IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THE COALITION FOR EQUITY AND EXCELLENCE IN MARYLAND HIGHER EDUCATION, INC., et al.,	)	Trial Date: Jan. 3, 2012
Plaintiffs,	)	
v.	)	Civil No. 06-2773-CCB
MARYLAND HIGHER EDUCATION COMMISSION, et al.,	)	
Defendants.	)	

DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Date: June 6, 2012

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Defendants Maryland Higher Education Commission ("MHEC"), the State of Maryland, the Secretary of Higher Education and the Chairperson of MHEC (collectively "MHEC" or "the State") submit these proposed findings of fact and conclusions of law.

I. Procedural History of Case

1. Plaintiffs, The Coalition for Equity and Excellence in Maryland Higher Education ("the Coalition") and several individuals (collectively "the plaintiffs"), sued MHEC, the Secretary of Higher Education, and MHEC's chairperson in 2006 alleging violations of Title VI of the Civil Rights Act of 1964[1] and the Equal Protection Clause of the Fourteenth Amendment.[2] The State of Maryland was added as a defendant in 2010.

[1] Section 601 of Title VI provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied benefits of,

2. The plaintiffs claim that the State has failed to dismantle certain aspects of its prior *de jure* segregated system of public four-year colleges and universities. MHEC disputes these claims. After extensive discovery and a narrowing of the issues over several years of pre-trial litigation, MHEC filed motions for summary judgment. The court granted the motions in part and denied the motions in part, and in its opinion order established a legal framework for trial. (Dkt. 242.) That order disposed of a number of claims, including those relating to intentional discrimination, capital funding, recruitment, admissions, retention and graduation. (Dkt. 242 at 9 and 8, n.10.) Plaintiffs previously had abandoned claims relating to academic and teacher preparation programs, partnerships with elementary and secondary schools, and partnerships between the four-year institutions and community colleges. (Dkt. 171 at 3-4, n. 10.) Prior to trial, plaintiffs disposed of more claims, stipulating that Maryland's public non-historically black institutions ("non-HBIs") are able to recruit and retain diverse faculty and staff, and that plaintiffs neither claim that there are vestiges of the *de jure* segregated system at Maryland's non-HBIs nor that Maryland has failed to desegregate its non-HBIs. (Dkt. 272 at 31, 33.)

3. Thus, when the trial began on January 3, 2012, the plaintiffs' case was limited to claims that the State maintained policies traceable to the *de jure* era that

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or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

[2] The plaintiffs' rights under Title VI are coextensive with, but no greater than, their rights under the Equal Protection clause. *See Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001).

continue to have segregative effects today in three areas: operational funding, program duplication, and limited institutional mission. The court did permit plaintiffs to present limited evidence regarding capital funding and construction to the extent that such evidence was relevant to one of the three remaining areas. (Order, Dkt. 279 at 2.) The parties presented 37 testifying witnesses over the course of a six-week trial. Thereafter, the parties submitted proposed findings of fact and conclusions of law.

4. After consideration of the evidence and exhibits admitted at trial and the parties' post-trial submissions, the court's decision follows.

II. Background

5. In an earlier period of its history, the State of Maryland operated a system of higher education that was segregated by law.

6. In 1954, the United States Supreme Court decided *Brown v. Board of Education*, 347 U.S. 483 (1954), the landmark decision in which the court declared unconstitutional state laws establishing separate public schools for black and white students.

7. Later, the Supreme Court ruled that all states that operated segregated school systems must dismantle them, "root and branch." *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430, 438 (1968).

8. In *U.S. v. Fordice*, 505 U.S. 717 (1992), the Supreme Court set out the standards applicable to states that once operated systems of higher education that were segregated by law.

9. *Fordice* established a three-part test to determine whether a state "has perpetuated its formerly *de jure* system in any facet of its institutional system." *Id.* at 728.

10. First, the burden is on the plaintiff to identify a current state policy that is "traceable to the State's prior *de jure* segregation." *Id.* at 729. A current policy that is "traceable" to a state's prior *de jure* segregation is derived from, a continuation of, rooted in, or has as its antecedent "decisions that were made or practices that were instituted in the past for segregative reasons, thus rendering it a vestige of segregation." *Knight v. Alabama*, 14 F.3d 1534, 1540 (11th Cir. 1994).

11. Second, once the plaintiff has identified a current, traceable policy, the burden shifts to the defendant to show that the policy does not continue to foster segregation, "either in influencing student enrollment decisions or by fostering segregation in other facets of the university system." *Fordice*, 505 U.S. at 731.

12. Third, if the policy does foster segregation, the defendant must show that the policy has a sound educational justification and cannot practicably be eliminated. *Id.*

13. According to the fourth amended complaint, the plaintiffs in this case are students and alumni of one of Maryland's four historically black universities (the HBIs"),

a high school student, and the Coalition for Equity and Excellence in Maryland Higher Education.[3]

14. Plaintiffs contend that Maryland's alleged failure to make HBIs "comparable and competitive" to what they call Maryland's "traditionally white institutions" ("TWIs") (also referred to as "non-HBIs") is a violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-4a.[4]

15. Here, the court need not reach the second and third parts of the *Fordice* analysis because plaintiffs have not identified a policy or practice in Maryland's current system of higher education that is traceable to the era of *de jure* segregation.

16. The evidence shows that none of Maryland's current policies has a segregative effect, but even if one did, plaintiffs cannot satisfy the first part of the *Fordice* test merely by pointing to an effect without identifying the traceable policy that brought about that effect.

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[3] All of the plaintiffs who testified at trial were affiliated with Morgan State University, and none was a student, former student, or prospective student of any of Maryland's other three HBIs.

[4] Plaintiffs also allege a violation of their constitutional rights under the Fourteenth Amendment, but because they have not alleged a claim under 42 U.S.C. § 1983, they fail to state a constitutional claim upon which relief can be granted. The Fourteenth Amendment itself "does not create a cause of action"; instead, § 1983 "creates a statutory basis to receive a remedy for the deprivation of a constitutional right." *Hughes v. Bedsole*, 48 F.3d 1376, 1383 (4th Cir.), *cert. denied*, 516 U.S. 870 (1995).

17. Under *Fordice*, the threshold element can be satisfied only by proof of current policies and practices that have segregative effects and can be traced to the days of *de jure* segregation. In *Fordice*, the lower courts ultimately found after remand from the Supreme Court that Mississippi's policy of awarding non-resident fee waivers and certain scholarships to out-of-state children of alumni had "present segregative effects" in that the policy resulted in "the disproportionate award of such scholarships to white students." *Ayers v. Fordice*, 111 F.3d 1183, 1209 (5th Cir. 1997). The court went on to conclude, however, that Mississippi's policy did not violate the Constitution because the policy was not "traceable" to the era of *de jure* segregation. *Id.* The fact upon which the *Fordice* plaintiffs relied – that blacks had been excluded from the historically white institutions during the *de jure* period – "without more, does not establish the traceability of the alumni element of the present non-resident fee waivers." *Id.* In rejecting the plaintiffs' claim, the court stated: "In effect, plaintiffs seek relief for 'present discriminatory effects without addressing whether such consequences flow from policies rooted in the prior system. The Supreme Court has rejected this position.'" *Id.* (citing *Fordice*, 505 U.S. at 730 n. 4).

18. In this case, the evidence presented by plaintiffs fails to identify a current policy or practice that is traceable to the *de jure* era. Instead, as made particularly clear by the testifying plaintiffs, their case focused relentlessly, and almost exclusively, on their belief that Maryland's HBIs, as institutions, are disadvantaged.[5]

[5] This assertion is unsupported by the evidence, discussed below, concerning the State's current funding of HBIs relative to non-HBIs.

19. That claim is not cognizable under *Fordice*. It is not institutions, but student choice, that the Supreme Court, in *Fordice*, deemed to be entitled to Constitutional protection. During the six weeks of trial, the court heard considerable testimony from plaintiffs' witnesses about the historically black institutions that are part of Maryland's public system of higher education, but the court heard little or nothing from those witnesses about the students enrolled in that system. That the lingering effects of *de jure* segregation might still affect a given institution is not a violation of law: "Current policies and practices (as distinguished from lingering disparities in institutional development per se) implicate the Fourteenth Amendment only insofar as they are traceable to the prior system and continue to have segregative effects, either by influencing student choice or otherwise." *Ayers*, 111 F.3d at 1210.

20. Applicable law does not support the plaintiffs' contention that defendants have violated federal law by allegedly failing to make Maryland's HBIs "comparable and competitive" with its non-HBIs.[6] Indeed, the plaintiffs' conception of "comparable and

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[6] In 1978, the Office of Civil Rights ("OCR") published Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education ("Criteria"). *See* 43 Fed. Reg. 32, 6658-64 (Feb. 15, 1978). The Criteria called for expanding non-black enrollment at HBIs by enhancing HBI campuses and offering unique, high-demand academic programs at HBIs.

Thereafter, in 1992, the United States Supreme Court decided *Fordice*, which made no reference to "enhancement" of institutions or establishment of "unique" or "high demand" programs. The focus of *Fordice* was students, not the institutions that served them. The OCR issued a Notice of Application of Supreme Court Decision ("Notice"). *See* 59 Fed. Reg. 4271 (Jan. 31, 1994). The Notice reaffirmed that "all states with a

competitive" is reminiscent of the principle and practice rejected as unconstitutional by the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483.

21. The vast majority of African American post-secondary school students in Maryland do not attend an HBI. Of African American students attending a public, four-year institution of higher education, 59 percent attend a non-HBI. (Wilson (President of Morgan State University) Trial Tr. vol. 1, 75, Jan. 4, 2012; DX 146, at 10.)[7] If one includes all public and private, non-profit four-year institutions, as well as community colleges, 81% of Maryland's African American students attend non-HBIs. (DX 146, at 10-11.) Moreover, African Americans make up a significant portion of the 29,125 students enrolled in Maryland private career schools and the 11,349 students enrolled in out-of-state institutions that operate in Maryland. (*Id.* at 9, 41.)

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history of *de jure* segregated systems of higher education have an affirmative duty to ensure that no vestiges of the discriminatory system are having a discriminatory effect on the basis of race," and stated that such a requirement was "the standard set out in *Fordice*." *Id.* In addition, OCR stated that it *might* require some states to "strengthen and enhance traditionally or historically black institutions" and that such a requirement was "*consistent with Fordice*." *Id.* (emphasis added). In other words, the OCR acknowledged that while the Supreme Court and the Constitution did not prohibit state enhancement of HBIs, they also did not mandate it.

This court has already ruled that Maryland's alleged failure to fulfill the terms of the Partnership Agreement is a contractual dispute that only the OCR, the other party to the agreement with Maryland, can press, and that plaintiffs have no standing to enforce the terms of the Partnership Agreement. (Mem. and Order Re: Contract Claim, Dkt. 57, August 20, 2008.)

[7] Volume 1 refers to the a.m. portion of the trial transcript.

22. Public higher education in Maryland currently is provided by (1) sixteen community colleges; (2) eight regional higher education centers; (3) Morgan State University ("Morgan"), a doctoral research university and an HBI; (4) St. Mary's College of Maryland, a small liberal arts college; and (5) the University System of Maryland, which is made up of 11 schools, including 3 HBIs. (Howard (Interim Secretary of MHEC) Trial Tr. vol. 1, 20-21, Jan. 23, 2012; *see generally* Md. Code Ann., Educ. (hereinafter "Educ.") Titles 10, 12, 13, 14 and 16).

A. Maryland Higher Education Commission

23. MHEC was established by the Maryland General Assembly in 1988. (1988 Md. Laws, ch. 246.)

24. MHEC is responsible for advising the Governor and General Assembly on statewide higher education policy and conducting statewide planning for higher education. (Educ. § 10-207.)

25. MHEC coordinates and arbitrates among the public and private segments of higher education. *Id.* Thus, in addition to overseeing the public institutions of higher education, MHEC is responsible for oversight of private career schools and independent institutions. (Howard Trial Tr. vol. 1, 20-21, Jan. 21, 2012.)

26. MHEC's coordination duties include approval of programs at institutions, review and recommendation on budgets, review of mission statements, data collection, scholarship distribution and performance accountability. (*Id.* at 20-27; Educ. §§ 10-207; 11-105.)

B. The University System of Maryland

27. The University System of Maryland (sometimes referred to as "the USM") was created by the Maryland General Assembly. (Educ. § 12-102.)

28. The schools that make up the USM are: Bowie State University ("Bowie"); Coppin State University ("Coppin"); Frostburg State University ("Frostburg"); Salisbury University ("Salisbury"); Towson University ("Towson"); University of Baltimore ("UB"); University of Maryland, Baltimore ("UMB"); University of Maryland, Baltimore County ("UMBC"); University of Maryland, College Park ("UMCP"); University of Maryland Eastern Shore ("UMES"); and University of Maryland University College ("UMUC"). (Educ. § 12-101.)

29. UMES, Bowie and Coppin are the University System of Maryland's HBIs.

C. Morgan State University

30. When the USM was created, Morgan argued successfully that it should not be part of the USM. (PX 563, at 38-42 (Report of the Task Force to Study the Governance, Coordination, and Funding of the University System of Maryland, Interim 1998); Kirwan Trial Tr. vol. 2, 38-40, Jan. 23, 2012.)[8]

31. Accordingly, Morgan is governed by its own Board of Regents, the members of which are appointed by the Governor.[9] (Educ. § 14-102; *see also* Richardson

[8] Volume 2 refers to the p.m. portion of the trial transcript.

[9] St. Mary's College of Maryland also has a separate governing board, the Board of Trustees of St. Mary's College of Maryland. (Educ. § 14-402.) All other four-year

(former president of Morgan) Trial Tr. vol. 1, 51; vol. 2, 10, Jan. 12, 2012; Wilson Trial Tr. vol. 2, 57, Jan. 3, 2012; Howard Trial Tr. vol. 1, 20-21, Jan. 23, 2012.)

32. Because it is not part of the USM, Morgan is able to manage its affairs independently and directly advocate for its needs with the Department of Budget and Management ("DBM"), the Governor and the General Assembly. (Richardson Trial Tr. vol. 1, 51; vol. 2, 10, Jan. 12, 2012; *see also* Taylor (vice president of university operations at Morgan) Trial Tr. vol. 1, 14, Jan. 11, 2012; Treasure (director of Maryland Office of Budget and Management) Trial Tr. vol. 2, 52-53, Jan. 30, 2012; Educ. §§ 11-105 (i), 14-104; State Fin. & Proc. § 3-602 (c).)

33. Morgan also has authority to issue its own bonds. (Newman Trial Tr. vol. 1, 33, Feb. 1, 2012.)

III. Summary of Conclusions

34. While support and enhancement of the HBIs is an aspiration to which the State has demonstrated a commitment and toward which it has taken significant steps, nothing in the Constitution or in federal law requires that the State provide HBIs with the enhanced funding plaintiffs seek.[10] It is undisputed that segregation operated to the

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public institutions are governed by the Board of Regents of the University System of Maryland. (Educ. § 12-102 (b).)

[10] In fact, the evidence on relative funding, discussed below, demonstrates that the State, although not required to do so, has provided significantly greater funding per FTE student to HBIs in comparison to non-HBIs.

detriment of HBIs. If merely showing past inequities were enough to trigger present-day remedies, there would have been no need for a trial in this case. The question this court must answer in its threshold inquiry is whether *current* policies or practices are traceable to the *de jure* era. *See Fordice*, 505 U.S. at 730 n. 4 ("To the extent we understand private petitioners to urge us to focus on present discriminatory effects without addressing whether such consequences flow from policies rooted in the prior system, we reject this position."); *Ayers*, 111 F.3d at 1223 ("The district court correctly focused on the traceability of policies and practices that result in funding disparities rather than the traceability of the disparities themselves, as plaintiffs urge."); *id.* at 1210 ("The Supreme Court expressly rejected the proposition that the State's duty to dismantle its prior *de jure* system requires elimination of all continuing discriminatory effects"); *id.* at 1207 ("It is only 'surviving aspects' of *de jure* segregation that a state need remedy").

35. Plaintiffs seek to have this court order enhancement of the HBIs, but their rationale is unclear. If plaintiffs' goal is to enhance the HBIs so that the African American students who choose to attend them will have better educational experiences, that goal is inconsistent with *Fordice* and the Supreme Court's decision in *Brown v. Board of Education*. *See, e.g., Fordice*, 505 U.S. at 743 (rejecting private petitioners' request to order enhancement of Mississippi's historically black institutions "*solely* so that they may be publicly financed, exclusively black enclaves by private choice" as perpetuating a separate, but "more equal" system of higher education); *U.S. v. Louisiana*, 9 F.3d 1159, 1163 (5th Cir. 1993) (rejecting a consent decree that "was directed more

towards merely enhancing the State's black schools as black schools rather than towards 'convert[ing] its white colleges and black colleges to just colleges.") (quoting *U.S. v. Louisiana*, 692 F. Supp. 642, 658 (E.D. La. 1988)).

36. If plaintiffs' goal in enhancing HBIs is to increase white enrollment at the HBIs so that they are no longer racially identifiable, the court declines to do so for at least two reasons. First, plaintiffs presented no credible evidence that enhancement of the HBIs would result in increased white student enrollment.

37. Second, if HBIs are to retain their identities as black institutions, the task of converting them from "black colleges to just colleges" becomes almost impossible. The goal of *Fordice* was not to sever HBIs from "their distinctive histories and traditions." *United States v. Fordice,* 505 U.S. 717, 745 (1992). Indeed, as Justice Thomas emphasized in his concurrence, a state may, consistent with sound educational principles, continue to operate institutions like HBIs "with established traditions and programs that might disproportionately appeal to one race or another." *Fordice,* 505 U.S. at 748-49.

38. In any case, this court rejects the premise that institutional enhancement is required. Enhancement is a remedy, and this court need not reach the consideration of possible remedies because plaintiffs have failed to prove liability. They cannot establish that Maryland's system of higher education has a current policy or practice that is traceable to *de jure* segregation.

39. Without an established need to remedy a current policy or practice that continues to foster segregation, a court must not substitute its judgment for the judgment

of educators about what is and is not sound educational strategy. "The purpose of federal supervision is not to maintain a desired racial mix at a school," *Manning v. Sch. Bd. of Hillsborough County, Fla*., 244 F.3d 927, 941 (11th Cir. 2001), but to dismantle a segregated system when a state has failed to do so.

40. Here, the evidence shows that Maryland has properly dismantled its system of *de jure* segregation. The evidence further confirms that Maryland has made efforts to enhance the HBIs, not because the Constitution requires it, but because Maryland has chosen to do so. Under these circumstances, this court need not and will not inject itself into the process of running Maryland's system of higher education. *See Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (discussing the deference courts should give to the educational judgment of university administrators).

41. Even more fundamental, however, is plaintiffs' lack of capacity to bring any claims under *Fordice.* Because plaintiffs have failed to meet their threshold burden of establishing the basic elements of justiciability, this court will dismiss their claims for lack of standing and/or mootness.[11]

IV. The Plaintiffs Lack Standing.

42. This court has a threshold duty to affirm that plaintiffs' claims are justiciable. "[T]he party invoking federal jurisdiction bears the burden of establishing its

[11] For the sake of efficiency, the court nonetheless will address the substance of plaintiffs' claims.

existence." *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 104 (1998). The "threshold" requirement that a matter be justiciable is "inflexible and without exception." *Id.* at 94 (internal citation omitted). *See Allen v. Wright*, 468 U.S. 737, 750 (1984). Under this constitutional limitation, federal courts may exercise power only in "actual cases ... involving issues that are precisely framed by their connection to specific litigants in a concrete context." *Burke v. City of Charleston*, 139 F.3d 401, 405 (4th Cir. 1998).

43. At the trial stage, a plaintiff must prove standing by a preponderance of the evidence. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Gladstone, Realtors v. Vill. of Bellwood,* 441 U.S. 91, 115 n.31 (1979)).

44. This requirement of evidentiary proof is "strictly enforced." *See, e.g.*, *Burke*, 139 F.3d at 405 n.1 (discussing Supreme Court decisions requiring strict enforcement of standing requirements); *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 496-97 (5th Cir. 2007) ("Standing to sue must be proven, not merely asserted, in order to provide a concrete case or controversy and to confine the courts' rulings within our proper judicial sphere."); *ACLU-NJ v. Twp. of Wall*, 246 F.3d 258, 261 (3d Cir. 2001).

45. The "gist of the question of standing" is whether each plaintiff has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

46. In considering the standing requirement, the Supreme Court has identified two components. The first consists of constitutional (or "Article III") requirements that are necessary prerequisites to standing in all cases. *See, e.g., Caplin & Drysdale, Chartered v. U.S.*, 491 U.S. 617, 624 n.3 (1989).

47. Even if a claimant has met these threshold preconditions, the claimant has to qualify for standing under the second, "prudential standing" requirement. *Id.* Using the three prudential standing considerations, a court decides whether it is prudentially unwise to exercise jurisdiction. *See, e.g., Burke*, 139 F.3d at 405.

48. As shown below, plaintiffs fail to fulfill either the constitutional or prudential standing requirement.

A. The individual plaintiffs lack constitutional standing.

49. Article III standing requires proof of (1) an injury in fact (2) caused by the defendant that (3) is likely to be redressed by a favorable decision. As the Supreme Court has explained:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"-- an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical. . . .'" Second, there must be a causal connection between the injury and the conduct complained of-- the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan, 504 U.S. at 560-61 (internal citations and footnote omitted). The requirement of a "particularized" injury "mean[s] that the injury must affect the plaintiff in a personal and individual way." *Id.* at 560 n.1.

1. Non-testifying plaintiffs (Jomari Smith, Damein Montgomery, Rashaan Simon, and Kelly Thompson)

50. Four of the eight individual plaintiffs (Jomari Smith, Damein Montgomery, Rashaan Simon, and Kelly Thompson) did not testify, and plaintiffs offered no evidence regarding their individual circumstances. This silence is fatal to their standing to proceed in this court. These four plaintiffs failed completely to meet their burden of proving that they were injured in fact by the defendants' allegedly wrongful acts. In light of this wholesale lack of evidence, the court must dismiss their claims for lack of standing.

2. Testifying Morgan alumni (Anthony Robinson and David Burton)

51. The two testifying alumni, Anthony Robinson and David Burton, also did not meet their burdens of proving injury in fact. Alumni lack standing to challenge alleged discrimination or other illegal conditions at their alma maters and cannot obtain an injunction against wrongdoing at their former schools because they cannot show that "there is '*sufficient immediacy and reality' to [their] allegations of future injury to warrant invocation of the jurisdiction of the District Court.*" *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974), quoting *Golden v. Zwickle*, 394 U.S. 103, 109 (1969) (emphasis in original).

52. To have a justiciable stake in the outcome, plaintiffs need to show a risk of future injury. *See O'Shea,* 414 U.S. at 498 ("the threat of injury from the alleged course of conduct they attack is simply too remote to satisfy the case or controversy requirement and permit adjudication by a federal court"). "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief … if unaccompanied by any continuing, present adverse effects [. . . .]" *Id.* at 495-96 (1974); *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) ("To seek injunctive relief, a plaintiff must show that he is *under threat of suffering* 'injury in fact.'") (emphasis added); *Arguello v. Conoco, Inc.*, 330 F.3d 355, 361 (5th Cir. 2003) (holding that customers who were subject to past discrimination by a gas station attendant lacked Article III standing to sue for prospective relief).

53. Moreover, the threat of future injury must be "sufficiently real and immediate." *Roe v. Operation Rescue*, 919 F.2d 857, 864 (3d Cir. 1990) (internal citation and quotation marks omitted).

54. Former students who have no concrete future plans to re-matriculate at their respective alma maters cannot meet this test, because they face no threat of any future injury, let alone the "real and immediate threat" required by Supreme Court precedent.

55. For this reason, courts have dismissed for lack of standing claims by alumni challenging conditions, policies, or management of their former schools. As one court explained,

> Because she is no longer a student at Loyola, the facts alleged by the plaintiff describe "past exposure" to discriminatory conduct by the defendant. However, "[p]ast exposure to illegal conduct does not itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects." *O'Shea v. Littleton*, 414 U.S. at 495-96. Plaintiff must allege some facts that establish a continuing injury to her. Without some threat of future injury, the court lacks "an existing controversy" to exercise jurisdiction over a claim seeking injunctive relief.

Filardi v. Loyola Univ., No. 97 C 1814, 1998 WL 111683, at *3 (N.D. Ill. Mar. 12, 1998) (internal citations altered).[12]

[12] Generally, alumni (and alumni associations) lack standing to challenge conditions at schools they once attended. As the Fifth Circuit has held:

> The vast majority of the [alumni] Association's allegations concern acts or omissions committed by the Boards in their management of Grambling University. The Association contends that these acts and omissions harmed Grambling and thus somehow violated the Association's civil rights. The district court properly held that the Association lacks standing to assert these claims. … The Association's allegations concerning the Boards' mismanagement of Grambling fail on this ground [lack of injury in fact]. These allegations relate to acts or omissions by the Boards that, while conceivably harmful to Grambling University or its employees, could not produce a "concrete" injury to the Association or the other named Plaintiffs.

Grambling Univ. Nat'l Alumni Ass'n v. Bd. of Supervisors for La. Sys., 286 Fed. Appx. 864, 869, 2008 WL 2704562, at *4 (5th Cir. 2008); *Ad Hoc Comm. of Baruch Black & Hispanic Alumni Ass'n v. Bernard M. Baruch Coll.*, 726 F. Supp. 522, 525 (S.D.N.Y. 1989) ("alumni groups have no standing to challenge college policies in a court of law because they lack a concrete interest in those administrative practices"); *Russell v. Yale Univ.*, 737 A.2d 941, 946 (Conn. App. Ct. 1999) (affirming that alumni donors lack standing to challenge university policies).

56. The testimony of Messrs. Robinson and Burton serves to illustrate why they, as alumni, lack standing. Neither testified that the defendants' current policies, practices or decisions had caused a "particularized" injury "affect[ing] the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1. Instead, their testimony actually showed no particularized injury whatsoever.

57. *Anthony Robinson*: Mr. Robinson graduated from Morgan in 1970, some forty-two years ago, and his career thrived thereafter. He earned a law degree from American University in 1973 (with a full scholarship) and went on to serve as CEO of the Minority Business Enterprise Legal Defense and Education Fund for the past three decades. (Robinson Trial Tr. vol. 1, 28, 45, Jan. 12, 2012.)

58. Mr. Robinson even encouraged his daughter, a current Morgan student, to attend an HBI "because of the nurturing environment that those institutions provide to students." As he explained, "Having been both at a white institution and a black institution, I know the difference in the nurturing kind of environment that is provided to a black student at an historically black college, and I wanted my children to have that experience." (*Id.* at 46.)

59. Mr. Robinson did not testify to any specific deleterious personal impact that he has experienced due to defendants' alleged violations of Title VI or the Fourteenth Amendment. Mr. Robinson did not assert that his degree has been devalued or discredited. He did not testify that his experience at Morgan somehow was hurting him

professionally, and he did not claim that he had been deprived of opportunities of any kind.

60. Instead, Mr. Robinson's testimony addressed issues that caused him no personal injury whatsoever: during the 1990s, he twice tried to place two research projects at Maryland HBIs but found that the institutions lacked resources and infrastructure, and so he placed them elsewhere. (*Id.* at 32-42.) When asked to explain the impact of this limitation, he cited what he believed to be negative effects on "business" in general ("It is a huge loss of opportunity for the business. That it does not have the bright minds that exist at these institutions. . . ."), the HBIs ("it hurts the academic institutions because they don't get access to the billions of dollars that flow into research and development in this state and across the country"), and a hypothetical student ("The student, where the big loss occurs, is not having access to the private sector, to industry and not having access to the … technologies that drive the economy in the future."), but Mr. Robinson never testified to any impact on himself**.** (*Id.* at 44.)

61. *David Burton*: Mr. Burton graduated from Morgan in 1967, some forty-five years ago. (Burton Trial Tr. vol. 1, 94, Jan. 17, 2012.) He, too, has thrived with his Morgan degree. He attended graduate school at the University of Pennsylvania, held significant positions in military intelligence, and then held prominent positions in businesses such as Harbison and Control Data before running his own consulting business. (Burton Trial. Tr. vol. 1, 95-96; vol. 2, 18-19, Jan. 17, 2012.)

62. Like Mr. Robinson, Mr. Burton testified to Morgan's positive attributes: it provided a "nurturing" environment as an "academic village," attracted "the best and the brightest," and had a "reputation for academic richness." (Burton Trial Tr. vol. 1, 97; vol. 2, 16, Jan. 17, 2012.)

63. When asked to address the impact of the alleged underfunding of Maryland's HBIs, Mr. Burton testified in global, impersonal terms, citing a general societal harm both to educational interests and the general economy in light of the HBIs' "unique and special role … in bridging and supporting the economic empowerment of the minority community." (Burton Trial Tr. vol. 2, 9, Jan. 17, 2012.) Mr. Burton did not identify any personal impact.

64. The claims of these plaintiff alumni fare no better, and indeed are much weaker, than those of the African American public school students and their parents in *Allen v. Wright*, 468 U.S. 737 (1984), who unsuccessfully sought to challenge the grant of federal tax-exempt status to racially discriminatory private schools. In *Allen*, the court held that (1) African Americans lack standing, as a general matter, merely to prevent the government from violating the law; and (2) although racial discrimination often causes a "stigmatizing injury," the "cases make clear that such injury accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." *Allen*, 468 U.S. at 753-56 (emphasis added) (quoting *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984)). The Supreme Court recognized that plaintiffs did not allege "a stigmatic injury suffered as a direct result of having *personally* been

denied equal treatment," *id.* at 755 (emphasis added), and held that "[r]ecognition of standing in such circumstances would transform the federal courts into "no more than a vehicle for the vindication of the value interests of concerned bystanders." *Id.* at 756 (quoting *United States v. Students Challenging Reg. Agency Procedures* (*SCRAP*), 412 U.S. 669, 687 (1973)).[13]

65. No doubt Mr. Robinson and Mr. Burton have a keen and laudable interest in the success of their alma mater and, as African American citizens of Maryland, in the success of HBIs throughout the state. But that generalized concern and affinity for the HBIs falls far short of the concrete particularized injury required to establish a case or controversy under Article III.

3. Previously graduated Morgan student (Chris Heidelberg)

66. A third testifying alumnus, Dr. Chris Heidelberg, was a graduate student at Morgan when these claims were first brought but has since graduated. He attended Morgan from 2001 to 2008, earning his master's degree and Ph.D., after previously

[13] *Allen* also held that the plaintiffs' second claimed injury, the "children's diminished ability to receive an education in a racially integrated school," was a judicially cognizable, concrete and particularized injury, but the Supreme Court nonetheless found a lack of standing because "the injury alleged is not fairly traceable to the Government conduct respondents challenge as unlawful." 468 U.S. at 757, 758 ("The line of causation between that conduct and desegregation of respondents' schools is attenuated at best.… The diminished ability of respondents' children to receive a desegregated education would be fairly traceable to unlawful IRS grants of tax exemptions only if there were enough racially discriminatory private schools receiving tax exemptions in respondents' communities for withdrawal of those exemptions to make an appreciable difference in public school integration. Respondents have made no such allegation.").

attending Morgan from 1983 through 1987 for his undergraduate degree. (Heidelberg Trial Tr. vol. 2, 59-60, Jan. 9, 2012.) Dr. Heidelberg testified that the facilities at Morgan were inferior to what he had observed at non-HBIs in Maryland. (*Id.* at 63-71.)

67. Like Mr. Robinson and Mr. Burton, Dr. Heidelberg never testified as to how he was injured by these deficiencies such that he suffered a cognizable constitutional injury in fact.

68. Apart from difficulties sending e-mails and the loss of his undergraduate records (which was remedied), he did not testify to any personal harm whatsoever other than the fact that, when he had internships, he was exposed to technologies that students attending non-HBIs could operate but he could not. (*Id.* at 71-74.) He did not testify, however, that either his education or his career suffered as a result.

69. Indeed, unlike the plaintiffs in *Fordice*, who claimed that they were consigned to HBIs due to continuing segregative policies, Dr. Heidelberg chose to return to Morgan for graduate school after a very successful decade of private-sector work. (*Id.* at 78-79.)

70. Dr. Heidelberg's testimony does not establish standing under Article III.

71. His claims are non-justiciable for a second reason as well: mootness. Even if Dr. Heidelberg did experience a constitutionally cognizable injury in fact, that injury halted upon his graduation four years ago, in 2008. None of the problems alleged by Dr. Heidelberg affected him during the subsequent four years. He did not testify to any personal impact since graduation.

72. To the extent that, *arguendo*, Dr. Heidelberg may have been injured in the past, his claims for prospective relief are no longer justiciable. *See Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 69 (2d Cir. 2001) ("[I]f the plaintiff loses standing during the pendency of the proceedings …, the matter becomes moot, and the Court loses jurisdiction."). *See also, e.g.*, *Bd. of Sch. Comm'rs v. Jacobs*, 420 U.S. 128, 129 (1975) (per curiam) (finding that plaintiffs' graduation from high school prior to oral argument in the Supreme Court mooted controversy over rules governing student newspaper); *Doremus v. Bd. of Educ. of Borough of Hawthorne*, 342 U.S. 429, 432-33 (1952) (rejecting constitutional challenge to statute requiring daily reading of five verses of the Old Testament in school because plaintiff "graduated from the public schools before this appeal was taken to this Court" and "[o]bviously no decision we could render now would protect any rights she may once have had"); *Fox v. Bd. of Trustees of SUNY*, 42 F.3d 135, 140 (2d Cir. 1994) ("This Court has consistently held that students' declaratory and injunctive claims against the universities that they attend are mooted by the graduation of the students. . . ."); *Cook v. Colgate Univ.*, 992 F.2d 17, 19 (2d Cir. 1993) (holding that graduation of plaintiffs, who had successfully sued university under Title IX, rendered case moot on appeal).[14]

[14] *Accord, e.g., DeFunis v. Odegaard*, 416 U.S. 312, 319 (1974) (per curiam) (pointing out that a graduating law student "will never again be required to run the gantlet of the Law School's admission process, and so the question [of constitutional defects in the process] is certainly not 'capable of repetition' so far as he is concerned."); *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1099 (9th Cir. 2000) ("a student's graduation moots his claims for declaratory and injunctive relief against school

73. In theory, the rule requiring dismissal of moot claims is subject to three possible exceptions, none of which applies here. The three recognized exceptions allow for adjudication of moot claims where the case involves (1) viable damages claims for past violations; (2) certification of a class action before the claims become moot; and (3) claims capable of repetition yet evading review.

a. The plaintiffs are not seeking damages.

74. Though a viable claim for damages can prevent dismissal of an action for mootness, *see, e.g.*, *Cook,* 992 F.2d at 19 ("a viable claim for damages generally avoids mootness of the action"), that exception cannot apply in this case because the prayer for relief in the plaintiffs' fourth amended complaint does not request an award of damages.

75. Even if the plaintiffs had sought damages, their damages claim would not be viable. To recover damages under Title VI, plaintiffs must prove intentional

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officials"); *Nomi v. Regents for Univ. of Minn.*, 5 F.3d 332, 333 (8th Cir. 1993) ("Nomi has now graduated from law school and we conclude that the case is moot."); *Gomes v. R.I. Interscholastic League,* 604 F.2d 733, 736 (1st Cir. 1979) (finding student athlete's Title IX action moot because season had ended and plaintiff had graduated); *Beasley v. Alabama State Univ.*, 3 F. Supp. 2d 1325, 1344 (M.D. Ala. 1998) ("While Beasley had standing to pursue injunctive relief when she first filed suit, as well as when she first moved to certify a plaintiff class in June 1996, because she still had several months of eligibility to participate in NCAA athletics at that time, her eligibility has now long expired. Consequently, she can no longer benefit from an order requiring ASU to comply with the mandates of Title IX, and her claim for injunctive relief is now moot."). The same rule is applied to claims challenging admissions policies. *See, e.g.*, *Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 493 (10th Cir. 1998) (holding that litigants seeking to enjoin a university's admission policies must make "an adequate showing" that they "will reapply to" that school "and will thus be evaluated under disputed policy again 'in the relatively near future'").

discrimination. *See Alexander v. Sandoval*, 532 U.S. 275, 281 (2001) ("'Title VI itself directly reach[es] only instances of intentional discrimination'") (quoting *Alexander v. Choate*, 469 U. S. 287, 293 (1985)). In its June 6, 2011 ruling on defendants' motions for summary judgment, this court determined that the plaintiffs lack "sufficient evidence" to "permit a claim of present-day intentional discrimination to proceed." (Dkt. 242 at 9).

b. This is not a class action.

76. Plaintiffs have failed to avail themselves of a second potential exception to mootness: class certification. *See, e.g., Jacobs*, 420 U.S. at 129 ("The case is therefore moot unless it was duly certified as a class action pursuant to Fed. Rule Civ. Proc. 23" and other tests are satisfied).

77. At the outset of this litigation, plaintiffs made allegations on behalf of a putative class. In 2008, plaintiffs moved for certification (Dkt. 57); defendants opposed (Dkt. 75); and plaintiffs then withdrew their certification motion (Dkt. 78). Plaintiffs later filed a second amended complaint that contained no class allegations. (Dkt. 80-2). The plaintiffs' fourth (and final) amended complaint similarly makes no reference to a class claim. (Dkt. 124-1).

78. At this stage, when the claims of the plaintiffs are no longer justiciable, the failure to allege a class and seek certification is binding. *See, e.g., Jacobs*, 420 U.S. at 130 (holding that, where the student had graduated during the course of the appeal, and "[b]ecause the class action was never properly certified nor the class properly identified by the District Court," the case was moot and should be remanded to the district court for

vacatur and dismissal); *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 135-36 (3d Cir. 2000) ("If … the putative class representative's individual claim becomes moot before he moves for class certification, then any subsequent motion must be denied and the entire action dismissed.").

79. Given plaintiffs' election to withdraw their request for class certification and their subsequent amendments of the complaint to delete references to a class action, the exception for class actions cannot rescue plaintiffs' claims from dismissal for mootness. *See Warth v. Seldin*, 422 U.S. 490, 502 (1975) ("Petitioners must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent."); *O'Shea*, 414 U.S. at 494 ("[I]f none of the plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class."); *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1309 n.2 (9th Cir. 1982) ("Prior to class certification, the plaintiffs must have standing to raise race discrimination claims before they can assert them on behalf of a class.").

c. Claims of this type are unlikely to evade review.

80. Plaintiffs also cannot satisfy the third exception to the mootness rule because the type of claims they assert will almost certainly be susceptible to judicial review if such claims are asserted in some future action.

81. Thousands of students currently attend HBIs in Maryland. Many attend for extended periods of time (for example, Dr. Heidelberg was a graduate student at Morgan for seven years, from 2001 through 2008). Nothing prevented any of these students from intervening in this case or from participating as a class member via class certification, and nothing would preclude them from asserting in some future action claims similar to those raised by the plaintiffs in this case.

4. Graduating Morgan student (Muriel Thompson)

82. The fourth plaintiff who testified at trial, Muriel Thompson, is a graduate student at Morgan who was scheduled to graduate with a doctorate in community college leadership on May 17, 2012. (M. Thompson Trial Tr. vol. 2, 14-15, 44, Jan. 3, 2012.)

83. Ms. Thompson testified that she was drawn to Morgan by the specific community college leadership program, which was fairly new and is the only such program available in Maryland. (*Id.* at 12, 29, 43.) According to her testimony, she "did not look at any other programs anywhere else" due to Morgan's location in Baltimore, where she lives, and because of her own belief that it is "a dream come true" to have the "opportunity to attend an HBCU, especially Morgan State University." (*Id.* at 10.) Ms. Thompson further explained that she had grown up believing it "a badge of honor to go to Howard University or … to come up to Baltimore and attend Morgan. . . ." (*Id.* at 10; *see also id.* at 32-33 (explaining her "intrinsic desire to … be a part of something that has had such a long legacy, a historical legacy of producing" leaders and scholars like Thurgood Marshall and Kweisi Mfume).)

84. Like the other testifying plaintiffs, Ms. Thompson did not identify any discrete personal injury in fact. Instead, she testified generally about conditions at Morgan, rather than any particular impact that those conditions might have had on her, personally. (*Id.* at 16-29, 36-37, 43-44.)[15]

85. Ms. Thompson's testimony fails to establish a cognizable injury under *Fordice*, which addressed a binary system in Mississippi that had preserved the trappings and effects of *de jure* segregation through a variety of vestigial policies and practices. Unlike the testimony of Ms. Thompson or any of her fellow plaintiffs, the record in *Fordice* documented the persistent exclusion of African American students from TWIs and their involuntary relegation to HBIs. A plaintiff who fulfills her lifelong dream of attending an HBI cannot be said to suffer from the same injury as the African American students in *Fordice*, who attended an HBI because they were denied the opportunity to attend a TWI.

86. Ms. Thompson's claimed injury, and that of the other testifying plaintiffs, is the antithesis of the claim recognized in *Fordice*. She values the predominantly African

[15] For instance, Ms. Thompson testified about the lack of a designated classroom and use of a shared graduate student lounge for classes, flooding in the Jenkins Building during rainstorms, poor lighting in another building, limited access to tenured faculty, insufficient library resources, and lack of direct deposit for financial aid payments. (M. Thompson Trial Tr. vol. 2, 16-29, 36-37, 43-44, Jan. 3, 2012.) Yet she identified no individual injury other than (a) stating that she had to travel to other schools or use the interlibrary loan system to find materials for her dissertation research and (b) making a vague assertion that she lacked adequate support "to get through the doctoral program" (*id.* at 45), although she earlier attributed her delays in the program to health and family reasons (*id.* at 15).

American heritage and character of the HBIs and chose to attend Morgan precisely for that reason. Like her fellow plaintiffs, Ms. Thompson does not claim that her choice of postsecondary school was coerced or circumscribed by the operation of a binary system. Instead, she complains that the facilities and programs at Morgan – the school she chose – are inferior to what she has seen at non-HBIs. *See id.* at 36-37 (contrasting her expectation "to be able to access whatever resources I needed" at Morgan itself, *e.g.*, "I envisioned myself in the library at Morgan late into the night," with her finding that she "had to go outside of Morgan. I spent those wee hours at Towson or the University of [Maryland] College Park in their library").

87. Her claimed injury is the alleged lack of equal resources at the HBI she chose to attend, not the lack of a fair opportunity to choose among schools or even the lack of a diverse, integrated student body at Morgan. Accordingly, Ms. Thompson does not claim an injury of the type made actionable by *Fordice*.

88. Finally, even if Ms. Thompson had standing to bring a *Fordice* claim, her graduation renders that claim moot. *See DeFunis v. Odegaard*, 416 U.S. 312, 319-20 (1974) (per curiam) ("Because the petitioner will complete his law school studies at the end of the term for which he has now registered regardless of any decision this Court might reach on the merits of this litigation, we conclude that the Court cannot, consistently with the limitations of Art. III of the Constitution, consider the substantive constitutional issues tendered by the parties."); *Cook*, 992 F.2d at 19 ("The last of the complaining parties will graduate before the district court's order can affect them, and

there has been no suggestion that Colgate's policies will be visited upon any one of them in the future.").

89. Like the students whose claims were deemed moot in *DeFunis* and *Cook*, Ms. Thompson will have graduated before the court's disposition of plaintiffs' claims could take effect. Therefore, her claims must be dismissed as moot.

B. The individual plaintiffs lack prudential standing.

90. Even if the individual plaintiffs satisfied the constitutional requirements under Article III, they lack prudential standing.[16] As discussed above, prudential standing has three key requirements: (a) the plaintiff's alleged injury must fall within the specific zone of interest protected by the statutory or constitutional provision at issue, (b) the harm must be specific and not generalized in nature, and (c) the plaintiff must have experienced it personally and not derivatively. *See Allen*, 468 U.S. at 751; *Burke*, 139 F.3d at 405; *Md. Minority Contractors Ass'n, Inc. v. Md. Stadium Auth.*, 70 F. Supp. 2d 580, 586 (D. Md. 1998).

[16] Prudential standing considerations apply to claims arising under Title VI of the Civil Rights Act of 1964. *See, e.g., Md. State Conf. of NAACP Branches v. Md. Dep't of State Police*, 72 F. Supp. 2d 560, 567 (D. Md. 1999) (Blake, J.) ("I find that the plaintiffs satisfy the prudential standing requirements for a suit under Title VI."); *Bogdan v. Housing Auth. of City of Winston-Salem*, No. 1:05CV00568, 2006 WL 3848693, at *6 (M.D.N.C. Dec. 29, 2006) (same, citing *NAACP Branches*). In this Title VI action, the applicability of prudential standing principles is not affected by case law interpreting other civil rights statutes, such as the Fair Housing Act, which by their terms extend standing to sue to the limits of Article III. *See, e.g., Gladstone, Realtors*, 441 U.S. at 103 n.9; *Equal Rights Ctr. v. Equity Residential*, 798 F. Supp. 2d 707, 717 (D. Md. 2011) (Blake, J.).

91. These additional standing requirements have been prescribed by the Supreme Court because "courts should not be called upon to decide questions of broad social import in cases in which no individual rights will be vindicated, and access to the federal courts should be limited to those litigants best suited to assert the claims." *Mackey v. Nationwide Ins. Co.*, 724 F.2d 419, 421-22 (4th Cir. 1984).

92. Here, the four testifying plaintiffs fail all three prudential standing tests for the same reason: each plaintiff chose to attend an HBI because of the unique qualities and features of HBIs in general and Morgan in particular. Plaintiffs who enthusiastically elect to attend HBIs because of their superior characteristics are the antithesis of the students that *Fordice* was intended to protect.

93. First, plaintiffs' claims do not fall within the zone of interest protected by Title VI under *Fordice.* As noted above, their stated interest lies in obtaining resources at HBIs equal to those at non-HBIs, rather than removing obstacles to students' exercise of free choice in the selection of an institution to attend.

94. Second, plaintiffs voice no more than a generalized concern about the perceived imbalance in the conditions at HBIs as contrasted with those found at non-HBIs. They do not complain that they were personally injured by any alleged failure to facilitate integration at the HBIs, or that they were wrongly denied admission to non-HBIs and thus denied access to the resources at those institutions.

95. Third, plaintiffs cannot assert the interests of other African American students at HBIs who might be attending by State-imposed necessity and not by choice.

(The record contains no evidence of such students.) Having testified that they sought out the benefits of an HBI, plaintiffs cannot raise the concerns of hypothetical students who were involuntarily forced to attend a segregated school because no other option was available to them. Thus, because the individual plaintiffs fail to satisfy all three components of the test for prudential standing, the court must dismiss their claims.

C. The Coalition lacks both constitutional and prudential standing.

96. The Coalition also fails to meet the requirements for Article III and prudential standing.

97. An organization composed of HBI alumni, the Coalition acknowledges that it was formed for the purpose of litigating this action. The Coalition was not itself injured by the policies at issue and, according to plaintiffs' own evidence, it lacks members who were injured.

1. The Coalition lacks Article III standing.

98. The tests for Article III standing of associations or organizations are well settled. As the Fourth Circuit has explained:

> Associations can allege standing based upon two distinct theories. First, the association "may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." *Warth v. Seldin*, 422 U.S. 490, 511 (1975). Second, the association may have standing as the representative of its members who have been harmed. *Id. See also Hunt v. Wash. State Apple Adver. Comm'n,* 432 U.S. 333, 344-45 (1977).

Md. Highways Contractors Ass'n, Inc. v. Maryland, 933 F.2d 1246, 1250 (4th Cir. 1991) (internal citations altered). Plaintiffs failed to establish that the Coalition satisfies either of these tests.

a. Injury in its own right

99. An organization or association has an independent right to bring claims if it is injured as an entity or if its institutional interests are directly affected. *See id.* ("When determining whether an association has standing, a court conducts the same inquiry as in the case of an individual, determining if the plaintiff alleged such a personal stake in the outcome of the matter to warrant his invocation of federal court jurisdiction.").

100. To establish standing as an independent entity (sometimes called "organizational standing"), a group must have more than a mere abstract interest in advocating a generalized policy interest that would be advanced by the litigation. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (a "setback to the organization's abstract social interests" is inadequate to establish standing); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976) ("abstract concern with a subject" is not sufficient to establish Article III standing); *Sierra Club v. Morton,* 405 U.S. 727, 739 (1972) ("a mere 'interest in a problem' … is not sufficient"); *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 476 n.14 (1982) (Plaintiff "has alleged no injury to itself as an organization, distinct from injury to its taxpayer members. As a result, its claim to standing can be no different from those of the members it seeks to represent."); *Md. Highways Contractors*, 933 F.2d at 1250-51

("although the Association alleges that its broad purposes have been violated by the MBE statute, this type of injury is insufficient to support standing").

101. If the law were different, individuals without standing could simply associate and form an organization to bring litigation otherwise prohibited under Article III. *See Sierra Club*, 405 U.S. at 739-40. (*See also* cases cited at n. 12, *supra*, regarding lack of standing of alumni associations.)

102. Apart from evidence of direct actions taken against the organization itself (*e.g.*, prohibiting a political event sponsored by the organization), an organizational injury may be established by showing that the organization has had to divert significant resources from its normal operations to address and counteract the alleged wrongful acts or omissions and that its purpose therefore has been frustrated. *See Havens Realty*, 455 U.S. at 379 ("If, as broadly alleged, petitioners' steering practices have perceptibly impaired [the plaintiff's] ability to provide counseling and referral services for low- and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities – with the consequent drain on the organization's resources – constitutes far more than simply a setback to the organization's abstract social interests.").

103. Recently, in *Equal Rights Ctr. v. Equity Residential*, 798 F. Supp. 2d 707 (D. Md. 2011), this court acknowledged a split of authority among the circuits as to whether the injury-in-fact requirement for Article III standing may be established merely by showing that a plaintiff organization diverted resources from its existing operations to

the litigation in question, or whether the organization must experience injury independent of litigation costs – for example, by having to alter its operations by devoting sums to remedial measures or programs such as providing assistance to other allegedly injured parties. *Id.* at 722 n.8 (citing decisions of the Second, Third, Fifth, Seventh, Ninth, and District of Columbia circuits).[17] In *Equal Rights Ctr.*, the court found it unnecessary to

[17] In other words, diversion of resources is necessary under *Havens*, but in some courts not sufficient, unless the resources are diverted to a use distinct from the litigation. *Compare Fair Employment Council of Greater Washington, Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994) (espousing the more stringent view, and holding that "[t]he diversion of resources to testing in preparation for the litigation might well harm the Council's other programs, for money spent on testing is money that is not spent on other things. But this particular harm is self-inflicted.") *and Walker v. City of Lakewood*, 272 F.3d 1114, 1124 n.3 (9th Cir. 2001) (declining to consider "the time and money the [housing organization] has expended in prosecuting this suit" in deciding if the organization had standing) *with Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990) ("[T]he only injury which need be shown to confer standing on a fair-housing agency is *deflection of the agency's time and money* from counseling to legal efforts directed against discrimination. These are opportunity costs of discrimination, since although the counseling is not impaired directly there would be more of it were it not for the defendant's discrimination.") (emphasis added).To date, decisions in five Circuits have adopted the more demanding of the two standards. *See Equal Rights Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1140 (D.C. Cir. 2011); *Fla. State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1166 (11th Cir. 2008); *Fair Housing of Marin v. Combs*, 285 F.3d 899, 902-03 (9th Cir. 2002); *Fair Housing Council of Suburban Philadelphia v. Montgomery Newspapers*, 141 F.3d 71, 79 (3d Cir. 1998); *Ass'n for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Retardation Ctr. Bd. of Trustees*, 19 F.3d 241, 244 (5th Cir. 1994). While serving on the D.C. Circuit, then-Judge Ruth Bader Ginsburg articulated a widely cited explanation for this position:

> An organization cannot, of course, manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit. Were the rule otherwise, any litigant could create injury in fact by bringing a case, and Article III would present no real limitation. .... *Havens* makes clear, however, that an organization establishes Article III injury if it

decide that question because the plaintiff organization had "expended resources counteracting" the alleged violations of law through measures separate from the litigation, and "some of those efforts began before" the plaintiff commenced its investigation that preceded the lawsuit.

104. In this case, it is again unnecessary for this court to address the area of disagreement that divides the circuits, because pertinent decisions unanimously agree upon the requirement that the Coalition is unable to satisfy: to establish organizational standing, a plaintiff must show that the alleged injury caused the organization to divert its resources from its ongoing activities to address the injury. All federal courts agree that such a diversion of resources must be shown. *See, e.g.*, *Nat'l Coalition for Students with*

> alleges that purportedly illegal action increases the resources the group must devote to programs independent of its suit challenging the action.

Spann v. Colonial Vill., Inc., 899 F.2d 24, 27 (D.C. Cir. 1990) (Ginsburg, J.).

This approach is more consistent with *Havens Realty* and the Supreme Court decisions limiting organizational standing since *Sierra Club*, and thus is more likely to be adopted by the Fourth Circuit. At least one judge in this district has taken the D.C. Circuit's more exacting view. *See Buchanan v. Consol. Stores Corp*., 125 F. Supp. 2d 730 (D. Md. 2001) (Chasanow, J.):

> [S]imply alleging that [the organization] spent money to test or challenge alleged discrimination, d[oes] not support standing … It does not appear from the papers that [defendant's] … policy had any concrete effect on any of [the organization's] programs. Further, the organization chose to investigate Defendant's policy. . . . [It] cannot claim that because it chose to funnel its funds this way, Defendant's … policy has caused it injury in fact sufficient to satisfy Article III's standing requirements.

Id. at 737 (citing *Fair Employment Council of Greater Washington, Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268 (D.C. Cir. 1994)).

Disabilities Educ. & Legal Def. Fund v. Scales, 150 F. Supp. 2d 845, 840 (D. Md. 2001) (Williams, J.) (finding that organization was aggrieved by violation of voting registration law because this "noncompliance requires the organization to expend resources in facilitating the registration of disabled persons that they otherwise would spend in other ways").[18]

105. Here, the Coalition has acknowledged that its only activities involve the pursuit of claims in this litigation. The evidence failed to show any diversion of funds from other activities whatsoever. There was no suggestion by the Coalition or any witness that the litigation "interfered with its existing programs" that "began before" any investigation leading up to the filing of the complaint, as was the case in *Equal Rights Ctr.*, 798 F. Supp. 2d at 722. Unlike those advocacy groups that have successfully made the showing necessary for Article III standing, the Coalition does not exist to further a

[18] For example, a series of cases in this district involving the Equal Rights Center have found organizational standing because the organization showed that it had diverted resources away from non-litigation-related activities, such as "counseling, education and referral services," and thus the defendant's alleged violations had frustrated the organization's purpose. *Equal Rights Ctr. v. Abercrombie & Fitch Co.*, 767 F. Supp. 2d 510, 519 (D. Md. 2010) (Motz, J.); *see also Equal Rights Ctr. v. Equity Residential*, 798 F. Supp. 2d at 721-22; *Equal Rights Ctr. v. Avalon Bay Communities, Inc.*, Civ. A. No. AW 05–2626, 2009 WL 1153397, at *5 (D. Md. Mar. 23, 2009) (finding standing due to claim that organization "divert[ed] significant resources that [it] would have used to provide counseling, education, and referral services" and that its mission was "frustrated"); *Equal Rights Ctr. v. Equity Residential*, 483 F. Supp. 2d 482, 487 (D. Md. 2007) (Davis, J.) (ruling that plaintiff's allegations demonstrated "that the defendants' actions 'have caused the organization to divert resources to identify and counteract the defendants' unlawful practices,' and thereby impede and frustrate its core mission, which is, through 'education, counseling, advocacy, enforcement, and referral services to aid protected individuals'").

broad, established commitment to the advancement of organizational interests. Instead, as the Coalition concedes, it is an *ad hoc* organization formed to pursue a specific objective: to investigate and litigate the claims asserted in this lawsuit.

106. According to the only source of testimony about the Coalition, founder and current president and CEO David Burton, he and other Morgan alumni formed the Coalition to secure compliance with the law as it pertains to HBIs, by bringing this lawsuit in lieu of having the suit brought by the HBIs themselves. (Burton Trial Tr. vol. 1, 100, 103-04; vol. 2, 2, Jan. 17, 2012.) As he explained:

> In my view, it was important that an organization be established which would have some independence from the HBCUs themselves because we felt that it was difficult for them to sue themselves, and also because of their close association with the State system. You know, any chance of that, you know, that the various leaderships would not, you know, survive the tenure of the case, so we wanted to have an independent and objective way of prosecuting the case to bring some objectivity to all the fact-gathering necessary.

(Burton Trial Tr. vol. 2, 2, Jan. 17, 2012.) According to Mr. Burton, the only investigative measures by the Coalition (Burton Trial Tr. vol. 1, 102, 103, Jan. 17, 2012) were undertaken as "support fact-gathering and support for information that would support the prosecution of the case. . . ." (Burton Trial Tr. vol. 2, 2-3, Jan. 17, 2012.) This lawsuit, Mr. Burton candidly acknowledged, is the Coalition's "primary purpose." (Burton Trial Tr. vol. 2, 3, Jan. 17, 2012.)

107. Plaintiffs identified no other purpose for the Coalition's existence. No one testified to any diversion of Coalition funds or resources from any other activities or

missions. Neither Mr. Burton nor any other witness identified any independent ongoing activities of the Coalition that were "perceptibly impaired" by the alleged violations of Title VI or by the lawsuit itself. *Equal Rights Ctr.*, 798 F. Supp. 2d at 722. To the contrary, the evidence showed that the Coalition's *raison d'être* is to seek redress for those alleged violations through this lawsuit. *See* Burton Trial Tr. vol. 1, 103, Jan. 17, 2012 (explaining that Dr. Burton and his classmates "just made a decision to form the Coalition and to move forward and to ensure that the State of Maryland complied with the law"). In the absence of any showing that the Coalition had other initiatives that suffered from a diversion of resources due to this lawsuit, the Coalition lacks Article III standing.

108. Defendants maintain that the correct standard is the one that requires a showing that, as a result of the defendants' alleged violations, the organization has diverted resources from an activity unrelated to the litigation. *See Fair Employment Council of Greater Washington, Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994). The court need not reach the issue, however. Unlike the Equal Rights Center, the Coalition cannot show that prosecuting this lawsuit has frustrated its purpose; this lawsuit *is* its purpose. Even under the most lenient standard, the Coalition does not have standing because it has not shown that, but for the alleged violation of law, it would have expended resources in any other way. *See Doe v. Obama*, 670 F. Supp. 2d 435, 441 (D. Md. 2009) (Williams, J.) (ruling that an organization could not demonstrate injury in fact where it "is fulfilling its [organizational] purpose of pursuing constitutional challenges by

the very act of filing this lawsuit"); *Goldstein v. Costco Wholesale Corp.*, 278 F. Supp. 2d 766, 770-72 (E.D. Va. 2003) ("When an organization's primary source of revenue is litigation directed against alleged discrimination, it cannot be said that the organization's participation in such litigation impairs its ability to do its work.").

b. Representational or associational standing

109. Plaintiffs similarly failed to meet their burden of proving that the Coalition satisfies the tests for representational standing. An organization that does not have standing in its own right may satisfy the constitutional minimum for standing on behalf of its members if "(1) its own members would have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to the organization's purpose; and (3) neither the claim nor the relief sought requires the participation of individual members in the lawsuit." *Md. Highways Contractors*, 933 F.2d at 1251 (applying *Hunt*, 432 U.S. at 343).

110. Under the first prong, "an organization suing as representative [must] include at least one member with standing to present, in his or her own right, the claim (or the type of claim) pleaded by the association." *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 555 (1996); *see also Piney Run Pres. Ass'n v. Comm'rs of Carroll County*, 268 F.3d 255, 262 (4th Cir. 2001) (requiring that "at least one member would otherwise have standing"). In this case, the Coalition has failed to produce evidence satisfying the first *Hunt* prong. The record contains no evidence that any of its members is an HBI student with standing to sue.

111. As discussed above, the individuals with standing to bring a *Fordice* claim are the alleged victims: African American students who currently attend HBIs by necessity, not by choice, as the result of policies traceable to *de jure* segregation. Because plaintiffs presented no evidence that any such student exists, the court must conclude that no such student is a member of the Coalition.[19]

2. The Coalition lacks prudential standing.

112. Even if the Coalition had standing under Article III, it could not satisfy the requirements for prudential standing. Federal courts have long "adhered to the rule that a party generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004).

113. As the Fourth Circuit has explained, prudential standing requirements "add to the constitutional minima a healthy concern that if the claim is brought by someone other than one at whom the constitutional protection is aimed, the claim not be an abstract, generalized grievance that the courts are neither well equipped nor well advised

[19] The record discloses no evidence that any member of the Coalition is a student at all. Instead, the evidence established that the Coalition was formed by alumni, that it features alumni as its current members, and that, to the extent the Coalition communicates with current HBI students, it does so through alumni associations. *See* Burton Trial Tr. vol. 2, 2, Jan. 17, 2012 (describing "outreach to each of the four alumni associations"); *id.* at 3 (stating that the alumni associations at the four HBIs "are our primary means of reaching out to past students, existing students, and also through their cooperation, we also work with them to make connections with the existing students at the four HBIs").

to adjudicate." *Burke*, 139 F.3d at 405 (internal citation omitted). Thus, "access to the courts should be limited to those litigants best suited to assert the claims," and "the persons best suited to challenge the practices impinging on individual rights are the direct victims of the alleged illegal practices." *Mackey*, 724 F.2d at 422 (internal citation omitted).

114. These concerns have led this court to deny prudential standing to associations in civil rights cases, even when the organization could establish Article III standing. *See*, *e.g.*, *Equal Rights Ctr.*, 767 F. Supp. 2d at 522-23 (denying standing on prudential grounds to advocacy organization bringing ADA Title III claim asserting legal rights of disabled customers); *Nat'l Coal. for Students with Disabilities v. Scales*, 150 F. Supp. 2d 845, 850-51 (D. Md. 2001) (denying standing on prudential grounds to a non-profit advocacy group asserting legal rights of disabled students); *Buchanan v. Consol. Stores Corp.*, 125 F. Supp. 2d 730, 739 (D. Md. 2001) (denying standing on prudential grounds to civil rights organization asserting discrimination claims on behalf of African American customers of retail chain); *Md. Minority Contractors Ass'n*, 70 F. Supp. 2d at 588 (denying standing on prudential grounds to association of minority businesses which sought to challenge statute on behalf of its members, even though two of its members were parties to the suit and had standing as individuals).[20]

[20] The prudential rule against organizational standing to assert third-party claims may be overcome only if the organization can show that it has a "close relationship" with the third party and that the third party faces some obstacle to asserting his or her own right. *See Kowalski*, 543 U.S. at 130; *Abercrombie & Fitch*, 767 F. Supp. 2d at 523. Neither of

115. Thus, the Coalition's claims must be dismissed because it cannot satisfy the minimum showing necessary to overcome the prudential restriction against litigating the rights of others.

V. Maryland Does Not Operate A Segregated System Of Higher Education.

116. Even assuming that plaintiffs had standing, they failed to establish a necessary element of their claim under *Fordice*.

117. The trial produced a considerable volume of evidence regarding conditions at various campuses that are part of the Maryland public system of higher education and the funding of those campuses, including leaky roofs, poorly maintained buildings, and allegedly inadequate library holdings to be found at some of those institutions. What the court did not hear or see during the proceedings was any evidence of a lack of student choice or the perpetuation of a segregated dual system of higher education.

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these conditions applies here. First, plaintiffs have not shown any special relationship between the Coalition and aggrieved HBI students. If anything, the evidence showed the complete absence of any direct relationship. As Mr. Burton testified, the Coalition uses the four HBI alumni associations as intermediaries for its outreach to current students. *See* Burton Trial Tr. vol. 2, 2, Jan. 17, 2012. Moreover, even if some relationship existed, the Coalition's status as an advocacy group would not establish a "'special relationship with those whose rights [it] seeks to assert, such that [the court] might overlook this prudential limitation.'" *Nat'l Coal. for Students with Disabilities*, 150 F. Supp. 2d at 851 (alterations in original) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992)). Second, plaintiffs failed to show any impediment that would preclude any aggrieved HBI student from bringing these claims. Indeed, the fact that some students were named as plaintiffs (albeit none that was proven to have been injured in fact) confirms that "there exists no obstacle to a lawsuit by the parties whose rights were allegedly violated." *Md. Minority Contractors Ass'n*, 70 F. Supp. 2d at 588; *accord Abercrombie & Fitch*, 767 F. Supp. 2d at 523; *Nat'l Coal. for Students with Disabilities*, 150 F. Supp. 2d at 851; *Buchanan*, 125 F. Supp. 2d at 739.

118. In this action, which plaintiffs acknowledge is governed by *Fordice*, the question properly before the court is whether Maryland operates a dual system that channels African American students toward one group of schools and white students toward another, not whether the HBIs need more money. If that were the question, it would be easily answered in the affirmative. The testimony left little doubt that HBIs could benefit from more funding, as could other Maryland public institutions. *See, e.g.*, T. Thompson (former president of UMES) Trial Tr. vol. 1, 48-49, Jan. 3, 2012 (all college presidents have to "think outside the box" in order to get what they want for their institutions).

119. Plaintiffs contend that because the HBIs are predominantly African American, and therefore are racially identifiable, Maryland's system of higher education violates the Constitution. That contention is not supported by applicable law.

120. *Fordice* holds that the racial identifiability of an institution is not *per se* unconstitutional. The relevant question is "whether existing racial identifiability is attributable to the State." 505 U.S. at 728. When it is not, there is no constitutional violation. Thus, in *Bazemore v. Friday*, 478 U.S. 385 (1986), the court approved the financing and operational assistance provided by a state university's extension service to voluntary 4-H and Homemaker Clubs, despite the existence of numerous all-white and all-black clubs. In *Fordice*, the court explained its decision in *Bazemore*: "After satisfying [itself] that the State had not fostered segregation by playing a part in the decision of which club an individual chose to join," the court found that continued

operation of racially identifiable programs did not violate the Constitution. *Fordice*, 505 U.S. at 731. As Justice Thomas wrote in his concurring opinion in *Fordice*: "we focus on the specific *policies* alleged to produce racial imbalance, rather than on the *imbalance* itself." *Id*. at 746 (emphasis in original).

121. Therefore, resolution of the question posed by this lawsuit does not turn upon the racial identifiability of specific schools. Instead, the question must be answered by taking into account policies and practices of the Maryland system of higher education as a whole.

A. The system as a whole is not segregated.

122. In their papers in opposition to MHEC's motions for summary judgment, plaintiffs stated: "As Plaintiffs have made clear, this case is about Maryland's *HBIs*. The 'improvements' of TWIs are immaterial." (Pls.' Opp. To Defs.' Mot. for Summ. J. Re Intentional Discrimination and Md.'s Funding of Public Institutions of Higher Education Under *Fordice* at 6, Dkt. 212 (emphasis in original)).

123. The parties have since jointly stipulated that "Plaintiffs do not claim the existence of vestiges of the *de jure* segregated system at non-HBIs in Maryland," and that "Plaintiffs do not contend that Maryland has failed to desegregate its non-HBIs." (Joint Proposed Pre-Trial Order at 33, ¶¶ 29, 30 Dkt. 272.) *See also* testimony of plaintiffs' expert, Conrad Trial Tr. vol. 1, 100, Jan. 10, 2012 ("the dual structure has been eliminated with the public TWIs"); *id.* at 115 ("Q: Are the traditionally white institutions in Maryland desegregated? A: They are, yes, indisputably.").

124. Plaintiffs have conceded, therefore, that Maryland's public non-HBIs are desegregated, and plaintiffs make no claim that students at TWIs experience any lingering vestiges of the former *de jure* segregation. Moreover, all of the evidence presented at trial shows that Maryland's non-HBIs enjoy significant African American student enrollment (DX 146, at 10; Gibralter (President of Frostburg), Trial Tr. vol.1, 18, Jan. 24, 2012; Bogomolny (President of UB), Trial Tr. vol. 1, 14, Jan. 30, 2012; Caret (Former President of Towson), Trial Tr. vol. 2, 2, Jan. 31, 2012); Hrabowski (President of UMBC), Trial Tr. vol. 1, 62, Feb. 1, 2012), and sizeable and improving retention and graduation rates among African American students. (DX 146, at 14; DX 145, at 14; DX 144, at 14; Dudley-Eshbach (President of Salisbury), Trial Tr., vol. 2, 31-32, Jan. 25, 2012 (stating first- to second-year retention rates for African American students at Salisbury are higher than they are for majority students); Bogomolny, Trial Tr. vol. 1, 17-20, Jan. 30, 2012; Caret, Trial Tr. vol. 2, 6-9, Jan. 31, 2012; Hrabowski, Trial Tr. vol. 1, 74, Feb. 1, 2012.)[21]

125. By itself, the fact that Maryland's nine public non-HBIs are desegregated extinguishes plaintiffs' claims. As noted earlier, the relevant analysis focuses on *systemic* policies and practices, and neither *Fordice* nor any other legal authority compels a state to ensure that every one of the institutions in its system of higher education is racially

[21] In 2009, Maryland's non-HBIs had non-white enrollment ranging from a high of 62.2% (UMUC) to a low of 23.5 % (St. Mary's College), for an average of 45.8% non-white enrollment. (DX 146, at 10.)

diverse. Instead, applicable law requires states that once maintained a *de jure* segregated system of higher education to dismantle that system. Maryland has done so.

126. *De jure* segregation was characterized by a state policy of keeping black and white students apart by offering academic programs for white students at white schools and the same programs for black students at black schools. *Fordice* (including the Fifth Circuit and district court decisions issued after the Supreme Court remanded the case) found that program duplication was problematic when it involved duplication between institutions that were "geographically proximate" and "racially identifiable." *See Ayers*, 111 F.3d at 1217-21 (discussing program duplication between proximate and non-proximate schools and repeatedly referring to duplication between "racially identifiable" institutions). By acknowledging that Maryland's non-HBIs are desegregated, plaintiffs concede that the non-HBIs are not "racially identifiable" as formerly white-only institutions. In the current context, therefore, it makes no sense to speak of program duplication having a segregative effect, because there is no racially identifiable institution to duplicate the programs offered at the HBIs.

127. Similarly, even if the HBIs are racially identifiable, an evaluation, under *Fordice*, of plaintiffs' claim that Maryland's HBIs are underfunded necessarily demands consideration of *comparative* funding. That is, if Maryland no longer has any "white"

public institutions, as the plaintiffs have stipulated, then the State's funding decisions cannot be said to favor those nonexistent institutions.[22]

B. The individual institutions that make up Maryland's system of higher education are desegregated.

128. Even if the court were to focus on individual institutions, rather than the system as a whole, the record would demonstrate that Maryland's public institutions of higher education are desegregated. Today, no more than 90% of the student population at any of Maryland's thirteen 4-year public institutions of post-secondary education is made up of any one race. With minority enrollment in excess of 10% at each of Maryland's public colleges and universities, including the HBIs, the State of Maryland cannot be said

[22] In their motion for summary judgment, defendants pointed out that almost a decade after the Supreme Court's decision in *Fordice*, 505 U.S. at 717, the court made clear that private parties must prove intentional discrimination to prevail on a claim under Title VI of the 1964 Civil Rights Act. *Sandoval*, 532 U.S. 275, *followed in Peters v. Jenney*, 327 F.3d 307 (4th Cir. 2003). Defendants argued that without a showing of intentional discrimination, these plaintiffs could not prevail on a *Fordice* claim. (Defs.' Mot. For Summ. J. Regarding Intentional Discrimination and Funding, Dkt. 207-8.) This court rejected that position. (Mem. Order Granting, in Part, Defs.' Mot. for Summ. J., Dkt. 242, June 6, 2011.) Nevertheless, defendants renew their argument for preservation purposes and, in addition, question the continuing relevance of the *Fordice* analysis altogether more than 50 years after the end of *de jure* segregation and at a time when many African American students (such as the testifying plaintiffs in this case) affirmatively *choose* to attend an HBI; when students of all races have the opportunity to attend, and do attend, all of Maryland's public universities; when so many options exist for delivery of instruction, including for-profit, public, online and evening and weekend courses; and when technology renders increasingly irrelevant the notion of "geographical proximity." (Howard Trial Tr. vol. 1, 20-22, Jan. 23, 2012 (array of choices); 38-40 (yield rate research showing HBIs are as attractive as non-HBIs); 46-47 (impact of online educational options); 93 (competitiveness of all institutions).)

to be operating a system of higher education in which any one of its institutions is segregated.[23]

129. Defendants' trial exhibits 144, 145 and 146 are the Maryland Higher Education Commission data books for the years 2009 through 2011, showing enrollment by race at each of Maryland's public post-secondary schools. According to those data, the percentages of other-race enrollment by headcount at each of Maryland's HBIs for the years 2007 through 2009 were as follows: [24]

[23] Various authorities have identified 10% other-race enrollment as the threshold that characterizes a desegregated system or institution. *See, e.g.,* Alfreda A. Sellers Diamond, *Black, White, Brown, Green, and Fordice: The Flavor of Higher Education in Louisiana and Mississippi*, 5 HASTINGS RACE & POVERTY L.J. 57 (2008); David J. Armor & Christine H. Rossell, *Desegregation and Resegregation in the Public Schools*, BEYOND THE COLOR LINE: NEW PERSPECTIVES ON RACE AND ETHNICITY (Abigail Thernstrom & Stephen Thernstrom eds., 2002). For instance, following the second remand of the *Fordice* case to the district court, the parties entered into a settlement agreement that provided for the establishment of various scholarships, academic programs and funds. Notably, the agreement, approved by the district court, provided that state funding of the endowment by which the state would achieve desegregation of its formerly segregated institutions of higher education would cease – and funds would be transferred to the control of the individual institutions – when "the historically black university attains a total headcount other-race enrollment of 10% and sustains such a 10% other-race enrollment for a period of three consecutive years." Settlement Agreement at 10, *Ayers v. Fordice*, 879 F. Supp. 1419, 1453 (N.D. Miss. 1995); *see also id*. at 11, 12 and 16. The parties explicitly defined "other-race" to mean "persons who are not African-American." *Id*. at 10 n.2.

[24] For the academic year 2009-10, Maryland's HBIs averaged other-race enrollment of 13.1%. DX 146 at 10. At present, 15% of all Morgan students (both graduate and undergraduate) are non-African American. (Wilson Trial Tr. vol. 1, 56, Jan. 4, 2012.)

Institution	Year	Percentage
Coppin	2007	13.9%
	2008	14.3%
	2009	11.8%
Bowie	2007	11.6%
	2008	11.8%
	2009	11.5%
UMES	2007	23.2%
	2008	22.7%
	2009	22.4%
Morgan	2007	10.3%
	2008	10.2%
	2009	9.3%

(Morgan has always hovered at around 10% other-race enrollment, but it equaled or topped 10% for 3 consecutive years during 2001 (10.0%), 2002 (10.5%) and 2003 (10.6%)). (DX 144, at 7; DX 145, at 7, 10; DX 146, at 7, 10.) Moreover, Morgan's other-race enrollment for the 2011-12 school year was 15% (Wilson Trial Tr. vol. 1, 56, Jan. 3, 2012), and its other-race enrollment for 2010-11 was 14.6%. (*Id*.)

130. All of Maryland's HBIs, therefore, enrolled other-race students at rates above the thresholds established by *Fordice* and other authorities. Based solely on statistics (that is, without taking into account any other facts), all of Maryland's public colleges and universities are "desegregated."[25]

131. Once a school system is desegregated, and the state has dismantled a formerly dual system of education, the state is not responsible for segregation at its public institutions of education that comes about for reasons other than state action. Thus, the state has no constitutional obligation to "achieve maximum desegregation" or to "achieve an ideal racial balance in the schools." *Hull v. Quitman County Bd. Of Educ.*, 1 F.3d 1450, 1455 (5th Cir. 1993). Similarly, the state is not constitutionally required to integrate schools that have become segregated due to demographic effects. *See Freeman v. Pitts*, 503 U.S. 467, 493 (1992). Moreover, once a court finds that a formerly dual school system has achieved unitary status, the school district is not obligated to refrain from taking even those actions that might perpetuate the effects of past racial segregation. *Price v. Austin Indep. Sch.*

[25] In fact, presidents of HBIs other than Morgan did not testify that Maryland operates a segregated system of higher education or that Maryland discriminates against the HBIs. (Neufville (interim president of UMES) Trial Tr. vol. 2, 24, Jan. 5, 2012 (does not believe UMES is segregated); T. Thompson Trial Tr. vol. 2, 67-68, Jan. 4, 2012 (by many measures, including quality of undergraduate instruction, academic programs, student pass rate of national exams, accreditation, graduate school acceptance and employability of its graduates, UMES "fares very well"); Burnim Trial Tr. vol. 2, 55, Jan. 5, 2012 (Bowie gets more money per FTE than some non-HBIs and also gets HBI enhancement funds and access and success funds); *id.* at 68 (is not aware of any programs that unnecessarily duplicate Bowie's); *id.* at 70 (sees no evidence that segregated system or processes exist today); Avery (President of Coppin) Trial Tr. vol. 2, 50-51, Jan. 9, 2012 (Coppin has received significant enhancements and has been better funded for the last 10 years than other Maryland schools).)

Dist., 945 F.2d 1307 (5th Cir. 1991). *See also Board of Educ. of Oklahoma City Pub. Sch. v. Dowell*, 498 U.S. 237 (1991).

C. None of Maryland's policies and practices is traceable to *de jure* segregation.

132. The issue under *Fordice* is whether the State has dismantled its formerly segregated system—not the State's treatment of individual institutions. Still, having reviewed the evidence presented, including testimony and exhibits addressing how State policies and practices affect HBIs *vis à vis* other public institutions, the court finds that Maryland does not discriminate against the HBIs.

133. In its June 6, 2011 memorandum and order, this court ruled that there was no evidence of intentional discrimination and granted summary judgment to defendants on that claim. (Dkt. 279.) The court identified the following three issues that remained to be resolved at trial: (1) operational funding ("issues concerning the extent to which the funding formula is based on institutional missions traceable to the era of *de jure* segregation, as well as disputes concerning appropriate treatment of the State's 'flagship'[26] campus at College Park and whether the HBIs 'dual mission' should be taken

[26] The University of Maryland, College Park is Maryland's "flagship" university. Educ. § 10-209 (f). In so designating UMCP, the Maryland General Assembly directed the USM to enhance UMCP "with programs and faculty nationally and internationally recognized for excellence in research and the advancement of knowledge," admit "highly qualified students who have academic profiles that suggest exceptional ability," and provide "the level of operating funding and facilities necessary to place [UMCP] among the upper echelon of its peer institutions." *Id*. *See also* Educ. § 11-105 (b)(5); § 12-106 (a)(1)(iii).

into account.") (Dkt. 279 at 8); (2) program duplication (*id.* at 9); and (3) institutional mission (*id*. at 10). The court addresses each issue in turn.

1. Funding

134. At trial, the witnesses included presidents of both HBIs and non-HBIs. Irrespective of the history or demographics of the school in question, most, if not all, of these presidents lamented the difficulties of achieving the institution's goals within the budget provided by the State. For example, presidents testified about unmet capital needs at Frostburg (Gibraltar Trial Tr. vol. 1, 24-26, Jan. 24, 2012) (discussing need for dormitories, academic buildings and university police headquarters); deferred maintenance issues at Frostburg (*id.*); insufficient funding for remedial education at UMUC (Aldridge (President of UMUC) Trial Tr. vol. 2, 15, Jan. 25, 2012); insufficient funding to meet the needs of any UMUC student (*id.*); inadequate funding to support the predominantly science- and math-focused curriculum at UMBC (Hrabowski Trial Tr. vol. 1, 97-99, Feb. 1, 2012); the need for more money at Salisbury to pay for full-time employees (Dudley-Eshbach Trial Tr. vol. 2, 41-43, Jan. 25, 2012), maintenance (*id.* at 44-47) and financial aid (*id.* at 59); and Towson's inability to become a research-intensive institution because of insufficient funding (Caret Trial Tr. vol. 1, 89, Jan. 31, 2012).

135. The university presidents also acknowledged, however, that although the budget requests to the Maryland Department of Budget and Management ("DBM"

include line items, the bulk of the appropriations each institution receives, with few exceptions, is provided in a lump sum and can be spent in the manner chosen by each institution. There is no penalty associated with declining to spend money as requested for a particular item and, instead, using those funds for something entirely different. (Wilson Trial Tr. vol. 1, 67-70, Jan. 4, 2012; *see also id.* at 26; Burnim (president of Bowie) Trial Tr. vol. 2, 32, Jan. 5, 2012; Dudley-Eshbach Trial Tr. vol. 2, 29, 60, Jan. 25, 2012; Gibralter Trial Tr. vol. 1, 14, Jan. 24, 2012.)[27]

136. Thus, the testimony of Morgan's former president, Dr. Earl Richardson, and other witnesses to the effect that the State did not provide Morgan with sufficient money for particular programs, for full-time faculty positions, for maintenance, etc., is inaccurate to the extent that it implies that the State specifically funds such items. *See generally* Richardson Trial Tr. vols. 1 and 2, Jan. 12, 2012.

137. The only way to determine whether Morgan or any of Maryland's other three HBIs were "inequitably" or "unequally" funded is to compare the State's funding of those institutions with the State's funding of other comparable institutions of higher education.

[27] Secretary Howard testified that "the argument that is being made about the ways in which the HBIs are disadvantaged could also be made by other institutions that are not HBIs in terms of state-of-the-art equipment and aging physical plants" and that "one measure of competitiveness is the success of an institution's graduates. The HBIs' graduates are competitively positioned with graduates of other institutions." (Howard Trial Tr. vol. 1, 93, Jan. 23, 2012.)

138. As described below, the evidence establishes that, when compared on a full-time-equivalent ("FTE") student basis, the State's appropriations to its HBIs have exceeded its appropriations to the other comparable institutions of higher education, and that even in the recent era of extreme budget cuts, the State has preserved the favorable funding provided to the HBIs.

a. The appropriations process

139. The process for funding public colleges and universities in Maryland begins with DBM. At the close of each session of the Maryland General Assembly, DBM begins the budget process for the next fiscal year, which at that point is nearly 15 months away. (Treasure Trial Tr. vol. 2, 35-36, Jan. 30, 2012.) DBM assesses the just approved budget and other General Assembly enactments, and compares the State's needs with the anticipated revenues. (*Id.*) DBM then issues detailed instructions for the operating budget to all State entities, including the public colleges and universities. (*Id.*) The instructions provide the various parameters needed to construct each entity's budget. (*Id.*) DBM also issues specific individual guidance to each entity on its maximum budget target and anticipated revenues. (*Id.*) DBM does not prohibit entities from requesting additional funds above the target. (*Id*.) DBM provides the budget target to the USM as a whole, not by individual institution, and provides the budget target for Morgan directly to Morgan. (*Id.* at 48-50.) The USM's and Morgan's base budget submissions must be within the target set by DBM, but DBM permits submissions of separate requests for funding that exceeds the target. (*Id.* at 50.)

140. Based on the instructions from DBM and its Strategic Plan, the USM administration issues guidelines concerning the upcoming budget year to the presidents of its constituent institutions which, again, include all public four-year higher education institutions in the State except Morgan and St. Mary's College of Maryland. (Vivona Trial Tr. vol. 1, 6, Jan. 31, 2012.) These guidelines include information about the "fixed" costs such as health insurance premiums, employee cost of living increases, and others. (Treasure Trial Tr. vol. 2, 35, Jan. 30, 2012; Vivona Trial Tr. vol. 1, 12, Jan. 31, 2012.)

141. Each USM institution then submits to the USM administration office a proposed itemized budget that includes the anticipated cost to run the institution at its current service level and any enhancements for which it seeks approval. (Vivona Trial Tr. vol. 1, 6, Jan. 31, 2012.)

142. The USM reviews those requests and draws up a recommended budget covering all of its institutions, which it submits to DBM. (Kirwan Trial Tr. vol. 2, 8, 26, Jan. 23, 2012.)

143. The USM generally adjusts the requests made on behalf of institutions with lower tuition revenue such as Bowie, Coppin, Frostburg and UMES, so that the State can provide proportionately greater appropriations to these institutions and roughly compensate for their lower revenue. (Vivona Trial Tr. vol. 1, 48-53, Jan. 31, 2012; *see also id.* at 20-21.)

144. In the past ten years or so, the USM has made a conscious effort to provide enhanced funding to the HBIs and, during recent years, to protect them from budget

reductions. (Vivona Trial Tr. vol. 1, 19-21, 35, Jan. 31, 2012; Kirwan Trial Tr. vol. 1, 67-68, Jan. 25, 2012; Treasure Trial Tr. vol. 2, 58-59, Jan. 30, 2012.) When budget cuts were unavoidable, the USM attempted to reduce the HBIs' budgets at a lesser rate than cuts imposed on other institutions. (*Id*.)

145. Because it is not part of the USM, Morgan determines its own needs and wants for the coming fiscal year and devises a budget request accordingly. (Treasure Trial Tr. vol. 2, 50-51, Jan. 30, 2012; Vollmer Trial Tr. vol. 1, 71, 73, Jan. 11, 2012.)

146. USM officials and representatives of Morgan typically have a series of meetings with DBM representatives and the Governor or Governor's representatives to discuss their requests and otherwise advocate for their budgets with DBM, the Governor, and the General Assembly. (Kirwan Trial Tr. vol. 2, 28-29, Jan. 23, 2012; Newman Trial Tr. vol. 1, 20, Feb. 1, 2012; Treasure Trial Tr. vol. 2, 50-51, Jan. 30, 2012; Vollmer Trial Tr. vol. 1, 71, 73, Jan. 11, 2012.)

147. In consultation with DBM, MHEC is responsible for submitting its recommendations on a consolidated higher education operating and capital budget to the Governor and General Assembly. (Educ. § 11-105 (i)(2); Popovich Trial Tr. vol. 1, 32-33, Jan. 9, 2012; Newman Trial Tr. vol. 1, 20-21, 25, Feb. 1, 2012.) MHEC does not conduct an item by item review in developing its recommendations, but looks at whether the proposals are consistent with the State Plan and with the priorities of the Governor. (Newman Trial Tr. vol. 1, 20-21, Feb. 2, 2012.)

148. The Governor then presents the budget to the General Assembly. (Treasure Trial Tr. vol. 2, 39, Jan. 30, 2012; Vollmer Trial Tr. vol. 1, 73, Jan. 11, 2012.) Once the General Assembly passes the budget bill, the USM, Morgan and St. Mary's each receives its total budget. The USM decides what portion of the whole goes to each school within the USM. (Treasure Trial Tr. vol. 2, 49, Jan. 30, 2012; Burnim Trial Tr. vol. 2, 38-40, Jan. 5, 2012; T. Thompson Trial Tr. vol. 2, 5, Jan. 4, 2012.) Each school is free to determine how to apportion the funds allocated to it and may even apportion them in a manner that is not consistent with the itemized budget request. (Treasure Trial Tr. vol. 2, 51-52, Jan. 30, 2012.) There is no penalty for spending the appropriations in a manner that differs from the request. (*Id.* at 52.)

149. After the funding decisions are made, Maryland uses the funding guidelines as a metric against which the State can judge how well it has funded its public post-secondary institutions compared to the institutions' respective peers in other states. (Treasure Trial Tr. vol. 2, 56, Jan. 30, 2012; Newman Trial Tr. vol. 1, 22, Feb. 2, 2012.) The guidelines embody the State's goal for funding higher education, but they play only a minimal role in the actual funding process. (*Id.*; Vivona Trial Tr. vol. 1, 14, Jan. 31, 2012.)

150. The current guidelines provide an aspirational framework for evaluating the adequacy of budget appropriations for each Maryland public institution of higher education. (Newman Trial Tr. vol. 1, 22, Feb. 1, 2012.) The guidelines are determined by examining the funding provided to comparable institutions throughout the United

States. (Newman Trial Tr. vol. 2, 87, Jan. 31, 2012; Caret Trial Tr. vol. 2, 24-25, 42, Jan. 31, 2012.)

151. The basic concept of the current guidelines is to identify peer institutions that are similar to each Maryland institution in size, program mix, enrollment composition, and other defining characteristics, and then to look at the funding provided to those peer institutions in an effort to assess Maryland's ability to compete on a national level. (DX 404.4; Newman Trial Tr. vol. 2, 88, Jan. 31, 2012; Vivona Trial Tr. vol. 1, 14-16, Jan. 31, 2012.)

152. Maryland's goal is to be in at least the 75th percentile with respect to funding of each of its public post-secondary schools when compared to the funding received by other, like institutions across the country. (Newman Trial Tr. vol. 2, 89, Jan. 31, 2012.)

153. The current funding guidelines were created in 1999, following a detailed process, and they continue to be revised, as needed. (DX 88.1; *see also* DX 404.4; PX 244; PX 246; Newman Trial Tr. vol. 2, 89, Jan. 31, 2012.) First, each institution's comparator, or "peer," institutions in other states were identified; second, every year, after the completion of the budget process, the 75th percentile level of funding for the peer group on an FTE student basis is determined; third, this target level is multiplied by the Maryland institution's number of FTE students; and, finally, the institution's expected tuition revenue is subtracted from that figure to achieve the funding guideline amount. (DX 88.1; Newman Trial Tr. vol. 2, 88-91, Jan. 31, 2012.)

154. The institutions play a role in selecting their peers, but MHEC makes the final determination. (Newman Trial Tr. vol. 1, 3-18, Feb. 1, 2012.)

155. Peer selection begins with looking at institutions that share the same Carnegie Classification as the home institution. (Newman Trial Tr. vol. 2, 87-89, Jan. 31, 2012.) The Carnegie Classification is a system developed by the Carnegie Foundation, which periodically collects data on all institutions of higher education and then classifies them based on the type, number and level of degrees awarded by the institution, as well as the level of research activity at the institution. (*Id.* at 98-99; *see generally* Newman Trial Tr. vol. 2, Jan. 31, 2012; vol. 2, Feb. 1, 2012.)

156. To identify appropriate peer schools, MHEC considers several factors about the home institution including enrollment, racial composition of the student body, and degrees awarded, and then performs a statistical analysis to identify those schools that most closely match the home institution. This process generates a list of several dozen peers for each institution. (PX 244, PX 246; DX 88.1; DX 404.1.)

157. In 2008, in response to requests by institutions, the process for selecting peers was adjusted for Morgan, UB, Towson and UMBC. (Newman Trial Tr. vol. 1, 1-19, Feb. 1, 2012.)

158. To address Morgan's concerns that its peers did not adequately reflect Morgan's unique challenges (Vollmer Trial Tr. vol. 1, 88-92, Jan. 11, 2012), including its

"dual mission,"[28] MHEC added consideration of at least nine additional variables not used in the process for the other public four-year institutions, including the percentage of students receiving federal tuition grant financial aid, in order to reflect the socioeconomic status of the students; research expenditures as a percentage of total operating expenditures, to reflect the university's doctoral and research mission; degree of urbanization, to reflect Morgan's urban mission; and 25th and 75th percentile SAT scores of the student population, to reflect the academic preparedness of Morgan students. (Newman Trial Tr. vol. 1, 8-16, Feb. 1, 2012.) In addition, in response to Morgan's urging, the selection of peers for Morgan was specifically limited to institutions with FTE

[28] There was considerable testimony concerning the concept of "dual mission." Most often "dual mission" was described as providing access or admission to students who are under-prepared for college level work as well as providing access or admission to academically qualified students. *See, e.g.*, Howard Trial Tr. vol. 1, 89, Jan. 23, 2012; Wilson Trial Tr. vol. 2, Jan. 3, 2012; Burnim Trial Tr. vol. 2., 41, Jan. 5, 2012. Student under-preparedness may be a consequence of one or more of the following factors: a deficient secondary education, low family income, being the first in one's family to attend college, or lack of maturity. (Kirwan Trial Tr. vol. 2, 48, Jan. 24, 2012; Avery Trial Tr. vol. 1, 100, 111-12, Jan. 9, 2012; Wilson Trial Tr. vol. 1, 65-66, Jan. 4, 2012.) Three HBI presidents described the concept as serving unprepared students and also a larger community. (Thompson Trial Tr. vol. 1, 69, 86-87, Jan. 4, 2012 (advancing community and rural development; educating the wider community, including farmers and researchers); Wilson Trial Tr. vol. 1, 39, Jan. 4, 2012 (addressing critical needs of Baltimore City); Avery Trial Tr. vol. 1, 100, 111-12, Jan. 9, 2012 (meeting emerging community and state needs).) The decision to maintain and allocate resources for a dual mission resides with the institution. (Treasure Trial Tr. vol. 2, 53-54, Jan. 30, 2012; Wilson Trial Tr. vol. 1, 69, Jan. 4, 2012.) Morgan's president, David Wilson, testified that Morgan's mission as an "urban" university is to serve Baltimore City graduates, whatever their skill level, and that Morgan should not drop its dual mission or set higher admission criteria. (Wilson Trial Tr. vol. 1, 37-39, Jan. 4, 2012.) Non-HBIs also admit under-prepared students. (Burnim Trial Tr. vol. 2, 70, Jan. 5, 2012; Gilbralter Trial Tr. vol. 1, 18-37, Jan. 24, 2012; Aldridge Trial Tr. vol. 1, 103-05, vol. 2, 14-15, Jan. 25, 2012; Bogolmony Trial Tr. vol. 1, 18-19, Jan. 30, 2012.)

student enrollments of less than 10,000, to reflect Morgan's size. (*Id.* at 19.)[29] Ultimately, of the ten peers chosen by MHEC for Morgan, eight were recommended by Morgan. (Richardson Trial Tr. vol. 1, 101-02, Jan. 12, 2012.)

159. Funding decisions, therefore, do not stem from a policy or practice rooted in *de jure* segregation. As explained above, the State's appropriations to its institutions of higher education are determined by a great many factors, none of them traceable to *de jure* segregation.

160. In *Fordice*, on remand, the district and circuit courts reviewed and approved Mississippi's newly enacted funding formula. In response to an earlier court decision, the formula relied not on missions (which the court deemed traceable to the *de jure* era), but on the size of a university's enrollment, faculty, and physical plant. The newly adopted funding formula resulted in the same allocations that had preceded the adoption of the formula. That is, the HBIs did not gain any additional funding as a result

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[29] Maryland does not claim that it has in every instance achieved the goal of providing State appropriations at the 75th percentile level compared to peer institutions, as determined by the guidelines. (Vivona Trial Tr. vol. 1, 14, Jan. 31, 2012.) Maryland's HBIs, however, have received funding that comes closer to meeting the guideline goal than other Maryland higher education institutions. For example, in FY 2012, Coppin received state appropriations amounting to 110.8% of the funding received by peer institutions as identified in the guidelines, Morgan – 77.5%, UMES – 71.6%, and Bowie – 70.2%. (DX 404.5.) These institutions ranked 1st, 2d, 4th, and 5th in receiving funding that came closest to the State's goal. The only non-HBI ranked within the top five was the State's flagship, UMCP, which received 75.1% of the amount received by its peers, as identified by the guidelines. (*Id.*) The bottom five were all non-HBIs, and ranged from UB at 46.4% to Frostburg at 68.7%. (*Id.*)

of a funding formula based on non-traceable factors. Notwithstanding the similarity of new funding levels to those appropriated under the prior vestigial system, the court upheld the constitutionality of the newly enacted funding formula and concluded that "[c]urrent policies and practices governing funding of institutions are lawful. There is no *per se* funding policy or practice traceable to the *de jure* era. Attainment of funding 'equity' between the HBIs and HWIs is impractical and educationally unsound." *Ayers*, 111 F.3d at 1221 (quoting *Ayers v. Fordice*, 879 F. Supp. 1419, 1453 (N.D. Miss. 1995)).

161. The plaintiffs in *Fordice*, like plaintiffs here, argued that state funding in that case was deficient because it failed to take into account the dual mission of Mississippi's HBIs, the greater amount of financial aid required for the student population of the HBIs, and disparities in the institutions created during the days of *de jure* segregation. *See id.* at 1223 ("Plaintiffs also contend that the district court erred by failing to consider adjustments to the funding formula to take into account student financial need and the higher costs of remedial education, or increases in funding to the [HBIs] to aid them in overcoming the cumulative effects of decades of underfunding. Plaintiffs specifically request funding to enhance existing facilities, including libraries and equipment, at the HBIs.") (internal quotation marks omitted).

162. That argument by the *Fordice* plaintiffs was rejected by both the trial court and the appellate court, each of which concluded that the plaintiffs had not "identified any traceable policy related to the funding of remedial education" and that "any potential segregative effects of the failure of the formula to take financial need into account is a

function of the socioeconomic status of black applicants, not a traceable policy of the *de jure* system." *Ayers*, 111 F.3d at 1224. Moreover, the *Fordice* courts dismissed the notion of ordering "catch-up" funding for the HBIs to make up for past inequities: "private plaintiffs appear to advocate enhancement of the HBIs in order to rectify the detrimental effects of past *de jure* segregation, without regard to present policies and practices. This position is at odds with standards established in *Fordice." Id.* at 1210 (citing the Supreme Court's opinion).

163. In recent years, Maryland has found it necessary to make dramatic cuts in funding of state agencies due to the recession, and its universities have not been spared from this reality. (Treasure Trial Tr. vol. 2, 43-45, 58-59, Jan. 30, 2012; Vivona Trial Tr. vol. 1, 16-18, Jan. 31, 2012.) Despite these recent budget cuts, in the period from FY 2000 to 2012, overall State financial support for Maryland's four HBIs grew by 82.5%, compared to 43.3% for the non-HBIs, excluding UMB and UMUC.[30] (Treasure Trial Tr. vol. 2, 66-67, Jan. 30, 2012.) On a per-FTE-student basis, overall state financial support during this time period increased by 37.6% for the HBIs, as compared to only 11% for the non-HBIs, excluding UMB and UMUC. An HBI (Coppin) ranked first in the percentage of increase compared to the other higher education institutions, and a non-HBI (UB) ranked last, with its State funding actually showing a decrease. Finally, from 2000 to 2012, if the four HBIs together were viewed as a single State agency, their

[30] For the reasons discussed below, UMB and UMUC are atypical institutions, and the parties agree that they should not be used for comparative purposes.

combined funding growth rate would have ranked 11th highest among all State agencies. (*Id.* at 70-71.)

b. Maryland's HBIs are not underfunded compared to its Non-HBIs.

164. Defendants' expert, American University Distinguished Professor Allan Lichtman, and plaintiffs' expert, University of Georgia Professor of Higher Education Robert Toutkoushian, each undertook a comparative funding analysis to determine whether the State was providing less funding to its HBIs than it was providing to comparable non-HBIs.

165. Both experts excluded from their comparison UMB, Maryland's specialty professional school, and UMUC, the Maryland public university known for distance education. Both experts agreed that those two schools are simply too different from all the other public institutions of higher education in Maryland for comparison purposes. (Lichtman Trial Tr. vol. 2, 22-23, Feb. 1, 2012.)

166. The chief point on which Dr. Lichtman and Dr. Toutkoushian differed was whether UMCP, the State's flagship university, also should be excluded from the comparison. (Toutkoushian Trial Tr. vol. 2, 103, Jan. 17, 2012.)

167. Dr. Lichtman provided compelling evidence regarding UMCP's status as an outlier to explain why his comparative analysis did not include UMCP. (*See, e.g.*, DX 405, at slides 2, 3, 4, 5; Lichtman Trial Tr. vol. 2, 21, 25-30, 34-35, Feb. 1, 2012.)

168. The facts establishing UMCP's outlier status, as provided by Dr. Lichtman, were not controverted by Dr. Toutkoushian or any other witness.

i. UMCP should be excluded from a comparative funding analysis.

169. A number of factors support the conclusion that UMCP is a statistical outlier compared to Maryland's other public, four-year non-HBIs, excluding UMB and UMUC (the "Non-HBI Comparison Group").[31] (Lichtman Trial Tr. vol. 2, 25-29, Feb. 1, 2012.)

170. UMCP was designated by the Maryland General Assembly as Maryland's flagship campus. (Educ. §§ 10-209(f), 11-105(b)(5)(i), 12-106 (a)(1)(iii) 1.) The General Assembly intended for UMCP to achieve national and international eminence. (Kirwan Trial Tr. vol. 2, 43-44, Jan. 23, 2012.) By statute, the USM is directed to provide UMCP with "the level of operating funding and facilities necessary to place it among the upper echelon of its peer institutions." (Educ. § 10-210 (f)(4).)

171. UMCP enrolls many more students than other schools in the Non-HBI Comparison Group. (Lichtman Trial Tr. vol. 2, 21, Feb. 1, 2012.)

172. UMCP receives a greater share of State higher education dollars than all institutions in the Non-HBI Comparison Group combined. (*See* DX 405, at slide 5.)

[31] The Non-HBI Comparison Group consists of the schools that both Drs. Lichtman and Toutkoushian chose to compare to the HBIs with respect to funding: Frostburg, Salisbury, UB, Towson, UMBC, and St. Mary's.

173. For example, during the period from 1984 through 2010, UMCP received cumulative annual appropriations totaling $7,254,345,000, while the six other institutions in the Non-HBI Comparison Group, *combined*, received total appropriations of $4,876,924,000. In other words, one institution received 60% of the total combined annual appropriations provided to these seven institutions during a 27-year period. (*Id.* at slide 3.)

174. UMCP's funding remains disproportionate even when one adjusts for size of the student body. On an FTE student basis, UMCP's state funding continues to exceed by far the funding of all other schools in the Non-HBI Comparison Group. In 2010, for example, the amount UMCP received from the State ($13,072 per FTE student) was more than double the average amount ($6,431 per FTE student) received by institutions in the Non-HBI Comparison Group. For the period 1984 through 2010, a comparison shows nearly the same disproportion in funding: UMCP's annual appropriation averaged $9,732 per FTE student, and the other schools in the Comparison Group averaged $5,191 per FTE student. (*Id.* at slides 2, 4.)

175. UMCP remains an outlier when one looks at unrestricted revenue, which includes state appropriations plus revenue that is not in the State's control (for example, revenue from sales, services, tuition, fees, some grants and some contracts). From 1984 to 2010, UMCP received approximately $17.544 billion in unrestricted revenue, compared to approximately $13.285 billion received by the other institutions in the Non-HBI Comparison Group. *See id.*, at slide 7. This comparison shows that UMCP alone

accounted for 57% of all unrestricted revenue received by these seven non-HBIs during a 27-year period. (Lichtman Trial Tr. vol. 2, 35-36, Feb. 1, 2012.)

176. Again, adjustment for size leads to a similar result. From 1984 to 2010, UMCP received unrestricted revenue averaging $25,537 per FTE student – or about 80% more than the $14,141 per FTE student received by the schools in the Non-HBI Comparison Group. If one averages unrestricted revenue received during 1984 to 2010 for the schools in the Non-HBI Comparison Group and UMCP together, the average is over $4,000 per FTE student more than it would be without the addition of UMCP. In other words, the inclusion of UMCP drives the results in a manner that shows it to be an outlier. (Lichtman Trial Tr. vol. 2, 36-37, Feb. 1, 2012; DX 405, at slide 8.)[32]

177. Dr. Lichtman testified that the combination of UMCP's inordinate size and its legislative designation since 1988 as Maryland's flagship university, along with the priority funding associated with its flagship role, caused UMCP's numbers to drive and dominate all

[32] A similar pattern is evident with regard to restricted revenue and total revenue. Restricted revenue is revenue that is earmarked for a particular purpose, and mostly comes in the form of grants and contracts from various private institutions, as well as the federal and state government. From 1984 to 2010 UMCP received more than triple the average unrestricted revenue received by the institutions in the Non-HBI Comparison Group. On an FTE student basis, UMCP received restricted revenues that account for 72% of the total restricted revenue received by it and the six schools in the Non-HBI Comparison Group combined. (Lichtman Trial Tr. vol. 2, 37-38, Feb. 1, 2012; DX 405, at slides 9, 10.) For total revenue, which includes all revenue except for capital allocations, from 1984 to 2010, UMCP received more than 60% of the total amount of revenue received by it plus the institutions in the Non-HBI Comparison Group combined. On an FTE student basis, the total revenue for UMCP was almost double the average of the total revenue for the institutions in the Non-HBI Comparison Group. (Lichtman Trial Tr. vol. 2, 38-39, Feb. 1, 2012; DX 405, at slides 11, 12.)

other figures to such a degree that an assessment of state appropriations that included College Park would render meaningless, or at best unedifying, any effort to compare Maryland's HBIs to its non-HBIs. Dr. Lichtman testified:

> College Park drives any analysis when you include it in State appropriations. … When you have one case here, one institution that drives everything, the most appropriate analysis is to do a comparison with more appropriate institutions. And it's not like we don't have enough for a comparison. We have six other non-Historically Black Institutions, which we're comparing to four Historically Black Institutions.

(Lichtman Trial Tr. vol. 2, 34-35, Feb. 1, 2012.)[33]

178. The court concludes that it is unreasonable to include UMCP, a substantive and statistical outlier, when determining whether Maryland's HBIs have received greater state appropriations than its non-HBIs.

ii. A comparative analysis that excludes UMCP

179. For every fiscal year from 1984 to 2010, the HBIs received state appropriations above and beyond what would be projected based on their share of FTE students, as compared to the schools in the Non-HBI Comparison Group, which does not

[33] The evidence shows that the state appropriations provided by Maryland to its flagship institution are in line with the funding provided by other states to their flagship institutions. For example, in 2008, UMCP received State appropriations of $12,305 per FTE student, while the University of Florida (Gainesville), University of North Carolina (Chapel Hill), University of Texas (Austin) and University of Virginia (Charlottesville) received, on average, $12,658 per FTE student in state appropriations that year. (*See* Lichtman Trial Tr. vol. 2, 32-33, Feb. 1, 2012; DX 405, at slide 6.)

include UMCP. This "excess" amount varied from year to year, but never dropped below zero, and began to increase dramatically after 2005. (*Id.* at 41-43; DX 405, at slide 14.)[34]

180. When the enhancement funds provided to the HBIs are considered, the cumulative excess received by the HBIs from 1984 to 2010 amounts to $542,860,000. (Lichtman Trial Tr. vol. 2, 43-44, Feb. 1, 2012.)

181. HBIs also fared well in comparison to non-HBIs with respect to unrestricted revenues. From 1984 to 2010, the HBIs received an excess of $35,257,000 compared to what they would have received if they had received unrestricted revenues in proportion to their share of FTE students. While not a huge excess, this figure shows that the HBIs are not being disadvantaged in their receipt of unrestricted revenues when compared to schools in the Non-HBI Comparison Group. (*See id.* at 65-67; *see also* DX 405, at slide 31.)

182. The same holds true when one measures total revenue. From 1984 to 2010, the HBIs received a cumulative excess of nearly half a billion dollars (or slightly greater than $483 million) more than they would have received if total revenues were

[34] On a mean basis, during that period, the State appropriated $1,874 more to the HBIs than it did to the schools in the Non-HBI Comparison Group, or $7,065 per HBI FTE student versus $5,191 per non-HBI FTE student. In 2010, the difference was even greater: a mean of $9,948 per HBI student compared to $6,431 per non-HBI student. (Lichtman Trial Tr. vol. 2, 44-45, Feb. 1, 2012; DX 405, at slide 16.)

proportionate to their FTE student enrollment. (Lichtman Trial Tr. vol. 2, 70-71, Feb. 1, 2012; DX 405, at slide 34.)[35]

183. Even when one adopts Dr. Toutkoushian's numbers regarding tuition and fees (which are what he calls "net tuition and fees" and exclude revenue spent on scholarships and other financial aid), HBIs come out ahead of non-HBIs. For instance, in 2008, the HBIs on average received more in combined appropriations plus tuition and fees than any of the schools in the Non-HBI Comparison Group ($14,435 versus $13,959 per FTE student). The numbers are even more skewed in favor of the HBIs if one uses Dr. Lichtman's tuition and fee figures ($16,748 versus $15,217). (*See* DX 405, at slide 32; Lichtman Trial Tr. vol. 2, 67-69, Feb. 1, 2012.)

184. The figures for 2011 continued to show a substantial excess for the HBIs. Including the enhancement funds, the State awarded the HBIs a mean of $9,802 per FTE student versus a mean of $6,444 per FTE student in the Non-HBI Comparison Group – an excess of $3,358 per FTE in favor of the HBIs. (Lichtman Trial Tr. vol. 2, 45-46, Feb. 1, 2012; DX 405, at slide 17.)

[35] If one looks only at the period 2001 through 2010, the HBIs received a 33% increase in state appropriations per FTE student, while appropriations to the schools in the Non-HBI Comparison Group were nearly flat, with only a 4% increase. (Lichtman Trial Tr. vol. 2, 46-47, Feb. 1, 2012; DX 405, at slide 18.) When enhancement funds are factored in, the HBIs on average received a little over $8,600 annually per FTE student during that ten-year period, compared to about $6,120 per FTE student in the Non-HBI Comparison Group, which amounts to approximately $2,500 *more* for the HBIs. (Lichtman Trial Tr. Vol. 2, 48, Feb. 1, 2012.)

185. Finally, Maryland's HBIs fare well in state appropriations compared to HBIs in four other formerly *de jure* segregated states. For 2008, the latest year in which IPEDS[36] data was available, Maryland provided greater average state appropriations per FTE student to its HBIs than Alabama, Louisiana, Mississippi, and Tennessee provided to their HBIs. (*See* DX 405, at slide 30; Lichtman Trial Tr. vol. 2, 65, Feb. 1, 2012.)

186. As conclusively demonstrated by the data, no matter how one analyzes the numbers, Maryland's HBIs are not underfunded compared to other, comparable institutions of higher education. (*See* Lichtman vol. 2, Feb. 1, 2012; vol. 1, Feb. 2, 2012.)[37]

iii. Comparison including UMCP

187. Even if one compares the funding received by the HBIs to the funding provided to all schools in the Non-HBI Comparison Group *plus* UMCP, the HBIs continue to come out ahead.

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[36] The Integrated Postsecondary Education Data System (IPEDS) is a national clearinghouse for educational data within the United States Department of Education. (Lichtman Trial Tr. vol. 2, 12, Feb. 1, 2012; Toutkoushian Trial Tr. vol. 1, Jan. 18, 2012; Conrad Trial Tr. vol. 1, 47, Jan. 10, 2012.)

[37] As Dr. Lichtman testified:

> So on every measure, then, that you look at when you compare State appropriations, either over the full-time period, either cumulative, either adjusted for FTEs, either during the most recent time period, either the most recent two years, that the HBIs are doing much better than the six non-HBIs, not counting College Park. No matter how you slice into that pie, it still comes out a cherry pie. It makes no difference.

(Lichtman Trial Tr. vol. 2, 48, Feb. 1, 2012.)

188. From 1984 through 2010 the HBIs received an excess of state appropriations plus enhancement funds in the amount of $84,621,000 over what they would have received if these funds had been distributed to all eleven institutions in proportion to their respective shares of FTE students. (Lichtman Trial Tr. vol. 2, 52-54, Feb. 1, 2012; DX 405, at slide 22.)

189. During the period 2001 through 2010, appropriations to the HBIs increased by 33%, while appropriations to the schools in the Non-HBI Comparison Group plus UMCP barely increased at all – only 2%. (Lichtman Trial Tr. vol. 2, 46-47, Feb. 1, 2012; DX 405, at slide 18.)

190. In 2010, mean appropriations to the HBIs were $842 higher per FTE student than mean appropriations per FTE student to the institutions in the Non-HBI Comparison Group plus UMCP. (Lichtman Trial Tr. vol. 2, 60, Feb. 1, 2012; DX 450, at slide 26.)

191. In 2011, the trend continued with the State awarding HBIs a mean of $9,802 per FTE student in appropriations and enhancement funds, while providing the schools in the Non-HBI Comparison Group plus UMCP a mean of $9,182 per FTE student – an excess of $620 per FTE student. (Lichtman Trial Tr. vol. 2, 45-46, 59, Feb. 1, 2012; DX 405, at slide 17.)

iv. Capital allocations

192. Between 2001 and 2010, Maryland's four HBIs ranked first (Coppin), second (Morgan), fourth (UMES), and fifth (Bowie) in State capital allocations per FTE student. (DX 405, slide 56.)[38]

193. In capital allocations provided during this time, the State invested very heavily in Coppin and provided it with allocations far greater than those provided to the other institutions examined. (Lichtman Trial Tr. vol. 1, 8-9, Feb. 2, 2012; DX 405, at slide 47.) In fact, the capital allocations to Coppin from 2002 to 2010 were $275.8 million, close to the approximately $300 million that the 2001 Coppin Study Report suggested should be invested in that university over a ten-year period. (Lichtman Trial Tr. vol. 1, 17, Feb. 2, 2012; DX 405, at slide 51; PX 461 (Report of the Independent

[38] The State also gave the HBIs significantly greater capital allocations compared to non-HBIs during the years 1984 to 2010. This is true whether UMCP is excluded or included in the analysis. If UMCP is excluded from the analysis, the State awarded HBIs a net excess of $425,454,000 compared to schools in the Non-HBI Comparison Group (Lichtman Trial Tr. vol. 1, 4-5, Feb. 2, 2012), not quite double the amount they would have received if spending were proportional to the number of FTE students. (*Id.* at 5). If UMCP is included in the analysis, the HBIs received a net excess of $472,174,000, a little more than double the amount they would have received if funding were provided proportionally. (*Id.* at 6-7; DX 405, at slide 54.)

Looking back even further in time and analyzing capital funding for the years 1975 through 2010, a period of thirty-five years, reveals an even greater excess of capital funding for the HBIs. Adjusting for inflation, and comparing the capital allocations to the HBIs versus the capital allocations to the schools in the Non-HBI Comparison Group *and* UMCP, shows that HBIs received an excess of $651.7 million in capital allocations. (Lichtman Trial Tr. vol. 1, 11, Feb. 2, 2012; DX 405, at slide 48.) (If UMCP is excluded, the excess is $588.8 million.) (*Id.*)

Study Team on the Revitalization of Coppin State College (September 2001).) In addition, the State invested about $65 million in capital allocations for Bowie from 2005 to 2010, following a 2004 report that recommended increased investment in Bowie's facilities. (Lichtman Trial Tr. vol. 1, 17-18, Feb. 2, 2012; PX 346.) This is compared to $489 million for seven of the non-HBIs combined over the same period. (Lichtman Trial Tr. vol. 1, 18, Feb. 2, 2012; DX 405, at slide 52.)

v. Comparison of objective facility indicators

194. In the fall of 2007, the HBIs' facilities had more total square feet per FTE student (213) than those of the Non-HBI Comparison Group plus UMCP (189). **(**Lichtman Trial Tr. vol. 1, 28, Feb. 2, 2012; DX 405, at slide 58.) Also as of fall 2007, the HBIs had a greater percentage of square feet in facilities built since 1992 (45% versus 41%), and the HBIs narrowly edged out the Non-HBI Comparison Group in percentage of facilities built since 1982 (57% versus 56%). (Lichtman Trial Tr. vol. 1, 29, Feb. 2, 2012; DX 405, at slide 59.)

195. The "Report of Committee II: Final Review of the Partnership Agreement Between Maryland and the United States Department of Education Office for Civil Rights (Feb. 2006)" compared the HBIs to what it considered to be the most comparable non-HBIs on the following objective facility indicators: academic space per FTE, academic space surplus or deficiency, average age of buildings in years, number of buildings renovated since 1970, and academic library holdings per FTE. (PX 803.) Bowie, Coppin and UMES were compared to three non-HBIs: Frostburg, Salisbury and

Towson. Morgan was compared to four non-HBIs: Frostburg, Salisbury, Towson, and UMBC.

196. When compared to the average figures for the non-HBIs studied, the HBIs collectively scored better on 14 of 20 comparisons. (*See* Lichtman Trial Tr. vol. 1, 30-32, Feb. 2, 2012; DX 405, at slides 61 – 64; DX 64A, at 34-36; Lichtman Report May 17, 2010.) Finally, as of fall 2006, the institutions with the greatest deficits in research lab space by far were both non-HBIs: UMB and UMCP. (*See* Lichtman Trial Tr. vol. 1, 32-33, Feb. 2, 2012; DX 405, at slide 65.)

197. In addition, both Towson and UMBC had greater deficits in lab space than any one of the HBIs. (*See* Lichtman Trial Tr. vol. 1, 32-33, Feb. 2, 2012; DX 405, at slide 65; PX 2, at 83 (Final Report of the Commission to Develop the Maryland Model for Funding Higher Education (December 2008).)

vi. Funding for African American students

198. Excluding UMUC and UMB, 41% of African American students attend one of Maryland's public non-HBIs. Accordingly, Dr. Lichtman also examined the financial support that the State gave to African American students, as opposed to HBIs. (Lichtman Trial Tr. vol. 1, 20, Feb. 2, 2012.) Dr. Lichtman found that, on average, African American students attended institutions that received greater than average State appropriations and capital allocations per full-time-equivalent student. This finding held true whether or not UMCP was included in the analysis. (*Id.* at 20; DX 405, at slide 53.) He concluded that African American students as a group are not discriminated against

with regard to Maryland's funding practices for operations at public institutions of higher education. (Lichtman Trial Tr. vol. 1, 20-21, Feb. 2, 2012.)

199. The court finds Dr. Lichtman's analysis to be reliable and persuasive.

D. Maryland's system avoids unnecessary program duplication.

200. As noted earlier, courts have deemed deliberate program duplication to be a vestige of *de jure* segregation, when it occurs between geographically proximate, racially identifiable institutions. Despite their admission that none of Maryland's non-HBIs can be considered a "white school" today, plaintiffs claim that Maryland fosters segregation by allowing academic programs offered at the HBIs to be duplicated at the State's non-HBIs.[39]

201. Not only does the State not perpetuate policies or practices that are traceable to the era of *de jure* segregation, it has developed an elaborate system designed to avoid specifically the types of program duplication about which plaintiffs complain.

202. That plaintiffs may not always like or agree with that system's decisions does not suffice to prove that Maryland has a policy or practice of unnecessary program duplication. As described below, Maryland's painstaking program approval process is far from a "vestige" of *de jure* segregation. In fact, it is a proactive policy aimed precisely at preventing unnecessary program duplication.

[39] Again, the HBIs are not unanimous in that assessment. For example, the president of Bowie attributed the decrease in Bowie's white student population to program duplication, not at the State's non-HBIs, but at private institutions Hood College and The John Hopkins University. (Burnim Trial Tr. vol. 2, 61-62, Jan. 5, 2012.)

203. MHEC, which has broad responsibility for coordinating postsecondary activities across the various segments of higher education in Maryland, is responsible for reviewing and approving new academic programs. (Howard Trial Tr. vol. 1, 18-19, Jan. 23, 2012; Blanshan Trial Tr. vol. 2, 60, Feb. 2, 2012; Code of Maryland Regulations (hereinafter "COMAR") 13B.02.03.03 (DX 400).)

204. MHEC is guided by the State Plan for Higher Education, which summarizes the State's priorities for higher education and is revised every four years. (Blanshan Trial Tr. vol. 2, 53, Feb. 2, 2012; DX 149.)

205. MHEC is charged with implementing Maryland's statutory and regulatory provisions concerning the approval of academic programs, which set forth detailed procedures for preventing unnecessary program duplication that lacks educational justification. (Educ. §11-206.1 (DX 345); COMAR 13B.02.03 (DX 400). MHEC recently promulgated a new version of COMAR 13B.02.03. (*See* 39 Md. Reg. 6, 409-10 (March 23, 2012).)

206. Although all Maryland institutions have the autonomy to propose new programs, Educ. §11-206.1 (DX 345), MHEC does not have the authority to propose or direct that institutions develop specific academic programs. (Blanshan Trial Tr. vol. 2, 59-60, Feb. 2, 2012.)

207. Before any public higher education institution in Maryland can offer a new academic program or substantially modify an existing program, it must submit the

program proposal to MHEC. (DX 390 (Academic Program Proposal Form); Blanshan Trial Tr. vol. 2, 56, Feb. 2, 2012; vol. 1, 5-6, Feb. 6, 2012.)

208. When an institution proposes a new program, MHEC proceeds from the understanding that the institution has performed an assessment to ensure that it has adequate faculty, library resources, physical facilities, instructional equipment and financial resources necessary to support the successful implementation of the proposed program and the students enrolled in it. (Howard Trial Tr. vol. 1, 51-53, Jan. 23, 2012; Blanshan Trial Tr. vol. 2, 10-11, 56-58, Feb. 2, 2012.)

209. Decisions concerning funding of specific academic programs take place at the campus level. The State provides general funds to institutions, and the institutions determine the appropriate use of those funds, which can include funding new academic programs. (Kirwan Trial Tr. vol. 1, 87, Jan. 23, 2012; Gibralter Trial Tr. vol. 1, 14, Jan. 24, 2012; Aldridge Trial Tr. vol. 1, 102, Jan. 25, 2012.)

210. When proposing a new program to MHEC, institutions must state that the proposed program is aligned with the diversity goals of the State Plan for Higher Education. (Howard Trial Tr. vol. 1, 53, Jan. 23, 2012.)

211. MHEC's current program approval process involves an objective, multi-step, multi-factor assessment that provides for collective participation by all Maryland higher education institutions, public and private. (COMAR 13B.02.03 (DX 400).)

212. After ensuring that a program proposal is complete, MHEC analyzes the proposal according to the 13 criteria specified in COMAR 13B.02.03.06. (DX 400; Blanshan Trial Tr. vol. 1, 13, Feb. 6, 2012.) These criteria include the following:

a. Centrality to mission and planning priorities, relationship to the instructional program emphasis as outlined in the mission statements, and campus priority for academic program development (COMAR 13B.02.03/07 (DX 400));

b. Critical and compelling regional or statewide need as identified in the State Plan (COMAR 13B.02.03.08 (DX 400));

c. Quantifiable and reliable evidence and documentation of market supply and demand in the region and service area (COMAR 13B.02.03.08 (DX 400));

d. Reasonableness of program duplication, if any (COMAR 13B.02.03.09 (DX 400));

e. Adequacy of curricular design and related learning outcomes (COMAR 13B.02.03.10 (DX 400));

f. Adequacy of articulation;

g. Adequacy of faculty resources (COMAR 13B.02.03.11 (DX 400));

h. Adequacy of library resources (COMAR 13B.02.03.12 (DX 400));

i. Adequacy of physical facilities and instructional equipment (COMAR 13B.02.03.13 (DX 400));

j. Adequacy of financial resources with documentation (COMAR 13B.02.03.14 (DX 400));

k. Adequacy of provisions for evaluation of program (COMAR 13B.02.03.15 (DX 400));

l. Consistency with the Commission's minority student achievement goals (COMAR 13B.02.03.15)); and

m. Relationship to low productivity programs identified by the Commission (COMAR 13B.02.03.17 (DX 400)).

213. By taking into account these criteria, MHEC assesses, among other things, whether the proposed program is consistent with the State's minority student achievement goals, the existence of critical and compelling regional or statewide need, and the reasonableness of program duplication.

214. MHEC's analysis of regional or statewide need is made in the context of COMAR 13B.02.03.08. MHEC considers both occupational and societal need. Occupational need is the need for a particular credential for an area of employment. Societal need represents a more general need in the State. MHEC also considers market demand, which involves an analysis of the current number of programs available in the State, and the number of job openings projected by the Bureau of Labor Statistics and the Maryland Department of Labor, Licensing and Regulation. Market demand analysis also includes consideration of whether there is high student demand for a particular program. (COMAR 13B.02.03.08; Blanshan Trial Tr. vol. 1, 15-16, Feb. 6, 2012.)

215. The ways in which MHEC analyzes proposed programs has necessarily changed over the years, due in part to the increases in technology, distance and online

education, which have changed dramatically the way education is delivered. (*See* Howard Trial Tr. vol. 1, 47, Jan. 23, 2012; Conrad Trial Tr. vol. 1, 121-22, Jan. 10, 2012; Sabatini (former MHEC acting secretary) Trial Tr. vol. 2, 14-16, Jan. 12, 2012.)

216. For its program duplication analysis, which is a factor in the approval process, MHEC is guided by COMAR 13B.02.03.09. This provision sets forth the variables that MHEC considers for every proposed program. In order to determine whether two programs are duplicative, MHEC considers the following:

a. degree level

b. area of specialization

c. curricular design

d. program objectives, including learning and career objectives

e. academic content, i.e., sequencing of courses and course level and evidence of quality.

f. market demand

g. consistency with institution's role and mission

h. accessibility and educational delivery

i. residency requirements

j. enrollment characteristics

217. MHEC examines all of the 13B.02.03.09 variables in order to determine whether two programs are actually duplicative. (Blanshan Trial Tr. vol. 1, 21, Feb. 6, 2012.)

218. MHEC maintains a program inventory database listing every academic program in the State, including degree programs and certificate programs. The database includes CIP[40] codes, institution name, program name, areas of concentration, and whether a program is active or discontinued. (Blanshan Trial Tr. vol. 2, 51-52, Feb. 2, 2012.)

219. MHEC does not use CIP codes to analyze whether there is duplication between programs because programs within the same CIP code can be very different from one another. Further, because CIP codes are updated only once per decade, there may not yet be a relevant CIP code designated for programs in new areas. (Blanshan Trial Tr. vol. 1, 22-23, Feb. 6, 2012.)

220. While MHEC is performing its own analysis of a program proposal, it sends a copy of the proposal, along with MHEC's cover memorandum, to all Maryland public higher education institutions. Each of those institutions then has 30 days to review the proposed program in light of its own offerings and, if it wishes, object to the proposal. (Howard Trial Tr. vol. 1, 49, Jan. 23, 2012; Blanshan Trial Tr. vol. 1, 25, Feb. 6, 2012.)

221. There are four bases on which one institution may object to another institution's program proposal. They are: 1) inconsistency with institutional mission; 2)

[40] The Classification of Instructional Programs (CIP) is a data-tracking system established by the federal government to track enrollment and graduation at colleges and universities. It is a component of the Integrated Postsecondary Education Data System (IPEDS) within the National Center for Educational Statistics, United States Department of Education. (Blanshan Trial Tr. vol. 1, 21 Feb. 6, 2012; Conrad Trial Tr. vol. 1, 46-47, Jan. 10, 2012.)

failure to meet state need; 3) unreasonable program duplication that could cause harm to another institution; and 4) failure to meet the State's obligations under state and federal law, which includes the State's duties under *Fordice*. (Howard Trial Tr. vol. 1, 50, Jan. 23, 2012; Blanshan Trial Tr. vol. 1, 27-28, 89-90, Feb. 6, 2012.)

222. MHEC may also object to a program on one or more of these bases. (Blanshan Trial Tr. vol. 1, 25; Feb. 6, 2012; Educ., §11-206.1 (DX 345).)

223. When MHEC receives objections to a proposed program, it shares the objections with the proposing institution and gives it an opportunity to respond. (Blanshan Trial Tr. vol. 1, 25, Feb. 6, 2012.) MHEC then makes all objections and responses available for anyone to review on its website. (*Id.* at 26.) MHEC tries to bring together the institutions involved in an effort to generate a compromise solution. (*Id.* at 30-31.)

224. Ultimately, the decision whether to approve a new program or program modification goes to the Secretary of Higher Education. (COMAR 13.B.02.03.04.)

225. Institutions may appeal any decision of the Secretary to the full Commission. *Id.* The Commission will hold a public hearing before making a decision on the appeal. (COMAR 13B.02.03.25D.)

226. There is no evidence in the record that an HBI has ever been denied a new program that it requested. (Howard Trial Tr. vol. 1, 54, Jan. 23, 2012; O'Keefe Trial Tr. vol. 2, 2, Jan. 30, 2012; Sabatini Trial Tr. vol. 1, 10-11, Jan. 12, 2012 (each unaware of any denial).)

227. Moreover, far from being limited by the program approval process, all of the HBIs have expanded their program offerings significantly in the last 30 years. (DX 404-DX 409; Blanshan Trial Tr. vol. 1, 96, Feb. 6, 2012.)

228. For example, Morgan offers more than 40 baccalaureate degrees, as well as 30 master's degree programs and 15 doctoral degree programs. (Wilson Trial Tr. vol. 1, 59-60, Jan. 4, 2012; DX 389.)

229. Also, Morgan and UMCP are currently the only Maryland public institutions that offer an architecture degree. (Popovich Trial Tr. vol. 1, 13, Jan. 9, 2012.)

230. UMES now has a program in pharmacy, which accepted 65 students out of the 931 who applied the first year the degree was offered. (T. Thompson Trial Tr. vol. 2, 9, Jan. 4, 2012.)

231. UMES also has the only aviation science program in the state (aside from the Naval Academy's). (*Id.* at 17.)

232. The construction management program at UMES is the only such program in the State. (*Id.* at 64.)[41]

233. UMES recently added an engineering program over the objection of one other school. That objector was Morgan. (*Id.* at 63.)

[41] UMES has programs in computer science, engineering and business that IBM considers number one in providing "state-of-the-art" trained students. (T. Thompson Trial Tr. vol. 2, 57, Jan. 4, 2012.)

234. Any alleged program duplication has not stunted student interest in attending HBIs. According to research regarding yield rate (number of applicants measured against number of enrollees), interest in attending Maryland's HBIs is increasing. (Howard Trial Tr. vol. 1, 39-40, Jan. 23, 2012.)

235. Although the court heard extensive testimony about Maryland's vast inventory of academic programs and the detailed program review process, plaintiffs submitted evidence of only two programs that ultimately were approved at a non-HBI over an objection by an HBI. The two programs were the Towson/UB Joint MBA program and the UMUC Community College Leadership program. The court addresses both programs below.

236. First, the State gave UMUC only limited approval for its Community College Leadership program; UMUC is permitted to provide online courses in Community College Leadership only to students residing in other states so that it will not compete for Maryland students with the Community College Leadership program offered at Morgan. (O'Keefe (former MHEC Commissioner) Trial Tr. vol. 2, 7-8, Jan. 30, 2012; DX 329B.)[42]

237. Second, during trial, plaintiffs focused on the MBA program now offered jointly by Towson and UB as an example of what they deem unnecessary program

[42] Similarly, the State denied Towson's application to offer a certificate in project management at the regional higher education center in Harford County in order to protect Morgan's online program in project management. (Howard Trial Tr. vol. 1, 54-55, Jan. 23, 2012.)

duplication. According to plaintiffs, the Towson-UB joint MBA program draws white students away from and unnecessarily duplicates the MBA program offered by Morgan.[43]

238. The court concludes that plaintiffs' allegations are not supported by the evidence.

239. UB has had an MBA program since 1972. (Bogomolny Trial Tr. vol. 1, 37, Jan. 30, 2012.)

240. Before Towson University approached UB to propose that the two institutions offer a joint MBA, it first approached Morgan. Morgan declined to enter into such a partnership with Towson. (Caret Trial Tr. vol. 2, 64, 69, Jan. 31, 2012.)

241. Although the Secretary of Higher Education initially denied approval of the Towson/UB joint MBA, the two schools offered additional evidence of educational justification and the Secretary then reversed himself and approved the program. (O'Keefe Trial Tr. vol. 1, 102, Jan. 30, 2012; PX 697.)

242. Morgan appealed the Secretary's decision approving the program to the full Commission. (O'Keefe Trial Tr. vol. 2, 102, Jan. 30, 2012.)

243. The Commission held a hearing on the appeal in the spring of 2005. At the hearing, the Commissioners voted to begin a process of negotiation among Towson, UB and Morgan. (O'Keefe Trial Tr. vol. 1, 102-03, Jan. 30, 2012.)

[43] Morgan houses the prestigious Earl G. Graves Business School, which has received accreditation from the Association to Advance Collegiate Schools of Business. It is one of only two schools in Maryland to receive that accreditation, which is given to only 5% of all business schools. (Wilson Trial Tr. vol. 1, 51-53, Jan. 4, 2012.)

244. A work group, chaired by John Toll and George Funaro, promptly formed in an effort to bring about a consensus among the three schools. The work group met throughout the summer of 2005. In September 2005, Drs. Toll and Funaro informed the Commission that they could find no possible ground for an agreement. (*Id.*)

245. The Commission specifically considered both *Fordice* and the Partnership Agreement as factors in determining whether to approve the MBA program over the objection of Morgan. After consulting with the Office of the Attorney General for a legal opinion regarding the application of *Fordice* to the approval decision, the Commission conducted its own review to determine whether there was sufficient educational justification for approval of the program. (*Id.*) Commissioners reviewed workforce data from federal and state agencies and consulted with the business community in the State. (*Id*.)

246. The Commission ultimately voted to approve the Towson/UB Joint MBA program. (*Id.* at 104; Caret Trial Tr. vol. 2, 70-71, Jan. 31, 2012.)[44]

[44] Because Plaintiffs never established the existence of a policy or practice regarding program duplication that is traceable to the era of *de jure* segregation, the burden never shifted to defendants to prove that the joint Towson/UB program was educationally justified. Nevertheless, in fact, several witnesses testified regarding the educational justification for the program. (*See* Kirwan Trial Tr. vol. 1, 100-02, Jan. 24, 2012 (testifying that TU's business school needed to offer an MBA in order to attract high quality faculty who would enrich the curriculum, and that there was an unmet need for another public MBA program); Bogomolny Trial Tr. vol. 1, 37, Jan. 30, 2012 (testifying that he agreed to establish the joint program because he believed that a collaboration with another institution would allow UB to improve the quality of its MBA program within its then-existing budget); O'Keefe Trial Tr. vol. 1, 108-10, Jan. 30, 2012 (testifying that the Commissioners based their conclusion that the joint MBA program was educationally

247. Towson and UB ultimately established the joint MBA program. Students who graduate from the Towson/UB joint MBA program receive a diploma which names both UB and Towson as the degree granting institutions. (Kirwan Trial Tr. vol. 1, 101, Jan. 24, 2012.)

248. Even if MHEC and the Commission made the "wrong" decision in one or even a few instances, that does not render the system inadequate, nor does it mean that Maryland has a current policy or practice of duplicating programs. In the words of the *Fordice* trial court after remand from the Supreme Court: "As the higher education system exists today, duplication of programs among institutions continues to be pervasive; however, that is true of all systems throughout the country which have more than one university." *Ayers*, 879 F. Supp. at 1444. Moreover, "[t]hroughout the United States, duplicative course offerings between proximate institutions is a matter of concern in regard to fiscal irresponsibility and usually nothing more." (*Id.*)

249. The *Fordice* trial court had before it an analysis by Dr. Clifton Conrad, who also testified as plaintiffs' expert in this case. Dr. Conrad's analysis in *Fordice* shared some of the same simplicity that characterizes his analysis here (which takes into account only CIP codes and program titles and makes no effort to understand the finer points of

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justified upon federal and state workforce statistics and requests from the business community showing the need for another public MBA program); *id.* at 3-5 (educational justification was based upon Mr. O'Keefe's finding that there was "clear need for additional capacity in a public MBA program and that Morgan was, for perfectly good reasons, not willing to direct its resources, apparently, to developing that program").)

any given program). Upon considering Dr. Conrad's analysis, the *Fordice* court found it "difficult to accept the proposition that Conrad's analysis actually yields an answer to the threshold question he himself poses: '[h]as this [formerly] *de jure* curriculum system been dismantled?'" *Id*. at 1145. The court noted that factors not considered in Dr. Conrad's analysis, such as a program's specific emphasis, perceived quality, and specific degree awarded, also play a role in student choice and therefore, have a bearing on whether any existing duplication has the effect of promoting segregation. *Id.*

250. It was only because the "duplication issue … does not stand alone" but instead operated "in conjunction" with "the element of differential admissions standards," that the *Ayers/Fordice* court found that similar institutional offerings between Mississippi's HBIs and geographically proximate, racially identifiable TWIs raised an inference that duplication continued to promote segregation. (*Id.*) In this case, plaintiffs have alleged nothing regarding differential admissions standards. Every public higher education institution in Maryland sets its own admissions criteria. (Neufville Trial Tr. Vol. 2, 25 Jan. 5, 2012; *see also* Educ. §10-208(4).) Plaintiffs do not (and cannot) allege that Maryland discriminates between African American and non-African American students with respect to the admissions process. That fact, combined with Maryland's thorough program review process, implemented specifically to avoid segregative duplication, means that even if plaintiffs show that some programs are duplicated, they have not shown that Maryland's policies and practices are traceable to the era of *de jure* segregation, or that Maryland operates a segregated system of higher education. Further,

as noted earlier, unlike the conditions that *Fordice* addressed in Mississippi, HBIs in Maryland have no "geographically proximate," "racially identifiable" TWIs to serve as the comparators that were essential to the courts' analysis of program duplication in *Fordice*. This fact, which is not challenged by plaintiffs, poses yet another insurmountable obstacle to plaintiffs' claims.

251. It is plaintiffs' burden to prove that the Maryland system of higher education has in effect a policy or practice of program duplication. They failed to do so. Nevertheless, defendants' evidence addressed and refuted every one of the contentions made by plaintiffs' expert, Dr. Conrad. With respect to the programs Dr. Conrad identified as unnecessarily duplicative in Table 1 attached to plaintiffs' January 29, 2012 letter (DX 410), Dr. Blanshan testified that many identified programs were actually different programs involving different subject matter or course curricula; a number were in different geographic regions of the State; a number involved high need or high demand programs; at least one was a core program; at least one was discontinued and no longer offered; a number involved a specialized focus, thereby differentiating the comparative programs; a number of the comparative programs were authorized for an HBI after the program had been established at the non-HBI, which Dr. Conrad testified were not deemed to be duplicative (Conrad Trial Tr. vol. 2, 41, Jan. 10, 2012); and a number of the programs were established before the time period identified as relevant by Dr. Conrad. (DX 411; Blanshan Trial Tr. vol. 1, 58-59, Feb. 6, 2012.)

252. As shown above, Maryland has put in place elaborate and carefully considered policies and practices designed to eliminate any vestiges of a dual system. Even if plaintiffs had shown that a current policy has a segregative effect, they did not trace that policy to the *de jure* era.

E. Maryland's HBIs are not disadvantaged because of their missions.

253. This court has previously noted that institutional missions are relevant to the inquiry in this case only insofar as they affect the two other issues highlighted by plaintiffs. (Dkt. 242 at 9-10) ("This seems to the court to be an issue that overlaps with operational funding and unnecessary program duplication."). As described and concluded above, Maryland's appropriations decisions and program approval process rely on factors independent of historical missions.

254. Each of Maryland's public institutions of higher education is responsible for developing its own mission statement. (Educ. § 11-302(a) and (b); Howard Trial Tr. vol. 1, 27, Jan. 23, 2012.)

255. MHEC's role is to formulate a statewide higher education plan, to coordinate the role played by each of Maryland's institutions and, ultimately, to approve the mission articulated by any given institution in light of that statewide plan. (Howard Trial Tr. vol. 1, 26-28, Jan. 23, 2012.) Sometimes MHEC makes suggestions about how to improve or add to what an institution proposes. (T. Thompson Trial Tr. vol. 2, 3-4, Jan. 4, 2012.) MHEC has 30 days following submission by the institution of its mission statement to confer with the institution if it believes the statement is not aligned with the

statewide plan; beyond that, MHEC has no role in changing, editing, or modifying the mission statement. (Blanshan Trial Tr. vol. 2, 91, Feb. 2, 2012.).[45]

256. There is no evidence in the record that MHEC has ever failed to approve a proposed mission statement.

257. Plaintiffs allege that the Carnegie Classifications are based on institutional missions traceable to the *de jure* era and challenge the use of the Carnegie rankings in State funding decisions. As explained above, funding comparators are derived only in part from Carnegie Classification System rankings and are used only at the end of the appropriations process to assess the State's provision of funds to any particular institution. Thus, Plaintiffs are wrong as a matter of both fact and law.

258. As a matter of fact, an institution's Carnegie Classification does not limit its funding. Aside from the State's flagship institution, UMCP, the three best-funded institutions are all HBIs, including Coppin and UMES, which hold the two lowest Carnegie classifications of all the institutions. The worst-funded institution, Towson, has one of the highest Carnegie classifications, and UMBC, the institution holding the highest Carnegie classification aside from the State's flagship, ranks lower in funding than Morgan, Coppin, and UMES. (*See* Lichtman Trial Tr. vol. 2, 63-65, Feb. 1, 2012.)

[45] Thelma Thompson, former president of UMES, testified that, in establishing a mission, a school does not begin with its mission statement. First, it identifies what it wants to do and what is feasible; then, if warranted, a school changes its mission statement to reflect those choices. (T. Thompson Trial Tr. vol. 2, 6-7, Jan. 4, 2012.)

259. As a matter of law, plaintiffs are also mistaken. Under applicable precedent, the State's funding process does not fall short of constitutional requirements merely because former missions may have contributed to, or exacerbated, factors that drive current funding decisions. The *Fordice* court faced a situation in which "the present formula allocates funds as a function of the size of each institution's enrollment, faculty, and physical plant" – all of which were established during the *de jure* era. *Ayers*, 111 F.3d at 1224. The court concluded, however, that "[w]hile the formula responds to conditions that to a significant degree have resulted from the mission designations (and consequently results in the HWIs receiving a greater proportion of funds), the manner in which the formula does so is guided by valid educational concerns and is not linked to any prior discriminatory practice." *Id.* Accordingly, the court found that institutional missions did not play a role in maintaining a segregated system.

F. Maryland's system of higher education does not affect student choice.

260. *Fordice* teaches that student choice is the key to determining whether a post-secondary-school system retains unconstitutional vestiges of segregation. *Fordice*, 505 U.S. at 742-43. Accordingly, cases that pose a *Fordice* challenge have focused on the ability of students to elect freely between various state schools, without the state funneling or channeling white students toward one school and black students toward another. In *Knight v. Alabama*, for example, the court heard testimony from three separate experts on the topic of student choice and then made 25 separate findings of fact on the issue. *See Knight*, 900 F. Supp. at 282-84.

261. In this case, by contrast, plaintiffs' only attempt to address student choice came in the form of testimony from Dr. Clifton Conrad, who relied on a single limited study he published in 1997, in which he interviewed 36 white students after they had already enrolled in one of five HBIs. Based solely on those 15-year-old data, Dr. Conrad testified at this trial that unique, high-demand programs were necessary to attract white students to HBIs. (Conrad Trial Tr. vol. 1, 42-43, Jan. 10, 2012.) [46]

262. Dr. Don Hossler, defendants' expert on student choice, criticized Dr. Conrad's methodology of interviewing white students "post-hoc" – that is, after they had already chosen an HBI. Dr. Hossler further noted that the publication in which Dr. Conrad's study appeared is "not a top-tier journal." (Hossler Trial Tr. vol. 2, 38, Feb. 6, 2012.) Dr. Hossler testified that it would be a "very, very rare student" for whom academic major or program offerings played a role in the first stage of making a college choice. (*Id.* at 18; *see also id.* at 59 ("the vast majority of students, they don't think about program. They mostly think about that institution.").)

263. Dr. Hossler also testified that demography (the characteristics of the population that geographically surrounds any given school) "makes a huge difference"

[46] When asked whether any articles other than his own agree that "unique, high demand programs create diversity," Dr. Conrad claimed that "there are several others." (Conrad Trial Tr. vol. 1, 43, Jan. 10, 2012.) In fact, the articles cited in his reports do not support that proposition. *See, e.g.*, Wilma J. Henry & Rosemary B. Closson, *White Students at the Historically Black University, Toward Developing a Critical Consciousness*, MULTICULTURAL EDUC. 13(2010); *The Whitening of Public Black Colleges and Universities*, J. OF BLACKS IN HIGHER EDUC. 13, 26-28) (Autumn, 1996).

with respect to the characteristics of the student population at a school. (*Id*. at 50.) Dr. Hossler was a retained expert in *Knight v. Alabama.* A study he conducted for that case concluded that programs "didn't seem to make that much [of] a difference" in attracting white students to HBIs. (*Id.* at 69.)

264. In short, plaintiffs bore the burden of showing that some policy or practice of the State "affects student choice and perpetuates a segregated higher education system." (*Fordice*, 505 U.S. at 742.) There is no evidence before the court to support that conclusion.

265. Instead, plaintiffs argued that the State should provide more funding to the HBIs, allegedly to further desegregate them, making the unsupported assertion that HBIs need unique, high-demand programs in order to attract white students in greater numbers.[47] Even assuming that what plaintiffs seek would result in greater white student enrollment, what they request is a remedy; remedies need not be considered unless and until a plaintiff establishes liability. In *Fordice*, the courts ordered certain enhancements and establishment of programs at Mississippi's HBIs, but only after finding that the plaintiffs' evidence established "the traceability of the HBIs' limited missions and of their

[47] Morgan complains that it needs greater funding because its student population is declining (Popovich Trial Tr. vol. 1, 38, 61, Jan. 5, 2012), but according to the testimony of David Wilson, its president, Morgan's enrollment *increased* by 7.5% in 2010-2011, compared to the prior academic year, which was a higher percentage increase in enrollment than any other Maryland 4-year public institution of higher education, and that trend continued in 2011-12. (Wilson Trial. Tr. vol. 1, 48-50, Jan. 4, 2012.) Morgan's enrollment today is larger than it has ever been. (*Id*. at 50.)

continuing racial identifiability." *See Ayers*, 111 F.3d at 1204. [48] Plaintiffs in this case made no such showing.

VI. Conclusion

"The vestiges of segregation that are the concern of the law in a school case may be subtle and intangible but nonetheless *they must be so real that they have a causal link to the de jure violation being remedied*." *U.S. v. City of Yonkers*, 197 F.3d 41, 76 (2d Cir. 1999) (quoting *Freemans*, 503 U.S. at 496) (internal quotation marks omitted) (emphasis in original). In Maryland, there are no remaining vestiges of segregation, but even if there were, any such vestiges could not be attributed to a current policy or practice and, therefore, do not require a remedy from this court.

Judgment is entered in favor of defendants.

Respectfully submitted,

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[48] The trial court in *Fordice* found "no traceable policy" with respect to faculty salaries and "the court properly declined to order relief," despite finding that salaries were, on average, lower at the HBIs than at TWIs. *Ayers*, 111 F.3d at 1227. The court determined that the disparity resulted from historic factors, rather than current policies or practices. *Id.*

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