

Department of Legislative Services
 Maryland General Assembly
 2014 Session

FISCAL AND POLICY NOTE

Senate Bill 169 (Senators Conway and Pugh)
 Education, Health, and Environmental Affairs

**Maryland Higher Education Commission - Review of Duplicative Academic
 Program Proposals - Revisions**

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. MHEC must make a determination on whether an unnecessary duplication of programs exists and, if so, whether the program has sound educational justification, upon a request from one of the public historically black colleges and universities (HBCU) in the State. MHEC’s determination in this context is subject to judicial review in the circuit court.

Fiscal Summary

State Effect: General fund expenditures increase by approximately \$33,200 beginning in FY 2015 for MHEC to hire a part-time Education Policy Analyst to review objections to program proposals and develop the required regulations. Future year estimates reflect annualization, regular salary increases, and inflation. Additional costs related to legal fees depend on the frequency of court challenges. 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, the new procedures adopted by MHEC, and the frequency of court challenges. Revenues are not affected.

(in dollars)	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	33,200	39,600	41,500	43,400	45,400
Net Effect	(\$33,200)	(\$39,600)	(\$41,500)	(\$43,400)	(\$45,400)

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. The circuit court can likely handle any increased workload with existing resources.

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

Analysis

Bill Summary: If MHEC does not receive any comments or objections to a completed proposal and fails to act within 60 days of the date of submission of a completed proposal, the proposal is automatically deemed approved.

Upon request from a public HBCU in the State (*i.e.*, Bowie State University, Coppin State University, MSU, or the University of Maryland Eastern Shore (UMES)), MHEC must determine whether an unnecessary duplication of programs exists. If MHEC determines that unnecessary duplication exists, MHEC must determine whether the unnecessary duplication has sound educational justification. MHEC must determine that the unnecessary duplication is unjustified if the program (1) does not have sound educational justification and (2) violates the State's agreement with the U.S. Department of Education Office for Civil Rights or the State's equal educational opportunity obligations under State or federal law. A determination by MHEC must include the criteria used by MHEC in making the determination.

"Sound educational justification" is defined to mean a program that creates unnecessary duplication that cannot be practicably eliminated or established by less segregative means.

"Unnecessary duplication" is defined to mean the offering by two or more institutions of (1) the same nonessential or noncore programs; (2) nonbasic liberal arts and sciences coursework at the bachelor's level; or (3) all duplication at the master's level and above.

Current Law:

Processes for Implementing New Academic Programs

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 approval 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 private nonprofit and for-profit institutions of higher education, 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.

When a public or private nonprofit 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 for a public institution of higher education or a final recommendation on implementation for a private nonprofit institution of higher education.

Review of Unreasonably Duplicative Academic Programs

MHEC may review existing programs at public institutions of postsecondary education if MHEC has reason to believe that academic programs are unreasonably duplicative or inconsistent with an institution's adopted mission. MHEC may make that determination on its own initiative or after receipt of a request for determination from any directly affected public institution of postsecondary education.

If MHEC makes such a determination, MHEC may (1) make recommendations to an institution's governing board on the continuation or modification of the programs; (2) require any affected governing board to submit a plan to resolve the duplication; and (3) negotiate, as necessary, with any affected governing board until the *unreasonable* duplication is eliminated.

If MHEC determines that two or more existing programs offered by institutions under the governance of different governing boards are unreasonably duplicative, the governing boards of the institutions of postsecondary education at which the programs are offered must have 180 days from MHEC's determination to formulate and present to MHEC a joint plan to eliminate the duplication. If, in MHEC's judgment, the plan satisfactorily

eliminates the duplication, the plan must be implemented. On the other hand, if MHEC determines that plan does not satisfactorily eliminate the duplication, or if no plan is jointly submitted within the specified time period, MHEC may seek to eliminate the duplication by revoking the authority of a public institution of postsecondary education to offer the unreasonably duplicative program. Prior to imposing a sanction, MHEC must give notice to the affected institution. If timely requested, MHEC must provide an opportunity to meet with MHEC prior to imposing a sanction.

Background: Senate Bill 998 of 2006, which would have authorized an institution directly affected by the unreasonably duplicative program to appeal an MHEC decision to the circuit court, was passed by the General Assembly but vetoed by the Governor. Similar legislation was introduced in subsequent years, but identical bills were not passed by both houses of the General Assembly.

In October 2006, the Coalition for Equity and Excellence in Maryland Higher Education, which is a group of former, current, and prospective students of Maryland's HBCUs, filed suit against MHEC alleging violations of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, which protect against discrimination on the basis of race, color, or national origin.

In the coalition's lawsuit, three policies of the Maryland system of higher education allegedly traceable to the prior *de jure* (as a matter of law) segregated system were at issue: (1) limited institutional missions; (2) operational funding deficiencies; and (3) unnecessary program duplication. After a six-week bench trial in January and February 2013, the court did not find that mission-related policies or practices or current operational funding were traceable to the *de jure* era; however, the court did find that the State has failed to eliminate unnecessary program duplication for Maryland's HBCUs and that this policy is traceable to the *de jure* era. The 2014 issue paper on this topic, which includes a discussion of the case, can be found at the following link: (<http://mgaleg.maryland.gov/pubs/legislegal/2014rs-issue-papers.pdf>).

Unnecessary Program Duplication

The court concluded that the coalition proved that unnecessary program duplication continues and is a policy traceable to prior *de jure* segregation in Maryland higher education. The court, applying the law established by the U.S. Supreme Court in *United States v. Fordice*, 505 U.S. 717 (1991), defined unnecessary duplication between HBCUs and traditionally white institutions (TWIs) as the offering by two or more institutions of the same nonessential or noncore programs; nonbasic liberal arts and sciences course work at the bachelor's level; and all duplication at the master's level and above. The court cited MHEC's decision to approve a joint University of Baltimore (UB)/Towson University (Towson) Masters of Business Administration program (MBA),

despite the objections of MSU in 2005 as an example of how the State has failed to prevent additional unnecessary duplication. The court found that the State's "sound educational justification" for program duplication consisted of justifications for the approval of the MBA program at UB/Towson rather than a thorough and thoughtful assessment and analysis of whether the same goals could be accomplished with less segregative results, such as offering MSU additional funding for its MBA program or establishing a program at another HBCU instead of a TWI. The court also found that, in addition to failing to disapprove *new* duplicative high-demand programs at TWIs within close proximity to HBCUs, MHEC also failed to analyze and eliminate *existing* high-demand programs that are duplicated at TWIs and HBCUs.

The court rejected the State's argument that programs offered by institutions have a very limited impact on which institution a student chooses to attend and instead noted that unique, high-demand programs in other states have a significant impact on where a white student will attend. According to testimony provided to the court by the coalition's expert, Maryland's HBCUs offer an average of 3 nonduplicated, high-demand, noncore programs per HBCU compared with 17 per TWI. The court found that the coalition "convincingly demonstrated that duplication does have a palpable effect on student choice, [therefore] the State is under an obligation to eliminate it."

The strong collaborative partnership between UMES and Salisbury University that currently exists demonstrated to the court that unnecessary program duplication can be minimized. The court found that only 9% of HBCU programs are unnecessarily duplicated on the Eastern Shore while 38% are unnecessarily duplicated in the Baltimore area. In 2009, UMES had a 13.3% white student population, which is significantly more desegregated than the 1% to 4% white student population at HBCUs in the Baltimore area, which the court attributed to the lack of unnecessary duplication at UMES and Salisbury as one factor in UMES's success in attracting white students.

Next Steps

Despite the findings of fact and conclusions of law included in the court's memorandum, the court has deferred entry of judgment pending mediation or further proceedings, if necessary, to establish a remedy. The State is scheduled to meet with the mediator on January 31, 2014. As a "promising" starting point, the court suggests that each HBCU "should develop programmatic niches of areas or areas of excellence in at least two high-demand clusters within the next three to four years." The niche areas identified by the court include Green Sustainability Studies, Computer Sciences, Aging Studies, and Health Care Facilities Management. Additionally, the court said it is likely that transfers or merging of programs will be necessary. If mediation is unsuccessful, then one or more of the parties may request an immediate appeal under the Federal Rules of Civil Procedure.

Number of Program Proposals

MHEC advises that, in calendar 2013, there were 328 proposals submitted for specific program actions (e.g., new programs, substantial modifications to existing programs, program title changes, and program discontinuations). Of these 328 proposals, 199 proposals were new academic programs or substantial modifications to existing academic programs. The 199 proposals included 146 in-state proposals and 53 out-of-state proposals. A total of 14 objections were filed: 2 to in-state programs and 12 to out-of-state programs.

State Expenditures: General fund expenditures increase by \$33,242 in fiscal 2015, which accounts for the bill's October 1, 2014 effective date. This estimate includes the cost of hiring one half-time Education Policy Analyst by MHEC to review objections to program proposals and develop the required regulations, fringe benefits, one-time start-up costs, and ongoing expenses.

	<u>FY 2015</u>	<u>FY 2016</u>	<u>FY 2017</u>
New Position	0.5	-	-
Salary and Fringe Benefits	\$28,654	\$39,314	\$41,159
Start-up/Operating Expenses	<u>4,588</u>	<u>293</u>	<u>296</u>
Total	\$33,242	\$39,607	\$41,455

Future year expenditures reflect a full, half-time salary with annual increases and employee turnover as well as annual increases in ongoing operating expenses.

The additional administrative workload 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 depends on the number of program proposals created by each institution that face an objection and the specific procedures adopted by MHEC.

MHEC program decisions would be appealable to the circuit court under the bill. Given the few objections that MHEC receives currently, it is assumed that the additional workload for MHEC, and higher education institutions is minimal and can be handled with existing resources. However, even one or two large cases could result in significant legal costs for the State.

Local Expenditures: The additional administrative workload 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 depends on the number of program proposals created by each institution that face an objection and the specific

procedures adopted by MHEC. MHEC program decisions would be applicable to the circuit court; however, because MHEC currently receives few objections, it is assumed that the additional workload for the courts can be handled with existing resources.

Small Business Impact: The additional administrative workload 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 depends on the number of program proposals created by each institution that face an objection and the specific procedures adopted by MHEC.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Maryland Higher Education Commission, University System of Maryland, Department of Legislative Services

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