other state.

A. Institutions Use Operating Funding To Carry Out Their Missions.

698. Operating funding is used to run Maryland's institutions of higher education, meaning that institutions allocate those funds to academics, administration and research "in order for them to carry out the mission of the institution." (1/11/12 AM Trial Tr. 71 (Vollmer).)

699. Institutions of higher education use operating funding to support their academic programs and to pay faculty salaries. ((1/11/12 AM Trial Tr. 84-86 (Vollmer); 1/03/12 PM Trial Tr. 68-69 (Wilson); PTX 13 at 10).)

700. Students receive financial aid out of their institutions operating budget. (1/03/12 PM Trial Tr. 68-69 (Wilson) 1/11/12 AM Trial Tr. 84-85 (Vollmer).)

701. "The State's capital appropriations for facilities include funding to equip each facility as long as it supports a new function and it has an expected life of 15 years or more. Increasingly, however, this funding source has only provided a fraction of the cost of equipping academic facilities since the majority of the equipment has computing components with an expected life of less than 15 years. Therefore, much of the equipment that has a life of 15 years for new facilities must be funded from the operating budget. Sometimes this cost can be as much as 20 percent of the cost of the facility." (PTX 281 at 16.)

702. Equipment with a useful life of less than 15 years, including microscopes, is purchased out of an institution's operating budget. (1/03/12 PM Trial Tr. 64-65 (Wilson).) Relatedly, institutions fund campus maintenance projects with these resources. (1/03/12 PM Trial Tr. 55 (Wilson); PTX 281 at 6.)

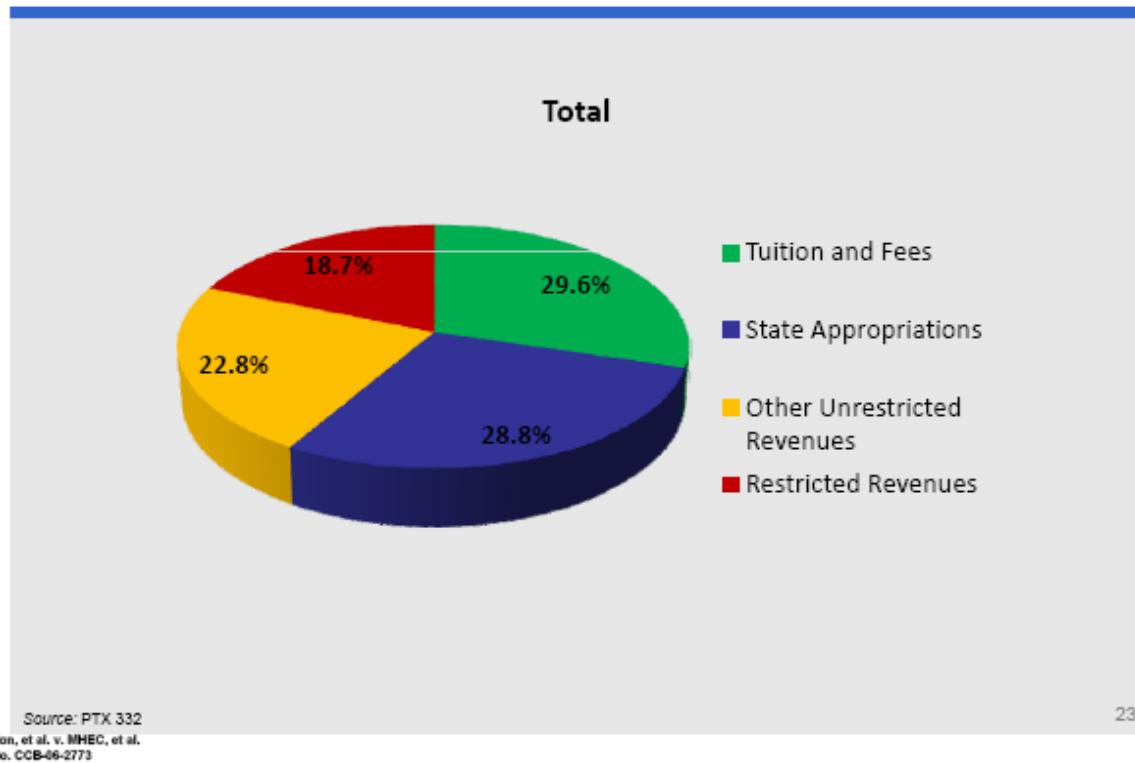
B. Institutions Receive Revenues From A Variety Of Sources, Including State Appropriations, Tuition and Fees, and Grants and Contracts.

703. According to Maryland's Bohanan Commission, "The cost of a student's higher education is generally funded from one or more of three often unequal primary sources: (1) state allocations; (2) family contributions, including tuition, student employment and loans; and (3) financial aid (federal, state, and institutional). In academic circles this is referred to as the 'three legs of the stool.'" (PTX 2 at 35.)

704. "[C]olleges and universities get revenues from several different sources. And all of those revenues are needed for providing educational services for their students, producing research, and public service mission." (1/17/12 PM Trial Tr. 29 (Toutkoushian).)

705. In FY 2009, for example, Maryland's institutions of higher education received funding from state appropriations, tuition and fees, other unrestricted revenues, and restricted revenues. Tuition and fees accounted for a larger percentage than state appropriations. (PTX 855 at 23.)

Total Breakdown of Revenue by Source (FY 2009)



(PTX 855 at 23.)

706. Considering state appropriations in isolation would be misleading because “there are two primary components that are available to educate students, and you have to put them together. One is state support. But the other is tuition and fees. And that’s [] the funding that you have available to educate your students.” (1/11/12 AM Trial Tr. 77 (Vollmer).)

707. An institution’s resource base “is the general fund money, the tuition, research and grants. Of course, there is an auxiliary side to our universities that we like to think of as self-support.” ((1/12/12 AM Trial Tr. 87 (Richardson).)

708. Joseph Vivona of the University System of Maryland observes that “[t]here are four major revenue sources. The first two have to do with what we call the state-supported budget that is the budget that the General Assembly of the state ultimately will approve. It consists of two of those four items. One is general funds from the state, roughly half of the budget, known as the state-supported budget, and the other half would be tuition and fee revenue paid by students. That accumulates up to about 2.2 of a \$4 billion budget. We have another billion dollars or so in research dollars that are really not appropriated by the state. They are federal transfer payments predominately to the university for grants and contracts. We have about a billion dollars in auxiliary enterprise, and in sale and services....Clinical revenue to the medical school and the hospital would be within that last billion. So in general it is about a \$4 billion budget.” (1/31/2012 AM Trial Tr. 7 (Vivona).)

709. About \$1 billion of USM’s approximately \$4 billion budget is from research dollars that are not appropriated from the State. (1/31/12 AM Trial Tr. 7 (Vivona).)

C. Maryland Acknowledges That The HBIs Do Not Receive The Enhanced Level Of Resources Necessary To Fulfill Their Dual Mission.

1. Maryland’s HBI Panel Concluded That Maryland’s Policies And Practices Marginalize the HBIs and Deprive Them of the Resources Necessary to be Comparable and Competitive With the TWIs.

710. Maryland’s 2008 HBI Panel “refer[s] to the process by which a state sets university missions, approves new programs, funds them through some model or process, and then holds universities accountable for results. Whether intentional or not, the past treatment of the historically black institutions 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." (PTX 2 at 129.)

711. "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.*" (PTX 2 at 124.) (emphasis added)

712. The HBI Panel observed that "[t]he Commission's charge to the Panel portends its intent to pursue a more strategic approach to the enhancement of HBI programs and facilities to eliminate any vestiges and effects of prior discrimination and the disadvantages created by the cumulative shortfall of funding over many decades. The charge also portends an intent to adopt a strategic funding plan to acknowledge that shortfall and appropriate funds over time that will build the capacity of HBIs and make them comparable in terms of quality and resources to the state's public TWIs. Comparability once achieved will place HBIs in the position they would have been, absent the perpetuation of discriminatory policies and practices, to compete efficiently with other public institutions in the state." (PTX 2 at 118-119.)

713. According to the 2008 HBI Panel Report, "[t]here 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 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. Indeed, one can reasonably assume that had the state consistently treated HBIs over their lifespan in a manner comparable to the treatment of TWIs, the HBIs would currently be competitive with other public institutions in these and other aspects of their operations both at the undergraduate and doctoral levels. The goal is to adopt a set of policies and practices that ultimately lead to the achievement of a public higher education system of national eminence in Maryland” (PTX 2 at 119.) Geoffrey Newman, MHEC’s Director of Finance Policy and 30(b)(6) representative, agrees that there are many indicators that suggest that substantial additional resources must be invested in the HBIs to overcome the competitive disadvantages caused by prior discriminatory treatment. (2/1/12 AM Trial Tr. 48 (Newman).)

714. While acknowledging that the HBIs and TWIs were somewhat similar based on certain traditional indicators, including funding per student, the HBI Panel concluded that these comparisons “do not take into account the fact that HBIs require additional funding in order to successfully carry out their broader missions. The Panel holds, accordingly, that the Commission should consider a different approach as it seeks to determine the kind and level of HBI capacity needed to be competitive. This approach centers on identifying those institutional action needed for an HBI to improve graduation rates significantly. ***The very different and greater challenges faced by HBIs in terms of student preparation and affordability should determine the specific capacity required by the HBIs, not a strict comparison to the TWIs.***” (PTX 2 at 124.) (emphasis added)

715. According to the HBI Panel, “[t]he consequences of serving a higher percentage of students from low-income families include the following: (1.) HBIs must expend a higher percentage of revenue toward student financial aid; (2.) HBIs must charge lower tuition and fees

because students cannot afford higher costs. Consequently, in FY 2007, the revenue from tuition and fees for HBIs is on the average \$1,500/FTE student less than that of TWIs (this analysis excludes UMUC and St. Mary's College because of their unique status); (3.) The HBIs' graduation rates are less than that of the TWIs because of the challenges associated with graduating students from low-income families at the same rate as that of students from higher income families; and (4.) HBIs must expend larger portions of their budgets toward developmental education and academic support than TWIs.” (PTX 2 at 125.) MHEC acknowledges that Maryland’s HBIs expend a higher percentage of their revenue towards financial aid and developmental education than the TWIs. (2/1/12 AM Trial Tr. 50 (Newman).)

716. Maryland’s HBIs have higher discount rates than the TWIs, meaning that they provide higher percentages of their tuition revenues to their students as financial aid than the TWIs. (1/17/12 PM Trial Tr. 43 (Toutkoushian).) For example, Morgan spends 12% of its operating budget on financial aid, a larger percentage than Maryland’s TWIs. (1/11/12 AM Trial Tr. 84 (Vollmer); 1/03/12 PM Trial Tr. 68 (Wilson).)

717. Maryland’s HBIs do not have the resources necessary to meet the significant financial need of their economically disadvantaged students, which results in high levels of student attrition and limits access to higher education. (1/03/12 PM Trial Tr. 78-79 (Wilson); 1/5/2012 Trial Tr. PM 35-36 (Burnim); 1/12/12 AM Trial Tr. 77-78 (Richardson).)

718. MHEC’s Assistant Secretary for Planning and Academic Affairs and 30(b)(6) witness, Dr. George Reid, confirms that the low graduation and retention rates at the HBIs are attributable to financial issues: “ Q. I’m asking: Does MHEC stand by the statement that substantial additional resources are needed to ensure the state’s HBIs are comparable to the

state’s TWIs on the point of recruitment, retention and graduation? A. Yes. Probably, yes, that’s correct.” (1/18/12 PM Trial Tr. 77 (Reid).)

719. In its analysis of the finances of Maryland’s HBIs, the HBI Panel not only considered state appropriations, but it also accounted for tuition, financial aid, fund raising/endowment, grants and contracts, and research as part of the total resources available to an institution. (PTX 272.)

720. Maryland’s HBIs have below average graduation and retention rates:

**RETENTION AND GRADUATION BY RACE
AT FOUR-YEAR PUBLIC INSTITUTIONS IN MARYLAND**

| INSTITUTION | AFRICAN AMERICAN STUDENTS | | ALL STUDENTS | |
|---|---------------------------|------------|--------------|------------|
| | RETENTION | GRADUATION | RETENTION | GRADUATION |
| Bowie State University | 71.0% | 43.4% | 70.8% | 43.2% |
| Coppin State University | 61.0% | 17.4% | 61.8% | 17.5% |
| Frostburg State University | 72.4% | 53.9% | 71.9% | 60.4% |
| Salisbury University | 78.3% | 64.6% | 79.9% | 72.3% |
| Towson University | 87.6% | 75.9% | 83.0% | 75.1% |
| University of Baltimore | 74.2% | — | 81.6% | — |
| University of Maryland - Baltimore County | 87.1% | 65.6% | 85.2% | 67.9% |
| University of Maryland - College Park | 90.7% | 70.8% | 93.0% | 82.7% |
| University of Maryland - Eastern Shore | 69.6% | 39.0% | 68.6% | 38.7% |
| Morgan State University | 68.5% | 35.4% | 68.3% | 34.8% |
| St. Mary's College of Maryland | 97.1% | 81.3% | 90.8% | 85.5% |
| STATEWIDE | 72.8% | 43.2% | 80.8% | 64.7% |

***Notes:**

- (1) Retention rates are for the 2008 full-time, first-time undergraduate cohort, who returned after completing one year.
- (2) Graduation rates are six-year rates for the 2003 cohort of new, full-time undergraduates.
- (3) University of Maryland - Baltimore is excluded because it does not enroll first-time freshman.
- (4) University of Maryland - University College is excluded because it primarily serves the adult, part-time population.

Sources:

Maryland Higher Education Commission's Enrollment Information System, 2009
Maryland Higher Education Commission's Degree Information System, 2009

(PTX 755 at 20.)

721. The HBI Panel further recommended “that Maryland consider augmenting its need-based student assistance programs so that affordability is increased for lower income students at all public universities. This, of course, will affect HBI students and HBIs disproportionately.” (PTX 2 at 128.)

2. The Bohanan Commission Adopted the Conclusions of the HBI Panel and Made Additional Specific Recommendations to Partially Address Funding Disparities.

722. The Bohanan Commission observed that “[t]he magnitude of the challenges faced by the HBIs is particularly great, especially at the undergraduate level, and will require special attention and consideration if they are to be satisfactorily overcome.” (PTX 2 at 11.) Therefore, “[t]he commission strongly endorses the HBI Panel’s finding that undergraduate education should be the first funding priority and that graduation rate should be the primary indicator of performance.” (PTX 2 at 15.)

723. Summarizing certain aspects of the HBI Panel’s conclusions, the Bohanan Commission observed that “[t]he panel noted that on traditional capacity indicators such as funding per student and student-faculty ratios, HBIs and TWIs are more similar than different. However, the panel found differences in both the kinds of students served, *e.g.*, higher percentages of underprepared students many of whom are from low-income families, and the outcomes achieved by HBIs and TWIs. The panel concluded that HBIs need a different form and level of capacity because, unlike TWIs, HBIs have a dual mission to provide regular collegiate programs and to provide strong developmental education for students, mostly from low income families, who otherwise would not have an opportunity to pursue a bachelor’s degree and that *HBIs are not funded appropriately to carry out both missions at once.* (PTX 2 at 45.) (emphasis added)

724. The Bohanan Commission concluded that “[t]he specific programmatic and funding needs for each HBI should be developed based on a process similar to that proposed by the HBI Panel.” (PTX 2 at 47.) The HBI Panel suggested the appointment of a panel of experts, among other things, for this project. (PTX 2 at 142.)

725. There are costs associated with implementing best practices in remediation “because it has to be intensive, it has to be ongoing, and it has to be consistent, and sometimes that’s not always the case. Usually people think that you remediate only at the freshman level, but it is impossible to make up for a lifetime of deprivation in nine months.” (1/4/12 AM Trial Tr. 103-04 (T. Thompson).)

726. 70% of students at Bowie require remedial education. There are not enough funds for space in the Summer Bridge program for all the students who need it. This has the effect of lowering graduation and retention rates. (1/5/2012 Trial Tr. PM 32-34 (Burnim).)

727. According to MHEC’s 2011 Data Book, in 2007-2008, 73.6% of Coppin’s students required remediation, which was the highest rate of any four-year public institution in Maryland. (PTX 755 at 18.)

728. Approximately 61% of Morgan’s students have remedial education needs. (1/12/12 AM Trial Tr. 78-79 (Richardson).)

729. According to MHEC’s Data Book, in 2007-2008, 69.7% of the students at UMES needed remediation. (PTX 755 at 18.) In the absence of adequate state funding, UMES has had to rely upon federal Title III funding to provide remediation services. (1/4/12 AM Trial Tr. 105 (T. Thompson).)

730. Maryland’s Bohanan Commission recommended that the HBIs receive “a supplement of approximately \$1,400 per student to underwrite remediation, mentoring, and other services to help offset the disparity in college preparedness of students entering the HBIs.” (PTX 2 at 11.) But \$1,400 per student in need of remedial services is inadequate to underwrite remediation, mentoring, and other services to offset the disparity in college preparedness of students entering the Historically Black Institutions. (1/12/12 PM Trial Tr. 43 (Richardson).)

The Bohanan Commission described this estimate as “preliminary.” (PTX 2 at 46.) During deliberations on the issue, Norman Augustine, the Vice Chair of the Bohanan Commission, “said he is not sure that the \$1400 additional per FTE at HBIs is adequate but he is treating it as a placeholder until he gets a better number.” (PTX 1014 at 5.)

731. Mr. Raymond Vollmer, Morgan’s Vice President of Finance and Management, has calculated the “cost of access,” an amount independent of expenses associated with remediation, as approximately \$2,856 per student. (PTX 835 at 10.)

732. The HBI Panel also recommended that the HBIs be funded at the 80th percentile of funding guideline attainment “to accelerate these universities efforts to reach educational parity.” (PTX 2 at 10-11.)

733. The states identified by the Bohanan Commission as Maryland’s competitors are “Pennsylvania, Virginia, North Carolina, New Jersey, New York, Massachusetts, Ohio, Minnesota, Washington, and California.” (PTX 2 at 37.)

734. In 2006-2007, Maryland provided lower levels of need-based grant funding as a percentage of state appropriations for higher education operating expenses than all of its competitor states, except North Carolina and Virginia. (PTX 2 at 91.)

735. The Bohanan Commission recommended that Maryland “set investment in need-based financial aid per student to match the 75th percentile of such funding provided by the competitor states.” (PTX 2 at 10.) To reach this goal it recommended increased funding for need based aid to offset tuition increases and inflation. (PTX 2 at 43.) This additional financial aid would “increase affordability for low-income students, which would disproportionately affect HBIs and their students.” (PTX 2 at 46.)

3. Maryland's 2009 State Plan for Higher Education Adopted the Work of the Bohanan Commission and Identified Providing Enhanced Funding to the HBIs as a Priority.

736. Maryland's 2009 State Plan for Higher Education adopted the work of the Bohanan Commission: "One of our state's great strengths is its diversity, and one reflection of that diversity is our Historically Black Institutions (HBIs), which boast a proud history and a continuing mission of providing quality education, including educating low-income students and students who are the first generation in their families to attend college. *We join the Commission to Develop a Higher Education Funding Model for Maryland in supporting enhancements to these institutions.*" (PTX 1 at 4.) (emphasis added)

737. According to Maryland's 2009 State Plan for Higher Education, "[t]he State of Maryland has identified as a *priority* for higher education the goal of providing the funding necessary to ensure that its four public HBIs— Bowie State University, Coppin State University, Morgan State University, and the University of Maryland Eastern Shore - are *comparable and competitive* with the State's public TWIs." (PTX 1 at 30.) (emphasis added) As of 2009, MHEC recommended to Maryland that funding over and above then-current levels was necessary to promote higher levels of academic achievement and comparability and competitiveness at the HBIs. (3/4/12 Reid Dep. Tr. 95-96)

738. The 2009 Maryland State Plan also recognized that Maryland assigns the dual mission to the HBIs: "As part of their dual missions, HBIs are *charged* with providing access to academically well-qualified students and also a significant percentage of under-prepared students. Responding to the needs of poor and under-prepared students, requires academic and support services tailored to their needs." (PTX 1 at 56.) (emphasis added).

739. The 2009 State Plan for Higher Education described the benefits that Maryland would realize from fully funding the dual mission as follows: “The Study Panel on the Comparability and Competitiveness of Historically Black Institutions, which was a part of the Commission to Develop the Maryland Model for Funding Higher Education, recommended enhanced funding to support the public HBIs’ dual missions of educating the most qualified students, as well as those who were not adequately prepared to complete college level work. Supporting this effort is one means of expanding access in Maryland. The State must also expand postsecondary opportunities for students who have the desire and ability, but not the financial resources, to be successful in college.” (PTX 1 at 29.)

740. According to the 2009 State Plan for Higher Education, Maryland’s HBIs not only need additional resources to support the access component of their dual mission, but they also need additional support for their regular academic programs: “The majority of instructional resources at HBIs are used to educate students who meet the regular admissions criteria established by the institutions, and who are educated consistent with their respective missions. Therefore, funding for HBIs must include resources necessary to enhance instructional services for regularly admitted, academically prepared students regardless of race and/or socioeconomic status. This fact notwithstanding, HBIs also enroll a disproportionate share of low-income students who are not academically prepared to successfully matriculate in college, and adequate funding is also required to enhance the access and success rates of these students.” (PTX 1 at 32.)

741. In its 2009 State Plan for Higher Education, Maryland acknowledges that “[s]ubstantial additional resources are needed to ensure the State’s public HBIs with their dual

missions are comparable to Maryland's TWIs in their capacity to be competitive with respect to the following areas:

- Recruiting, retaining, and graduating an academically, racially, culturally, and ethnically diverse student body;
- Attracting and retaining quality faculty able to teach, conduct scholarly activities, and perform services consistent with each institution's mission;
- Generate external revenue by securing contracts and grants from Federal and State agencies that support instructional services and enhance institutional infrastructure and facilities; and
- Form partnerships with businesses and foundations that expand educational opportunities for students and that promote development in the communities proximate to the institutions.” (PTX 1 at 31.)

742. Maryland's 2009 State Plan for Higher Education notes that “the investment of substantial additional resources by the State needed to ensure that its public HBIs are comparable and competitive with its public TWIs refers to the sum total of resources needed to deliver on the HBIs' 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.” (PTX 1 at 32.)

D. Maryland's *De jure* Era Policies And Practices Provided Separate Institutions For African-Americans But Funded Them Unequally.

1. Maryland's 1937 Soper Commission Describes Maryland's *De Jure* Era Policy of Providing HBIs With Inadequate and Untimely Funding.

743. Maryland's 1937 Soper Commission concluded that “[t]he policy of State aid to education has benefitted the white schools on all levels very much more than the Negro schools.” (PTX 17 at 145.)

744. “The comparative liberality of the State over a period of time may be seen from Table No. XIII which presents the appropriations for current expenditures for ten years, 1927-

1936. The total sum appropriated for this decade was \$11,693,794, of which \$10,919,616 was for white institutions and \$774,178 for Negro institutions. Negro higher education in these ten years received 6.6 per cent of the State appropriations. White institutions received in 1926-27 and in 1935-36, respectively, 21.1 and 10.9 times as much as Negro institutions. Over the ten year period white institutions received 14.1 times as much as Negro institutions or a disparity nearly three times as great as the population ratios.” (PTX 17 at 63.)

TABLE NO. XIII*

Net State Appropriations for Current Expenditures of Maryland
Colleges and Universities for the Ten Years 1926-1936

| White | 1935-36 | 1926-27 | Ten Year Total 1926-1936 |
|---|---------|---------|-----------------------------|
| Univ. of Md. (College Park) | 335,199 | 368,090 | 4,351,254 |
| Univ. of Md. (Baltimore Professional Schools) | 26,708 | 52,500 | 550,377 |
| Johns Hopkins Univ. | 67,000 | 75,000 | 742,000 |
| St. John's | 67,000 | 50,000 | 655,750 |
| Washington | 60,500 | 45,000 | 609,500 |
| Western Maryland | 52,000 | 27,700 | 442,800 |
| Blue Ridge | 3,500 | 7,000 | 66,500 |
| Frostburg Teachers' Coll. | 33,746 | 37,500 | 566,608 |
| Towson Teachers' College | 108,142 | 179,000 | 2,152,274 |
| Salisbury Teachers' Coll. | 29,226 | 33,000 | 582,053 |
| Maryland Art Institute | 20,000 | 17,000 | 197,000 |
| Total White | 803,121 | 891,790 | 10,919,616 |
| Colored | | | |
| Morgan | 35,000 | 7,000 | 211,300 |
| Princess Anne | 15,513 | 18,120 | 210,927 |
| Bowie Normal School | 23,397 | 17,100 | 351,951 |
| Total Colored | 73,910 | 42,220 | 774,178 |
| <u>Ratios Colored to White</u> | 1-10.9 | 1-21.1 | 1-14.1 |
| What amount of Negro appropri- ations would have been if based on racial ratio of 1 to 4.9 - - - - - | 163,900 | 181,998 | 2,227,777 |
| Net racial disadvantage - - | 89,990 | 139,778 | 1,456,499 |

* Data from Annual Reports Board State Aid and Charities and from Comptroller, University of Maryland.

** Coppin Normal School is not included. The Board of School Commissioners of Baltimore City appropriated \$169,567 to Coppin in the ten years 1926-1936.

(PTX 17 at 66)

745. The Soper Commission calculated a "net racial disadvantage" that compared the money the HBIs would have received if they would have received funds in proportion to the

African American percentage of the population: “To engage for a moment in pure speculation, based upon the ten years 1927-1936 only: if Negro higher education had received State assistance [sic] in proportion to white higher education, the amounts would have been, over and above what it did receive, \$89,990 in 1935-36, and for the ten years 1927-36, \$1,456,499. If the democratic principle of equality of privilege be granted, it is therefore probably true to say that the State of Maryland is in arrears in 1936 with respect to its appropriations to the current expenditures of Negro higher education something like one and a half million dollars. This is merely a ten year arrearage; to cover a longer period would add enormously to the figure.” (PTX 17 at 63-66)(emphasis in original)

746. “In the field of higher education, while the State has fostered white colleges for one hundred and fifty years it made its first grant to a Negro college in 1914 or twenty-two years ago. The State organized and supported a white teacher training institution in 1866, seventy years ago. It has aided a Negro Normal School only since 1911 - twenty-five years.” (PTX 17 at 146) “It is thus clear that the white population has had the advantage of generous state support for its higher education many years in advance of the Negro population. The contrast between the amounts of money received by the two racial groups would show, it possible of computation [sic], an enormous differential in favor of the white race.” (PTX 17 at 146.)

747. “Proportionately, Negro Higher Education in Maryland receives through institutional channels from the state treasury less than one-fourth as much as white Higher Education. This applies only to appropriations for current expense; the situation relative to state investment in plant, land and equipment being still more adverse to the colored population.” (PTX 17 at 37.)

748. “Although Princess Anne was designated by the Governor of Maryland as the federal land grant college for Negroes in 1891, and the Governor as ex officio President to the Board of Trustees of the Maryland Agricultural College certified to the United States Secretary of the Interior the intention of the Board ‘to provide for this branch according to its needs.’ There is no evidence that such support was ever given by the Maryland Agricultural College, than and since the recipient of large state grants. The Princess Anne Academy applied for a small state grant in 1905 but was refused. In the same year the white land grant college received a biennial grant of \$65,378. The first state grant to the Negro land-grant college was \$500 in 1914.” (PTX 17 at 144-45.)

749. “Morgan College received its first State appropriation of \$1,000 in 1919.” (PTX 17 at 145.)

750. In addition, the Soper Commission found that white students received better financial aid than African American students and that hurt enrollment at the HBIs: “Proportionately, state aid to individuals in the form of stipends, scholarship and reductions in fees is extended to about one-half the number of Negro students and represents less than one-half, on the average, in the amount provided each student.” (PTX 17 at 37.) However, “generally speaking, Negro college students come from economic environments much less likely to provide them with funds for higher education than is the case with white students. In other words, Negro students really need more assistance from public funds than white students.” (PTX 17 at 68.) The Commission concluded, therefore, “that the enrollment of white state-aided institutions is very much more stimulated by the aid given than is the case with the Negro institutions. We may also conclude that the enrollment in the Negro institutions would be very considerably

greater if State aid to Negro students were on a par with that offered white students.” (PTX 17 at 72.)

2. Maryland’s 1947 Marbury Commission Report Details the Effect of the Meager Appropriations Provided to HBIs.

751. The 1947 Marbury Commission concluded that “[t]he state has consistently pursued a policy of providing higher education facilities for Negroes which are inferior to those provided for whites. The meager appropriations and the inferior accreditation status of the Negro colleges attest to this fact.” (PTX 18 at 108.)

752. “It seems to us that the state’s obligation to afford equal facilities requires the adoption of a policy of supporting institutions for the higher education of whites and of Negroes at the same financial level. Specifically, we make the following recommendations: (a) That any racial discrimination with respect to the salaries paid to the staff and faculty between institutions for white and Negro students should be eliminated and that the maintenance of nondiscriminatory salaries should have the special attention of the proper authorities of the state[;] (b) That the state budget provide such annual appropriations for institutions for the higher education of Negroes that the activities being conducted at those institutions may be maintained on a basis equal in quality to those maintained in comparable state institutions for white students[;] (c) That in order to bring Negro institutions to the level of white institutions, sufficient additional funds be immediately appropriated to Morgan State College and to the State Teachers College at Bowie to enable them to qualify for national accreditation status equivalent to that held by the comparable institutions for white students[;] (d) That specific provision be made for the land-grant college for Negroes to have an equitable share of the federal funds

allocated to the state for agricultural extension and for research in agriculture and the mechanical arts.” (PTX 18 at 381.)

3. Maryland’s 1950 Weglein Commission Describes the Investment Necessary to Provide Comparable Facilities for African-Americans.

753. According to Maryland’s 1950 Report, “[t]he only positive indication that segregated higher education is sanctioned in Maryland is the fact that the state’s legislature makes separate appropriations for white and Negro institutions.” (PTX 826 at 20.)

754. More particularly, the Weglein Commission found a substantial difference between the University of Maryland and any of the HBIs: “If Maryland were to attempt the duplication for the Negro of the facilities at the University of Maryland either at Morgan or at any other location in the state, the cost would amount to many millions of dollars...” (PTX 826 at 23.) This level of investment would be required because “[p]roportionately, Negro Higher Education in Maryland receives through institutional channels from the state treasury less than one-fourth as much as white Higher Education. This applies only to appropriations for current expense; the situation relative to state investment in plant, land and equipment being still more adverse to the colored population.” (PTX 17 at 37.)

755. The Weglein Commission made the following observations regarding Maryland’s policy of providing African-Americans scholarships to out-of-state institutions: “The Maryland out-of-state scholarship program cannot be regarded as a permanent solution to the problem of providing equal educational opportunity for the Negro in Maryland. It is at best a temporary measure to more or less atone for the exclusion of Negro students from facilities available only to white students at the University of Maryland.” (PTX 826 at 31.) The Commission further observed that “the small number of undergraduate awards is surprising.” (PTX 826 at 31.)

4. Maryland Continues to Acknowledge Historical Funding Disparities Between HBIs and TWIs.

756. “There were disparities in funding provided by the State of Maryland to Maryland’s HBIs and TWIs during *de jure* segregation.” (Def.s’ Answers to Plaintiff’s First RFAs at 2 (Feb. 12, 2010).)

757. In 2006 testimony before the Maryland legislature, Dr. William Kirwan, the Chancellor of the University System of Maryland, testified that “there is no question that we have not done right over time by Historically Black Institutions and they deserve special scrutiny and attention in terms of adequacy of funding.” (1/24/2012 PM Trial Tr. 68 (Kirwan).)

E. Maryland Has Documented The HBIs’ Need For Enhanced Funding To Overcome Historical Discrimination And Support The Dual Mission.

758. Maryland’s 1974 Cox Commission Report recommended that “a degree of conscientious funding--beyond the conventional funding--must be provided to allow the Historically Black Colleges to further enhance their role and image, and to develop internal management systems to achieve greater efficiency in realizing institutional objectives.” (PTX 22 at 9.)

759. In 1974, Maryland recommended “that special attention and funding be given to financial aid and other student-supportive service offices in these colleges. These offices must have a full complement of experienced personnel so that they can handle the unique problems at predominately black colleges, notably the problems contingent upon serving many students of a socio-economic level who in some instances exhibit a need for considerable financial and academic aid. Increased student financial aid should be made available through these colleges.” (PTX 22 at 44.)

760. Significant state appropriations provided to Towson and UMBC from 1964-1974 corresponded with substantial enrollment growth at those institutions.

FTE Students and State Appropriations, 1964-1974

| FTE Students and State Appropriations, 1964-1974 | | | | |
|--|-----------|-----------|------------------|--------------------------|
| School | 1964 FTES | 1974 FTES | Increase in FTES | Appropriations 1964-1974 |
| Towson | 3,412 | 8,887 | 5,475 | \$ 49,169,200.00 |
| UMBC | NA | 4,854 | 4,854 | \$ 46,067,000.00 |
| Frostburg | 1,768 | 2,815 | 1,047 | \$ 26,339,800.00 |
| Bowie* | 520 | 2,255 | 1,735 | \$ 24,370,600.00 |
| Coppin* | 431 | 2,145 | 1,714 | \$ 22,520,920.00 |
| Morgan* | 2,879 | 4,686 | 1,807 | \$ 19,131,400.00 |
| Salisbury | 624 | 2,127 | 1,503 | \$ 15,032,000.00 |
| UMES* | 632 | 940 | 308 | \$ 9,355,700.00 |

| |
|-------------|
| Key: |
| * - HBI |

| |
|---|
| Source: |
| Report to the Maryland Council for Higher Education by the Task Force to Propose Ways of Enhancing the Role and Image of Predominately Black Public Colleges in Maryland, August 9, 1974, MDED 00017388 |

(PTX 22 at 52-62)

761. The overall purpose of Maryland’s 1981 Consultant’s Report to the Desegregation Task Force of the State Board for Higher Education “was to determine what financial resources need to be allocated to the historically black institutions in order to permit them to offer academic programs of equal quality to historically white institutions. For the purpose of the [E]nhancement [S]tudy, the University of Maryland, Baltimore County (UMBC) and Towson State University were considered as criterion institutions against which the historically black institutions were compared. Morgan State University and UMES were compared with UMBC; Coppin State College and Bowie State College were compared with Towson State.” (PTX 40 at 10.)

762. In the 1981 Report, Maryland observed that “not only must a detailed analysis be made of the resources to support and upgrade existing programs at a level comparable to those at peer institutions, but note must be taken of the need for resources to purchase new equipment

and maintain equipment already on hand. Additionally, special library needs, laboratory facilities, and the need for sophisticated learning centers in mathematics, sciences, and communication skills must be met. Enhancement will mean that in addition to the general funds support based on an enrollment-based formula, provision for special funding must also be made. These special funds should be targeted to the amelioration of specific deficiencies discovered through institutional self-study and by outside technical assistance as was done in this Study.” (PTX 40 at 9.) “In this Study, therefore, enhancement is defined as the sum total of all actions taken by the state (a) to strengthen the role and mission of the historically black institutions; (b) to provide regular and special fiscal and other resources at a level consistent with that provided for historically white institutions with similar role and mission...”(PTX 40 at 9.)

763. While noting that “[a]dequate funding is the sine qua non for excellence in higher education” (PTX 40 at 244), the report concluded with the observation that “[i]f the recommendations of this Study are implemented, the State’s historically black institutions will be put in a position to be competitive with comparable institutions and will be assured of the continued capability to serve all of the citizens of the State, regardless of creed or color.” (PTX 40 at 246.)

764. Maryland has acknowledged the need to allow HBIs to “‘catch up,’ which includes funding of enrollment increases that over the years have had limited or no General Fund support, and areas of under-funding which include, for example, scholarships, student services, information technologies, libraries, and other institutional infrastructures.” (PTX 41 at 7.)

765. In 2005, the presidents of Maryland’s HBIs observed that “[i]n addition to basic operations, HBIs have special funding needs that need to be reflected in their operating budgets if they are to close the gap with their counterparts. For example, they require more favorable

student-faculty ratios and additional staff to provide for the extra academic and student support services they need to provide. They need additional funds for student financial aid. They require adequate funds to equip and support the operation and maintenance of new or renovated buildings. They also need to be able to add functions that broaden their appeal such as research parks, business incubators, technology transfer centers, etc.. To the extent that these additional needs are not funded adequately, they will not be carried out or they will have to be supported through re-allocation from basic operations, which has the effect of undermining other enhancement efforts.” (PTX 13 at 10.) The presidents added that “The commitment to operating budget enhancement at HBIs in the Plan unfortunately is weak ... This approach generally makes it difficult for campuses to expand their missions ...” (PTX 13 at 9.)

766. Over the last decade, Coppin has “without question” experienced underfunding. (1/9/12 PM Trial Tr. 33-34 (Avery).) But the institution actually needs “an infusion of operating funds to allow the college to recover from a century of constraints.” (PTX 549 at 8; 1/9/2012 PM Trial Tr. 32:16-33:2 (Avery).)

F. The Different Iterations Of The Funding Guidelines All Contained A Mission-Based Component.

1. In the 1980s, Maryland’s Funding Process Considered Enrollments, Mission, and Economies of Scale.

767. Maryland’s funding guideline during the 1980s “had a mission component to the funding that colleges received, but it was primarily enrollment driven.” (1/17/12 PM Trial Tr. 105-106 (Toutkoushian); 1/11/12 AM Trial Tr. 77 (Vollmer).)

768. During the 1980s, Maryland’s funding guideline “provided extra funding for institutions for research activities.” (1/17/12 PM Trial Tr. 79 (Toutkoushian).)

2. During The 1990s, Maryland's Funding Policies And Practices Failed To Account For Enrollment Growth At The HBIs.

769. During the 1990s, Maryland's funding guideline was primarily driven by institutional mission. (1/17/12 PM Trial Tr. 79 (Toutkoushian).) This funding guideline de-emphasized enrollment growth. (1/11/12 AM Trial Tr. 76 (Vollmer).)

770. From 1990-2000, in-state tuition and fees at the HBIs increased by 44%, while in-state tuition and fees for the TWIs increased by 62%. Over this same period, state aid to HBIs increased by 9% and state aid to TWIs increased by 13%.

TABLE 2
TRENDS IN TUITION, FINANCIAL AID, AND APPROPRIATIONS AT MARYLAND INSTITUTIONS:
1990 TO 2000 (CONSTANT 2000-2001 DOLLARS)

| Institution | Dollar Amount | | | | | | Change | | |
|--|---------------|--------|--------|--------|---------|---------|--------|-------|-------|
| | 1990 | 1992 | 1994 | 1996 | 1998 | 2000 | 90-94 | 94-00 | 90-00 |
| In-state tuition & fees | | | | | | | | | |
| HBCUs | 2,775 | 3,058 | 3,134 | 3,363 | 3,732 | 3,988 | 13% | 27% | 44% |
| Public four-year, non-HBCUs | 3,165 | 3,762 | 4,195 | 4,603 | 4,989 | 5,113 | 33% | 22% | 62% |
| Private, four-year | 12,118 | 13,211 | 14,287 | 15,521 | 16,988 | 17,801 | 18% | 25% | 47% |
| Community colleges | 1,687 | 1,921 | 2,151 | 2,316 | 1,951 | 2,340 | 28% | 9% | 39% |
| Average state financial aid award | | | | | | | | | |
| HBCUs | 1,324 | 1,220 | 1,256 | 1,452 | 1,484 | 1,785 | -5% | 42% | 35% |
| Public four-year, non-HBCUs | 1,443 | 1,392 | 1,454 | 1,533 | 1,613 | 2,032 | 1% | 40% | 41% |
| State-aided private, four-year | 2,380 | 2,195 | 2,365 | 2,326 | 2,361 | 2,476 | -1% | 5% | 4% |
| Community colleges | 728 | 663 | 652 | 696 | 607 | 661 | -10% | 1% | -9% |
| % awards at comm. coll. to Blacks | 21% | 26% | 31% | 36% | 38% | 38% | 254% | 39% | 394% |
| % awards at public four-year to Blacks | 29% | 30% | 31% | 33% | 35% | 47% | 31% | 24% | 63% |
| State Aid to Institutions (in millions) | | | | | | | | | |
| HBCUs | 101.1 | 87.7 | 86.4 | 88.0 | 93.4 | 110.3 | -15% | 28% | 9% |
| Public four-year, non-HBCUs | 484.5 | 411.6 | 437.9 | 431.1 | 468.0 | 545.4 | -10% | 25% | 13% |
| State-aided private four-year | 33.4 | 27.2 | 30.5 | 34.3 | 35.3 | 41.6 | -9% | 36% | 25% |
| Community colleges | 159.1 | 158.8 | 151.4 | 151.4 | 158.5 | 189.4 | -5% | 25% | 19% |
| Total higher education support | 1,065.4 | 923.8 | 918.6 | 934.7 | 1,003.8 | 1,174.6 | -14% | 28% | 10% |

(PTX 851 at 13.)

771. Maryland's HBIs experienced enrollment growth during the 1990s, when Maryland's funding guideline was not driven by enrollments. (PTX 835 at 6.)

772. Writing in 2005, the presidents of Maryland's HBIs observed that "[w]ith the unfunded enrollment growth, the State funding per student [for HBIs] declined throughout most

of the 1990s, then during the late 1990s, increased at a slower pace than at majority campuses.” (PTX 13 at 3.)

773. During the 1990s, Maryland’s HBIs “would have benefited substantially” from a funding guideline that considered enrollments because of their increasing enrollments during that period. (1/17/12 PM Trial Tr. 37 (Toutkoushian).) For example, the funding formula in place during the 1990s resulted in an annual loss to Morgan of \$2,000 per student. (1/11/12 AM Trial Tr. 80 (Vollmer); 1/12/12 AM Trial Tr. 91 (Richardson).) According to Dr. Earl Richardson, Morgan “calculated at the time, over an annual budget, that it meant somewhere in the neighborhood of a 14 or \$15 million difference in the appropriation we could have gotten. That is \$15 million that could have gone toward faculty, 15 million that could have gone toward financial aid, retention, graduation, 15 million that could have also been used for operations of the institution. That’s the impact of not having the funds we did. Because we didn’t have the funds, we couldn’t address these critical issues at the university.” (1/12/2012 PM Trial Tr. 92-93. (Richardson).) Maryland’s failure to provide adequate state appropriations to HBIs during the 1990s had an “enormous” detrimental impact on their ability to attract non-black students. (1/12/12 AM Trial Tr. 91 (Richardson).)

774. According to Dr. Thelma Thompson, the former president of UMES, “[e]nrollment growth means that you need more to handle the needs of the students you have registered. So if the budget is static, then it means you take money from elsewhere. At the University of Maryland Eastern Shore, we considered the academic programs to be sacred, and so we wouldn’t-even if we suffered a budget cut, other things happened. We had furlows. We had support staff laid off. We had unfilled positions. But we tried to keep the academic

programs in tact, because that is our primary mission.” (1/4/2012 PM Trial Tr. 27 (T. Thompson).)

775. Between 1988 and 2000, Maryland’s HBIs had smaller growth in state funding per FTE students than the TWIs, and for UMES the funding decreased over that period. (PTX 1010.)

| FTE Funding 1988 and 2000 (Excluding UMUC and Baltimore City) | | | |
|---|------------------------------|-----------------------------------|------------|
| Institution | 1988 Actual State Support GF | 2000 Actual State Support GF/HEIF | Difference |
| College Park | \$ 6,420 | \$ 11,553 | \$ 5,133 |
| St. Mary's | \$ 5,162 | \$ 7,945 | \$ 2,783 |
| University of Baltimore | \$ 4,345 | \$ 7,108 | \$ 2,763 |
| Baltimore County | \$ 4,704 | \$ 7,340 | \$ 2,636 |
| Towson | \$ 3,134 | \$ 4,584 | \$ 1,450 |
| Frostburg State | \$ 4,392 | \$ 5,823 | \$ 1,431 |
| Salisbury | \$ 3,376 | \$ 4,769 | \$ 1,393 |
| Morgan State | \$ 7,370 | \$ 7,958 | \$ 588 |
| Bowie State | \$ 5,667 | \$ 5,819 | \$ 152 |
| Coppin State | \$ 5,908 | \$ 5,975 | \$ 67 |
| Eastern Shore | \$ 9,131 | \$ 7,674 | \$ (1,457) |

(PTX 1010.)

776. In 1998, Maryland’s Larson Commission “examined the funding and allocation of State support since the establishment of USM. This examination revealed that funding for one group of institutions has been enhanced relative to the group average. This group includes St. Mary’s College, Salisbury State, Towson, UMB, UMCP, and UMBC. Among these gainers, however, only St. Mary’s and UMCP exceed the group average, with UMCP receiving the largest proportional increases over the period. State support for a second group of institutions has decreased relative to the group average. This group includes Bowie State, Coppin State, Morgan State and UMES. Funding for Frostburg State University remained unchanged relative to the group average.” (PTX 563 at 103)

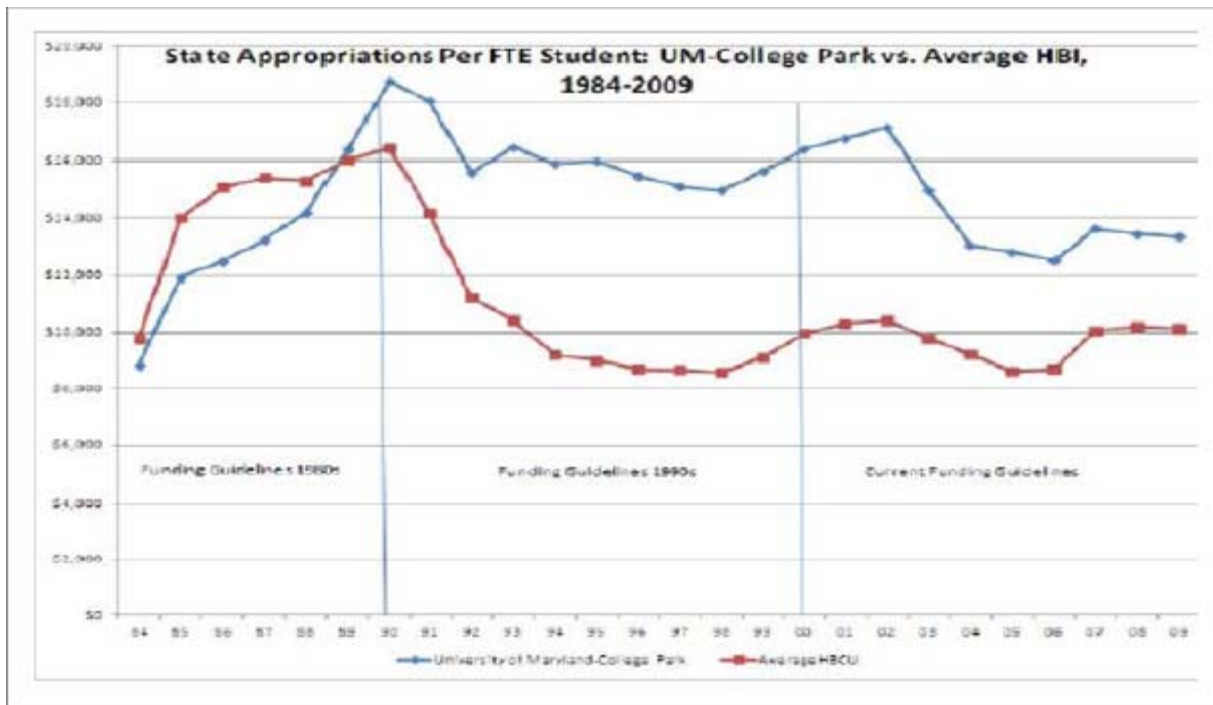
777. The Larson Commission also concluded that “MHEC’s funding proposals for public senior higher education institutions must include special initiative funding for academic programs at HBIs.” (PTX 563 at 61.)

3. During the 1990s, Maryland Began To Show Preferential Treatment To UMCP, The Newly Designated Flagship Institution.

778. Maryland designated UMCP as its “flagship” institution in 1988. (2/8/12 AM Trial Tr. 5-6 (Toutkoushian).) This designation was largely arbitrary because “the state designation as a flagship institution is not tied to a specific, unique attribute of College Park. The label could have been applied to other institutions as well if the state had chosen to do so.” (2/8/12 AM Trial Tr. 6 (Toutkoushian).)

779. This change to a more amorphous funding guideline during the 1990s gave Maryland “flexibility to divert more resources towards the University of Maryland College Park.” (1/17/2012 PM Trial Tr. 105-106 (Toutkoushian).)

780. During the 1990s, Maryland provided increased funding to UMCP at the expense of the HBIs:



(PTX 855 at 28.)

4. Maryland’s Operating Budget Process Is Driven By Institutional Mission And Involves Several Reviews of Operating Funding Requests.

781. With respect to funding, the Charter states that “Funding proposals for public senior higher education institutions shall include: (1) Base funding in accordance with the role and mission of the institution, as approved by the Maryland Higher Education Commission....” Md. Code Ann., Educ. § 10-203.

782. Each year, the governing boards of USM, Morgan, and St. Mary’s submit their annual operating budget requests and proposals for capital projects to the Commission. The USM requests and proposals are broken down by institution. Md. Code Ann., Educ. § 11-105(i)(1).

783. By statute, the governing boards of Morgan State University, St. Mary's College, and the University System of Maryland must "[e]valuate and approve institutional budget submissions." Md. Code Ann., Educ. § 10-208(7).

784. The Education Code also provides for a number of provisions particular to USM. The USM Board, in consultation with the institutions and Chancellor, shall "[e]stablish standards for funding based on differences in the size and mission of the constituent institutions..." Md. Code Ann., Educ. § 12-105(a)(1)(i). The Board also shall "[r]eview, modify, as necessary, and approve consolidated budget requests for appropriations for the University System of Maryland with respect to: (1) [t]he operating budget; and (2) the capital budget." Md. Code Ann., Educ. § 12-105(a)(1)(ii). The Board then submits these requests organized by constituent institution to the Commission, as well as directly to the Governor and General Assembly. Md. Code Ann., Educ. § 12-105(a)(1)(iii). After the budget is submitted, the President of College Park has the opportunity to meet with the Governor to discuss how the requests for appropriations impact the mission of College Park and recommend that the Governor approve or enhance the requests. Md. Code Ann Educ. § 12-105(2).

785. The Education Code provides that St. Mary's has a predetermined appropriation amount that since the 1993 appropriation is adjusted annually based on inflation. Md. Code Ann., Educ. § 14-405(b)(2). This was "[i]n order to establish a predictable level of funding." Md. Code Ann., Educ. § 14-405(b)(1).

786. The Commission has a number of responsibilities related to the funding of and budgeting for higher education institutions. The Commission develops "guidelines to assess the adequacy of operating and capital funding based on comparisons with institutions designated as peer institutions and other appropriate factors" in consultation with the segments of higher

education. Md. Code Ann., Educ. § 11-105(h)(4). It also makes recommendations “on the appropriate level of funding for higher education” in consultation with the Department of Management and Budget. Md. Code Ann., Educ. § 11-105(h)(5).

787. The Commission, in consultation with the Department of Management and Budget also presents to the Governor and the General Assembly “a consolidated operating and capital budget for higher education that includes the operating and capital budget requests of the governing boards and institutions ..., the operating budget request of the Commission, a report on the current funding of the adopted sets of peer institutions, and recommendations regarding the funding of higher education.” Md. Code Ann., Educ. § 11-105(i)(2).

788. In submitting recommendations to the Governor and the General Assembly, “the Commission shall comment on the overall level of funding for higher education in order to achieve the goals established in the State Plan for Higher Education, and may comment regarding funding priorities among segments of higher education and, within public senior higher education, among institutions.” Md. Code Ann., Educ. § 11-105(i)(4). The Commission “[m]ay not recommend against a budget item approved by the Board of Regents [of USM or Morgan State] unless the item is clearly inconsistent with the State Plan for Higher Education.” Md. Code Ann., Educ. § 11-105(i)(4)(iii)(2).

789. Institutions that are part of the University System of Maryland have limited ability to affect the amount of their total operating budgets. For example, Bowie is given an operating budget every year by USM. (1/5/2012 Trial Tr. PM 40 (Burnim).)

5. The funding guidelines determine operating funding recommendations and influence the actual appropriations with reference to institutional mission.

790. By statute, MHEC must “[a]ssess the adequacy of operating and capital funding for public higher education and establish operating funding guidelines based on comparison with peer institutions and on other relevant criteria.” Md. Code Ann., Educ. § 10-207(5).

791. “The funding guideline is calculated by determining the seventy-fifth percentile of the sum of State appropriation and tuition and fee revenue per FTES of the competitor state peer institutions. The resulting per student rate is multiplied by the institution’s projected enrollment and projected institutional tuition and fee revenue is subtracted.” (PTX 2 at 37; PTX 324 at 12.)

792. The current funding guideline is driven by both enrollments and mission. MHEC uses a statistical methodology called a “cluster analysis” to identify peer institutions for the funding guidelines based on similarities in institutional missions, among other things. (1/17/12 PM Trial Tr. 31-33 (Toutkoushian); 1/18/12 AM Trial Tr. 14-15 (Toutkoushian).)

793. The funding guidelines process for UMCP, unlike the process used for the HBIs, allows UMCP to identify aspirational peers, which are “institutions that you aspire to be like. Not necessarily what you’re like today, but what you want to be tomorrow.” (1/11/12 AM Trial Tr. 89 (Vollmer).)

794. According to Maryland’s 1999 Larson Report, “Maryland is unusual in the attention and importance given to the use of peer comparisons as the basis for determining funding needs and levels.” (PTX 563 at 104.)

795. The funding formula is used to determine the funding recommendations for the HBIs in Maryland. (3/5/10 Lyons Dep. Tr. 223.)

796. “The funding guideline is intended to determine an amount per full-time equivalent student. That amount is determined by, for each institution, a group of peer public universities and colleges nationally that are like the Maryland institution in question.” (1/31/12 AM Trial Tr. 14-15 (Vivona).)

797. The funding guideline “was created and initially was used in many ways to determine allocations.” (1/31/12 AM Trial Tr. 13-14 (Vivona).)

798. MHEC, the governor, and the general assembly use the funding guidelines as a benchmark for their operating funding-related decisions. (2/1/12 AM Trial Tr. 22 (Newman).)

799. The funding guidelines are one factor that the Department of Budget and Management considers when it makes its recommendations regarding operating funding for Maryland’s institutions of higher education. (1/30/12 PM Trial Tr. 73-74 (Treasure).)

6. Peer-based funding disadvantages the less research-intensive HBIs.

800. “The mission is where you would get the connection between what’s going on now at the HBIs in terms of funding and what’s happened historically, because the mission will influence the amount of revenues that they receive and also their competitiveness for other types of revenues from donations, research grants, and other things.” (1/17/12 PM Trial Tr. 77-78 (Toutkoushian).)

801. “It is important to recognize that this pattern of underfunding goes back to the very inception of those campuses, and has been continued, and has cumulative effects over a century relative to the TWIs. The contemporary funding disparities, those disparities that persist, are due to an assignment of less research intensive and prestigious missions to HBIs, the point being there that a research mission, for example, translates into higher levels of funding because it is just presumed and understood that you need different resources, you need different faculties,

you need different facilities. So to the extent that that mission category has been denied HBIs, then their potential for receiving higher levels of funding has been capped.” (1/18/2012 AM Trial Tr. 74 (Allen).)

802. USM has three research-intensive institutions. UMB and UMCP are high research-intensive and UMBC is research-intensive. (1/31/12 AM Trial Tr. 10 (Vivona).) Under the current funding guidelines, “the mission determines a lot about need, but within the appropriate Carnegie classification.” (1/31/12 AM Trial Tr. 43-44 (Vivona).) Research-intensive universities generate external funding. They have high costs research labs, lower student-faculty ratios, and a larger number of graduate students (1/31/12 AM Trial Tr. 9-10 (Vivona).)

803. “In FY 10, the top two institutions (UM-CP and UM-B) and 5 of the top 6 institutions in terms of state funding per FTE were research-oriented institutions.” (PTX 1029 at 26.)

7. Under the funding guidelines, tuition and general appropriations are considered in concert.

804. The USM board makes final determinations about tuition and mandatory fees at each institution. (1/31/12 AM Trial Tr. 49 (Vivona).)

805. The HBIs charge lower tuition because of the economic profile of the students. (1/31/12 AM Trial Tr. 52 (Vivona).)

806. According to Joseph Vivona, “[w]e look at institutions, the capacity for tuition, and then we consider then the amount of general funds we would use to support institutions that will not be able to generate very much in the way of tuitions, given the demographic profile of a particular populations.” (1/31/12 AM Trial Tr. 12-13 (Vivona).)

807. “[O]ne has to consider both tuition revenue, as well as state funding when trying to make comparisons about funding from the state, because the current funding guidelines are meant to not only compare state funding across for our institutions compared to other institutions, but look at the combination of state funding and tuition and fee revenues for each of the Maryland institutions compared to other institutions.” (2/8/12 AM Trial Tr. 62-63 (Toutkoushian).)

808. African-American students are more sensitive to education costs than White students. (1/23/2012 Trial Tr. 69 (Howard).)

809. An expensive school might be more attractive to White students because of perceived prestige. (1/23/2012 Trial Tr. 70 (Howard).)

8. The funding guidelines do not fully account for the expenses actually incurred by the HBIs.

810. The funding “guideline does not control for several critical factors that disproportionately impact HBIs, such as, mission; institutional size; current status of development; socio-economic status of students; variances in characteristics and funding calculations between Maryland and other states . . .” (PTX 339.)

811. In 2001, MHEC rejected Morgan’s proposal to make a scholarship adjustment to the funding guideline that would account “for only a portion of the added costs of serving students from low socio-economic backgrounds.” (PTX 290 at 3; 1/11/12 PM Trial Tr. 5-6 (Vollmer).)

812. In 2001, Maryland failed to act on enhancement requests submitted by the HBIs pursuant to the Partnership Agreement. (1/12/12 PM Trial Tr. 33 (Richardson).) In particular, “Morgan State University submitted its initial plan for parity to MHEC in February 2001. That

plan provided for the strengthening of existing academic programs and the launching of new offerings. Also, it provided for several new capital projects. For the most part, the provisions of Morgan's plan have not been addressed." (PTX 281 at 5.)

813. Maryland's funding formula does not account for the dual mission of the HBIs. (1/17/12 PM Trial Tr. 34-35 (Toutkoushian); 3/5/2010 Lyons Dep. Tr. 223.) Today, Morgan is not funded at an appropriate level to carry out its dual mission. (1/4/12 AM Trial Tr. 25 (Wilson).) According to Dr. David Wilson, the president of Morgan, "the more money you have to take out of the operating budget to support the access mission on the part of [the] institution, the fewer dollars you have then to do the other work to advance the other part of the institution's mission." (1/03/12 PM Trial Tr. 68-69 (Wilson).)

9. In recent years, Maryland has emphasized maintaining current levels of service, as opposed to enhancing the operations of the HBIs.

814. For about the last decade Maryland has worked off of an incremental budget system that looks to maintaining the same level of service from the year prior with some program enhancements "to achieve the goals of the strategic plan and goals of the university specifically within its mission." (1/31/12 AM Trial Tr. 6 (Vivona).)

815. Under the cost model, the existing footprint of the university is a factor of the university will receive. In addition, new buildings come into play in the cost model because of costs associated with them. (1/31/12 AM Trial Tr. 41-42 (Vivona).)

816. Under Maryland's current funding process, "generally, there is not a lot of flexibility" for consideration of pressing needs at the HBIs. (1/5/12 PM Trial Tr. 40 (Burnim).)

10. Funding guideline attainment is misleading.

817. MHEC “recognizes that funding above the targeted 100% of the funding guidelines may be appropriate and necessary to improve the status of Morgan as the state’s public urban university and address HBI enhancements.” (PTX 289 at 2.)

818. In 2001, Karen Johnson, then Maryland’s Secretary of Higher Education, submitted a report to OCR detailing Maryland’s efforts under the Partnership Agreement. (PTX 5.) As it related to closing the funding gap, she noted that, in her view, “[t]he goal is to move toward funding at 100% of the guidelines.” (PTX 5 at 4.) OCR responded that “[t]o the extent that this suggests a standard for evaluating HBI enhancements other than whether they will lead to comparability between Maryland’s HBIs and TWIs, we do not agree.” (PTX 6 at 2.). OCR also “found that the funding actually approved for Maryland TWIs represents increases for the TWIs as a whole that were substantially greater than the increases in funding for Maryland’s HBIs. Indeed, rather than enhancing the position of the HBIs in relation to the state’s other public four year institutions, these funding decisions are likely to move Maryland further away from the goal of comparability.” (PTX 6 at 2.)

819. As of 2009, UB received 105% of attainment of its funding guideline. (PTX 461 at 4-5.) In 2008, UB contended that the weighting of UB’s law students should be adjusted from 1.8 to 3.0 (in other words every law student would be counted as 3 FTEs for the purposes of determining UB’s funding guideline amount) to take into account the high cost for training law students, the underfunding of UB’s law school compared to other law schools, and the State’s appropriation levels exceeded the funding guideline levels. (1/30/12 AM Trial Tr. 67-68 (Bogomolny); PTX 461 at 4.) MHEC accepted UB’s proposal, which reduced UB’s attainment

for state appropriations compared to the funding guideline for FY 2009 from 105% to 64%. (1/30/12 AM Trial Tr. 67 (Bogomolny); PTX 461 at 5.)

820. The former dean of the UB law school, who resigned on July 29, 2011, believed that the university was taking law school funds and using them for other operations at the university. (1/30/12 AM Trial Tr. 70-71 (Bogomolny).) For academic year 2011-12, the tuition and fees for in-state UB law students is \$24,300 and the tuition somewhere under \$20,000. (1/30/12 AM Trial Tr. 69 (Bogomolny); PTX 918 at 3-4.) The President of UB confirmed that the law school generates more revenue than it expends and that since July 2011, the law school's funding has been readjusted to give more operating funds to the law school. (1/30/12 AM Trial Tr. 74-75 (Bogomolny).)

G. HBIs Have Experienced Substantial Cumulative Funding Deficiencies Since 1984

1. Overview of Expert Testimony

821. Dr. Robert Toutkoushian is a Professor of Higher Education at the University of Georgia. (1/17/2012 PM Trial Tr. 22 (Toutkoushian).) He was previously a professor at Indiana University's College of Education, where he "worked with a group of legislators on a regular basis to review the K-12 funding formula that the State uses for providing revenues for public K-12 schools across the state." (1/17/2012 PM Trial Tr. 22 (Toutkoushian).)

822. Dr. Toutkoushian has written approximately 30 peer-reviewed articles, most of which "have had to deal in one way or another with economics and finance of higher education issues." (1/17/2012 PM Trial Tr. 23 (Toutkoushian).) One of Dr. Toutkoushian's articles, *The Value of Cost Functions for Policy Making and Institutional Research*, examined economies of scale in higher education. (1/17/2012 PM Trial Tr. 24 (Toutkoushian).)

823. The court qualified Dr. Toutkoushian to testify on behalf of the plaintiffs as an expert in “funding issues in higher education” and the “economics of higher education. (1/17/2012 PM Trial Tr. 25-26 (Toutkoushian).)

824. Though he has testified as an expert in approximately 75 cases, defendants’ funding expert, Dr. Allan Lichtman, had not previously testified in any cases involving the funding of higher education. (2/1/12 PM Trial Tr. 18 (Lichtman).)

825. Dr. Lichtman had not previously examined operational expenditures and budgets as it applied to a state higher educational system. (2/1/12 PM Trial Tr. 11 (Lichtman).)

2. Maryland’s HBIs Have Experienced Substantial Cumulative Revenue Deficiencies.

826. As Judge Murphy noted in *Knight*, underfunding is cumulative, and has a profound effect on an institution: “Inequality in funding over a number of years cannot be made up over night. The funding level over a period of years affects a school’s mission program, facilities and reputation, all of which can then change only very slowly.” *Knight v. Alabama*, 900 F. Supp. 272, 311 (N.D. Ala. 1995). As Judge Murphy explained, underfunding in one year becomes “imbedded” in an institution. (“The citation out of the *Knight* case makes that point, that literally what could be a small discrepancy in year one, by year 25 is larger, by year 50 is larger still, by year 100 is overwhelming.”) (1/18/2012 AM Trial Tr. 79 (Allen).)

827. When one accounts for enrollment shares, tuition and fee revenues, and/or the remediation component of the dual mission, Maryland’s HBIs have experienced substantial cumulative revenue deficiencies in their state appropriations and enhancements, unrestricted revenues, and total revenues for both 1984-2010 and 1990-2010.

Summary of Revenue Deficiencies for HBIs

| Cumulative Deficiency | Years Used in Calculation: | |
|--|----------------------------|------------------|
| | 1984 to 2010 | 1990 to 2010 |
| Appropriations + Enhancements | | |
| Enrollment share | -\$17,822,046 | -\$182,636,119 |
| (Table 9) Enrollment share and mission | -\$136,046,241 | -\$278,792,942 |
| Appropriations + Enhancements + Tuition/Fee Revenue | | |
| Enrollment share | -\$792,769,359 | -\$890,006,189 |
| (Table 10) Enrollment share and mission | -\$910,993,554 | -\$986,163,012 |
| Unrestricted Revenues | | |
| Enrollment share | -\$1,872,414,458 | -\$1,862,229,146 |
| (Table 11) Enrollment share and mission | -\$1,990,638,653 | -\$1,958,385,969 |
| Total Revenues | | |
| Enrollment share | -\$2,018,019,124 | -\$2,053,559,109 |
| (Table 12) Enrollment share and mission | -\$2,136,243,319 | -\$2,149,715,932 |

- Revenue deficiencies are still substantial through FY2010
- Remediation mission adjustment increases deficiencies in all four revenue categories by \$118 million (FY1984 to FY2010) or \$96 million (FY1990 to FY2010)
- Revenue deficiencies persist in periods 1984-2010 and 1990-2010

(PTX 1029 at 20.)

840. Dr. Toutkoushian explains the significance of unrestricted revenues as follows: “Unrestricted revenues include revenues from nine separate categories: (i) tuition and fees, (ii) state appropriations, (iii) federal grants and contracts, (iv) private gifts, grants and contracts, (v) state and local grants and contracts, (vi) sales and services-educational, (vii) sales and services-auxiliary, (viii) other sources, and (ix) mandatory transfers. In 2009, current unrestricted revenues represented 76 percent of total revenues across the set of all four-year, public institutions in the state. This is the most important revenue category to consider when examining disparities in revenues because colleges and universities rely on their unrestricted revenues to

hire faculty and staff and implement services to help ensure that students can succeed in college.” (PTX 324 at 24-25.)

841. Dr. Toutkoushian defines total revenues as “unrestricted revenues plus restricted revenues from federal, state, and local grants and contracts, educational sales and services, endowment income, and other restricted income. The restricted dollars constitute about 24% of total revenues for all public institutions in Maryland in 2009. The analysis is an important addition to the analysis of unrestricted revenues because even though restricted revenues are designated to be used for a specific purpose, they still enable an institution to fulfill its mission through research, teaching, and service.” (PTX 324 at 34.)

842. According to Dr. Toutkoushian, “[w]hen drawing conclusions about equity in funding, the amount of aggregated revenues (unrestricted or total) is more important than a single source of funds within these totals. Colleges and universities rely on their unrestricted and total revenues, as opposed to only state appropriations or federal grants, to provide educational services for students. It is the total level of financial resources that allows institutions to be competitive in terms of hiring and retaining high-quality faculty, attracting students from all racial backgrounds, and implementing support services to help students be successful in college.” (PTX 324 at 20.)

843. Dr. Toutkoushian’s analysis indicates that from 1984-2010 the HBIs experienced a cumulative deficiency of \$910,993,554, based on both the proportion of state appropriations, enhancements and tuition and fee revenue that one would expect them to receive as a function of their enrollments and the Bohanan Commission’s methodology for accounting for the costs associated with the remedial component of the HBIs’ access mission. (PTX 1029 at 20.) If one

does not account for the partial cost of subsidizing the dual mission, then the cumulative deficiency becomes \$792,769,359. (PTX 1029 at 20.)

844. USM institutions, like Coppin, cannot unilaterally set their own tuition and fees. (1/23/2012 AM Trial Tr. 83 (Howard).)

845. If one excludes UMUC, then Maryland’s HBIs all have lower in-state tuitions than all of Maryland’s TWIs. (PTX 755 at 38; 1/11/12 AM Trial Tr. 83 (Vollmer).)

PUBLIC FOUR-YEAR UNDERGRADUATE TUITION AND FEES, FY2006 - FY2010

| Institution | FY06 | FY07 | FY08 | FY09 | FY10 | 1-Year Change | 5-Year Change |
|---|--------------|--------------|--------------|--------------|--------------|---------------|---------------|
| RESIDENTS | | | | | | | |
| Bowie State University | \$5,481 | \$5,730 | \$5,939 | 6,005 | 6,040 | 0.6% | 10.2% |
| Coppin State College | 4,714 | 4,745 | 4,980 | 5,140 | 5,276 | 2.6% | 11.9% |
| Frostburg State University | 6,230 | 6,392 | 6,550 | 6,614 | 6,684 | 1.1% | 7.3% |
| Salisbury University | 6,376 | 6,412 | 6,412 | 6,492 | 6,618 | 1.9% | 3.8% |
| Towson University | 7,096 | 7,164 | 7,234 | 7,314 | 7,418 | 1.4% | 4.5% |
| University of Baltimore | 6,794 | 6,814 | 6,934 | 7,051 | 7,171 | 1.7% | 5.5% |
| University of Maryland - Baltimore | 6,493 | 6,542 | 6,603 | 6,721 | 6,860 | 2.1% | 5.7% |
| University of Maryland - Baltimore County | 8,520 | 8,622 | 8,707 | 8,780 | 8,872 | 1.0% | 4.1% |
| Univ. of Maryland - College Park | 7,821 | 7,906 | 7,969 | 8,005 | 8,053 | 0.6% | 3.0% |
| Univ. of Maryland - Eastern Shore | 5,808 | 5,908 | 5,988 | 6,042 | 6,082 | 0.7% | 4.7% |
| Univ. of Maryland - University College | 5,520 | 5,520 | 5,520 | 5,520 | 5,520 | 0.0% | 0.0% |
| Morgan State University | 6,110 | 6,204 | 6,318 | 6,438 | 6,548 | 1.7% | 7.2% |
| St. Mary's College of Maryland | 10,896 | 11,418 | 11,989 | 12,604 | 13,234 | 5.0% | 21.5% |
| AVERAGE | 6,758 | 6,875 | 7,011 | 7,133 | 7,260 | 1.8% | 7.4% |

(PTX 755 at 38.)

846. Coppin has the lowest tuition in the University System of Maryland, which creates a revenue shortfall that “inhibits the development of programs that would lead to student success.” (PTX 810 at 52.)

847. Based on Dr. Toutkoushian’s analysis, the HBIs received \$136,046,241 less in state appropriations and enhancements from 1984-2010 than one would expect based on their enrollments and the Bohanan Commission’s estimate of the funding necessary to subsidize their remediation costs. (PTX 1029 at 20.) The HBIs experienced a cumulative deficiency of \$17,822,046 based solely on their proportional share of enrollments. (PTX 1029 at 20.)

848. According to Dr. Toutkoushian, “[t]hese disparities are the direct consequence of Maryland’s decision to assign its HBIs less research-intensive missions during its *de jure* system of segregated higher education, missions that have not been substantially enhanced even today.” (PTX 324 at 3.)

849. If Dr. Robert Toutkoushian accounted for the effects of economies of scale, then his cumulative deficiency calculations would be larger. (1/17/12 PM Trial Tr. 67 (Toutkoushian).)

H. Dr. Lichtman’s Analysis Presents A Misleading Picture Of The Finances Of Maryland’s HBIs.

1. Dr. Lichtman’s Analysis Merely Recounts Calculations of FTE Funding.

850. The bottom line of Dr. Lichtman’s analysis is that between FY 1984 and FY 2011, the HBIs were not disadvantaged on a per FTE basis compared to TWIs. He did not analyze per FTE operational funding prior to 1984 or per FTE capital funding prior to 1975. (2/2/12 AM Trial Tr. 43-44 (Lichtman).)

851. Dr. Lichtman acknowledges that the HBIs received less funding per FTE in FY 2006 and received more funding per FTE beginning in FY 2007. (2/2/12 AM Trial Tr. 46-47 (Lichtman).) He also admits that at the time the Bohanan Commission recommended enhanced funding for the HBIs, the HBIs were receiving more funding per FTE than the TWIs. (2/2/12 AM Trial Tr. 47-50 (Lichtman).)

2. For much of their histories, Maryland’s HBIs have received higher funding per FTE than the TWIs.

852. As of 1947, even though “Princess Anne College spen[t] more per student than the University of Maryland spends, it would need to spend three or four times as much as it now

does in order to have anything like a comparable program for its small enrollment.” (PTX 18 at 165.)

853. In 1950, Princess Anne Academy and Bowie received the largest general fund appropriations per full time student. (PTX 826 at 43.)

**1950 GENERAL FUND APPROPRIATION TO STATE INSTITUTIONS
OF HIGHER EDUCATION PER FULL TIME STUDENT***

| <i>Institution</i> | <i>Enrollment (1950)</i> | <i>General Fund Appropriation 1950</i> | <i>General Fund Appropriation per Full Time Student</i> |
|--------------------------|------------------------------|--|---|
| Princess Anne | 409 | \$429,768 | \$1,051 |
| Bowie State Teachers | 206 | 187,186 | 908 |
| Salisbury State Teachers | 330 | 226,977 | 687 |
| Towson State Teachers | 770 | 480,130 | 620 |
| Frostburg State Teachers | 350 | 215,462 | 610 |
| Morgan State College | 1,528 | 606,297 | 397 |
| University of Maryland | | Data not available | |

*Exclusive of part time and summer enrollments.

(PTX 826 at 43.)

854. In 1974, UMES and Bowie received the highest general fund support per FTE student in Maryland. (PTX 381 at 387-90.)

855. In December 1980, the Maryland State Board for Higher Education observed that “[s]tudents of any race who freely choose to attend a historically black institution should have the opportunity for an education equal in quality to students who choose to attend a historically white institution with a similar mission. Enhancement of the historically black institutions to overcome past neglect is therefore critical. *Available data indicates that the State currently provides black institutions with funding proportionally greater than the white institutions.*”

(PTX 263 at 45.)(emphasis added)

856. In 1985 Maryland observed that “[f]or at least the past 15 years, traditionally black institutions consistently have expended more funds per FTE student and received a higher

percentage of their total revenues from State General funds than have all public four-year institutions on the average.” (PTX 305 at 20.)

857. Dr. Walter Allen observes that equivalent FTE funding does not suggest that the HBIs have the resources necessary to fulfill and expand their missions: “The sort of conclusion that emerges very clearly, there are these constraints on the operational realities of HBIs tied to the fact that there are not sufficient resources to expand mission and to rise to a level of comparable [and] competitive status with respect to the programs that are being offered. And it all ties back both to two extremes in terms of the founding history and cumulative disadvantage of deficit and continuing, and the second, kind of continuation of that pattern of underfunding, so that having been put in this box, the HBIs can’t break out of it.” (2/8/12 PM Trial Tr. 16-17 (Allen).)

3. UMCP should be included in an analysis of higher education finance in Maryland because it is neither a substantive nor a statistical outlier.

858. Drs. Lichtman and Toutkoushian both excluded UMB and UMBC from their analysis. But Dr. Toutkoushian disagrees with Dr. Lichtman’s exclusion of UMCP. (2/1/12 PM Trial Tr. 23 (Lichtman); 2/2/12 AM Trial Tr. 73-74 (Lichtman).)

859. Dr. Lichtman excluded as outliers schools that receive more than half of the state appropriations as of FY 2010. The three universities that Dr. Lichtman excluded as outliers in his analysis of appropriations received about 56 percent of the state appropriations. The schools included in Dr. Lichtman’s analysis received about 44 percent of the state appropriations. (2/2/12 AM Trial Tr. 84-85 (Lichtman); PTX 755 at 32.)

860. UMCP was designated Maryland’s flagship institutions as a result of state policy. (2/2/2012 Trial Tr. 85 (Lichtman).) UMCP is not a substantive outlier because “the state

designation as a flagship institution is not tied to a specific, unique attribute of College Park. The label could be applied to other institutions as well if the state had chosen to do so.” (2/8/12 AM Trial Tr. 5-6 (Toutkoushian).)

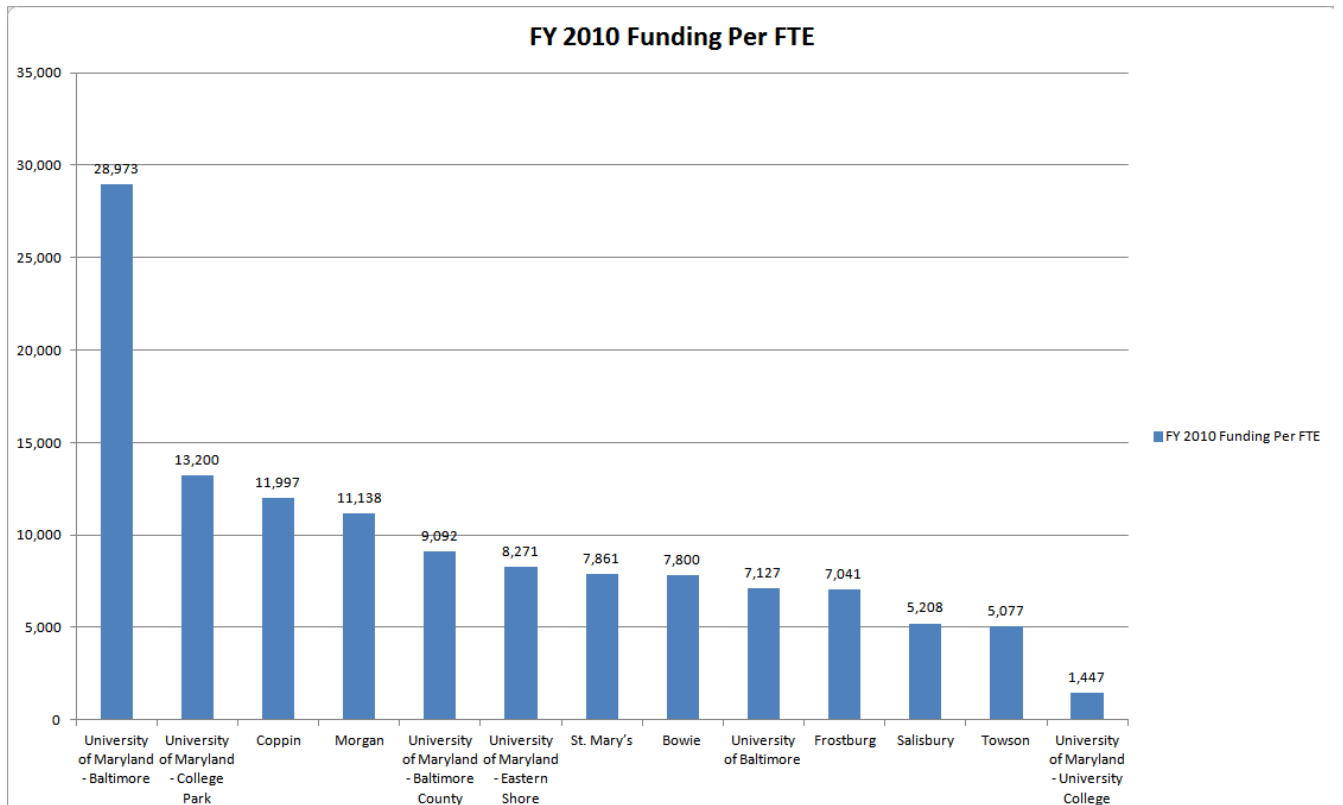
861. According to Maryland’s Bohanan Commission, “UMBC and UMCP may provide a model for defining the level of comparable capacity needed at MSU, at least with respect to the generic indicators of quality.” (PTX 2 at 133.)

862. Neither the Partnership Agreement nor the HBI Panel excluded UMCP from comparisons with the HBIs. (PTX 4 at 5 (identifying UMCP as a TWI); PTX 2 at 135 (including UMCP in comparisons with UMBC, Morgan, and UMES regarding quality of doctoral programs).)

863. Dr. Lichtman did not identify any statistical analysis, such as a standard deviation analysis, that he used in determining that College Park is a statistical outlier.

864. “[I]f one compared the state funding per FTE student for College Park currently to other institutions, while it is higher than most of the other institutions, it pales in comparison to what would be a clear statistical outlier, the University of Maryland Baltimore, where the state funding per student is several multiples higher than the other institutions. Then at the other extreme, University of Maryland University College has been the lowest funded with regard to state funding per FTE by several multiples as well.” (2/8/12 AM Trial Tr. 7-9 (Toutkoushian).)

865. In FY 2010, University of Maryland-Baltimore and University of Maryland-University College, the institutions that both Dr. Toutkoushian and Dr. Lichtman excluded as outliers, received \$28,973 and \$1,447, respectively, in state funding. UMCP received \$13,200, which was only \$1,203 per FTE student more than Coppin received.



(PTX 1020 at 80, 92; PTX 1021 at 11, 24, 34, 45, 55, 66, 77, 87, 96, 116.)

866. Maryland has decided to support UMCP at its current funding levels, but it would be inappropriate to exclude this funding from an analysis of how Maryland spends its higher-education resources based on this decision. (1/11/12 PM Trial Tr. 31-32 (Vollmer).)

4. Assessing library holdings on a per-student basis misrepresents the adequacy of HBI libraries.

867. To conclude that HBI libraries are superior to those of TWIs because they have more physical volumes per student “would be just flat out wrong. It would be flat out incorrect. Because, in fact, what we’re seeing is a function of the economies of scale....” (2/8/12 PM Trial Tr. 23 (Allen).)

868. “So what is an extreme discrepancy in disadvantage in physical volumes which is revealed when you look at the actual number of volumes in holdings, rather than a calculation of

FTE ratio, which is depressed by the fact of economies of scale for the TWIs and inflated for the HBIs, it becomes even a more extreme disparity when you look at differences in terms of access to the information and holdings which are the wave of the future.” (2/8/12 PM Trial Tr. 24 (Allen).)

869. As of 2008, the libraries at Maryland’s HBIs had relatively small library collections. (PTX 71 at 118.)

SIZE OF LIBRARY COLLECTION⁵⁷

| | Number of Books ⁵⁸ |
|---|-------------------------------|
| University of Maryland-College Park | 3,716,860 |
| University of Maryland- Baltimore County | 1,020,138 |
| University of Maryland-Baltimore | 735,951 |
| Towson University | 587,811 |
| Morgan State University | 378,687 |
| Bowie State University | 277,407 |
| Salisbury University | 271,328 |
| University of Maryland-Eastern Shore | 211,876 |
| University of Baltimore | 181,108 |
| Coppin State University | 86,160 |
| University of Maryland-University College | 2,118 |

(PTX 71 at 118.)

870. According to Dr. Conrad, the library holdings at the HBIs “are some of the smallest numbers I have ever seen.” (1/10/12 AM Trial Tr. 89 (Conrad).)

I. Dr. Toutkoushian’s Cumulative Deficiency Calculations Do Not Account For Several Factors That Adversely Impact The Finances Of Maryland’s HBIs.

1. Maryland’s HBIs Do Not Have Sufficient Enrollments To Achieve Economies of Scale.

a. Defining Economies of Scale

871. “Generally, if you have an organization, you have fixed costs, and [if] you can spread those fixed costs over more units or people then your cost per unit or people goes down.” (1/11/12 PM Trial Tr. 2-3 (Vollmer).)

872. “[I]n general a large school can educate students more economically than can be done at a small school.” (2/8/12 PM Trial Tr. 14 (Allen).)

873. “The operation of a university campus involves certain fixed costs regardless of the enrollment of the institution.” (PTX 810 at 52.)

874. UB is seeking to grow student enrollment to 8,000 and transition to a “medium institution status.” According to UB’s President, this is because “[t]he data on university financing indicates that medium universities between eight and 10,000 become a better unit in terms of scale for being cost-efficient. So our desire is to make the university more available to more students who need the education, and also to reduce the overall cost of running the institution by reason of scale.” (1/30/12 AM Trial Tr. 48-49 (Bogomolny); PTX 962 at 4.)

875. “[W]hether you’ve got a campus of a hundred or 20,000, you only need one president. You probably only need about five vice-presidents. You only need one library. So you spread your resources out over a lot more period, a lot more areas and so your unit costs go down.” (1/5/12 AM Trial Tr. 38 (Popovich).)

876. Institutions of higher education achieve increasing economies of scale as their enrollments increase up to 23,000 students. (1/17/12 PM Trial Tr. 73-74 (Toutkoushian).)

877. Larger schools enjoy economies of scale to some degree because not all costs are incremental. (1/25/12 PM Trial Tr. 50 (Dudley-Eshbach).)

878. Large institutions like UMCP can teach introductory courses with hundreds of students at a relatively low per-student cost. (1/17/12 PM Trial Tr. 67-68 (Toutkoushian).)

879. In the academic literature, there is no consensus on economies of scale in higher education. (2/2/12 PM Trial Tr. 10 (Lichtman).)

b. Maryland's Historical Recognition of Economies of Scale

880. The Soper Commission found: "Notwithstanding the inadequacy of Princess Anne and the small annual expenditure, the cost per student to the State, due to the small number of students, was much greater than at the University of Maryland: At the University of Maryland, College Park, \$91, at Princess Anne \$434." (PTX 17 at 14.) To explain this phenomenon the Soper Commission concluded that "[t]here is much less overhead and maintenance expense, in proportion, at the University of Maryland than in any of the other Colleges listed. This probably means that the much larger enrollment makes for very great economy in overhead." (PTX 17 at 125.)

881. According to the Soper Commission, "[f]rom these figures we may reasonably conclude that the enrollment of white state-aided institutions is very much more stimulated by the aid given than is the case with the Negro institutions. We may also conclude that the enrollment in the Negro institutions would be very considerably greater if State aid to Negro students were on a par with that offered white students." (PTX 17 at 72.)

882. "The difficulty arises solely because it has been the policy of the state to maintain several small institutions for purposes of teacher preparation. These units have such limited enrollments that they cannot be operated efficiently. Even with the increases in enrollments that have occurred in the autumn of 1946, at least three of the four state teachers colleges will continue to have inordinately high expenditures per student because of their small enrollments." (PTX 18 at 163-64.)

883. "It is usually difficult to put more than 60 percent of the total expenditures into the actual instructional program of a small college because administration, plant operation and maintenance, and library services have certain minimal requirements which must be maintained

regardless of the size of the institution. This situation merely emphasizes the inefficiency inherent in a small institution, to which attention has already been called.” (PTX 18 at 164-65.)

884. In 1947, Maryland acknowledged that “[p]revious investigations have shown that colleges with small enrollments are inordinately expensive per student, if a program of satisfactory quality is maintained.” (PTX 18 at 338.)

885. During the 1980s, Maryland’s funding guideline “recognize[d] the existence of economies of scale (i.e., as an institution increases in size, it is able to conduct certain programs at a lower unit cost).” (PTX 437 at 11.)

c. Maryland’s HBI do not have large enough enrollments to realize economies of scale.

886. In FY 2010, Coppin had 3,007 FTE students, UMES had 3,821 students, Bowie had 4,525 students, and Morgan had 6,444 students.

| FTES Enrollments, FY 2010 | | |
|--------------------------------------|--------------|-------------|
| School | FTES | Rank |
| UMCP | 31,000 | 1 |
| Towson | 17,500 | 2 |
| UMBC | 10,155 | 3 |
| Salisbury | 7,364 | 4 |
| <i>Morgan*</i> | 6,444 | 5 |
| Frostburg | 4,614 | 6 |
| <i>Bowie*</i> | 4,525 | 7 |
| UB | 4,293 | 8 |
| <i>UMES*</i> | 3,821 | 9 |
| <i>Coppin*</i> | 3,007 | 10 |
| Source: Dr.L._0000481-0000482 | | |

| Key: |
|-------------|
| * - HBI |

(DTX 65q at 6-7.)

887. Coppin's relatively high funding per-FTE students is the result of its small enrollments. (PTX 810 at 52.)

888. When the USM considers funding for Coppin, "there are economies of scale that are factors. It is not a linear progression. They are below a plateau that would indicate that with 3,000 FTE students, they would have an economy of scale that is, unless we provided funding in

the budget or recognized it, it would not be adequate to run the institution properly.” (1/31/12 AM Trial Tr. 48-49 (Vivona).)

889. The 2011 Revitalization Study directly addressed Coppin’s high per FTE funding and attributed it to Coppin’s small size:

The operation of a university campus involves certain fixed costs regardless of the enrollment of the institution. The high cost per FTE for Coppin shown in Appendix V-I, Chart 2, is reflective of the campus being built out, as a consequence of the capital plan in Imperative VI, for a larger enrollment than Coppin has yet to achieve.

(PTX 810 at 52.)

890. Despite a high per FTE funding the Revitalization Study concluded that Coppin was dramatically underfunded under Maryland’s funding guidelines, and recommended that in light of its mission Coppin be funded using “aspirational peers” (as is the case with UMBC and College Park). (PTX 810 at 63.)

891. “In addition, it is understood that programs are more expensive the smaller the graduate program enrollment. To make any program fiscally rational requires the development of a ‘critical mass’ of doctoral students and faculty in cognate fields. Therefore, as MSU achieves greater enrollment density in related graduate fields, the cost per graduate degree awarded will go down and the program will become more cost efficient.” (PTX 2 at 140.)

2. Maryland’s HBIs are less competitive for grants, contracts, and extramural funding than the TWIs.

892. “Much of the revenue-generating capacity of an institution comes from the investment the state makes in the infrastructure.” (1/12/12 AM Trial Tr. 87 (Richardson).) “HBIs have historically lacked surplus or additional resources beyond those required to insure day to day operation. Without the luxury of extra resources, HBIs were not able to invest in

upgrading institutional development functions such as fundraising or grantmaking.” (PTX 661 at 12.)

893. Maryland is second only to California in the amount of research and development money that flows through the State. (1/12/12 AM Trial Tr. 31 (Robinson).)

894. Morgan does not have the institutional capacity, including staffing to develop proposals and to comply with reporting requirements, necessary to compete for federal grants. (1/12/12 AM Trial Tr. 36 (Robinson).)

895. Limited infrastructure at Morgan and UMES results in the loss of opportunities to both access billions of dollars in research and development funding and to expose students to the private sector. (1/12/12 AM Trial Tr. 44 (Robinson).)

896. State extramural funds are state grants. They are operating monies that pay for salaries. They are separate from state appropriations. (1/31/12 AM Trial Tr. 74-75 (Vivona).)

897. In FY 2010, Maryland’s HBIs received about \$600 less in state extramural funding per FTE than the TWIs.

Table 4: Comparison of State Extramural Support for Public Higher Education Institutions, FY2010

| Institution | State Extramural Funding FY10 | FTE | State Extramural Funding/FTE |
|--|-------------------------------|-------|------------------------------|
| Bowie State University | \$1,776,846 | 4532 | \$392.07 |
| Coppin State University | \$1,444,535 | 3159 | \$457.28 |
| Frostburg State University | \$646,108 | 4646 | \$139.07 |
| Morgan State University (1) | \$4,981,302 | 6631 | \$751.21 |
| Salisbury University | \$2,840,604 | 7423 | \$382.68 |
| St Mary's College of Maryland (1) | \$119,275 | 2190 | \$54.46 |
| Towson University | \$17,975,201 | 17590 | \$1,021.90 |
| University of Baltimore | \$2,949,230 | 4274 | \$690.04 |
| University of Maryland-Eastern Shore | \$794,700 | 3981 | \$199.62 |
| University of Maryland-Baltimore County | \$13,721,697 | 10232 | \$1,341.06 |
| University of Maryland-College Park | \$46,842,093 | 31328 | \$1,495.21 |
| | | | |
| All Institutions | \$94,091,591 | 95986 | \$980.26 |
| All HBIs | \$8,997,383 | 18303 | \$491.58 |
| All TWIs | \$85,094,208 | 77683 | \$1,095.40 |
| | | | |
| Percent Funding for HBIs = | 9.56% | | |
| Percent FTEs for HBIs = | 19.07% | | |
| | | | |
| HBI share of state extramural funding based on enrollments | \$17,941,766 | | |
| HBI state extramural funding deficiency | -\$8,944,383 | | |

(PTX 1024 at 5.)

3. Maryland's HBIs have smaller endowments and fund balances than the TWIs because of cumulative underfunding and their inferior fundraising capabilities.

898. Maryland's HBIs "don't have sufficient revenues to develop the infrastructure and human capital structure to be competitive for external funding and also to be competitive for donations, you need to have a certain infrastructure in place to be successful at running fundraising campaigns." (1/17/12 PM Trial Tr. 42-43 (Kaiser).)

899. The absence of large affluent alumni populations make it difficult for HBIs to raise funds. For example, the programs from which Coppin students graduate "valuable as they are to sustaining the community and the city of Baltimore--are not those that typically produce wealthy alumni." (PTX 549 at 8.)

900. On average, Maryland's HBIs have significantly smaller endowments than the TWIs.

Plaintiffs' Exhibit 744
Table 7C: Ranking of Institutions on Endowment, 2008-09

| Institution Name | Endowment 2008-09 | Rank | Enrollments 2008 | Endowment per FTE | Rank |
|---|----------------------|------|---------------------|----------------------|------|
| St. Mary's College of Maryland | \$26,331,677 | 6 | 2,095.0 | \$12,568.82 | 1 |
| University of Maryland-College Park | \$335,939,668 | 1 | 30,728.0 | \$10,932.69 | 2 |
| University of Baltimore | \$32,864,779 | 3 | 3,985.0 | \$8,247.12 | 3 |
| University of Maryland-Baltimore Cty | \$43,531,633 | 2 | 9,749.0 | \$4,465.24 | 4 |
| Salisbury University | \$28,277,337 | 5 | 7,219.0 | \$3,917.07 | 5 |
| University of Maryland-Eastern Shore | \$14,225,901 | 7 | 3,821.0 | \$3,723.08 | 6 |
| Frostburg State University | \$12,284,572 | 8 | 4,434.0 | \$2,770.54 | 7 |
| Coppin State University | \$6,354,467 | 9 | 3,175.0 | \$2,001.41 | 8 |
| Towson University | \$31,403,431 | 4 | 17,275.0 | \$1,817.85 | 9 |
| Bowie State University | \$3,712,128 | 10 | 4,496.0 | \$825.65 | 10 |
| Morgan State University | \$1,345,835 | 11 | 6,287.0 | \$214.07 | 11 |
| | | | | | |
| HBI Average = | \$6,409,583 | | HBI Average = | \$1,691 | |
| TWI Average = | \$72,947,585 | | TWI Average = | \$6,388 | |

(PTX 714.)

901. Universities with a sufficient fund balance are able to finance certain capital projects by paying in cash from the fund balance, which are essentially institutional bank accounts. In FY 2012, UMCP, Towson, and UB were able to do this, including an \$8 million public safety building at Towson. (1/31/12 AM Trial Tr. 69-71 (Vivona); PTX 966 at 2; PTX 972.)

902. On average, Maryland's HBIs have smaller fund balances than Maryland's TWIs.

Ending Balance, 2010 Actual

| Ending Balance, 2010 Actual | | |
|--|------------------------|------------------|
| School | \$ | Rank |
| UMCP | \$ 265,544,927 | 1 |
| Towson | \$ 49,157,410 | 2 |
| Salisbury | \$ 46,464,792 | 3 |
| UMBC | \$ 26,317,256 | 4 |
| <i>Bowie*</i> | <i>\$ 15,508,235</i> | <i>5</i> |
| <i>Morgan*</i> | <i>\$ 10,111,056</i> | <i>6</i> |
| UB | \$ 10,349,121 | 7 |
| <i>UMES*</i> | <i>\$ 7,063,868</i> | <i>8</i> |
| Frostburg | \$ 4,650,765 | 9 |
| <i>Coppin*</i> | <i>\$ 1,443,611</i> | <i>10</i> |
| | <i>Mean \$</i> | <i>Mean Rank</i> |
| <i>HBI*</i> | <i>\$ 8,531,692.50</i> | <i>7</i> |
| TWI | \$ 67,080,711.83 | 4.33 |
| Source: MD FY 2012 Proposed Operating Budget | | |

| Key: |
|---------|
| * - HBI |

(PTX 1020 at 79; PTX 1021 at 23, 33, 45, 55, 66, 77, 86, 96, 116.)

4. Maryland's HBIs have substantial deferred maintenance backlogs.

903. “For several reasons, the amounts for total and urgent deferred maintenance for historically black colleges and universities (HBIs) are probably understated. Because of unsatisfactory facilities conditions, some HBIs are at risk or are limited in their ability to meet their missions adequately.” (PTX 387 at 59.)

904. “[T]he HBIs spend a disproportionate amount of their operating funds on operations and maintenance, and even with those high expenditures, they really cannot satisfactorily maintain their physical plants.” (1/17/12 AM Trial Tr. 26 (Kaiser).)

905. Maryland’s HBIs have higher Operations and Maintenance expenses than the TWIs:

Operating and Maintenance Expenses
at Maryland Public Higher Education Institutions, FY 2011

| OPERATING EXPENSES (2011) | O&M | TOTAL | % |
|----------------------------------|----------------|-----------------|---------------|
| COPPIN | \$12,822,874 | \$85,162,327 | 15.06% |
| SALISBURY | \$13,975,142 | \$117,359,520 | 11.91% |
| MORGAN STATE | \$18,197,000 | \$160,769,000 | 11.32% |
| BOWIE | \$8,120,388 | \$80,153,353 | 10.13% |
| UMES | \$9,371,529 | \$98,795,657 | 9.49% |
| FROSTBURG | \$8,655,668 | \$91,264,978 | 9.48% |
| UMB | \$86,108,559 | \$952,917,722 | 9.04% |
| TOWSON | \$23,163,641 | \$305,800,534 | 7.57% |
| UMBC | \$25,264,201 | \$336,809,949 | 7.50% |
| UMCP | \$98,913,012 | \$1,459,297,672 | 6.78% |
| UB | \$5,849,602 | \$97,176,705 | 6.02% |
| UMUC | \$17,266,232 | \$309,423,415 | 5.58% |
| USM | \$309,762,858 | \$3,998,175,888 | 7.75% |

(PTX 846.)

906. “A dollar spent on operations and maintenance is a dollar you are not spending on student aid or other services at the university. So it affects the quality of the support you are giving other areas....” (1/17/12 AM Trial Tr. 64 (Kaiser).)

907. Previous work by Dr. Kaiser concluded that “there were past patterns of inequitable funding, that is historically, through the *de jure*, and even post *de jure*. There was inadequate funding for operations and maintenance at the HBIs, and that built up a backlog of major maintenance, called deferred maintenance.” (1/17/12 AM Trial Tr. 16 (Kaiser).)

908. The HBI Panel identified “aging physical plants and lack of consistent funding for maintenance” as an issue facing HBIs that required substantial additional resources to address. (PTX 2 at 119.)

J. Resource Limitations Have A Detrimental Effect On The Operations Of Maryland’s HBIs And Deprive Their Students Of Equal Educational Opportunity.

909. “Maryland’s misguided funding priorities have left the HBIs under-resourced, unable to compete in the educational marketplace, and thereby neither comparable nor competitive with proximate TWIs.” (1/18/12 AM Trial Tr. 39 (Allen).)

910. The resource bases of Maryland’s HBIs, which include their general fund appropriations, tuition, research and grants, and auxiliary funding, are “woefully lacking,” when compared to those of the TWIs. (1/12/2012 AM Trial Tr. 87-88 (Richardson).)

911. According to David Burton, the President of the Coalition for Equity and Excellence in Maryland Higher Education, “it is a historical fact that the State has funded its traditionally white schools at much greater levels than its historically black institutions. That history of under-funding continues today and is reflected in all facets of the operations of historically black schools, namely, the academic program inventory, operating funds, faculty and staff and facilities.” (PTX 683 at 1.)

912. During Dr. Earl Richardson’s tenure as president of Morgan, 1984-2010, the institution never had the resources necessary to carry out its mission. (1/12/12 AM Trial Tr. 87 (Richardson).)

913. Dr. Mickey Burnim, the president of Bowie explains, “We start with the operating budget. When issues or matters arise that call for us to expend resources, we have to do a lot of

shuffling. We have to try to figure out how we are going to find money to take care of whatever issue or emergency has arisen.” (1/5/2012 PM Trial Tr. 32 (Burnim).)

914. Over the last decade, Coppin has had to redirect funds to cover the operating costs of new facilities because state funding was not sufficient to cover these additional costs. (1/9/12 PM Trial Tr. 37 (Avery).)

915. “During the past 10 years, Coppin, through donations and federal grants, has used a total of \$13.3 million in non-state funds toward the implementation of its award-winning IT program and to develop a state-of-the-art IT system. Currently, Coppin's voice and data are connected to the world through one path. In the current day and age where we all depend on being connected, this is a high risk. Coppin needs an additional voice and data connection to serve the campus. It is better to utilize a different service provider point of presence and a different internet service provider. This can be accomplished with a one-time capital cost of \$355,000 and an ongoing cost of \$48,000. Coppin will also need an additional \$200,000 to fund the implementation of online courses/programs (detailed recommendation 4) and an estimated increase in its operating budget of \$1,000,000 to cover the cost of supporting all the newly implemented IT at Coppin.” (PTX 810 at 10-11.)

916. Maryland does not adequately support UMES’ mission as a doctoral-granting institution. (1/5/2012 PM Trial Tr. 66 (Neufville).)

K. Maryland Does Not Adequately Support UMES’s Land Grant Mission.

917. Maryland has never provided UMES with the resources necessary to match its federal land grant funding. In fact, it currently makes available less than 30% of the necessary matching funds. (1/5/2012 PM Trial Tr. 10-11 (Neufville); 1/04/2012 PM Trial Tr. 42-43 (T. Thompson).)

918. In 2011, the Education Policy Committee of the USM Board of Regents acknowledged that “[t]he distribution of formula funds is subject to a 1:1 match of non-federal funds. **Any amount unmatched with non-federal funds will be deducted from the annual federal allocation to the university.** UMES struggles with this required match and while the UMES-AES is presently utilizing general funds that support the academic land grant programs for this purpose, the current 1:1 match will be nearly impossible to maintain unless additional state funding is realized.” (PTX 875 at 4.) (emphasis in original).

919. Maryland gives UMCP at least a 5:1 match of federal funds, meaning that the state provides approximately five dollars in matching funds for every dollar of federal land grant funding received by UMCP. (1/5/2012 PM Trial Tr. 11 (Neufville); PTX 875 at 3 Fig. 2.)

L. Funding Disparities Experienced By Maryland’s HBIs Lack Sound Educational Justification And Can Be Practicably Eliminated.

1. The Underfunding Of Maryland’s HBIs Lacks Sound Educational Justification And Should Be Remedied By Providing the HBIs With Sufficient State Appropriations To Make Them Comparable And Competitive With TWIs.

920. There is no sound educational justification for the underfunding of Maryland’s HBIs because “all of the campuses in the state are part of the state public higher education system.” 1/18/12 AM Trial Tr. 79 (Allen.)

921. “There has been a history of unequal funding between TWIs and HBIs. HBIs are still disadvantaged by funding formulas that advantage TWIs. To recognize and correct historical and current inequities, a dramatic shift is required. The remedy proposed is that HBIs receive a significant supplement to their state appropriations until the damage done to their operations by a lack of resources can be repaired.” (PTX 662 at 15.)

922. Maryland acknowledges in a published legal opinion that “[t]o the extent that enhancements are necessary to cure funding inequities traceable to *de jure* segregation, then they are constitutionally required.” (PTX 698 at 28.)

2. Maryland’s Economy is Recovering

923. According to Maryland’s Secretary of Budget and Management, “we are seeing trends that are moving in the right direction for the State’s economy, which continues steadfastly on the path of growth and recovery.” (1/30/12 PM Trial Tr. 78 (Treasure).)

924. Maryland’s total revenues have increased FY 2011-13.

| Revenues (\$ millions) | FY 2011 | FY 2012 | FY 2013 | Percent change '13 over '12 | Percent Total Revenues |
|---|---------------|---------------|---------------|--------------------------------|---------------------------|
| Individual Income Tax | 6,643 | 7,099 | 7,596 | 7% | 21% |
| Corporate Income Tax | 776 | 759 | 831 | 10% | 2% |
| Sales Tax | 3,897 | 4,059 | 4,162 | 3% | 12% |
| Lottery | 573 | 577 | 592 | 3% | 2% |
| Fuel Tax | 752 | 744 | 753 | 1% | 2% |
| Transportation Revenues | 1,296 | 1,798 | 2,022 | 12% | 6% |
| Higher Education Revenues | 3,598 | 3,813 | 3,929 | 3% | 11% |
| Fund Transfers | 347 | 240 | 431 | 79% | 1% |
| Other General Funds | 2,162 | 1,911 | 1,822 | -5% | 5% |
| Other Special Funds | 3,291 | 3,692 | 4,248 | 15% | 12% |
| Federal Fund Revenue | 9,951 | 9,438 | 9,343 | -1% | 26% |
| Total Revenues | 33,287 | 34,131 | 35,729 | 4.7% | 100% |
| Changes in general fund balances & reversions | (604) | 735 | 152 | | |
| Total Available | 32,684 | 34,865 | 35,881 | 2.9% | |

(PTX 949 at 6.)

3. Maryland Has Consistently Provided Insufficient Support To Higher Education.

925. Maryland does not fund its system of higher education at a level that is consistent with the relative wealth of its citizens. (1/17/12 PM Trial Tr. 80-81 (Toutkoushian).) Writing in 2008, the Bohanan Commission observed that “[a]lthough Maryland ranks second in median family income and, on a per capita basis, fourth among the 50 states in personal income, it ranks

twenty-first in higher education appropriations per capita, thirty-fourth in the fraction of state personal income devoted to higher education, and nineteenth in higher education appropriations per undergraduate FTES.... Increased funding that began in fiscal 2005 for need-based aid has improved Maryland's standing in this regard from its previous twenty-third place. However, as a percentage of higher education operating expenses, Maryland is ranked twenty-ninth in total grant funds. It also ranks below the median in need-based financial aid as a fraction of tuition.” (PTX 2 at 35.)

926. In 1973-74, Maryland reported that its “level of support for higher education, in comparison to other states, places it slightly below the mid-range. Maryland's wealth is among the top 10 states in the nation. Such a disparity between wealth, as determined by personal income and the level of support provided for higher education is a matter of considerable concern to many Marylanders.” (PTX 380 at 21.)

927. The 1947 Marbury Commission made the following observations about Maryland's level of investment in higher education: “On the basis of the total amount contributed by the state to the current support of educational programs of institutions of higher education, Maryland ranks thirty-fourth among the states. Maryland ranks thirty-sixth with respect to the amount contributed by the state to the support of publicly controlled institutions. Only four states exceed Maryland in the amount contributed by the state to institutions under private control.” (PTX 18 at 145.) “The analysis of the data that have been presented thus far in this chapter all point to one general conclusion-Maryland has not been supporting higher education from public funds as generously as most of the other states.” (PTX 18 at 155.)

928. According to Maryland's Soper Commission, “[i]n financial resources, Maryland exceeds all of these states in the per capita assessed value of its property [reference omitted] and

its per capita gross state debt does not exceed the average. It is fair to assume, therefore, that Maryland is as well able as any of these states to supply the needs of its colored citizens. How poorly it has performed this duty in comparison with other jurisdictions is shown by the following examples:”

| 1 9 3 5 - 1 9 3 6 | | | | |
|-------------------|---------------------|--|-----------------------|-------------------------|
| State | Negro Population | Number of Students (State-aided) | Capital Investment | Annual Appropriation |
| Maryland | 276,379 | 43 | \$100,000 | \$ 15,672 |
| Delaware | 32,602 | 83 | 521,297 | 44,500 |
| Kentucky | 226,040 | 528 | 693,297 | 70,000 |
| Missouri | 223,840 | 410 | 868,354 | 233,568 |
| North Carolina | 918,647 | 565 | 1,123,927 | 44,014 |
| Tennessee | 447,646 | 501 | 2,022,498 | |
| Virginia | 650,165 | 847 | 1,301,464 | 74,738 |
| W. Virginia | 114,893 | 655 | 1,340,953 | 155,000 |

(PTX 17 at 14-15.)

929. Even compared to other *de jure* states, Maryland’s 1937 report concluded that it underfunded its HBIs: “It will be seen that the money invested in Negro colleges in the seven comparable states is from 6.7 to 25.6 times as great in absolute amounts as in Maryland. Relative to the number of Negro inhabitants however the states named have from 5 to 64 times as great an amount. Per Negro inhabitant the State of Maryland has invested in its one state-owned Negro institution only twenty-five cents as compared with \$16.00 in Delaware, \$11.69 in West Virginia, and \$4.52 in Tennessee.” (PTX 17 at 119.)

4. Maryland Provides Unusual Amounts Of Unrestricted Funding To Private Institutions.

930. In FY 2010, Maryland provided a total of \$52,093,421 in aid to independent institutions through the Joseph A. Sellinger program. (PTX 755 at 34.)

931. Maryland determines its annual amount of support to independent institutions using a formula that recommends that these institutions receive one-sixth of the targeted appropriations for the public institutions. (1/17/12 PM Trial Tr. 82-84 (Toutkoushian).)

932. Funds that Maryland provides to private institutions under the Joseph A. Sellinger are not restricted to specific purposes. (1/20/12 PM Trial Tr. 81 (Treasure).)

933. Maryland's support of private institutions is "the most generous in the country." (1/5/2012 AM Trial Tr. 85 (Popovich).) Only New York, New Jersey and Maryland "have a practice of providing regular, substantial amounts of state funding directly to their private, independent institutions." (1/17/12 PM Trial Tr. 82-84 (Toutkoushian).)

934. Maryland's governor can reduce the amount of money that the State provides to private institutions. (1/20/12 PM Trial Tr. 41-42 (Treasure).)

5. MHEC Has The Authority To Recommend Funding Reallocation.

935. MHEC has the authority to recommend funding reallocation between Maryland's public colleges and universities. (3/26/10 Lyons Dep. Tr. Part 2 447.)

VIII. SEGREGATIVE EFFECT

936. Because Maryland bears the burden of showing that any current policies or practices traceable to the *de jure* era do not have a segregative effect, plaintiffs' Response brief will respond in detail to the arguments that Maryland makes in its initial brief. For the time being, plaintiff set forth a few points on the issue.

937. The HBIs are highly segregated in their student body. As the following table shows, the HBIs have a low number and percentage of white students, especially compared to the TWIs:

| White, Hispanic, and Asian Enrollment at Maryland HBCUs, Fall 2009 | | | | | | | |
|---|--------------|-------------------|-----------------|-------------------|--------------|-------------------|-------------------------|
| HBCUs | White | | Hispanic | | Asian | | Total Enrollment |
| | # | % of Total | # | % of Total | # | % of Total | # |
| Bowie | 234 | 4.2% | 92 | 1.6% | 99 | 1.8% | 5617 |
| Coppin | 51 | 1.3% | 16 | 0.4% | 9 | 0.2% | 3801 |
| UMES | 591 | 13.3% | 63 | 1.4% | 63 | 1.4% | 4433 |
| Morgan | 201 | 2.8% | 68 | 0.9% | 70 | 1.0% | 7226 |
| Total | 1077 | 5.1% | 239 | 1.1% | 241 | 1.1% | 21077 |
| Source: PTX 755 at 16 | | | | | | | |

| White, Hispanic, and Asian Enrollment at Maryland TWIs, Fall 2009 | | | | | | | |
|--|--------------|-------------------|-----------------|-------------------|--------------|-------------------|-------------------------|
| TWIs | White | | Hispanic | | Asian | | Total Enrollment |
| | # | % of Total | # | % of Total | # | % of Total | # |
| Frostburg | 3829 | 71.1% | 127 | 2.4% | 80 | 1.5% | 5385 |
| Salisbury | 6657 | 81.1% | 216 | 2.6% | 206 | 2.5% | 8204 |
| Towson | 14223 | 67.2% | 561 | 2.6% | 791 | 3.7% | 21177 |
| UB | 2549 | 40.7% | 133 | 2.1% | 287 | 4.6% | 6265 |
| UMBC | 6685 | 51.9% | 463 | 3.6% | 2320 | 18.0% | 12870 |
| UMCP | 20880 | 56.1% | 1976 | 5.3% | 4903 | 13.2% | 37195 |
| St. Mary's | 1576 | 76.5% | 90 | 4.4% | 77 | 3.7% | 2060 |
| Total | 56399 | 60.5% | 3566 | 3.8% | 8639 | 9.3% | 93156 |
| Source: PTX 755 at 16 | | | | | | | |

938. Interim Secretary Danette Howard co-authored an academic paper entitled “*The Status of Equity for Black Undergraduates in Public Higher Education in the South: Still Separate and Unequal*” (PTX 852; 1/23/12 AM Trial Tr. 59 (Howard)). In that paper, Dr. Howard and her co-authors used an equity index to determine whether racial equity had been achieved. The paper described how the scoring of the index worked:

939. Equity is achieved when an index is equal to one. An index that is less than one is below equity, while an index greater than one is above equity. “[B]ecause of the way in which it is calculated, the equity index provides a mechanism for comparing equity across racial/ethnic groups, across states, and at different points in time.” (PTX 852 at 6.)

940. The authors considered at a score of .75 as being “substantially below equity.” (PTX 852 at 12.) The authors found that Maryland’s HBIs had an equity index for white students of .03. (PTX 852 at 13.)

941. In their opening statement, Maryland suggested that demographic changes had influenced the demographics at the HBIs, including the increase in Asian and Hispanic students in the system. The above table in fact shows that Asian and Hispanic students are not going to HBIs: the percentage of Hispanic students at TWIs is more than three times greater than that at HBI and the percentage of Asian students at TWIs is more than eight times greater than that at HBIs.

942. Maryland also suggested that the areas in which the HBIs are located affected their student demographics. Dr. Ben Passmore, who performs demographic studies for USM, testified that Coppin’s white student population in 2010 was less than 20% of that in 2000. He also testified that the decrease was not attributable to demographic changes around Baltimore because Coppin drew students from a wider geographic area than in the past, including areas with substantial white population. (1/25/12 AM Trial Tr. 32 (Passmore); DTX 398 at 5.) Additionally, Dr. Passmore testified that Morgan drew students from all over the state. (1/25/12 AM Trial Tr. 68 (Passmore).) Additionally, he found that UMES and Salisbury both had a statewide draw and that Salisbury “is drawing more African-American students from across the state than is Salisbury, and it is true that Salisbury is drawing relatively more white students.”

(1/25/12 AM Trial Tr. 49 (Passmore).) Dr. Passmore’s demographic tables also showed that UMES’s percentage of white population dropped from 22.5% in 1990 to 13.3% in 2009. (DTX 398 at 22.)

943. Regarding Bowie, Dr. Passmore’s demographic tables showed that Bowie’s white student population dropped from 1,223 (29.2% of student population) in 1990 to 234 (4.2%) in 2009. (DTX 398 at 3-4.) Maryland keeps data on the county of residence of each of its schools. This data showed that the drop in white student population, at least from 2002 to 2009, could not be explained by demographic changes in Prince George’s County:

| REDUCTION IN NON-BLACK STUDENT POPULATION AT BOWIE STATE: University Student Population Cannot be Explained by Prince George's County Demographics | | |
|---|---|---|
| Year | Total Non-Black Students Overall | Total Non-Black Students in Prince George's County |
| 2002 | 718 | 310 |
| 2009 | 449 | 294 |
| Difference | 269 | 16 |
| Note: Foreign and "Unknown" Students Not Included | | |

(PTX 1027 at 30; DTX 398 at 3; DTX 155 at 36, 99; and PTX 664 at 34, 95.)

944. Maryland’s own data shows that the number of African American applicants at the HBIs is increasing and the number of applicants from any other race is decreasing:

| HBI | African American Applicants | | All Other Applicants | |
|---------------|--|-------------|-----------------------------|-------------|
| | 2005 | 2009 | 2005 | 2009 |
| Bowie | 3,210 | 3,083 | 646 | 443 |
| Coppin | 3,594 | 4,290 | 231 | 412 |
| UMES | 2,419 | 3,751 | 407 | 566 |
| Morgan | 9,515 | 11,241 | 1,930 | 913 |
| Total | 18,738 | 22,365 | 3,214 | 2,344 |

(DTX 132 at 1-3.)

PROPOSED CONCLUSIONS OF LAW

I. MARYLAND'S AFFIRMATIVE OBLIGATION TO DISMANTLE VESTIGES OF DISCRIMINATION

1. Plaintiffs assert that Maryland is in violation of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 for failing to eliminate the vestiges of discrimination in its formerly dual system of higher education whereby its HBIs remain separate and unequal to their traditionally white peer institutions.¹⁹ In 1954, the Supreme Court held in *Brown v. Board of Education* that “the doctrine of ‘separate but equal’ has no place” in the field of public education. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (“*Brown I*”). The following year, the Court ordered the states to end segregation in public education “with all deliberate speed.” *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (“*Brown II*”). While a state university system may differ in many respects from primary and secondary schools, there is no dispute that the constitutional obligation to “completely abandon[]” segregated education also applies to systems of higher education. *United States v. Fordice*, 505 U.S. 717, 727-29 (1992). As interpreted by the U.S. Supreme Court in *Fordice*, “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.” *Id.* at 728.

2. *Fordice* was the Supreme Court’s first opportunity to address the constitutional standards governing liability and remedies for past segregation in higher education. *Fordice* recognized that long after Mississippi replaced its dual system of higher education with race neutral policies, “the segregated public university system in the State remained largely intact.” *Id.* at 722. The Court rejected Mississippi’s claims it had “fulfilled its duty to disestablish its

¹⁹ Plaintiffs’ rights under Title VI are coextensive with their rights under the Equal Protection Clause. See *Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001).

state-imposed segregative system by implementing and maintaining good-faith, nondiscriminatory race-neutral policies and practices in student admission, faculty hiring, and operations,” successfully attracting a number of qualified black students to its traditionally white campuses. *Id.* at 725.

3. Instead, *Fordice* held that in a formerly *de jure* system of higher education, race-neutral policies alone do not demonstrate a state has completely abandoned its discriminatory system. The Court instructed that to satisfy *Brown II*, public university systems must do more than simply adopt and implement “race-neutral policies.” *Fordice*, 505 U.S. at 729. Rather, they must ensure that there are *no* current state policies or practices “traceable to the State’s prior *de jure* segregation and that continue[] to foster segregation.” *Id.* The State has not satisfied its burden of dismantling its prior system if it “perpetuates policies and practices traceable to its prior system [of *de jure* segregation] that continue to have segregative effects -- whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system.” *Id.* at 731.

4. Institutions of higher education are not fungible – each is designated by the State to perform a specific institutional mission and students enjoy a “range of choices.” *Id.* at 729.

That college attendance is by choice and not by assignment does not mean that a race-neutral admissions policy cures the constitutional violation of a dual system. In a system based on choice, student attendance is determined not simply by admissions policies, but also by many other factors. Although some of these factors clearly cannot be attributed to state policies, many can be.

Id. at 729.

5. The Supreme Court held that even race neutral policies that influence those decisions may be constitutionally suspect if they “substantially restrict” student choice in terms

of which college or university to attend, and they contribute to the racial identifiability of a state's institutions of higher learning. *Id.* at 733. Such policies must be justified or eliminated. *See id.* (holding that surviving aspects of Mississippi's prior dual system are constitutionally suspect in that while they "may be race neutral on their face, they substantially restrict a person's choice of which institution to enter, and they contribute to the racial identifiability of [its] eight public universities" such that "Mississippi must justify these policies or eliminate them").

6. Therefore, the obligation of a formerly *de jure* state is not simply to proscribe intentional discrimination or improve historically disfavored institutions, but to *undo* the segregative effects perpetuated by traceable policies and practices. *Id.* at 729. Even if a state replaces many of its discriminatory practices with race-neutral policies, state action may still foster segregation. *Id.* at 731. If policies or practices traceable to the *de jure* system remain and continue to produce segregative effects – "by influencing student [choice] or by fostering segregation in other facets of the university system" – then those policies and practices must be reformed "to the extent practicable and consistent with sound educational practices." *Id.* at 729-31.

7. The Supreme Court identified two broad categories of practices that can impede free choice by students: (i) those that discourage or prevent black students from attending TWIs and (ii) those that discourage white students from attending HBIs. The first category includes those policies or practices which discourage or prevent blacks from attending historically white institutions, such as admission policies. *Id.* at 729.

8. The second consists of policies or practices that discourage whites from attending HBIs, such as:

- assigning limited institutional missions to the HBIs that restrict their programs;
- duplicating programs at HBIs and TWIs in the same geographic area or failing to locate high-prestige programs at HBIs; and
- failing to fund HBIs comparably to the TWIs.

See id. at 733; *Knight v. Alabama*, 14 F.3d 1534, 1541 (11th Cir. 1994). As a result of such policies, “disproportionate numbers of whites *can* satisfy their curricular desires at HWIs, and *cannot* satisfy them at HBIs, thereby discouraging them from choosing to attend HBIs.” *Knight*, 14 F.3d at 1541 (citing *Fordice*, 505 U.S. at 736-43).

9. The case before this Court implicates the latter issue – whether Maryland maintains policies and practices that continue to discourage other race students from attending its HBIs. Plaintiffs identify three policies or practices traceable to the *de jure* era which continue to limit student choice and promote segregation and unequal opportunities at its historically black colleges and universities: (1) Maryland’s designation of limited roles and missions to its HBIs; (2) program duplication and the failure to place unique, high demand programs at its HBIs; and (3) the continuous and ongoing underfunding of the state’s HBIs under their current mission, let alone an enhanced one.

10. The fact that students are free to choose a college or university for themselves does not divorce this decision from state action, and does not mean that race-neutral policies show a state has successfully dismantled its dual system of higher education. “In a system based on choice, student attendance is determined not simply by admissions policies, but also by many other factors. Although some of these factors clearly cannot be attributed to state policies, many can be.” *Fordice*, 505 U.S. at 729.

11. When a state maintains policies and practices which limit student choice, then the court must also examine “whether [a school’s] existing racial identifiability is attributable to the State” due to the perpetuation of policies and practices traceable to any facet of the former *de jure* system. *Id.* at 728. In answering this question, the court will review whether state policies or practices continue to reinforce historic, race-based distinctions among its colleges and universities. *See id.* at 725, 728.

12. Because Maryland maintained a *de jure* segregated system of public colleges and universities which “impeded the free choice of prospective students,” it has not dismantled that system until it takes the necessary steps to ensure that student choice is now “truly free.” *Id.* at 742-43. Instead, the record shows that Maryland’s HBIs are more segregated today than in the 1970s when the state first started gathering student data by race. (PTX 184 at 1; 1/10/12 AM Trial Tr. 38 (Conrad).)

13. Plaintiffs do not contend that Maryland’s traditionally white campuses are segregated. Instead, the issue before this Court is whether Maryland has satisfied its constitutional obligation to dismantle policies and practices which perpetuate segregation *at its HBIs*. Today, approximately 60% of Maryland’s African American students are educated at one of the state’s four historically black campuses, where only 5% of the student population is white. (PTX 2 at 125; PTX 755 at 16.) More significantly, Plaintiffs contend that – as a result of the more limited institutional roles and missions assigned to those schools, the state’s failure to avoid the approval of duplicative programs at geographically proximate TWIs, the lack of commitment to placing high quality, unique programs at the HBIs, and the failure to adequately fund and support the HBIs – the educational opportunities afforded those students at Maryland’s HBIs continues to be both separate and unequal.

14. While racial balancing in and of itself may not be constitutionally required, the racial identifiability of a state's campuses may be "[relevant] to deciding whether [the state] has satisfactorily dismantled its prior *de jure* dual system" and must therefore take additional steps to "ameliorate such identifiability." See *Fordice*, 505 U.S. at 729-30 n.4. In Mississippi, for example, even thirty years after *Brown*, the racial composition at the state's three historically black colleges ranged from 92% to 99% black. *Fordice*, 505 U.S. at 724-25 (citing *Ayers v. Allain*, 893 F.2d 732, 734-35 (5th Cir. 1990) (panel decision)). The Supreme Court found such evidence significant as to whether Mississippi's race-neutral policies substantially restricted student choice, contributing to the racial identifiability of Mississippi's public universities and requiring that Mississippi "justify these policies or eliminate them." *Id.* at 733.

15. The record here indicates that Maryland's HBIs are similarly segregated (as summarized in the preceding findings) and relies on the Supreme Court's guidance in *Fordice*:

That an institution is predominantly white or black does not in itself make out a constitutional violation. But surely 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.

Id. at 743.

16. This Court's inquiry is further informed by the analysis in *Knight v. Alabama*, which analyzed policies and practices in Alabama in light of *Fordice*. *Knight v. Alabama*, 787 F. Supp. 1030 (N.D. Ala. 1991), 14 F.3d 1534 (11th Cir. 1994), 900 F. Supp. 272 (N.D. Ala. 1995). In *Knight*, plaintiffs charged that Alabama continued to maintain structures, policies and practices that contributed to the vestiges of segregation. *Knight*, 14 F.3d at 1543. Filed in 1983 to challenge the role that race played in Alabama's public higher education system, the case passed back and forth between the district court and court of appeals for ten years. *Id.* at 1539.

17. Ultimately, those decisions confirmed that limited institutional missions, program duplication and underfunding of the state's HBIs were traceable policies and practices that continued to produce segregative effects. *See Knight*, 787 F. Supp. at 1367; *Knight*, 14 F.3d at 1544-46 (finding that the district court held the HBIs have limited missions "because of prior state-sponsored discrimination"); *Knight*, 787 F. Supp. at 1331 (finding that "the location of unduplicated high demand programs has a definite impact on the enrollment of other race individuals at an otherwise racially identifiable institution" such that "location of such programs at the state's HBUs should materially assist their desegregation" and the "placement of high demand programs at the predominately white institutions in close proximity to the predominantly black institutions has a restricting influence on the latter's ability to attract white students and to meet their constitutional duty to desegregate"); and *Knight*, 787 F. Supp. at 1270-71 (finding that "Alabama has made no effort to overcome the effects of years of discriminatory funding as to the HBUs," nor did the state make funds available to assist its HBUs in "overcoming the effects of discriminately low funding so that they may adequately provide services to their students").

18. In addition to the guidance provided by the courts in *Fordice*, *Knight*, and other cases, the Court is also informed by Maryland's own interpretation of its constitutional mandate. Specifically, Maryland officials have indicated that the State's 2000 Partnership Agreement with OCR set forth what was deemed legally necessary to desegregate the HBIs. (1/11/12 AM Trial Tr. 35 (Oliver).) Indeed, the Partnership Agreement itself indicates that it "sets forth the commitments that the State and OCR anticipate will result in agreement that Maryland is in full compliance with its obligations under federal law, particularly Title VI of the Civil Rights Act of 1964 (42 U.S.C. Section 2000d, et seq.) (Title VI) and the standards set forth in *United States v.*

Fordice, 505 U.S. 717 (1992) (*Fordice*) regarding Maryland's system of public higher education.” (PTX 4 at 4.)

19. The Partnership Agreement committed to enhance the HBIs so that they would be *comparable and competitive* and thus would be attractive to students of all races:

[T]he state commits to design measures which ensure that the HBCUs are comparable and competitive with the TWIs in all facets of their operations and programs, as soon as possible and before the expiration of this Agreement. These measures will be designed to ensure that these institutions provide equal opportunity for a quality education to all students who choose to attend them and to enable them to compete for and be attractive to students regardless of race.

(PTX 4 at 37-38.)

20. As stated by the 2008 HBI Panel:

The terms “competitiveness” and “comparability” are often used as terms of art in the federal government’s evaluation of whether the state has remedied state-sanctioned racial discrimination in its public colleges and universities and eliminated where practicable the vestiges of that discrimination as required by both U. S. Supreme Court decisions in *Brown v. Board of Education* and *U.S. v. Fordice* and Title VI of the 1964 Civil Rights Act.

(PTX 3 at 5.)

II. BURDEN OF PROOF UNDER *FORDICE*

21. In the context of higher education, *Fordice* outlines a three-part analysis to determine whether a state has fully met its remedial obligation to dismantle policies and practices that inhibit student choice. *Fordice*, 505 U.S. at 729-31; *Knight*, 14 F.3d at 1540-42.

22. *First*, the plaintiffs must identify one or more current policies or practices traceable to the prior system of *de jure* segregation. Policies and practices originally adopted for a discriminatory purpose which continue to have discriminatory effects may still have “discriminatory taint.” *Fordice*, 505 U.S. at 734 (citation omitted). Where a state maintains

policies or practices traceable to the era of segregation, plaintiffs need not establish discriminatory intent in order to demonstrate a constitutional violation. *Id.* at 733 n.8.

23. A state “policy” may include a plan or course of action adopted by a government, regardless of whether that policy is formally incorporated into written rules or regulations. For example, the Fourth Circuit affirmed a district court’s definition of a municipal policy as including “not only ‘official policy directives, regulations or ordinances,’ but ‘what the law considers de facto or in fact practices, customs or policies caused, maintained, tacitly encouraged or condoned . . . even though these . . . have at no time received formal approval through the local government’s decision making channels.’” *Spell v. McDaniel*, 824 F.2d 1380, 1397-98 (4th Cir. 1987).

24. While federal courts have not articulated a universal definition of a state “practice,” it has been found to include repeated or customary action, habitual performance, or a succession of acts of similar kind such that an occurrence of a discriminatory practice amounted to discriminatory action. *Moseke v. Miller & Smith, Inc.*, 202 F. Supp. 2d 492, 502 (E.D. Va. 2002) (citing *Black’s Law Dictionary* 1172 (6th ed. 1991)). Indeed, the Supreme Court also found that even after a state dismantles its discriminatory policies or practices, “there may still be state action” traceable to *de jure* segregation which continues to foster segregation. *Fordice*, 505 U.S. at 729.

25. A policy or practice is “traceable” if to some degree it follows and maintains the structures that were inherent to *de jure* segregation. *Fordice* referred to such policies as “remnants” and specifically held certain practices traceable because they maintained structures that were inherent to racial segregation in the *de jure* era, regardless of whether these practices were embedded in new policies that did not exist in that form in the *de jure* era. *Id.* at 733. For

example, in *Ayers v. Fordice*, 111 F.3d 1183 (5th Cir. 1997), the court was unconvinced that the adoption of a new ACT score was unrelated to Mississippi's past discriminatory admission standards, even though this benchmark was established in 1961. *Ayers*, 111 F.3d at 1193.

26. Thus, a policy or practice may thus be traceable to the *de jure* era even if it was adopted after the end of legal segregation. “[A] challenged policy as it exists today [need not] have been in effect during the *de jure* period in order to be constitutionally problematic.” *Id.* at 1207. The Supreme Court emphasized that a “midpassage justification for perpetuating a policy enacted originally to discriminate against black students does not make the present admissions standards any less constitutionally suspect.” *Fordice*, 505 U.S. at 734. The challenged policy may be a “continuation of,” “rooted” in or have as their “antecedents” state decisions or practices instituted for “segregative reasons,” rendering it a vestige of discrimination traceable to past segregation. *Knight*, 14 F.3d at 1540-41, 1550.

27. As applied, traceability is not a difficult burden to meet.

Plaintiffs are likely to be able to identify, as these plaintiffs have identified, specific policies traceable to the *de jure* era that continue to produce a current racial imbalance. As a practical matter, then, the district courts administering our standard will spend their time determining whether such policies or practices have been adequately justified -- a far narrower, more manageable task than that imposed under *Green*.

Fordice, 505 U.S. at 746 (Thomas, J., concurring).

28. *Second*, once a plaintiff proves traceable policies or practices are still in effect, the burden is on the State to demonstrate there are no ongoing segregative effects as a result. Policies and practices with segregative effects are those that discourage or prevent blacks from attending traditionally white institutions, or those which discourage other race students from seeking to attend historically black institutions. *Knight*, 14 F.3d at 1541. In analyzing such

effects, the court may consider the combined effect of more than one challenged policy or practice. *Fordice*, 505 U.S. at 739.

29. *Third*, if a traceable policy or practice continues to produce discriminatory effects, the state must show it cannot be eliminated or reformed because there is no practicable and educationally sound alternative that would reduce segregation. *Knight*, 14 F.3d at 1541. In sum, a challenged policy cannot survive constitutional scrutiny if it originated during the *de jure* era, produces adverse impacts, and persists without sound educational justification. *Fordice*, 505 U.S. at 746 (Thomas, J., concurring).

30. Maryland's burden to articulate a sound educational justification for a segregative policy is a heavy one – a court should consider the “full range of less segregative alternative remedies” given the state's obligation to adopt the “practicable and educationally sound alternatives that will bring about the greatest possible reduction in segregative effects.” *Knight*, 14 F.3d at 1541-42 (citing *Fordice*, 505 U.S. at 742-43).

31. Moreover, the State must show its “legitimate educational objectives” could not be accomplished “through less segregative means.” *Fordice*, 505 U.S. at 744 (O'Connor, J., concurring). A state can be required to change even educationally sound practices where they have been found to produce continuing segregative effects, because “[o]nly where there are no alternative remedies that are practicable and educationally sound is the state defendant relieved of its obligation to remedy the vestiges' effects.” *Knight*, 14 F.3d at 1546.

32. Practicability requires courts to assess not only the costs and benefits of a proposed remedy, but “risks and returns as well.” *Knight*, 900 F. Supp. at 285. A practicable remedy is one that would appear at the time “to be most likely to achieve the remedial purpose

into the future.” *Id.* at 285 (referencing *Missouri v. Jenkins*, 515 U.S. 70 (1995) (Thomas, J., concurring)).

III. MARYLAND’S HISTORY OF POLICIES AND PRACTICES TRACEABLE TO THE *DE JURE* ERA

33. The parties agree that Maryland was one of many states operating a legally sanctioned dual system of education, enforcing the separation of white and black students in higher education. (Nov. 30, 2012 Joint Proposed Pre-Trial Order (Docket No. 272) at 31.) Indeed, a 2005 opinion from Maryland’s Attorney General stated that there is “no doubt” the *de jure* era lasted until 1969. (PTX 698 at 19.) From its inception, Maryland’s stated policy in higher education was to enforce state sanctioned segregation on its public campuses. The parties further agree that by doing so, Maryland historically denied equal educational opportunities to its black college students, providing them with clearly inferior funding, facilities, faculty, and programs. (Feb. 12, 2010 Defs.’ Answers to Pls.’ First Req. for Admis.)

34. Plaintiffs assert that this continues today. Based on the extensive record before it, this Court finds that Plaintiffs have met their burden on the sole factor for which they have responsibility under *Fordice*. Plaintiffs have demonstrated that Maryland maintains policies and practices traceable to the *de jure* era. *First*, Maryland assigns limited roles and missions to its historically black institutions which have not allowed its HBIs to meaningfully evolve beyond their primary assignment to educate African American students (the “dual mission”). *Second*, Maryland unnecessarily duplicates programs at geographically proximate TWIs and fails to place unique, high demand programs at its historically black schools as evidenced by their Carnegie classifications and more limited programmatic offerings. *Finally*, Maryland has underfunded its historically black institutions and in spite of recent enhancement funding directed at the HBIs,

the current funding formula fails to adequately fund the HBIs' dual mission, fails to remedy the past historical under funding, and remains rooted in a system that unfairly ties operational funding to an institution's role and mission to the disadvantage of the HBIs.

35. Before addressing each of these policies and practices in turn, the Court will briefly review Maryland's history of segregation in higher education. This history is well-documented in numerous state reports and commissions, and confirmed by testimony at trial. That narrative informs the Court's analysis of the current policies and practices identified by Plaintiffs as perpetuating the historical segregation at the HBIs. Rather than review the extensive record already outlined in the findings of fact, this Court will instead highlight those facts most relevant to the traceability and segregative effects of the specific policies and practices challenged by Plaintiffs.

36. The record confirms that Maryland was one of many states operating a legally segregated (or *de jure*) system of public higher education. (PTX 69 ¶ 12.)

37. After the Morrill Act of 1862, the state designated the Maryland Agriculture College as the land-grant school, a private institution which eventually merged with the public professional schools in Baltimore to become the University of Maryland. That school was not open to black students. (PTX 69 ¶ 13.)

38. The first institution of higher education open to black students was the privately run Morgan College in Baltimore, founded in 1867 and which later became Morgan State University. (PTX 69 ¶14.) In 1886, it created Princess Anne Academy, which would later become the University of Maryland Eastern Shore. (PTX 69 ¶ 14.) When the Second Morrill Act in 1890 conditioned federal funds on Maryland's commitment to provide educational opportunities for black students, the state contracted with Morgan College to carry out land-grant

activities at Princess Anne but refused to fund that school until 1914. (PTX 69 ¶ 15.) It was purchased by Maryland in 1935 and at that time began offering four year degrees. (PTX 69 ¶ 15.) Morgan College was purchased by the state in 1937. (PTX 69 ¶ 15.)

39. It was not until the second Morrill Act of 1890 that states were required to provide black students access to higher education, which was a condition of federal funding. (PTX 69 ¶ 10.) However, separate education for white and black students was tolerated by this Act, which allowed many southern states to develop a dual system of education – one for whites and another for blacks. (PTX 69 ¶ 10.)

40. This history of *de jure* segregation is notable in that the state's financial support for a black college did not come until 150 years after its support for its white college, and the first black teacher's school was not founded until 45 years after the white teacher's college. (PTX 69 ¶ 15.)

41. Morgan State was viewed as the second most prominent institution in Maryland's higher education system during the 1950s, one of only three schools offering a four-year, liberal arts education. (PTX 69 ¶ 18.) Morgan also had the second highest enrollment in the state, second highest revenue, and the second highest value in terms of facilities. (PTX 69 ¶ 18.) And while Princess Anne was deprived state support for many years, it still rated favorably compared to Salisbury, the other public college on the Eastern Shore. (PTX 69 ¶ 19.)

42. It is undisputed that long after *Brown*, Maryland continued its policies and practices which maintained its dual system of higher education. (PTX 69 ¶ 20.) The disparities between Maryland's HBIs and TWIs actually grew in the following decades, which saw the expansion of the state's three white teachers' colleges while the historically black teachers' colleges were left behind. (PTX 69 ¶ 21.) From 1955 to 1973, Maryland continued to invest

heavily in its TWIs, widening the gap between its TWIs and HBIs. Towson experienced astonishing growth and emerged as the second largest public institution of higher education in Maryland, quickly exceeding the combined enrollments of all four of the state's HBIs, where facilities and funding were lacking. (PTX 69 ¶ 22-23.)

43. Meanwhile, rather than accept the offer from Morgan State in 1969 to become the state's first truly multiracial university to accommodate the Baltimore region's growing demand for post-secondary education, Maryland invested in the creation of University of Maryland Baltimore County nearby proximately not just to Morgan, but also to Coppin, Bowie and Towson. (PTX 69 ¶ 24.)

44. This period was followed by over forty years of protracted negotiation between the federal government and Maryland to eradicate the vestiges of discrimination in its higher education system. (PTX 69 ¶ 35.) This history confirms, in many respects, the ongoing policies and practices which date back to that era and facilitate ongoing segregation on Maryland's public campuses.

45. In 1969, the federal government initiated efforts to desegregate Maryland's public university system. (PTX 69 ¶ 36.) Maryland's 1970 desegregation plan was found insufficient, and three years later the federal government informed Maryland that it had yet to comply with its constitutional obligation to desegregate its system of higher education. (PTX 69 ¶ 37.) In 1975, OCR determined that Maryland had failed to execute that plan "promptly and vigorously" and initiated enforcement action. (PTX ¶43.)

46. In 1985, the U.S. Department of Education Office for Civil Rights requested and accepted Maryland's five-year plan to improve educational opportunity in its higher education system. (PTX 69 ¶ 47.) In 1990, Maryland reported compliance with Title VI, while OCR

remained silent until 1999, when it initiated another settlement agreement with Maryland. (PTX 4 at 24.)

47. Consistent with *Fordice*, the 2000 Partnership Agreement sought to remove all vestiges of segregation from Maryland's public colleges and universities by avoiding unnecessary program duplication and ensuring that HBIs could be "comparable and competitive" with the TWIs in "all facets of their operations and programs." (PTX 4 at 25.) Maryland committed to provide equal opportunity to a quality education to all students who elected to attend an HBI, and to enable the historically black colleges to compete for and attract students "regardless of race." (PTX 4 at 37.)

48. That Agreement articulated the steps necessary to ensure that student choice would be "truly free." *Fordice*, 505 U.S. at 743. These included enhancements in the following areas: distinct programmatic missions; unique and quality programs not duplicated at geographically proximate TWIs; operational funding consistent with the mix and degree level of academic programs; support for the development of research infrastructure; support consistent with the academic profile and needs of students; lower student-faculty ratios appropriate to support institutional missions; improving the expanse, functionality and quality of physical facilities; improving the appearance, attractiveness and ambiance of the campuses and surrounding infrastructure; and funding to support quality of campus life. (PTX 4 at 38.)

49. The 2000 Partnership Agreement specifically recognized each of the policies and practices identified by Plaintiffs as continuing the vestiges of discrimination at the HBIs. Moreover, it identified educationally sound remedies to address each. To remedy the assignment of more limited institutional missions to the HBIs, Maryland committed to expand the missions of its HBIs and to provide them with unique, high demand programs. (PTX 4 at 36.) Maryland

committed to avoid unnecessary program duplication at geographically proximate TWIs. (PTX 4 at 36.) And Maryland committed to fund its HBIs at a level sufficient to permit them to compete for other race students. (PTX 4 at 38.)

50. At the expiration of the Partnership Agreement in 2006, Maryland represented to OCR it had fully complied with all of its obligations under that agreement. (PTX 69 ¶ 55.) While OCR has never responded, the Court finds that this is not determinative on the issue of whether the federal government would agree that Maryland fully satisfied its commitments under that Agreement. OCR remained silent for almost ten years following the expiration of the 1985 Partnership Agreement before determining that Maryland had not yet complied with its constitutional obligation to desegregate its system of higher education. (*See* PTX 4 at 24.)

51. Defendants contest the legal relevance of the 2000 Partnership Agreement, noting that the agreement's goal of making Maryland's HBIs "comparable and competitive" to the state's TWIs is not relevant to the legal standard articulated by *Fordice* to assess compliance with its obligations under federal law. This Court finds significant, however, both testimony and the state's own reports which reveal that representatives of the Maryland Higher Education Commission viewed the Partnership Agreement as defining the State's constitutional obligations under *Fordice*.

A. Maryland Maintains Traceable Policies and Practices of Assigning Limited Institutional Roles and Missions to its HBIs.

52. The parties agree that institutional missions influence many aspects of a university's operations, including "[the] programs it offers, the funding it receives, the buildings it constructs, and the students it attracts." (Oct. 29, 2010 Defs.' Statement of the Case and Issues to be Considered at Trial (Docket No. 178) at 12.) And where the issue is whether the state has

sufficiently dismantled its prior dual system, and when combined with the other policies or practices such as differential admission practices and unnecessary program duplication, “it is likely that the mission designations interfere with student choice and tend to perpetuate the segregated system.” *Fordice*, 505 U.S. at 741.

53. Missions may have as their antecedents “policies enacted to perpetuate racial separation during the *de jure* segregated regime.” *Fordice*, 505 U.S. at 739-40 (holding that at their inception Mississippi’s traditionally white institutions were “restricted for the education solely of white persons” while the traditionally black universities were “more limited in their assigned academic missions”). *Fordice* further held that policies and practices related to mission which were established after the *de jure* era may be traceable because they followed the structures of the *de jure* era to some degree. *Id.* at 740-41 (noting that even though the institutional designations at issue were created in 1981 they had as their “antecedents the policies enacted to perpetuate racial separation”). Where “inequalities among the institutions largely follow the [contemporary] mission designations, and the mission designations to some degree follow the historical racial assignments,” then maintaining the limited role and institutional missions of the HBIs is traceable because it preserves the inequalities of that era. *Id.* (quotation omitted).

54. As the 2008 HBI Panel found, the historic, present, and future mission of the HBI is the same, the dual mission:

First and most important, the mission of the HBIs in providing an undergraduate degree is substantially different and more challenging than that of the TWIs. HBIs historically and into the future have a dual mission. They are committed to the traditional mission of any institution of higher education to provide a quality educational experience and guide students to the attainment of an undergraduate degree. HBIs in the State of Maryland also have as their mission to address the educational needs of

students who come from families with traditionally less education and income and who are often under prepared as a result of their circumstances – not their abilities – for college level work. Helping these under prepared students earn a bachelor’s degree is central to the HBI mission. This function for the HBIs is disproportionately more important than in the TWIs.

(PTX 3 at 8.)

55. Even though the statutorily created mission statement approval process begins with the university presidents, the mission statements must be consistent with the Maryland Education Code and State Plan and be approved by MHEC and for the USM schools, the USM Board and Chancellor. Md. Code Ann., Educ. §§ 11-302(a), 11-302(d); § 10-207. As a result, institutions cannot simply adopt their own mission statements.

56. Moreover, this Court recognizes that an *institutional mission* must be distinguished from an institution’s *mission statement*. An institutional mission is what a college or university sees itself to be in a broad philosophical sense, including its major goals and responsibilities. It reflects certain “aspirational and futuristic aspects,” and the state may have nothing to do with that definition. *Knight*, 900 F. Supp. at 290.

57. Institutional role refers to what an institution does with respect to three major functions, “instruction, research and public service.” *Id.* Role is often revealed by the level of degree programs offered, and an institution’s targeted student population. *Id.* Institutional scope refers to the extent to which a school fulfills its role as reflected by its academic program inventory. *Id.* Role differentiation is necessary because “states cannot afford to fund every higher education institution at a level that would allow it to offer high-quality programs in all disciplines and at all degree levels.” *Knight v. Alabama*, 787 F. Supp. 1030, 1308 (N.D. Ala. 1991). Even so, the Supreme Court subsequently clarified that should those institutional roles

trace back to the discriminatory purpose of preserving the inequities of the *de jure* era, then they may be constitutionally suspect. See *Fordice*, 505 U.S. at 741 (recognizing that mission designations may in fact interfere with student choice and remanding to determine to what extent it would be practicable and consistent with sound educational practices to eliminate the effects of the state's assignment of missions).

58. The narrow program offerings at Maryland's HBIs are a product of their historically limited missions. As the *Fordice* decision noted, inequalities among institutions largely follow the mission designations, and mission designations to some degree follow historical racial assignments. Mission designations may have the effect of maintaining a more "limited program scope at the historically black universities," thereby limiting to some extent a student's choice about which school to attend. *Fordice*, 505 U.S. at 741 (quoting *Ayers v. Allain*, 914 F.2d 676, 690 (5th Cir. 1990)).²⁰

59. The record confirms that Maryland's assignment of more narrow institutional missions and programs to its HBIs has its roots in the *de jure* era. As in *Knight*, "[t]he issue is not whether the state universities to which African Americans have traditionally turned for college education in Alabama have limited missions because of prior state-sponsored discrimination, undoubtedly they do; rather, the issue is how does that limitation affect students who choose to attend the state's predominantly black institutions." *Knight*, 787 F. Supp. at 1046.

60. By statute, Maryland is directed to "[d]evelop a mission for each campus which builds upon the unique strength of the campus and embodies a diversity of programs[.]" Md. Code Ann., Educ. § 10-209(c)(2). Instead, this Court finds that Maryland established its HBIs

²⁰ *Ayers v. Allain*, 914 F.2d 676 (5th Cir. 1990) was the Fifth Circuit *en banc* decision reversed by the Supreme Court in *Fordice* based on the *en banc* court having failed to impose the proper burden on the State. The Supreme Court adopted numerous findings of the district court and the *en banc* court which were undisturbed.

with the specific purpose of providing its black students with separate and more limited educational opportunities, and has yet to significantly expand the role that HBIs play in its system of higher education.

61. For example, Maryland established the University of Maryland as a comprehensive university for white students, later operating Morgan State College and the Princess Anne campus for black students. It maintained its three white teachers colleges (Towson, Salisbury and Frostburg) separately from the two for black students (Bowie and Coppin). (PTX 69 ¶ 16.) As in Mississippi, when they were founded, Maryland's exclusively black universities were more limited in their assigned academic missions than their all-white peers, allowing the reasonable inference that "state funding and curriculum decisions throughout the period of *de jure* segregation were based on the purposes for which these institutions were established." *Fordice*, 505 U.S. at 740. Even though mission assignments were made without discriminatory purpose, the record in that case also demonstrated that "mission designations had the effect of maintaining more limited program scope at the historically black universities." *Fordice*, 505 U.S. at 741 (citing *Ayers*, 914 F.2d at 690).

62. The narrow institutional missions of the HBIs are reinforced by state law. The Maryland State Code reflects the elevated role that TWIs were assigned within the University of Maryland System. The University of Maryland College Park is designated the flagship campus with programs and faculty recognized for research and the advancement of knowledge, and students with "academic profiles that suggest exceptional ability." Md. Code Ann., Educ. § 12-106(a)(1)(iii)1.B. The school is to be provided with "the level of operating funding and facilities necessary to place it among the upper echelon of its peer institutions." *Id.* § 12-106(a)(1)(iii)1.D. Maryland also commits to "[m]aintain and enhance an academic health

center and a coordinated Higher Education Center for Research and Graduate and Professional Study in the Baltimore area” through the University of Maryland Baltimore and the University of Maryland Baltimore County. *Id.* § 12-106(a)(1)(iii)2. And Towson University is identified as “the largest comprehensive institution.” *Id.* § 12-106(a)(1)(iii)4.

63. By contrast, the only recognition of the HBIs in those statutory provisions is a reference to their racial identifiability. The state commits to “[e]nhance the historically African American institutions and recognize the role of the University of Maryland Eastern Shore as the State’s 1890 land grant institution.” *Id.* § 12-106(a)(1)(iii)5. The Maryland State Code does not assign Morgan State University a unique role in the state’s system of higher education. Morgan is assigned responsibility “with other educational institutions, for providing higher education research and graduate study in the Baltimore area.” *Id.* § 14-101. This role is duplicated by geographically proximate TWIs and can be contrasted with the designation of St. Mary’s College as a “public honors college.” *Id.* §14-401.

64. These statutory mission designations are insufficient to allow for comparable expansion of the program and curriculum offerings at Maryland’s HBIs. Consistent with their limited role and mission, the state has failed to assign as many new graduate programs at the HBIs as it did at the TWIs, impeding their ability to become comparable or competitive with the TWIs. For example, the evidence demonstrates that between 2001 and 2009, the TBIs introduced on average eight new graduate programs compared with twelve at the TWIs. (PTX 70 ¶ 51; Conrad Demonstrative 64.)

65. The limited role and mission of the HBIs corresponds to their relative placement in the Carnegie Classification system. This system is viewed as the leading framework for recognizing and describing institutional diversity in U.S. higher education. Institutions are

classified according to undergraduate and graduate instructional program classifications, enrollment profiles, undergraduate profiles, size, and settings. The record shows that by 2009, none of Maryland's HBIs were designated in the two highest levels of Carnegie classification (research universities), although University of Maryland College Park and University of Maryland Baltimore County were both so identified. Even the 2010 reclassification of Morgan State as a doctoral/research university does not significantly alter the overall clustering of HBIs at the masters' level. (Conrad Demonstratives 64, 66.)

66. Defendants suggest that these designations are driven by each institution rather than the State, and in any event that the designations are fluid. Even so, the evidence demonstrates that to the extent that an institution may be reclassified, even the recent promotion of Morgan State University and Bowie State University from Master's – Larger Programs to Doctoral/Research has not altered the overall clustering of TBIs at the lower levels, nor the absence of TBIs in the top two levels. (Conrad Demonstratives 64, 66.) The record further shows that such classifications, which reflect a school's research capacity, bear directly on an institution's ability to attract the research and development funding and faculty which support a growth in programs and thereby the ability to attract students of all races.

67. To the extent the HBIs are unique, it is in their assignment of a dual mission – the responsibility for providing a quality educational experience but also addressing the unique educational needs of all of Maryland's students, including those from families with traditionally less education and income, and who may be underprepared for college level work, not as a result of their abilities, but as a result of their circumstances. This public service aspect of an HBI's dual mission is disproportionately more important than it is at the TWIs, and comes with great costs. (PTX 2 at 120; 1/4/12 PM Trial Tr. 34 (T. Thompson).)

68. Maryland acknowledges that its HBIs serve a dual mission (2/1/12 AM Trial Tr. 48 (Newman); 1/24/12 AM Trial Tr. 91 (Kirwan)), and black students are in need of “more assistance from public funds than white students” given their economic circumstances. (PTX 17 at 68.) Even so, Defendants suggest that the HBIs voluntarily assume the role of serving a dual mission and may in fact abandon that dual mission at any time. The Court concludes, however, that this dual mission reflects the racial history of both the country and Maryland which denied the black population equal educational opportunity. (1/18/12 AM Trial Tr. 78 (Allen).)

69. State documents confirm that the limited role and institutional missions of its HBIs are traceable to the *de jure* era. In the 2006 Committee I Report, the committee found that the Maryland Higher Education Commission has an obligation to remedy all policies and practices traceable to its segregated system of higher education, including the “expansion of mission and program uniqueness and institutional identity” at its HBIs. (PTX 8 at 73.)

70. This Court therefore finds that in light of their more limited programmatic offerings, research capability and their dual mission, the roles and missions of the HBIs represent a policy or practice traceable to Maryland’s history of segregated higher education. Even today, the institutional missions of Maryland’s HBIs are not sufficiently expansive to ensure comparability with the TWIs. The HBIs have historically had relatively narrow missions and substantially fewer academic programs than majority campuses, limiting their attractiveness to students of all races. To a large extent, their missions continue to reflect the purpose for which they were founded – to provide modest educational opportunities for blacks. Rather than becoming more distinct, campuses have tended to become more duplicative of one another over time. (Conrad Demonstrative 103; PTX 856 at 29.)

71. As in *Fordice*, the institutional mission designations of Maryland's HBIs "have as their antecedents the policies enacted to perpetuate racial separation during the *de jure* segregated regime." 505 U.S. at 740. Even where such classification is made "without discriminatory purpose," the designations have "the effect of maintaining the more limited program scope at the historically black universities." *Id.* at 741. As the Court of Appeals stated: "inequalities among the institutions largely follow the mission designations, and the mission designations to some degree follow the historical racial assignments." *Ayers*, 914 F.2d at 692. As the Supreme Court concluded, "[t]hat different missions are assigned to the universities surely limits to some extent an entering student's choice as to which university to seek admittance." *Fordice*, 505 U.S. at 741. The same limitation is present on this record.

B. Maryland Maintains Traceable Policies and Practices Related to Duplication of Programs and Failure to Place Unique, High Demand Programs at the HBIs.

72. Program duplication is "part and parcel of the prior dual system of higher education." *Fordice*, 505 U.S. at 738. Indeed, "the whole notion of 'separate but equal' required duplicative programs in segregated schools, and the perpetuation of duplicative programs is a continuation of that practice. *Id.* Unnecessary program duplication occurs when geographically proximate HBIs and TWIs offer broadly similar academic programs that are not essential for the provision of general and specialized education in the core liberal arts and sciences at the undergraduate level. (PTX 70 ¶ 26.)

73. In order for racial desegregation to occur at HBIs and for them to attract, recruit and retain white students, they must be able to offer programs not available at the TWIs. The placement of "unduplicated high demand programs has a definite impact on the enrollment of

other race individuals at an otherwise racially identifiable institution.” *Knight v. Alabama*, 787 F. Supp. 1030, 1331 (N.D. Ala. 1991).

The location of such programs at the state’s HBUs should materially assist their desegregation. Likewise, the continued placement of high demand programs at the predominantly white institutions in close proximity to the predominantly black institutions has a restricting influence on the latter’s ability to attract white students and to meet their constitutional duty to desegregate.

74. *Id.* That court also held that federal oversight of the program approval process was “important to ensure the desegregation of the state’s predominantly black institutions” so that “program allocation does not impermissibly encourage or continue an institution’s racial identity.” *Id.*

75. Program duplication may be a traceable policy or practice, even though a state did not maintain such a policy during the *de jure* era. The Supreme Court so held even though Mississippi’s policy related to program approval involved a complicated, six-step review that had been adopted in 1980, long after the *de jure* era had ended. In addition, the Court recognized that even though Mississippi’s policy actually reduced overall program duplication, the very existence of program duplication is constitutionally impermissible even if it is the result of facially neutral policies or practices. *Ayers v. Allain*, 674 F. Supp. 1523, 1540-41 (N.D. Miss. 1987).

76. In *Fordice*, the Supreme Court noted that once plaintiffs demonstrate that program duplication is a current policy or practice, the burden shifts to the state to demonstrate that it has dismantled this aspect of its segregated system of higher education. *Fordice*, 505 U.S. at 738-39 (citing *Brown II*, 349 U.S. 294, 300 (1955)) (burden falls on the state and not aggrieved plaintiffs to establish it dismantled its prior *de jure* segregated system). Furthermore, some – if not all –

program duplication may be practicably eliminated in “the absence of any educational justification” for such duplication. *Id.* at 739 (citing *Ayers*, 674 F. Supp. at 1541) (duplication “cannot be justified economically or in terms of providing quality education”).

77. In *Knight*, the court identified program duplication at HBIs and HWIs in the same geographic area as a traceable policy that discourages whites from electing to choose an HBI. As the result of such policies, “whites can satisfy their curricular desires at HWIs, and cannot satisfy them at HBIs, thereby discouraging them from choosing to attend HBIs.” *Knight v. Alabama*, 14 F.3d 1534, 1541 (11th Cir. 1994).

78. “There is no doubt that Maryland operated *de jure* segregated public higher education programs 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.” (PTX 698 at 19.) Defendants actually admit that program duplication between Maryland’s HBIs and TWIs was “part and parcel” of Maryland’s prior dual system. (Feb. 12, 2010 Defs.’ Answers to Pls.’ First Req. for Admis. No. 2.)

79. Maryland therefore committed to avoid unnecessary program duplication and take appropriate steps to ensure that unique, high demand programs promote the competitiveness of its HBIs and their ability to attract students of all races. (PTX 4 at 37.) Yet Maryland has not avoided unnecessary program duplication or provided a meaningful number of new, high-demand, high quality programs at the HBIs. Instead, it tolerated program duplication.

80. A state may duplicate not just curricular programs, but entire institutions, as well. During the 1960’s and 1970’s, Maryland accelerated and invited the rapid growth in both the number of and enrollment at the state’s TWIs at the expense of its HBIs. The introduction of University of Maryland Baltimore County and the University of Baltimore, in addition to the

investments in the rapid expansion of Towson State University, not only resulted in the loss of white students from HBIs, but black students, as well. The result was that throughout the 1970's, desegregation was occurring but only in one direction – led by the influx of black students to Maryland's TWIs. This mirrors what the court deemed to be an unconstitutional practice in Alabama, where the state allowed University of Alabama and Calhoun State Community College in Huntsville and Auburn University and Troy State University in Montgomery to move into geographic competition with Alabama A & M University and Alabama State University while failing to provide the HBIs with the resources to fairly compete with those institutions. See *Knight v. Alabama*, 900 F. Supp. 272, 307 (N.D. Ala. 1995).

81. Plaintiffs have successfully demonstrated that the narrow programs at Maryland's HBIs today are the product of their historically limited missions. (1/18/12 AM Trial Tr. 65 (Allen).) For example, the teacher education programs available to black students were clearly inferior to those offered to whites. (PTX 17 at 86.) In addition, the land-grant program available at Princess Anne was "meager" compared with at University of Maryland College Park. (PTX 17 at 88.) Even after *Brown*, Maryland's policies and practices encouraged uneven program expansion at the predominantly black and white institutions, allowing its three white teacher's colleges to offer four-year programs while the two black teachers' programs did not. (PTX 21 at 32.) By 1962, two of the traditionally white schools had even expanded program offerings to include master's level degrees. (Conrad Demonstrative 22.) Meanwhile, Morgan State was an "undergraduate liberal arts college" which after state takeover resulted in no significant change in curriculum or function. (PTX 18 at 89.)

82. The evidence shows that an analysis of non-duplicated programs at HBIs as compared with TWIs between 2001 and 2009 shows that Maryland introduced 57 new, non-

duplicated programs at the HBIs compared to 137 new programs at the TWIs. (Conrad Demonstrative 67.) In both geographic regions analyzed – Baltimore and the Eastern Shore – the new programs approved at the TWIs outnumbered those at the HBIs. (Conrad Demonstrative 67.) In a statewide comparison, 24 of the programs introduced at the TWIs were high-demand, whereas only 4 programs approved at the HBIs were high-demand (Conrad Demonstrative 67), confirming that there is an absence of meaningful program uniqueness at Maryland's HBIs. (Conrad Demonstrative 70.)

83. Dr. Conrad analyzed the quality of programs at Maryland's HBIs and TWIs across a number of factors, including program offerings, degree levels, U.S. News and World Report rankings, retention rate, size of library collections, student selectivity, graduation rates, average faculty salary, percentage of faculty with terminal degrees, student faculty ratio, and faculty scholarship. In general, Maryland's HBIs perform below its TWIs on those criteria. (Conrad Demonstratives 83-94.)

84. More recently, Dr. Conrad analyzed unnecessary program duplication in Maryland between 2001 and 2009. (Conrad Demonstrative 60.) He found 18 new programs at TWIs which were unnecessarily duplicated at TBIs, of which 13 duplicated high-demand programs at TBIs. (Conrad Demonstrative 60.) During that same period, Dr. Conrad found 12 new programs at TWIs unnecessarily duplicated programs at TBIs in the Baltimore/College Park region. (Conrad Demonstrative 60.) Of those, 9 duplicated high-demand programs at TBIs. (Conrad Demonstrative 60.) He found limited duplication on the Eastern Shore due to the small number of non-core offerings. (Conrad Demonstrative 60.) In 2010, Dr. Conrad found more unnecessary duplication at the bachelor's and graduate level both statewide and in the Baltimore

region than he had observed in Mississippi back in 1994. (Conrad Demonstrative 82; *Ayers v. Fordice*, 111 F.3d 1183, 1218 (5th Cir. 1997).)

85. Unnecessary program duplication and few unique, high-demand programs have resulted in ongoing segregative effects at Maryland's HBIs. Without meaningful academic differentiation, white students choosing between a HBI and a TWI with similar programs are almost inevitably going to choose to attend an institution that does not have an explicit racial focus. (1/18/12 AM Trial Tr. at 89 (Allen).) Where there is unnecessary program duplication, student choice risks being governed by less academic considerations and more racial considerations. (PTX 661 at 8.)

86. Program duplication and the failure to place unique, high demand programs at Maryland's HBIs limits student choice as measured by student enrollment. Dr. Conrad explains that when Maryland's HBIs began offering graduate programs in the 1960s and 1970s, they were able to attract a fairly substantial number of white graduate institutions, demonstrating progress in the desegregation of the HBIs. (PTX 69 ¶ 63.) However, this trend has not sustained over the past three decades. White graduate enrollment at the HBIs "expanded to a high" in 1973 but declined significantly thereafter and has never regained its 1973 level. (PTX 69 ¶ 61.)

87. The effect of segregation at Maryland's HBIs is diminished overall quality in the education provided on those campuses which continue to struggle with more limited program offerings and program quality. Dr. Conrad specifically found "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." (PTX 71 ¶ 70.)

88. This simply confirms the conclusions of the state's own HBI Panel.

The current result of these longstanding past practices is that there exists a substantial lack of comparability and capacity . . . 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 process that has caused the inequities and lack of competitiveness between the HBIs and the traditionally white doctoral institutions.

89. (PTX 3 at 18.) The lack of infrastructure at Maryland's HBIs prevent them from competing in the marketplace and effectively delivering administrative services. (PTX 1 at 31.)

90. There are educationally sound and practicable alternatives to its policies related to programs identified in both the HBI Panel and the 2009 State Plan. The HBI Panel noted that 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," including the latest in university-wide technology and administrative support systems. (PTX 3 at 24.) The Panel found that while UMBC and UMCP have these elements of quality doctoral programs, Morgan State and UMES do not have those opportunities or support to the same or sufficient degree. (PTX 3 at 24.)

C. Maryland's Funding Policies and Practices are Traceable and Maintain Structural Inequities.

91. Plaintiffs have met their burden in demonstrating that Maryland's funding policies and practices with respect to operational funding and facilities follow and maintain structures inherent to the *de jure* era by systematically providing inadequate and inferior resources to the HBIs. Maintaining this separate but unequal system of higher education was a fundamental aspect of *de jure* segregation. The fact that Maryland's funding policies and practices perpetuate these inequities makes them traceable to state sanctioned segregation.

92. Drastic under-resourcing of Maryland's HBIs is an integral aspect of the formerly dual system of higher education. *See Fordice*, 505 U.S. at 739-40. Inequitable investment of resources in Maryland's HBIs was a consistent and highly effective method of limiting educational opportunity for blacks and maintaining segregated college campuses. A 1937 State commission found that 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." (PTX 17 at 146.) This was reinforced by another commission in 1947, which found that Maryland has consistently pursued a policy of providing higher education facilities to the HBIs inferior to those provided to whites, and that both the meager appropriations and inferior accreditation reflect that. (PTX 18 at 108.)

93. Maryland's funding practices are traceable because the state allocates funds based on university mission classifications defined by each school's Carnegie designation and those classifications follow their historic racial assignments. That framework provides the simplest way to identify the institutional mission of a school. While they are proposed by the university presidents and subject to MHEC (and USM) approval, the mission statements do not reveal what level of programs, degrees, or research information that they have. (PTX 660 at 13-14.) During the *de jure* era, the HBIs were authorized to offer lesser variety and a lower level of programs than the TWIs. The segregated, differentiated *de jure* roles of Maryland's college and universities are the "antecedents" of the current mission classifications. *See Fordice*, 505 U.S. at 740.

94. At its core, Maryland's funding formula is driven by the Carnegie mission classifications. The current funding formula sets a target funding level for each school based on comparator institutions. (PTX 324 at 12.) Maryland institutions are locked into the same

funding levels that correspond to their mission and Carnegie classification. This works to the disadvantage of the HBIs which are more biased toward teaching-oriented (rather than research based) missions and lead to lower levels of recommended funding. (PTX 324 at 13-14.) Inherent in these designations are the subordinate roles for the HBIs.

95. In addition, Maryland's funding policies are clearly traceable in that they are directly tied to the State's policy and practice of maintaining limited mission designations for the HBIs (as discussed above). The Maryland Code clearly specifies that both the operational and capital funding for Maryland's higher education institutions is based on institutional mission:

(c) Funding proposals for public senior higher education institutions shall include:

(1) Base funding in accordance with the role and mission of the institution, as approved by the Maryland Higher Education Commission ;

(3) Capital funding to support construction, operation, and maintenance of a physical plant that is consistent with each institution's mission.

Md. Code Ann., Educ. § 10-203.

96. This Court further finds that state funding support is not limited to appropriations. When drawing conclusions about equity in funding, "the amount of aggregated revenues (unrestricted or total) is more important than a single source of funds." (PTX 324 at 20.) Limiting this analysis to state appropriations is misleading. (1/11/12 PM Trial Tr. 15-16 (Vollmer).) Colleges and universities receive revenue from several sources, including tuition and fees, unrestricted revenues, and restricted revenues. (PTX 855 at 23.) Moreover, the Court rejects the contention that College Park should be excluded from this funding analysis. UMCP is not a substantive outlier because the state designation as a flagship is not tied to a specific,

unique attribute and the level of funding is not substantially different than that of the other schools. (2/8/12 AM Trial Tr. 5-6 (Toutkoushian).)

97. As the HBI Panel found, Maryland has not adequately funded the existing dual mission of its HBIs:

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.

....

The consequences of serving a higher percentage of students from low-income families include the following:

1. HBIs must expend a higher percentage of revenue toward student financial aid;
2. HBIs must charge lower tuition and fees because students cannot afford higher costs. Consequently, in FY 2007, the revenue from tuition and fees for HBIs is on the average \$1,500/FTE student less than that of TWIs (this analysis excludes UMUC and St. Mary's College because of their unique status);
3. The HBIs' graduation rates are less than that of the TWIs because of the challenges associated with graduating students from low-income families at the same rate as that of students from higher income families; and
4. HBIs must expend larger portions of their budgets toward developmental education and academic support than TWIs.

(PTX 2 at 124-25.)

98. Maryland's 2009 State Plan for Higher Education acknowledged that "[s]ubstantial additional resources are needed to ensure the State's public HBIs with their dual

missions are comparable to Maryland's TWIs in their capacity to be competitive." (PTX 1 at 31.)

99. Maryland has functionally acknowledged that it has failed to dismantle the vestige of discrimination as it relates to its funding formula. Maryland adopted the 2008 findings of its HBI Panel, including the findings that tie the inferior condition of the HBIs to past discrimination and underfunding. "There are many indicators to suggest that substantial additional resources must be invested in HBIs to overcome the competitive disadvantages caused by prior discriminatory treatment." (PTX 3 at 6.)

100. Commitment 9 of the 2000 Partnership Agreement specifically provided that Maryland enhance the HBIs to ensure they are "comparable and competitive with the TWIs in all facets of their operations and programs" to ensure that these institutions provide "equal opportunity for a quality education to all students who choose to attend them and to enable them to compete for and be attractive to students regardless of race." (PTX 4 at 35.)

101. *Knight's* application of *Fordice* is informative and confirms that Maryland's funding policies and practices are traceable. "If the past has been noted for inequitable allocations to institutions, so will the future – unless the formula is changed to ignore the inequities of the past." *Knight v. Alabama*, 787 F. Supp. 1030, 1207 (N.D. Ala. 1991). And while Maryland's funding policies and practices have evolved over time, they remain traceable as they continue the *de jure* practice of disadvantaging the HBIs by ignoring the impact of economies of scale and the increased remedial costs associated with the dual mission. Maryland's policies embeds the hierarchies of the *de jure* era in a new system.

102. Alabama's formula, like Maryland's, effectively based funding on the unequal distribution of resources established in the *de jure* era, preserving the *de jure* era hierarchy

between TWIs and HBIs. As the court stated, “all formulas are ultimately driven from some historic distribution of past resources. . . . If the past has been noted for inequitable allocations to institutions, so will the future – unless the formula is changed to ignore the inequities of the past.” *Knight*, 787 F. Supp. at 1207. And like Maryland, Alabama’s formula was traceable as it continued the *de jure* era practice of disadvantaging the HBIs by failing to address economies of scale or the increased costs of providing remedial education.

103. *Knight* also identified these two problematic aspects of Alabama’s funding formula. *First*, Alabama’s funding formula failed to account for economies of scale, which in general permits larger schools to educate students more efficiently and economically and which has the effect of systematically disadvantaging the state’s smaller HBIs. *Knight v. Alabama*, 900 F. Supp. 272, 311 (N.D. Ala. 1995). *Second*, the Alabama funding formula failed to account for the greater costs associated with providing remedial education to less prepared and economically disadvantaged students. *Knight*, 787 F. Supp. at 1200. The court contrasted Alabama’s policy with that in other states to justify ordering the state to triple the funding for remedial education. Both of these constitutionally suspect characteristics of Alabama’s funding formula are shared by Maryland’s current funding policy.

104. The court in *Knight* also noted that in Alabama as in most states, the funding and programs are intertwined. “Programs and funding have a symbiotic relationship; programs require money, but money follows programs, both formula-driven state monies as well as competitive monies.” *Knight*, 900 F. Supp. at 307.

105. Maryland may be required to take “necessary steps to ensure that [student] choice now is truly free” as it relates to the segregative effects of the state’s funding formula. *Fordice*, 505 U.S. at 743. *Knight* held that even 25 years of favorable funding to the HBIs does not

suffice to dismantle the dual system if it does not permit the HBIs to provide an education free from the stigma of past discrimination, such as “poor physical facilities and the tarnish of a reputation of [a] lack of quality education.” *Knight*, 900 F. Supp. at 308.

106. As in Alabama, Maryland found:

many indicators that suggest that substantial additional resources must be invested in the 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 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.

(PTX 2 at 119.)

107. *Knight* recognized the facilities at Alabama’s TWIs were far superior to its HBIs both functionally and aesthetically in ways likely to influence student choice. *Knight*, 787 F. Supp. at 1278-79. Plaintiffs have similarly shown that Maryland’s practice of providing inequitable and inadequate support for Maryland’s HBIs extends to facilities, as is evident by the inferior physical plants on those campuses.

108. In addition, as with Maryland, Alabama’s response to the explosive enrollment growth of the 1960’s, the state opted to create a new TWI and to expand another TWI rather than invest in its existing HBIs. The inevitable result was to deepen the disparities between the campuses. *Knight*, 787 F. Supp. at 1280.

109. Enhanced funding, even over an extended period, may still not satisfy the state’s obligation to dismantle the vestiges of segregation traceable to its discriminatory funding practices. Even though Alabama funded its HBIs at greater levels than its TWIs for over 25 years, the constitutional question is whether such funding has successfully eliminated the

second-class, inferior status of the HBIs. *Knight*, 900 F. Supp. at 307. Maryland's own Attorney General advised Maryland that "[e]nhanced funding has been a common element of post-*Fordice* higher education desegregation remedies," and that "[t]o the extent that enhancements are necessary to cure funding inequities traceable to *de jure* segregation, then they are constitutionally required." (PTX 698 at 28.)

110. Inequitable funding over a number of years "cannot be made up overnight." The cumulative effect of such deficiencies over a period of time affects a school's mission programs, facilities and reputation, "all of which can then change only very slowly." *Knight*, 900 F. Supp. at 311. Discrepancies tend to "grow and become embedded" over time. *Id.* "Of the major considerations that can affect raw financial comparisons – such as economy of scale, enrollment trends, and historical patterns – the historical patterns are the most important. This is because historical deficits tend to continue over a period of time, and become cumulative, which, of course, means they cannot be erased overnight." *Id.*

111. However one analyzes Maryland's funding formula over time, an examination of the missions, programs, facilities and reputations of the HBIs confirms that those institutions continue to be relegated an inferior status, "prevent[ing] white students who would otherwise attend an HBI, from choosing to do so." *Knight*, 900 F. Supp. at 307.

112. The court may look beyond direct state appropriations and tuition when assessing funding disparities. Insignificant or non-existent endowments result from historical underfunding of the HBIs. Better funded institutions generally attract better students, who in turn provide more endowment money to their alma mater. At the same time, black students who do attend HBIs may be less capable of donating if they are not professionally and economically successful. *See Knight*, 900 F. Supp. at 322.

113. As detailed in the preceding findings, Maryland's funding policies and practices continued and perpetuated the under funding of the *de jure* era. During the 1990s, for example, enrollment at Maryland's HBIs increased approximately 50%, far greater than at the TWIs. (PTX 835 at 6.) Yet Maryland changed its policies and practices in ways that prevented this enrollment growth from being properly supported with state resources. *First*, in 1988, Maryland designated UMCP as its flagship institution and began to provide it with increased funding, to the detriment of the HBIs. (2/8/12 AM Trial Tr. 5-6 (Toutkoushian), PTX 855 at 28); Md. Code Ann., Educ. § 12-106(a)(1)(iii). *Second*, in 1990, Maryland adopted a funding guideline that allocated resources based on an amorphous conception of "institutional mission" and de-emphasized enrollment growth. (1/11/12 AM Trial Tr. 77-78 (Vollmer).) This change gave Maryland "flexibility to divert more resources towards the University of Maryland College Park." (1/17/12 PM Trial Tr. 105-06 (Toutkoushian).) During the 1990s, Maryland's HBIs "would have benefited substantially" from a funding guideline that considered enrollments because of their increasing enrollments during that period. (1/17/12 PM Trial Tr. 37-38 (Toutkoushian).)

114. As a consequence of these policies and practices, between 1988 and 2000, Maryland's HBIs had smaller growth in the State's often touted measure -- state funding per FTE student -- than the TWIs, and for UMES the per-student funding actually decreased. (PTX 1010.) Maryland's failure to provide adequate state appropriations to HBIs during the 1990s had an "enormous" detrimental impact on their ability to attract non-Black students. (1/12/12 AM Trial Tr. 91-92 (Richardson).)

115. In fact, in 1998, Maryland's Larson Commission "examined the funding and allocation of State support since the establishment of USM." (PTX 563 at 103.) It concluded

that the HBIs were among the disadvantaged by Maryland's policies and practices. (PTX 563 at 214.)

116. The unfunded growth by the HBIs in the 1990s compounded the century of underfunding from the *de jure* era. It was exactly the opposite of the "catch-up funding" that was referenced in Maryland's 1991 report. (PTX 44.) As a result of Maryland's traceable policies and practices with respect to funding, the HBIs remained segregated and their students did not receive an equal educational opportunity as compared to students at the TWIs.

IV. MARYLAND HAS NOT DISPROVEN THAT ITS TRACEABLE POLICIES AND PRACTICES HAVE ONGOING SEGREGATIVE EFFECTS.

117. A segregative effect occurs when a policy or practice continues to foster segregation, or influences student enrollment decisions by substantially restricting, in a discriminatory manner, a person's choice of which institution to enter. *Fordice*, 505 U.S. at 731.

118. The bulk of the State's evidence was directed at the issue of whether the State's policies or practices were "traceable" under *Fordice*. There was ample evidence in the record that Maryland's policies and practices indeed have segregative effects *at the HBIs*. (See PTX 177 at 16 (white enrollment at four HBIs in the fall of 2008 was only 5.1%).) Each of the identified traceable policies and practices (mission, program duplication, and funding) have resulted in ongoing segregative effects.

119. *First*, in the case of limited institutional missions, there was ample evidence that such policies have ongoing segregative effects. An institution's mission is key to attracting other race students because mission tends to drive the ability of an institution to pursue advanced and specialized programs as well as to develop the widest range of curricular functions. *Fordice*, 505

U.S. at 741. In turn, limited missions constrain the competitiveness of historically black universities. *Id.*

120. Mission designations, even when adopted after the era of *de jure* segregation, may effectively fix the scope of programmatic offerings available at each university. *See Ayers v. Fordice*, 111 F.3d 1183, 1210 (5th Cir. 1997). More importantly (and especially when combined with unnecessary program duplication), limited institutional mission often interferes with student choice and perpetuates segregation. *Fordice*, 505 U.S. at 741. Broader missions that may lead to greater funding and programmatic offerings that respond to the particular needs and interests of local populations promote student choice and therefore the desegregation of HBIs. *See Ayers*, 111 F.3d at 1213-14.

121. Maryland's current policies and practices with respect to the limited institutional mission of the HBIs hamper their ability to offer comparable and competitive programming which might attract other race students who are instead drawn to more competitive and geographically proximate TWIs.

122. *Second*, as summarized in the preceding findings, program duplication and the failure to institute unique high demand programs at the HBIs has led to segregative effects. As the court held in *Knight v. Alabama*, the location of unduplicated, high demand programs at HBIs "should materially assist their desegregation." 787 F. Supp. at 1331. Similarly, "the continued placement of high demand programs at the predominantly white institutions in close proximity to the predominantly black institutions has a restricting influence on the latter's ability to attract white students and to meet their constitutional duty to desegregate." *Id.* The record here demonstrates that white enrollment at the HBIs has been hampered by duplicative programs at the TWIs and the lack of unique high demand programs at the HBIs. Maryland has not carried

its burden of proving that its program duplication policies have had no segregative effects. Certainly Maryland has not proven that its program allocation policies do not impermissibly “encourage or continue an institution’s racial identity.” *Id.*

123. *Third*, in the case of HBI underfunding, the record indicates that such policies and practices have had segregative effects. The drastic under-resourcing of black institutions was another keystone structure of the dual *de jure* system. *Knight*, 787 F. Supp. at 1091. Moreover, it is indisputable that funding and facilities both have a strong influence on student enrollments. *See id.* at 1271-72. While the parties may have presented conflicting evidence as to whether year-to-year allocations were equitable to the HBIs, the record is clear that such funding was not sufficient to “overcome the effect of past discriminatory under funding” of the HBIs. *Id.* As such, this lack of funding has failed “to provide an education today free from the stigma of past discrimination such as poor physical facilities and the tarnish of a reputation of lack of quality education.” *Id.* Facilities have “a definite influence in terms of student enrollments.” *Id.*

124. As in *Knight*, this Court finds that the underfunding of Maryland’s HBIs has unquestionably had segregative effects. In *Knight*, the court found that although Alabama had been giving its HBIs significantly favorable support for 25 years, the State had not satisfied its constitutional obligations. As in Maryland, the HBIs had not been raised to a level of quality from which they could compete with TWIs for students and desegregate. Accordingly, traceable funding policies existed and resulted in segregative effects. *Knight*, 900 F. Supp. at 307-11. The *Knight* court held that the test was not whether funding had improved, but whether such funding had undone the vestige of *de jure* segregation, which was the maintenance of the second-class status of the HBIs and the attendant segregative effects. The court found it had not:

[S]uch funding has not yet put those institutions in the place they would have been but for their black heritage and the *de jure* system. Formula funding, like Alabama's system, is the effect of cumulative past history. . . . In particular, the lack of funding and, the concomitant dearth of high quality and/or differentiated programs prevents white students who would otherwise attend an HBI, from choosing to do so.

Id. at 307 (citations omitted). Here as in *Knight*, the record demonstrates segregative effects in that the funding of the HBIs has been kept at a level that “prevents white students who would otherwise attend an HBI, from choosing to do so.” *Id.*

V. EDUCATIONALLY SOUND AND PRACTICABLE ALTERNATIVES WITH LESS SEGREGATIVE EFFECTS

125. Having found traceable policies and practices still in force that have discriminatory effects, such policies must be “reformed to the extent practicable and consistent with sound educational practices.” *Fordice*, 505 U.S. at 729.

126. As this Court has previously stated, it is not sufficient for the State to claim “good faith” in terms of the practicability inquiry. (June 6, 2011 Summary Judgment Opinion (Docket No. 242) at 5-6.) While the State has invoked *Grutter v. Bollinger*, 539 U.S. 306 (2003) in its defense, the question whether a current state policy creates intentional discrimination is an “entirely separate question” from whether a current policy is a vestige of prior *de jure* discrimination that has continuing segregative effects. (Summary Judgment Opinion at 5 (citing *Knight v. Alabama*, 14 F.3d 1534, 1545 (11th Cir. 1994).) In addition, even though *Grutter* concedes a degree of deference to a university’s “educational judgment,” that deference merely informs this third prong of the *Fordice* analysis -- it is in no way dispositive. Rather, “the State retains the heavy burden of proving that a segregative policy traceable to prior *de jure* segregation has a ‘sound educational justification’ and cannot be ‘practicably eliminated.’” (Summary Judgment Opinion at 6 (citing *Fordice*, 515 U.S. at 731).) Indeed, “[w]here the State

can 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.” *Fordice*, 505 U.S. at 744 (O’Connor, J., concurring) (quoting *Green v. Cnty. Sch. Bd. of New Kent Cnty., Va.*, 391 U.S. 430, 439 (1968)).

127. Educationally sound remedies further typical state higher education goals related to college participation and access to opportunity. They should encourage compliance and involve minimal judicial oversight. Ultimately, the remedy should bring the state and its higher education system into compliance with Title VI and *Fordice*. *Knight*, 900 F. Supp. at 284-85.

128. Practicability requires the court to assess not just the costs and benefits of a remedial policy, but the risks and returns as well. A practicable remedy would appear to be one which is most likely to “achieve the remedial purpose in the future.” *Id.* at 285.

129. Questions of educational soundness and practicable alternatives that are less discriminatory must be evaluated in light of the overall burden on the State to overcome the system of *de jure* segregation. A showing that a state policy is “educationally sound” is insufficient. As the *Knight* court held:

Under *Fordice*, a state can be required to change even educationally sound practices where they have been found to be vestiges of segregation with continuing segregative effects. Only where there are *no* alternative remedies that are practicable and educationally sound is the state defendant relieved of its obligation to remedy the vestiges’ effects.

130. *Knight*, 14 F.3d at 1546 (citing *Fordice*, 505 U.S. at 729).

131. The Court finds that the remedies outlined by plaintiffs’ expert, Dr. Allen, are practicable and consistent with sound educational policies. The Court will invite the parties to provide the Court with a supplemental submission regarding implementation of Dr. Allen’s proposed remedies at a date to be determined by the Court.

VI. THERE IS NO SOUND EDUCATIONAL JUSTIFICATION FOR MARYLAND'S TRACEABLE POLICIES AND PRACTICES

132. Defendants have the burden of proof in showing that there are no less segregative alternatives to the traceable policies and practices. As such, Plaintiffs' response brief will address in detail the arguments made by defendants on this issue. For now, plaintiffs set forth some relevant facts below.

A. Proximate Universities with Duplicative Programs Lacks Justification

133. "HBI and TWI public institutions in the Baltimore area and on the Eastern Shore, [are] a stone's throw from one another, [they are] closely proximate and closely located." (1/18/12 AM Trial Tr. 43-44 (Allen).) Every HBI is within 11 miles of a TWI. (1/5/12 AM Trial Tr. 120-121 (Allen).)

134. The maintenance of universities with duplicative programming is a vestige of the *de jure* era: "[I]t was clear that the originating justification [for locating schools in such proximity] had to do with trying to create separate educational streams and sites for Maryland's black and white populations." (1/18/12 AM Trial Tr. 44 (Allen).)

135. As a result of this proximity, there is a high-level of program, and a result, resource duplication among Maryland schools. This level of program duplication (and, as a result, low-level of program uniqueness) does not comport with best practices in higher education. (1/18/12 AM Trial Tr. 62-64 (Allen).)

136. "[G]iven the unrealized potential of the HBIs, the maintenance of these institutions, particularly in light of the unnecessarily duplicative programming and limited missions of several schools, [is] inconsistent with best practices in higher education." (1/18/12 AM Trial Tr. 44 (Allen).)

137. In order to preserve the viability of Maryland's higher education system as a whole, at some point in the future Maryland may wish to consider institutional merger. However, such merger can only take place after the individual institutions are strengthened under the proposals presented here. (1/18/12 AM Trial Tr. 85-86 (Allen).)

B. The Partnership Agreement Outlines Measures Necessary to Desegregate

138. By signing the Partnership Agreement, Maryland acknowledged that it needed to remove the vestiges of its *de jure* system. (1/11/12 AM Trial Tr. at 35 (Oliver).)

139. The Partnership Agreement provided sound, educational measures by which Maryland committed to remove these vestiges. These measures included enhancing the missions of the HBIs, creating new programs at the HBIs, eliminating unnecessary program duplication between HBIs and TWIs, and providing funding sufficient to enable HBIs to be comparable and competitive with TWIs in all facets of operation. (PTX 4 at 36-38.)

140. Mr. Oliver, who was Chairman of MHEC and signatory to the Partnership Agreement on behalf of the State, described the commitments as educationally sound, practical, and very achievable: "We felt they were very practical because we really, with the amount of effort that went into the negotiations, the parties that were involved, we really had a clear sense that these commitments, these obligations could be fulfilled, and they were practical ones. Because it was our belief, particularly my belief, that otherwise they wouldn't be in the agreement. . . . They were very achievable." (1/11/12 AM Trial Tr. at 36-37 (Oliver).)

141. Despite the practicability of these commitments, as well as the Partnership Agreement's prohibition on unnecessary program duplication, Dr. Conrad identified *18 new* programs at TWIs that unnecessarily duplicated programs at HBIs while the agreement was in effect. Plaintiffs' remedy expert, Dr. Allen, reviewed the academic program files for these

programs because former Secretary of Higher Education, James Lyons, described such files as the best resource for determining the basis for a program's approval. (1/18/12 AM Trial Tr. 46-47 (Allen).) Dr. Allen did not review additional files as part of his analysis as they were not made available by defendants during discovery. (1/18/12 PM Trial Tr. 3-4 (Allen).)

142. After a review of the program files, Dr. Allen determined that the justifications contained therein were so minimal that he was led to conclude "Maryland's justifications for unnecessary program duplication... lacked merit." (1/18/12 AM Trial Tr. 47 (Allen).)

143. Dr. Allen described the justifications noted by Maryland in the files as vague and repetitive, stating: "So, for example, looking at that first program approved, what we see in that program and in the subsequent programs is a kind of repetition of the notion that the programs—I'll just quote—the program demonstrates potential for success, an essential factor in making this decision. To be honest, that justification was, at best, superficial, and it just simply lacked the kind of rigorous merit that would be implied and called for from the earlier touchstones I referred to, coming from the Attorney General, coming from the Supreme Court." (1/18/12 AM Trial Tr. 47-48 (Allen).)

144. The lone exception was the program file for the joint MBA program at UB and Towson. There, the justification was more extensive, but nonetheless limited to the reason "that there would be an expanded demand for the program, which would justify creation of a new program." (1/18/12 AM Trial Tr. 49 (Allen).)

145. Dr. Allen concluded that this justification, like the others, was neither sound nor persuasive for two reasons. First, "the projected expansion was something that was really minimal...fewer than 20 students a year over a five-year period." (1/18/12 AM Trial Tr. 49-50 (Allen).) In addition, there was no analysis of expanding the program at Bowie or Morgan -- the

region's HBIs -- despite the fact that Morgan had expressed interest in meeting the new demand. (1/18/12 AM Trial Tr. 50-51 (Allen).)

146. Dr. Allen also reviewed spreadsheets produced by MHEC to OCR that provided reasons for their approval of programs. There, he also found that the justifications offered were too minimal to rise to the level of a sound, educational justification: "The justifications provided in that column were, in my judgment, minimal. They would cite the Code and add a cryptic expansion, a verbal expansion, for example, citing the Code for the reason of approval, approving the certificate in advance study of early childhood education by Towson University, which that program then represented unnecessary program duplication of a program already operating at Coppin. It simply said that it met the Code, and it was at degree level, and not taking up in any kind of serious way that I could tell, or that was apparent in the file, this issue of duplication." (1/18/12 AM Trial Tr. 52 (Allen).)

147. Tellingly, Defendants have offered no documentary evidence to justify their approval of any particular program that Dr. Conrad identified as unnecessarily duplicated.

C. HBI Panel Confirmed No Sound Justification for Segregative Policies

148. Seven years later, the HBI Panel was charged with ensuring that Maryland's HBIs are comparable and competitive with the TWIs. This Panel also determined that Maryland's current system of higher education lacks sound educational justification.

149. The HBI Panel acknowledged that "HBIs are providing an invaluable service to the state in its commitment to helping underserved students, and in preparing African-Americans for the Maryland workforce." (PTX 2 at 124.) Despite this important role, the Panel concluded that Maryland's prior treatment of its HBIs through the "the process by which [it] sets university missions, approves new programs, funds them through some model or process, and then holds

universities accountable for results. . . . 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.” (PTX 2 at 129.)

150. The HBI Panel further acknowledged that the State has not given the HBIs adequate resources to fulfill their missions: “HBIs historically and into the future have a dual mission. They are committed to the traditional mission of any institution of higher education to provide a quality educational experience and guide students to the attainment of an undergraduate degree. HBIs in the state of Maryland also have as their mission to address the educational needs of students who come from families with traditionally less education and income and who are often under prepared as a result of their circumstances -- not their abilities -- for college level work. Helping these under-prepared students earn a bachelor's degree is central to the HBI mission.” (PTX 2 at 120.) The Panel emphasized that “this function for the HBIs is disproportionately more important than in the TWIs.” (PTX 2 at 120.) Yet, Maryland's “HBIs are not funded at appropriate levels to carry out both parts of this mission at once.” (PTX 2 at 124.)

151. Even more critically, the HBI Panel concluded that “[t]here 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 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. Indeed, one can reasonably assume that had the state consistently treated HBIs over their lifespan in a manner comparable to the treatment of TWIs, the HBIs would currently be

competitive with other public institutions in these and other aspects of their operations both at the undergraduate and doctoral levels.” (PTX 2 at 119.)

152. Notably, the HBI Panel examined many of these “competitive disadvantages caused by [the State’s] prior discriminatory treatment” of its HBIs, and specifically recognized that “the substantial lack of comparability, and therefore the inability to be competitive, exists both in terms of the institutional platform upon which doctoral programs must be built and sustained, and with respect to the quality and nature of the specific doctoral programs offered by [Morgan and UMES].” (PTX 2 at 119, 129.)

153. The HBI Panel explained that “quality doctoral universities require 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 described above that are the hallmarks of quality doctoral programs. MSU and UMES have not had that opportunity and support to the same or sufficient degree.” (PTX 2 at 135.)

154. The HBI Panel also noted that Morgan’s “develop[ment] as a quality doctoral university has been slower than the other doctoral institutions in the state. [] [E]ven taking into account scale and uncertainty over intended specific missions, the data show that MSU has been slower to develop as a graduate/doctoral university than UMBC over roughly the same period . . . UMBC gained clear direction by the 1980s in terms of institutional role within the state” while

MSU developed “without the support of a state strategic plan that delineated and directed specific state support of its graduate mission.” (PTX 2 at 132.)

155. As recognized by the HBI Panel, “what is most important at this juncture” is for Maryland to “remedy both the lack of comparability among the doctoral institutions and restructure the process that has caused the inequities and lack of competitiveness between the HBIs and the traditionally white doctoral institutions.” (PTX 2 at 129-30.)

156. As such, the HBI Panel recommended educationally sound measures to make Morgan comparable and competitive with its TWI counterparts: “The Panel believes that the doctoral programs at MSU should have the support needed to become quality doctoral programs according to accepted standards of quality for doctoral programs of the kind offered by MSU. Equally important, Morgan should have the resources required to mount the kind of university-wide institutional platform needed, and generally expected in the higher education community, to support quality and competitive doctoral programs and quality doctoral universities.” (PTX 2 at 132.)

157. The Panel made similar recommendations to make UMES “comparable and competitive within each institutional category,” including the creation of a “detailed strategic plan designed to improve its institutional platform and the specific doctoral programs [UMES] offers to make them comparable with those of similarly situated quality institutions.” (PTX 2 at 139.)

158. In addition to acknowledging the lack of sound educational justifications for the segregative features of the HBIs’ doctoral programs, the Panel addressed the capital challenges faced by Maryland’s HBIs. The Panel recognized that “[a]ll institutions have unmet capital needs. However, the Panel wishes to make a special case for addressing the needs of HBIs both

as a priority and as expeditiously as possible. We recommend this not only out of our first-hand findings that the HBIs visibly lag behind the TWIs but also because addressing this deficiency is crucial to achieving the goals of capacity and competitiveness of the HBIs in both undergraduate and graduate education.” (PTX 2 at 140.)

159. Maryland admits that the content of the HBI Panel Report was accurate. (1/18/12 PM Trial Tr. 81 (Reid).)

D. 2009 State Plan Similarly Requires Removing Vestiges of Segregation

160. Like the HBI Panel Report, Maryland’s 2009 State Plan for Higher Education recognized that HBIs have a dual mission and the large number of low income and educationally underserved students in need of financial assistance and other support services at the State’s HBIs. (1/18/12 PM Trial Tr. 74-75 (Reid))

161. Maryland admits that the State Plan recommended enhanced funding, in addition to the amount then provided, to the public HBIs to enhance access to the state’s diverse citizenry. (1/18/12 PM Trial Tr. 74-75 (Reid).)

162. The State Plan stated the following about the need to provide enhanced resources for the HBIs:

163. Substantial additional resources are needed to ensure the State’s public HBIs with their dual missions are comparable to Maryland’s TWIs in their capacity to be competitive with respect to the following areas:

Recruiting, retaining, and graduating an academically, racially, culturally, and ethnically diverse student body;

Attracting and retaining quality faculty able to teach, conduct scholarly activities, and perform services consistent with each institution’s mission;

Generate external revenue by securing contracts and grants from Federal and State agencies that support instructional services and enhance institutional infrastructure and facilities; and

Form partnerships with businesses and foundations that expand educational opportunities

(PTX 1 at 31.)

164. Maryland endorsed the State Plan's recommendation for the State to provide substantial additional resources to the HBIs -- over and above what has already been provided -- in order to promote a higher level of academic achievement for all students attending those schools. (1/18/12 PM Trial Tr. 75-76 (Reid).)

165. To that end, Maryland "identified as a priority for higher education the goal of providing the funding necessary to ensure that its four public HBIs . . . are comparable and competitive with the State's public TWIs." (PTX 1 at 30.) Maryland further recommended that it "[a]ccelerate funding for public HBI capital priorities that build institutional capacity related to comparability and competitiveness," and "develop the institutional platform at the public HBIs and identify doctoral programs for targeted development." (PTX 1 at 33-34.)

166. Notably, Maryland explained in the 2009 State Plan that "the investment of substantial additional resources by the State needed to ensure that its public HBIs are comparable and competitive with its public TWIs refers to the sum total of resources needed to deliver on the HBIs' 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." (PTX 1 at 32.)

167. Maryland has agreed with and endorsed the recommendation in the 2009 State Plan that it should develop the institutional platform at the public HBIs for the targeted

development of doctoral programs at those institutions. (1/18/12 PM Trial Tr. 76 (Reid).) Moreover, Maryland has admitted that even as of 2009, this platform did not exist at HBIs. (1/18/12 PM Trial Tr. 76-77 (Reid).)

168. Despite this agreement, Maryland did not follow the 2009 State Plan's recommendations for the development of strategic plans to address recommendations, collaboration between MHEC and the public HBIs to develop capacity and outcome indicators to measure comparability and competitiveness, or ensuring adequate financial aid at the HBIs. (1/18/12 Trial Tr. 80-81 (Reid).)

E. The Partnership Agreement, 2009 State Plan, and HBI Panel Report Echo Recommendations in Maryland's Historic Reports to Enhance the HBIs

169. The recommendations articulated by Maryland in the Partnership Agreement, 2009 State Plan, and HBI Panel Report regarding the importance of the comparability and competitiveness of HBIs for desegregation are consistent with the recommendations set forth by Maryland decades earlier in the 1974 Task Force Report to the Maryland Council for Higher Education and the 1981 Consultants' Report to the Desegregation Task Force of the State Board for Higher Education.

170. The 1974 Maryland Plan, which was submitted by Maryland to the U.S. Department of Health, Education and Welfare's Office of Civil Rights, called for the establishment of a task force "to propose ways of enhancing the role and image of the predominantly Black public colleges in the State." (PTX 22 at 5.)

171. The 1974 Task Force concluded "that certain inequities and disadvantages which can be attributed to insufficient State fiscal support in terms of per capita wealth and public

attitudes about all higher education in Maryland, have been faced particularly by Black colleges since their beginnings.” (PTX 22 at 8.)

172. Recognizing the disparities faced by the HBIs, the 1974 Task Force identified measures to enhance Maryland’s HBIs. In particular, the Task Force recommended that Maryland fund the HBIs “beyond the conventional funding . . . to allow the historically black colleges to further enhance their role and image, and to develop integral management systems to achieve greater efficiency in realizing institutional objectives.” (PTX 22 at 9.)

173. The Task Force also recommended that Maryland’s HBIs be given the resources necessary to develop their “own specialty areas or programs within the total state system of higher education that will broaden the appeal of the institution to a more diverse student body.” (PTX 22 at 20-21.) Indeed, the Task Force emphasized that “[a]dequate planning funds must be allotted for the research and development aspects of these specialty programs to assure that their implementation will enhance institutional academic excellence.” (PTX 22 at 20-21.)

174. Similarly, in 1981, Maryland recognized that desegregation of the State’s HBIs necessarily required enhancement of the institutions. Specifically, Maryland acknowledged that “the concept of enhancement requires a state to ensure that historically black institutions have the facilities, quality and range of programs, degree offerings, faculties, student services and other resources comparable to those at traditionally white institutions having similar missions.” (PTX 40 at 9.) To provide enhancement to the HBIs, the 1981 Report advised determining “what financial resources need to be allocated to the historically black institutions in order to permit them to offer academic programs of equal quality to historically white institutions.” (PTX 40 at 1, 10.)

175. The 1981 Report further recommended that Maryland prioritize the “expansion and improvement of the science and laboratory facilities on the Bowie, Coppin, Morgan and UMES campuses [because] . . . the inadequacies in life and physical science laboratories stand out as the greatest current need. These facilities, designed and constructed primarily for teacher education, are simply not adequate or appropriate for proper instruction and research in modern techniques.” (PTX 40 at 50.) The 1981 Report also recommended that Maryland place emphasis “upon immediate and substantial improvement in the residential facilities at Bowie, Morgan and UMES.” (PTX 40 at 51.)

176. The 1981 Report concluded that Maryland’s HBIs have suffered from Maryland’s practice of inadequate funding. (PTX 40 at 245.) As such, the Report acknowledged the need for Maryland to set aside funding in its annual appropriation/budget for the HBIs to maintain and replace instructional equipment, and recommended that “a rehabilitation/renovation funding formula be established for buildings, based on age, condition, type of construction and use.” (PTX 40 at 50.)

VII. REMEDY

A. Partnership Agreement Provides Plan for Removing Vestiges of Segregation

177. The Partnership Agreement outlined the steps Maryland had to take in order eliminated the vestiges of its *de jure* system. (1/11/12 AM Trial Tr. at 35 (Oliver).)

178. Plaintiffs urge the Court that remedies outlined in the Partnership Agreement are still viable today. “[R]emedies including expanded missions, unique, non-duplicated, high demand academic programs and additional funding at the HBIs will attract qualified students of all races and ethnicities to Maryland’s HBIs.” (1/18/12 AM Trial Tr. 39 (Allen).)

179. *First*, HBIs must be given unique academic program emphases and exclusivity. Unnecessary program duplication between HBIs and TWIs should be eliminated and Maryland should develop new and unique programs at the HBIs and merge and/or transfer select high demand programs from TWIs to HBIs as a means of helping to create identities that are academic and institutional. (1/18/12 AM Trial Tr. 85 (Allen).) Defendants' own expert, Dr. Hossler, agrees that unique programs can attract other-race students at HBIs. (2/6/2012 PM Trial Tr. 58 (Hossler).)

180. *Second*, Maryland should engage in judicial review of new academic programs that are challenged as unnecessarily duplicative, and engage or require ombudsman or ombudsperson review of existing programs to identify opportunities for enhancement and expansion. (1/18/12 AM Trial Tr. 85 (Allen).)

181. *Third*, in the area of funding, Maryland should replace the current Funding Guidelines to account for the dual missions assigned HBIs, provide increased endowment funding for each HBI, supplement state appropriations to address current needs and historic funding disparities, and provide the HBIs with all the facilities enhancement necessary to support the implementation of new and expanded academic programs. (1/18/12 AM Trial Tr. 85 (Allen).) Dr. Hossler similarly agrees that money would increase other-race enrollments at HBIS and, in particular, financial aid would have the biggest impact on student choice between those institutions. (2/6/2012 PM Trial Tr. 56, 60 & 66 (Hossler).)

B. Remedies Articulated in the Partnership Agreement Would Benefit the USM

182. If the remedies articulated in the Partnership Agreement are implemented, many benefits will flow not just to the HBIs, but also to the university system as a whole: "Development of new, unique programs at HBIs would serve *multiple interests in the goal of*

creating a unitary system among TWIs and HBIs in the Maryland public higher education system. First and foremost these programs would represent significant enhancements for HBIs, adding new ideas, faculty, students, resources and academic rigor. These programs would also ensure the ability of HBIs to attract white and other non- black students who would be drawn by the attractive, unique, high demand academic program offerings. Finally, these programs would play essential roles in refinement of the institutional identity of HBIs, broadening their identity to encompass academic program characteristics.” (PTX 661 at 8.)(emphasis added)

183. Program offerings not only influence an institution’s academic identity, but also influence the diversity of an institution and thereby its racial identifiability (or lack thereof). “[S]ome of the factors that drive the choices of white students who attend historically black colleges [are] convenience[,] . . . where the school is located relative to where they live, but [there is] a sizeable impact from the kinds of programming and majors that are offered at the institution.” (1/18/12 AM Trial Tr. 112 (Allen).)

184. Program uniqueness translates in a practical sense into more students clamoring to attend that institution and the ability to attract students of all races since this is simply a more attractive set of opportunities with respect to student choice. (1/18/12 AM Trial Tr. 64 (Allen).) “[W]hite students choosing between an HBI and a TWI with similar programs is almost inevitably going to choose to attend the institution that does not have an explicit racial focus on students of a racial group different than their own. The remedy is to refine the institutional identity, to create academic foci and specialties for HBIs. Maryland ought to give selected program emphases and program exclusivity to HBIs.” (1/18/12 AM Trial Tr. 89 (Allen).)

185. The presidents of the HBIs have corroborated that the role of programs in enhancing institutional diversity: “[T]he president of Morgan State, Dr. Wilson, and the

president of Eastern Shore, Dr. Neufville, [testified] that high-demand programs translate into the attraction of non-black students” to HBIs. (1/18/12 AM Trial Tr. 91 (Allen).)

C. Expanded Missions & Programmatic Niches are Necessary at HBIs

186. Dr. Allen’s testimony included a number of specific remedial recommendations with respect to missions and programmatic identifies at HBIs. In particular, he testified that expanding the missions of the HBIs is necessary to increase their available program offerings: “TWIs . . . have distinctive institutional identities based on program offerings, and that mere fact has allowed program development and expansion consistent with advancing those missions. HBI missions, on the other hand, have not been sufficiently inclusive to ensure comparable program development and expansion relative to TWIs.” (1/18/12 AM Trial Tr. 65 (Allen).)

187. Dr. Allen advised that “[b]y refining the institutional identity, Maryland can create academic foci and specialties for the HBIs. To this end, Maryland ought to give selected program emphases and program exclusivity to HBIs in Maryland. Program emphasis simply means that an institution is assigned major responsibility for a program area by degree level. Program exclusivity is similar, but it assigns sole responsibility to a HBI in a designated program area based on degree classification.” (PTX 662 at 11.) One form that these proposed emphases and exclusivities can take is program niches, assigned to Maryland’s HBIs.

188. Specifically, Dr. Allen recommend that: “[e]ach HBI should develop programmatic niches or areas of excellence in at least two high-demand clusters within the next three to four years. Within each niche, at least three to four new programs, including at least two programs at the graduate level, should be offered. The programs would be primarily unique, that is non-duplicated, but in some instances would also include non-unique programs already

operating at TWIs that are essential to supporting the newly-created niche.” (1/18/12 AM Trial Tr. 90 (Allen).)

189. The following are niches suggested by Dr. Allen as illustrations of what could be implemented at the HBIs:

Proposed Program Niche: Green Sustainability Studies[:]
Green/Sustainability studies: Programs in this area explore sustainable development, environmental policies, ethics, ecology, landscape architecture, city and regional planning, economics, natural resources, sociology, and anthropology as well as the ways these traditional disciplines interact with one another in today’s world. Advanced study may include specializations such as sustainable urban and rural policy applications, material development and application, and the implications of current technological, economic, and cultural trends.

(PTX 856 at 52.)

Proposed Program Niche: Computer Sciences and Systems/Information Sciences/Networking Administration [:]
Computer Sciences and Systems/Information Sciences/Networking Administration: Areas of study that focus on the current applications of computing, computer science, and information science and systems. Advanced study in this area could include research aimed at theoretical advancement as well as application of knowledge and skills for the workplace.

(PTX 856 at 54.)

Proposed Program Niche: Interdisciplinary Center for Applied Aging Studies [:]
Interdisciplinary Center for Applied Aging Studies: The field of gerontology and later-life study focuses on the human aging process and/or aged human populations. Advanced study in this and related fields will increasingly need to harness the knowledge and methodologies of the social sciences, psychology and the biological and health sciences to better support and improve the quality of life and experience of the aged.

(PTX 856 at 56.)

Proposed Program Niche: Hospital and Health Care Facilities Management and Administration [:]
Hospital and Health Care Facilities Management and Administration: Degree programs in Hospital and Health Care Facilities Management and Administration prepare individuals to develop, plan, and manage health care operations and services within health care facilities and across health care systems.

Degree programs in this area variously offer instruction in planning, business management, fiscal management, public relations, human resources management, health care systems operation and management, health care resource allocation and policy making, health law and regulations, and applications to specific types of health care services.

(PTX 856 at 58.)

Proposed Program Niche: Public/Urban Health/Community Nurse/Nursing Administration [;] Public/Urban Health/Community Nurse/Nursing Administration: Degree programs that prepare students for careers in Public and Urban Health, Community Nursing, and Nursing Administration fulfill a range of societal needs. By housing a number of degree-related programs under one roof, degree programs may include the study of community and rural health, family therapy and intervention, disease prevention, health education, and community health assessment as well as administrative functions overseeing these diverse activities.

(PTX 856 at 60.)

Proposed Program Niche: Center for Holistic, Therapeutic, and Recuperative Health and Wellness [;] Center for Holistic, Therapeutic, and Recuperative Health and Wellness: Degrees in the traditional Western medicine include Physical Assistant, Occupational, and Physical Therapist programs that prepare professionals with the skills necessary to practice medicine, diagnose and treat, and recommend or prescribe therapies under the supervision of a physician. In the most general system, professionals in these overlapping fields often work on the front lines of medicine, caring for individuals in special or underserved populations, promoting ergonomics, environmental health, and the design and implementation of therapeutic interventions to promote individual and community fitness and health.

(PTX 856 at 62.)

Proposed Program Niche: Criminal/Public Justice Administration and Forensic Studies [;] Criminal/Public Justice Administration and Forensic Studies: Degrees in this niche prepare professionals for a range of careers related to keeping society just and safe through extensive training in enforcement law. Such programs provide individuals with up-to date knowledge and the capacity to apply the correctional sciences, organizational and administrative strategies, leadership skills, and the science behind the latest forensic techniques.

(PTX 856 at 64.)

D. Programmatic Remedies are Consistent with Scholarship on Desegregation

190. Scholars agree that unique, high-demand programs will attract larger numbers of white students at HBIs. For instances, scholars Brenda Hall and Rosemary Closson report, “Master’s program offerings in high-demand fields attract larger numbers of White students, often at much higher rates than undergraduates.” (Conrad Demonstrative 42; PTX 759 at 1.)

191. In addition, the Journal of Blacks in Higher Education has reported that “[o]ther [historically black] universities have instituted curriculum changes that are particularly appealing to white students.” (Conrad Demonstrative 44; PTX 779 at 3.)

192. Finally, a 1972 study concerning the reason white students select black colleges and universities was performed at the five predominantly black colleges and universities in the State of North Carolina. The results of the study indicated that fifty-seven percent of responders felt the courses and degrees offered were relevant to their goals; and forty-five percent were influenced by the low cost of their institution. (PTX 848 at 10.)

E. Transfers of Programs to HBIs Should Supplement Programmatic Remedy

193. Dr. Allen testified that transfers are also factors to consider in addition to elimination of duplicative programs. Specifically, rather than create programs anew at HBIs, the Court should consider “transfer or merger, for example, of select high-demand programs from TWIs to the HBIs to allow them to support programmatic development and the creation of an identity that is in addition to the racial identity.” (1/18/12 AM Trial Tr. 103 (Allen).)

194. Former Maryland Secretary of Higher Education, Dr. Lyons, confirmed that Maryland has authority and the capability for such a transfer and for program mergers.” Such transfers and mergers are steps that can reshape the mission and role of an institution. (1/18/12 AM Trial Tr. 107 (Allen).)

195. Dr. Lyons also testified he was aware of a proposed transfer of the UB Law School to Bowie and that the transfer was supported in many aspects by the remarks from the Maryland State Attorney General, making the point that such a transfer was feasible and could be reasonably undertaken. (1/18/12 AM Trial Tr. 105 (Allen).)

196. Similarly, the creation of collaborative programs through the wide use of resources to enhance the quality of current and newly developed programs at the HBIs would provide effective and creative methods of enhancing the HBIs' programs. As Dr. Allen explained: "For example, Morgan and Towson might launch a collaborative program where students at Towson, on successful completion of their undergraduate degree, automatically are admitted to the master's program at Morgan." (1/18/12 AM Trial Tr. 102 (Allen).)

F. Effective Public Relations is Necessary to Accompany Programmatic Change

197. Finally, Maryland will need to make its citizens aware of the changes within the University System. To do so, an enhanced public relations campaign for the university system will support desegregation. "[P]ublic relations, this is another very key and important point. There have to be public relations initiatives to introduce the public, with particular emphasis on student consumers, to the new structures and programming, and opportunities that are available under this newly emerging unitary system, making it clear that out of that restructuring has come new opportunities, new identities, and new realities in term of how we think about the different campuses in the system." (1/18/12 AM Trial Tr. 104 (Allen).)

CONCLUSION

The Court finds that plaintiffs have demonstrated policies and practices traceable to the prior *de jure* system that continue to foster segregation. Maryland's policies and practices with respect to missions, program duplication, and funding are traceable and continue to have

segregative effects. Those policies and practices lack can be practicably eliminated. In short, Maryland has failed to satisfy its burden of proving that it has dismantled its prior system and remains in violation of the equal protection clause under *Fordice*.

Dated: June 7, 2012

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

Jon Greenbaum (*pro hac vice*)
Brenda Shum (*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

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*)
2513 Gadsby Place
Alexandria, VA 22311
Telephone: (832) 687-3007
Email: jbrittatty@comcast.net