

**Department of Legislative Services**  
Maryland General Assembly  
2011 Session

**FISCAL AND POLICY NOTE**

Senate Bill 856 (Senator Conway)  
Education, Health, and Environmental Affairs

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**Maryland Higher Education Commission - Review of Program Proposals**

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This bill requires the Maryland Higher Education Commission (MHEC) to review objections to proposals for new academic programs or substantial modifications to existing programs through a deliberative fact-finding process that includes the receipt of witness testimony and the weighing of evidence. The bill repeals the provision of law that makes MHEC's decision on whether a proposed program is unreasonably duplicative final and not subject to further administrative appeal or judicial review.

The bill takes effect July 1, 2011.

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**Fiscal Summary**

**State Effect:** General fund expenditures increase by approximately \$48,700 beginning in FY 2012 for MHEC to hire a part-time assistant Attorney General to review objections to program proposals. Future year estimates reflect annualization, regular salary increases, and inflation. University System of Maryland (USM), Morgan State University (MSU), St. Mary's College of Maryland (SMCM), and Baltimore City Community College (BCCC) administrative expenditures may increase to propose new programs, depending on the number of programs proposed that receive objections and the new procedures adopted by MHEC. Revenues are not affected.

| (in dollars)   | FY 2012    | FY 2013    | FY 2014    | FY 2015    | FY 2016    |
|----------------|------------|------------|------------|------------|------------|
| Revenues       | \$0        | \$0        | \$0        | \$0        | \$0        |
| GF Expenditure | 48,700     | 45,200     | 47,400     | 49,800     | 52,300     |
| Net Effect     | (\$48,700) | (\$45,200) | (\$47,400) | (\$49,800) | (\$52,300) |

*Note: ( ) = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect*

**Local Effect:** Community college administrative expenditures may increase to propose new programs as described above.

**Small Business Effect:** Minimal. Administrative expenditures for nonprofit and for-profit institutions that are small businesses may increase to propose new programs.

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## Analysis

**Bill Summary:** MHEC is required to adopt regulations that allow for the receipt of comments and objections from appropriate parties following submission of a completed proposal for new programs that will require additional resources and provide for a deliberative fact-finding process in reviewing objections. If an objection is filed against a new program that will be implemented using existing resources, MHEC must determine if an institution's objection is justified through a deliberative fact-finding process, including receiving witness testimony and the weighing of evidence.

**Current Law:** There are two processes for implementing new academic programs at institutions of higher education, one for new programs that can be implemented with existing resources and another for new programs that will require additional resources. The processes are overseen by MHEC, and MHEC's determinations about program duplication are not subject to judicial review or administrative appeal.

Institutions of higher education seeking to implement new programs with new resources must submit proposals for the new programs to MHEC, and MHEC must approve or disapprove the programs or, in the case of nonpublic institutions, recommend that the programs be implemented or not implemented. If MHEC fails to act within 60 days of the date of submission of a completed proposal, the proposal is automatically deemed approved.

MHEC may review an existing program at a public institution if it has reason to believe that the academic program is unreasonably duplicative or inconsistent with the institution's adopted mission. MHEC may make a determination that unreasonable duplication exists on its own initiative or after receiving a request from a public institution affected by the program duplication. If MHEC determines that there is unreasonable duplication which would cause demonstrable harm to another institution, it may require the institutions with duplicative programs to submit a plan to resolve the duplication. If the plan does not adequately address the duplication, MHEC may revoke an institution's authority to offer a duplicative program. MHEC must offer the institution an opportunity to present an objection to its decision, but MHEC's decision is final.

When an institution of higher education determines that it can implement a new program with existing resources, the president of the institution must submit the proposal to the institution's governing board and to MHEC, and MHEC must distribute the proposal to

other institutions. MHEC or another institution may file an objection to the proposal based on (1) inconsistency with the mission of the institution proposing the program; (2) a lack of need for the program; (3) unreasonable program duplication that could cause harm to another institution; or (4) violation of the State's equal educational opportunity obligations. Based on those factors, MHEC must determine if an institution's objection is justified. If MHEC determines that an objection is justified, it must negotiate with the institution's governing board and president to modify the proposal. If the objection cannot be resolved within 30 days of receipt of an objection, MHEC must make a final determination about the approval of the proposed program.

## **Background:**

### *Office for Civil Rights Agreement*

The U.S. Office for Civil Rights (OCR) entered into a partnership agreement with Maryland in December 2000 to further enhance the four public historically black institutions (HBIs) (Bowie State University, Coppin State University, Morgan State University, and the University of Maryland Eastern Shore) and improve higher educational opportunities for African American students. Maryland had previously submitted to OCR plans to show that the vestiges of its formerly *de jure* system of segregation in higher education had been adequately dismantled, most recently in 1991. The Partnership Agreement expired December 31, 2005. On June 19, 2006, Maryland submitted a final report on the Partnership Agreement Commitments to OCR, which acknowledged receipt of the report in 2008. OCR has yet to formally reply or to find Maryland in compliance with the Partnership Agreement and federal civil rights laws. Six states, including Maryland, are currently subject to monitoring by OCR; the other states are Florida, Ohio, Oklahoma, Pennsylvania, and Texas.

A 1992 Supreme Court decision in *United States v. Fordice*, 505 U.S. 717 (1992), concerning Mississippi's efforts to desegregate its system of higher education established the standard of "unnecessary duplication," a key measure to which Maryland would be held by OCR in evaluating its efforts to eliminate segregation. The standard set forth by *Fordice* prohibits states from allowing any traditionally white institution (TWI) to duplicate nonbasic bachelor's- or graduate-level courses that are similar to existing courses at HBIs within close geographic proximity, unless sound educational justification exists.

Among the State's obligations outlined in the OCR Partnership Agreement is a commitment to develop high-demand academic programs at HBIs to promote racial diversity and to avoid duplicating such programs at nearby TWIs. Under State law, MHEC is responsible for reviewing and approving new academic programs in higher education, and the program approval process is designed to ensure that the State satisfies its responsibilities under federal civil rights law including the unnecessary duplication

standard. Institutions seeking to establish new programs in Maryland must demonstrate to the commission that the program is not unreasonably or unnecessarily duplicative of existing programs in close proximity; if duplication is determined to exist, the institution must demonstrate that the program meets a societal or State need consistent with the State plan. MHEC also circulates new program proposals to provide each campus the opportunity to raise issues like unnecessary duplication. After considering each new program, the Secretary of Higher Education either approves or denies the application. Institutions may appeal the Secretary's decision to MHEC. The commission's decision is final and there is no further appeal.

### *Objections to Proposed Programs*

Several programs have been proposed by TWIs in the last few years that were objected to by HBIs on the basis of unnecessary duplication. On December 19, 2008, MSU, which offers Maryland's only doctoral program in Community College Leadership, objected to an online doctoral program in Management in Community College Policy and Administration proposed by University of Maryland University College (UMUC), a TWI, on the basis of unnecessary program duplication. MSU's program can be completed by attending weekend classes and is offered at two Regional Higher Education Centers. In contrast, UMUC's proposed program is Internet-based, though it requires two to three days of in-person weekend attendance each trimester.

After analyzing UMUC's proposal, the Secretary determined that the availability of UMUC's proposed Doctorate in Community College Policy and Administration in Maryland would adversely affect recruitment for MSU's existing program, causing it demonstrable harm. In a letter dated September 21, 2009, sent to UMUC's president regarding the decision, Secretary Lyons noted that, while some Maryland residents may find the UMUC program more convenient due to its online nature, "the statutory test I must apply is demonstrable harm to Morgan." The Secretary denied UMUC's proposal to offer the program to Maryland residents but let stand his previous approval (on June 5, 2009) of the program for out-of-state students, citing UMUC's ability to help immediately address a national workforce shortage of community college administrators. This is the first known case in which a state has prohibited an online program due to the existence of a similar classroom-based program. The ruling has also created an unusual circumstance in which State residents are unable to enroll in a program offered by a Maryland public institution.

UMUC appealed the Secretary's decision to MHEC, which heard the appeal on October 14, 2009. During the hearing, MSU urged MHEC to reconsider the Secretary's approval of UMUC's program for out-of-state students, stating that this too would cause MSU demonstrable harm. On October 22, 2009, the commission sustained Secretary Lyons' ruling, allowing UMUC to offer its program to out-of-state students but not Maryland residents. The commissioners also resolved that an online doctoral program in

community college leadership would be offered to State residents by a Maryland institution by September 2011 “either by Morgan State University if it is willing and able, or by another public institution if Morgan State University cannot demonstrate to the Commission by June 1, 2011, that it is prepared to offer the program.” MSU has begun to move its doctorate in community college leadership online.

Prior to its appeal of UMUC’s program, MSU objected to a number of programs proposed by Maryland institutions based on unnecessary duplication, including a 2005 decision by the Secretary of Higher Education authorizing Towson University (TU) to offer a joint Masters of Business Administration (MBA) with the University of Baltimore (UB). MSU claimed that the new MBA program would unnecessarily duplicate its existing MBA program leading to further segregation in Baltimore-area universities. In this case, MHEC affirmed the Secretary’s decision, allowing the joint MBA program to proceed.

### *Recent Legislation and Lawsuit*

This decision prompted the introduction of legislation during the 2006 through 2009 legislative sessions to provide a course of appeal for MHEC decisions regarding program duplication, though none of the bills has become law. In 2007 the Attorney General’s Office issued an opinion (92 Op. Att’y Gen. 180) holding that current law does not allow State institutions of higher education to sue one another in circuit court and that judicial review of a commission decision regarding program duplication is expressly denied, though the Maryland Constitution does not prohibit legislation granting the right for judicial review. The Attorney General’s Office also noted that administrative *mandamus*, which is used to obtain judicial review of an agency decision where no law exists, does not apply to MHEC decisions because MHEC’s process is not “adjudicatory in nature [which] depends primarily upon whether there is a deliberative fact-finding process with testimony and the weighing of evidence.” As a result, legislative action would be required to permit further challenge of the joint MBA or community college leadership decisions.

Though institutions of higher education cannot sue the State or other institutions regarding unnecessary duplication, a group of current and prospective students and alumni of several Maryland HBIs called the Coalition for Equity and Excellence in Maryland Higher Education is suing the State for failure to comply with federal civil rights laws and constitutional obligations, including elimination of unnecessary program duplication. The suit seeks the elimination of several new academic programs at TWIs, including the joint MBA program at TU and UB. The case is in the discovery phase in the U.S. District Court. A trial has been set to begin June 27, 2011.

**State Expenditures:** MHEC advises that it receives approximately 450 to 500 requests for program changes each year. Approximately one-half of these requests are to start new academic programs, and virtually all the new program requests are approved. Institutions raise objections to approximately 10 to 15 new program requests per year,

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and about 1 to 5 of these objections ultimately result in an MHEC determination that a program is unreasonably duplicative. According to MHEC, it will need to treat each proposal as if it will face an objection by reviewing it through a deliberative fact-finding process due to the limited review period allowed under the bill and current law. MHEC reports that it will need to hire two higher education staff specialists, one administrative assistant, and a part-time assistant Attorney General to review every proposal at an annual cost of approximately \$300,000 beginning in fiscal 2012.

Legislative Services assumes that, even accounting for the limited review period, MHEC will only need to conduct a deliberative and fact-finding review for those proposals that are likely to face an objection. Therefore, general fund expenditures increase by \$48,712 in fiscal 2012, which accounts for the bill's July 1, 2011 effective date. This estimate includes the cost of hiring one part-time assistant Attorney General, fringe benefits, one-time start-up costs, and ongoing expenses.

|                             | <u><b>FY 2012</b></u> | <u><b>FY 2013</b></u> | <u><b>FY 2014</b></u> |
|-----------------------------|-----------------------|-----------------------|-----------------------|
| New Position                | 0.5                   |                       |                       |
| Salary and Fringe Benefits  | \$43,972              | \$44,777              | \$47,014              |
| Start-up/Operating Expenses | <u>4,740</u>          | <u>409</u>            | <u>413</u>            |
| <b>Total</b>                | <b>\$48,712</b>       | <b>\$45,186</b>       | <b>\$47,427</b>       |

Future year expenses reflect one part-time salary with 4.4% annual salary increases, 3% employee turnover, and 1% annual increases in ongoing operating expenses.

The additional administrative workload that will be required for USM, MSU, SMCM, and BCCC to go through a deliberative fact-finding process for each new program that faces an objection cannot be reliably estimated at this time. It will depend on the number of program proposals created by each institution that faces an objection and the specific procedures adopted by MHEC.

MHEC program decisions would be appealable to the Office of Administrative Hearings (OAH) and to the circuit court under the bill. Given the few objections that MHEC receives currently, it is assumed that the additional workload for OAH and the courts is minimal and can be handled with existing resources.

**Local Expenditures:** The additional administrative workload that will be required for community colleges to go through a deliberative fact-finding process for each new program that faces an objection cannot be reliably estimated at this time. It will depend on the number of program proposals created by each institution that faces an objection and the specific procedures adopted by MHEC.

**Small Business Impact:** The additional administrative workload that will be required for nonprofit and for-profit institutions, some of which are small businesses, to go through a deliberative fact-finding process for each new program that faces an objection cannot be reliably estimated at this time. It will depend on the number of program proposals created by each institution that faces an objection and the specific procedures adopted by MHEC.

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### **Additional Information**

**Prior Introductions:** As amended, SB 1084 of 2010 was similar. SB 1084 passed the Senate and received a hearing in the House Appropriations Committee, but no further action was taken.

**Cross File:** None.

**Information Source(s):** Maryland Higher Education Commission; Maryland Independent College and University Association; Judiciary (Administrative Office of the Courts); Morgan State University; Office of Administrative Hearings; University System of Maryland; *The National Law Journal & Legal Times*, January 10, 2011; Department of Legislative Services

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