

SUMMARY OF PROCEEDINGS AND STATUS OF THE CASE

***Coalition for Equity & Excellence in Maryland Higher Education, et al. v. Maryland Higher Education Commission, et al.*, Civ. No. 06-2773-CCB (U.S. District Court, District of Maryland)**

Commencement of the Trial and Issues Presented

On Tuesday, January 3, 2012, United States District Court Judge Catherine C. Blake heard opening arguments from the parties in the above-referenced case filed by the plaintiff Coalition. The trial was held to determine (1) whether the State of Maryland continues to perpetuate its former *de jure* segregated and discriminatory system of higher education in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution as defined by *Brown v. Board of Education* and its progeny, including the landmark *United States v. Fordice* decision governing the desegregation of such systems of higher education, *Title VI of the Civil Rights Act of 1964*, and other applicable civil rights laws, (2) whether vestiges of the former dual system of higher education remain in place and unremedied, (3) the extent and impact of continuing policies and practices that are traceable to the former dual system which foster discrimination and perpetuate segregated conditions in Maryland's higher education, and (4) whether the State's four Historically Black Institutions (HBIs) are comparable to and competitive with the State's Traditionally White Institutions (TWIs) in all facets of their operations in programs, a remedy necessary to ensure that the HBIs are competitive, viable choices for all students, regardless of race, and that these institutions provide an equal opportunity for a quality education for the students who choose to attend them. On that same day, the Court began to hear testimony from witnesses presented by the plaintiff Coalition in its case in chief. That testimony continued through Thursday, January 19. On Monday, January 23, the State of Maryland began to proffer witnesses in its defense. The court received testimony through Thursday, February 9.

The Coalition and Its Asserted Claims

The Coalition is comprised of students, alumni and supporters of Bowie State University, Coppin State University, Morgan State University, and the University of Maryland Eastern Shore. Mr. David J. Burton is the Coalition's president. Primarily, the Coalition asserts that throughout history and up to the present day, Maryland has maintained a racially segregated system of higher education and has systematically and purposefully engaged in a pattern and practice of racial discrimination that harms African American and other students who attend the HBIs and that has prevented the HBIs from achieving parity with their TWI counterparts. The lawsuit seeks equality between the State's HBIs and TWIs to ensure that all students attending the State's public colleges and universities receive a quality education. In this sense, parity must be reached in terms of missions and academic programs, facilities and resources necessary to support missions and programs, and funding where a cumulative funding deficiency for the HBIs has reached \$2.1 billion. The Coalition is represented by the law firm of Kirkland & Ellis and the Lawyers' Committee for Civil Rights Under Law. The legal team is led by Michael D. Jones (Kirkland) and Jon Greenbaum (Lawyers' Committee).

The State and Its Asserted Defenses

In its defense, the State has acknowledged Maryland's history of *de jure* segregation, but asserts that it has fulfilled its obligations to dismantle that system, that there are no remaining vestiges, policies or practices traceable to that segregated system, and that the State has no legal obligation to enhance the HBIs or make them comparable to or competitive with the State's TWIs, including facilities, academic programs and funding. The State further asserts that in the process of dismantling its dual system of higher education, it has vastly improved the four HBIs and more than compensated for the inequities of the past, claiming that per pupil funding proportionate to each institution of higher education in Maryland favors the HBIs. Moreover, it asserts that the "variables of context, change and choice" have removed the State from further liabilities in this matter and, specifically, that any remaining segregation and inequities are the result of demographic changes in the State and the effects of general societal discrimination beyond the State's control. The State is represented by the Venable Law Firm and the Office of the Attorney General of Maryland with the lead attorneys being Kenneth Thompson and Craig Thompson (Venable) and Carolyn Skolnik (OAG).

Presentation of Testimony and Evidence Received

Going directly to the core of the Coalition's case in chief, the Court has received significant, substantive and meticulous testimony detailing the continuing inequities in Maryland's system of higher education and the persistent gap between the capacities of the State's HBIs as compared to the TWIs. Specifically, the Coalition has detailed specific policies and practices that are traceable to the former *de jure* segregated system that continue to this day and which perpetuate discrimination against African American students at the HBIs and segregation among institutions of higher education. These policies and practices include those which govern or impact the designation and distinctiveness of the HBIs' missions and academic programs, the breadth and expanse of academic program inventories at the HBIs, and the continued unnecessary duplication of academic programs at the HBIs by geographically proximate TWIs. As well, these policies and practices impact whether the HBIs have new, unique and high demand academic programs necessary to enhance these institutions, achieve parity and eliminate segregated conditions among institutions and programs. Also at issue are policies and practices that affect the ability of the HBIs to provide facilities, faculty, funding and other essential resources necessary to support their missions and academic programs, and to provide the foundations upon which the HBIs ensure student access, retention and graduation.

The Court received testimony from an array of witnesses presented by the Coalition, including expert witnesses qualified in each of these areas, the sitting presidents of each of the State's four HBIs (Dr. David Wilson (Morgan), Dr. Mickey Burnim (Bowie), Dr. Reginald Avery (Coppin), Dr. Mortimer Neufville (UMES)), administration officials from the HBIs, the former presidents of Morgan State University and the University of Maryland Eastern Shore, the president of the Coalition (Mr. David Burton), students and alumni of the HBIs, and former State officials from the Maryland Higher Education Commission. Specifically, the group of witnesses included Dr. Earl S. Richardson (Morgan) and Dr. Thelma Thompson (UMES), Dr. Maurice Taylor, Dr. Joseph Popovich and Mr. Raymond Vollmer (Morgan), Mr. John "Jake" Oliver and Dr. Ann Emory (MHEC), Dr. John Sabatini (Assistant Secretary for Academic Affairs), Dr.

Chris Heidelberg and Mr. Anthony Robinson (Morgan alumni), and Ms. Muriel Thompson (Morgan student). The Coalition's expert witnesses include Dr. Clifton Conrad, Dr. Robert Toutkoushian, Dr. Harvey Kaiser, and Dr. Walter R. Allen.

Witnesses appearing for the State in defense included Dr. Danette Howard (Interim Secretary of Higher Education), Dr. William "Brit" Kirwan (Chancellor of the University System of Maryland), Dr. James Passmore and Mr. Joe Vivona (USM Vice-Chancellors for Administration and Finance), Dr. Jonathon Gibraltar (President, Frostburg State University), Dr. Susan Aldridge (President, University of Maryland University College), Dr. Janet Dudley-Eshbach (President, Salisbury University), Dr. Robert Bogolmony (President, University of Baltimore), Dr. Freeman Hrabowski (President, University of Maryland Baltimore County), Dr. Robert Caret (former President, Towson University), Mr. Kevin O'Keefe (former MHEC Chairman), Dr. Sue Blanshan (MHEC Assistant Secretary for Academic Affairs), Mr. Geoffrey Newman (MHEC Director of Finance and Facilities), and Mr. David Treasure (Director of Budget Analysis, Maryland Dept. of Budget and Management) . The State proffered expert witness testimony from Dr. Allen Lichtman and Dr. Donald Hossler.

Conclusion of the Trial

At the conclusion of the testimony on February 9, the Court agreed to schedule post-trial briefing and the parties subsequently provided written argument summarizing the law and applying it to the facts in evidence, including proposed Findings of Fact and Conclusions of Law and responsive briefs. On October 19, the Court received closing arguments presented orally by the parties in the courtroom. At that point, the trial concluded and the matter was submitted for consideration and judgment by the Court.

Opinion and Ruling of the Court

In a *Memorandum Opinion* issued on October 7, 2013, the Court made findings of fact and conclusions of law holding the State of Maryland liable for maintaining and perpetuating a separate and unequal system of higher education that is segregated by race in violation of the United States Constitution and the Civil Rights Act of 1964. Remedies will be required. *Mem. Op.* at 3. Specifically, the Court ruled that the State fosters discrimination by race and perpetuates segregated conditions in its universities by and through its continuing policies and practices regarding the approval of academic programs and the unnecessary duplication of academic programs at the HBIs by geographically proximate TWIs.

Moreover, the Court found that "[t]oday, Maryland's HBIs remain racially identifiable", *Mem. Op.* at 20, and that "to the extent the Coalition has proven that this racial identifiability continues to be perpetuated by State policies traceable to the *de jure* era, the State is liable for the continued segregative effects of those policies", leaving in place "policies rooted in its prior officially segregated system that serve to maintain the racial identifiability of its universities." *Mem. Op.* at 22 (citing *United States v. Fordice*). Specifically, "the Coalition has proven that unnecessary program duplication continues in Maryland, to the detriment of its HBIs, and is traceable to the *de jure* era". *Mem. Op.* at 44. "Accordingly, it is the Court's conclusion that the extensive program duplication in Maryland is a traceable vestige of the *de jure* era, that it

continues to exacerbate the racial identifiability of Maryland's HBIs by limiting their competitiveness in program offerings, and that there is no sound educational justification preventing the mitigation of this duplication." *Mem. Op.* at 59.

The Court concluded not only that the State's unnecessary program duplication is widespread and "comparable to, and in some cases more pronounced than, the duplication found in Mississippi during the *Fordice* remand proceedings that held the state liable for failing in its desegregation efforts", *see Mem. Op.* at 44, 46, but that, as a result, "there had been an intensification of the HBIs' racial identifiability over the past twenty years." *Mem. Op.* at 53. As such, Maryland has a "dual structure of higher education" which "prevents the HBIs from attracting non-black students, perpetuating the racial identifiability of the HBIs." *Mem. Op.* at 47. Given the large disparity in the number of unique, high demand programs between the TWIs and the HBIs (e.g. 122 to 11), there is "nothing that really distinguishes [the HBIs] . . . programmatically" and Maryland's dual structure, and concomitant harm to the HBIs, "is a direct result of a continuing failure of the State to address the *de jure* era policy of duplicating programs to maintain a dual, segregated system." *Mem. Op.* at 47-48.

Exemplary of the Court's conclusions that Maryland has systematically undermined the HBIs through the unnecessary duplication of academic programs and, in some instances, institutions, which "problem of duplicative institutions in Baltimore has never been addressed", the Court found that in lieu of investing in the HBIs to create competitive, diverse and desegregated institutions, the State instead (a) developed and heavily invested in Towson University, (b) created, developed and heavily invested in the University of Maryland Baltimore County, (c) acquired and brought the private University of Baltimore into the Maryland system of public higher education, (d) developed, invested in and expanded the University of Baltimore to include freshmen and sophomore classes, (e) continued to approve and allow unnecessary program duplication despite promising to discontinue this practice in the 2000 *Partnership Agreement Between the State of Maryland and the U.S. Department of Education, Office for Civil Rights*, and (f) approved and allowed the duplication of Morgan State University's MBA program at TWIs over the objection of Morgan and OCR and despite the advice and counsel of the Office of the Attorney General that such action on the part of the State was illegal. *See Mem. Op.* at 9-10, 30-31, 47-52.

Maryland "did not follow through" on its commitments in the Partnership Agreement to "avoid further unnecessary program duplication" and to create and develop "unique, high-demand academic programs at the HBIs". *Mem. Op.* at 49. Moreover, "the State has never dismantled the *de jure* era duplication of programs that facilitated segregation – and it has maintained policies and practices that have even exacerbated this problem." *Mem. Op.* at 49-50. Likewise, "MHEC has not effectively addressed unnecessary program duplication", its purported safeguards "are only forward facing – they do not address the substantial duplication that existed since, essentially, the beginning of Maryland's system of higher education", "the State offered no evidence that it has made any serious effort to address continuing historic duplication" and "even more troubling, the State has failed to prevent *additional* unnecessary duplication, to the detriment of the HBIs." *Mem. Op.* at 50-51. The State's "maintenance and exacerbation of this proximate program duplication, as described above, 'does not comport with best practices in higher education'", *Mem. Op.* at 58, and "the effect of unnecessary duplication on enrollment

demographics at Maryland's HBIs has been proven by the Coalition to be more than *de minimus*." *Mem. Op.* at 55, n.13.

"In light of the State's liability on the issue of program duplication," the Court set forth a framework for remedies, *Mem. Op.* at 59-60, as follows:

- (1) eliminate and further avoid unlawful unnecessary duplication of academic programs;
- (2) expand mission and program uniqueness and institutional identity of the HBIs, requiring both the enhancement of existing program offerings at the HBIs and the development of new, high-demand programs that will not be duplicated at the TWIs;
- (3) develop programmatic niches of areas or areas of excellence in, at a minimum, two or more high demand clusters within the next three to four years as a starting point, which new programmatic niches will have the capacity to spin-off newly created programs well into the future without the detrimental impact of unnecessary duplication or the potential of unnecessary duplication at the TWIs;
- (4) transfer specific programs from the TWIs to the HBIs to remedy specific violations of law and to advance the larger remedial requirements to maintain a desegregated system of higher education that operates in compliance with the law; and
- (5) merge specific programs and institutions where essential to effectively meet these same desegregation obligations.

Upon inclusion of each of these essential elements of a remedy, the Court further offers that "the creation of collaborative programs through the wide use of resources to enhance the quality of current and newly developed programs at the HBIs may be *an additional effective and creative method of enhancing the HBIs' programs*." *Mem. Op.* at 60 (emphasis added). Likewise, the remedial framework infers providing adequate resources to the HBIs necessary to ensure successful implementation of the remedy, including, but not limited to, funding, facilities, faculty, staff, recruiting and marketing; the permanent reform of State education policies and practices necessary to fully implement the remedy; and sufficient oversight and monitoring mechanisms necessary to ensure successful implementation of the remedy.

The Court ordered the parties to attempt to negotiate a remedy consistent with this framework. It retained jurisdiction to enter a negotiated remedial order or to hold a remedial phase of the trial, upon which the Court will order a remedy and enter final judgment.