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Separation Anxiety

In Maryland, a \$2 billion suit reopens the fight over segregation in public higher education.

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The National Law Journal

January 10, 2011

Nearly six decades after the U.S. Supreme Court struck down racially segregated schools, the state of Maryland is moving toward trial in a \$2 billion federal lawsuit charging that the state has failed to dismantle its dual system of higher education.

The trial, scheduled for June 27 before a federal judge, would be the first of its kind in 15 years, according to civil rights scholars and lawyers. And it will unfold amid increasing concerns by leaders of historically black colleges and others that a number of states either are not meeting or are backsliding on their legal obligations to fully desegregate their higher education systems.

Late last month, the assistant secretary for civil rights at the U.S. Department of Education met with the presidents of historically black colleges in the six states currently subject to monitoring by the department's Office for Civil Rights (OCR), according to Ricardo Soto, principal deputy assistant secretary for civil rights. The six states are Florida, Maryland, Ohio, Oklahoma, Pennsylvania and Texas.

"We've heard there is concern in the states we're currently involved in that the states aren't completely and fully implementing their commitments in desegregating their higher education systems," Soto said. "This is something we have heard consistently since this administration has taken office. That's why we have requested information from the historically black colleges and state officials. The assistant secretary also wanted to reassure [the presidents] that OCR is committed to enforcing these requirements."

It's about time, said Raymond Pierce, former deputy assistant secretary for OCR during the Clinton administration and now dean of North Carolina Central University School of Law.

"I'm a bit disappointed in OCR," he said. "I expect certain leadership in a Republican administration not to see as one of its major constituents those who value historically black colleges and universities. But here we're two years now into a Democratic administration, and I

have not seen any leadership from the Office of Civil Rights to counter eight years of recalcitrance and hostility towards finally resolving this nation's segregation cases."

Pierce, who had negotiated many of the agreements with the states still under OCR supervision, added that he had heard that OCR Assistant Secretary Russlynn Ali "said all the right things" in the late December meeting with the black college presidents. "I'm glad to see they're finally getting around to it, but after a decade of nonattentiveness, no wonder Maryland is in a lawsuit."

ENFORCING EQUALITY

The Maryland lawsuit — *The Coalition for Equity and Excellence in Maryland Higher Education v. Maryland Higher Education Commission* — was brought by alumni and students of Maryland's four historically black colleges and universities: Morgan State University, Bowie State University, Coppin State University and the University of Maryland-Eastern Shore.

Represented by Michael Jones, a partner at Kirkland & Ellis, and Jon Greenbaum, chief counsel of the Lawyers' Committee for Civil Rights Under Law, the coalition contends that Maryland has failed to eliminate the vestiges of its de jure system of segregation in essentially three areas: campus facilities, unnecessary program duplication and funding.

"This lawsuit is actually doing the work of federal enforcement," said school desegregation scholar John Brittain of the University of the District of Columbia David A. Clarke School of Law, who, along with the Howard University School of Law civil rights clinic, also represents the coalition.

As recently as 2000, he said, OCR found that Maryland was not in compliance with Title VI of the Civil Rights Act of 1964 and standards in *U.S. v. Fordice*, a 1992 Supreme Court decision on higher education desegregation. "This is just an enforcement action for what is already a finding of discrimination. It's just a question of whether they are doing enough to fulfill their obligations."

After the 2000 finding of noncompliance, OCR and Maryland entered into a five-year resolution agreement to remedy its civil rights violations. The agreement expired at the end of 2005. The coalition's lawsuit was filed in 2006.

Maryland told the federal court in October that OCR never, as required by the agreement, provided written annual feedback. OCR also never commented on Maryland's final report, which claimed the state had met its obligations.

"The first time [OCR] asked for additional information was to take some tours of the universities for evaluation purposes, which was in the summer of 2008," said Maryland Assistant Attorney

General Anne Donahue. "They didn't finish and I don't know why. Then this past summer, we initiated some contact with them to say we can give some additional information to update what we gave in 2006. They accepted that information. I'm assuming that process led them to asking for more information on Christmas Eve."

The Department of Justice is also working with OCR to examine Maryland's compliance, said OCR's Soto.

Donahue, who has been with the lawsuit from the beginning, said, "We have met our obligations to the federal government. Obviously, that's what the trial will determine."

The 2000 agreement with OCR was the third desegregation plan executed by Maryland since OCR told Maryland in 1969 and 1972 that its higher education system violated Title VI.

DOING ENOUGH?

Since the 1960s, the struggle for full desegregation of higher education systems in 19 states has been undertaken by private and federal lawsuits and federal supervision. Four states were sued by private plaintiffs and the Justice Department; the other 15 were under OCR's supervision, with six of them still being monitored.

Maryland has made progress toward dismantling its dual system of higher education, but not enough, said Kirkland's Jones.

In the area of program duplication, he said, "Frankly, I don't think they have made much progress at all." He noted, for example, that a Master of Business Administration program was launched at the traditionally white Towson State and University of Baltimore even though Morgan State had long had that degree program and the state attorney general's office objected.

Program duplication is widespread, he said, adding, "One consequence of that is the historically black colleges are now more segregated than in the '70s."

The state has remediated many of the physical conditions of its black college facilities — described in historical documents as "shameful" — but, Jones said, the state's own blue-ribbon commissions have reported they still "visibly lack" what the traditionally white institutions have. "We suggested to the judge that she go and see for herself," he said.

Although there has been some progress in providing additional funding to the historically black colleges, Jones said the state's own study panel found the funding to be insufficient and a funding formula to disadvantage those institutions. "We are requesting enhanced funding, up to \$2 billion, spread among the historically black institutions," Jones said.

The Maryland Higher Education Commission counters that there is limited program duplication and what exists can be justified on educational grounds. On funding, it claims it will show that its historically black colleges have been funded "more generously" than nonhistorically black institutions since 1984. And in terms of facilities, the state criticizes what it calls the plaintiffs' "eye of the beholder" analysis and says that it has "generously" built and renovated black college facilities during the past 25 years compared to the nonhistorically black institutions' facilities.

The two sides also disagree on how to apply the legal standard by which the judge must view those facts — the Supreme Court's 1992 *Fordice* decision, which said a state's duty is not discharged "until it eradicates policies and practices traceable to its prior de jure dual system that continues to foster segregation."

Maryland, in its statement of the case, says *Fordice*'s "usefulness is limited, given its age, narrow factual scope, ambiguities, and the massive changes which have occurred in higher education and society in the nearly 20 years since it was decided."

The coalition's Jones and Greenbaum say, "Despite the passage of time, *Fordice* — like its predecessor *Brown* — has not been repudiated nor limited by the Supreme Court and thereby remains legitimate and controlling precedent."

The experience of Maryland's historically black colleges is shared "across the Southern states and even some Northern ones," said desegregation scholar Marybeth Gasman of the University of Pennsylvania.

Racism is still alive, and black public colleges continue to be underfunded compared to white public institutions, she said. "Even to receive equal funding is not really equal because there's such a legacy of discrimination. Parity would be if they are getting more."

While some states have made progress, she added, "If you don't stay on these states — if OCR and the federal government don't stay on them — yes, they'll backslide. It costs money to provide equality in higher education."

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